



# Detention of a Person Subjected to Operational Investigative Prosecution

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**Keywords:** Operational-investigative activities, operational-investigative measures, operational-investigative prosecution, detention, inspection of a person, physical detention, actual detention.

**Abstract:** The research goal of the study was to consider the issues of detention in flagrante delicto as a result of operational and investigative activities. The research objectives included: to analyze the theory and practice of detention of persons subjected to operational-investigative prosecution; to conduct a survey of employees of operational-investigative units on the registration of the results of their actual detention; to formulate proposals to ensure the rights of a detained person subjected to operational-investigative prosecution. As a result of the study the authors of the article made the following conclusions. It is necessary to fix in the Federal law "On detective-search activity" a concept of "detective-search prosecution". Operational-investigative prosecution should be understood as carrying out of operative-investigative measures in respect of a person suspected of committing a crime in order to obtain information that can be used for further criminal prosecution against him. The authors of the study share the opinion of scientists on the illegality of detention of a person subjected to operative-search prosecution in the manner provided for by administrative legislation. The researchers support the idea of a unified approach to the regulation of the institution of detention by a separate federal law. The authors of the study propose to legislate: 1) to define the legal status of a suspected person subjected to operatively-search prosecution; 2) to provide for immediate inspection of a person during the implementation of his actual detention.

## 1 INTRODUCTION


Analysis of law enforcement practice shows that in most cases, based on the results of operational-investigative activities, suspected persons were actually detained and taken to law enforcement agencies, where they remained for a long time in an uncertain legal status. This circumstance in some cases leads to an excess, abuse of power and entails criminal consequences for the employees of operational units, as well as violates the constitutional rights of persons subjected to operational prosecution, to qualified legal assistance.


The authors study the issue of detention of a person suspected by the results of operational-investigative activity. The authors conducted a comparative legal analysis of: 1) the norms of Russian legislation (Federal Law "On Operative-

Investigative Activity", Federal Law "On Police", the Code of Administrative Offences of the Russian Federation, the Code of Criminal Procedure of the Russian Federation; 2) publications of scientists; 3) legal position of the Constitutional Court of the Russian Federation and the European Court of Human Rights rulings.

The novelty of the study lies in the fact that the authors propose, as a solution to the problem under consideration, legislative measures aimed at ensuring the rights of the individual during his actual detention: 1) to fix in the Federal Law "On Operative Investigative Activity" (hereinafter – the Law on OIA), the legal status of a person suspected; 2) to legislate the need for immediate inspection of the person during his actual detention.

Hypothesis. Russian legislation does not regulate the issues of actual detention of a person, his

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inspection and delivery during operational and investigative activities, which is a violation of the right to inviolability of the person. This problem seems to be insufficiently investigated.

The research objective is to investigate the problem of actual detention of a person during operational and investigative activities.

Research tasks include, first, conducting an analysis of scientific publications on the topic under consideration; second, analyzing legal positions of the Constitutional Court of the Russian Federation and the European Court of Human Rights; studying law enforcement practice on the procedure of actual detention of an individual; fourth, developing proposals to ensure the rights of a suspected person subjected to detention, allowing to exclude abuses by security service officers.

## 2 MATERIALS AND METHODS

The authors applied a set of research methods, among which the dialectical method takes the leading place, other methods should be named: system-structural, formal-logical, comparative-legal and empirical methods of research were also used. The researchers studied 580 criminal cases, 327 of the cases examined, suspected persons were detained as a result of operational and investigative measures in accordance with Article 91 of the Code of Criminal Procedure of the Russian Federation.

## 3 RESULTS AND DISCUSSION

Russian legislation and the Law on Investigative Work does not give powers to detain people during the performance of operational and investigative activities. However, apprehension of a suspected person in flagrante delicto (entrapment on the spot, actual apprehension) as a result of carried out operational and investigative activities and his compulsory escort to a law enforcement agency for further investigation is considered a normal phenomenon. The most widespread is the use of false arrest as a result of conducting operational and investigative activities, such as test purchase, controlled delivery and operational experiment. That is, when the operation was carried out in respect of a specific person suspected of criminal activity. Moreover, according to the standards of the ECHR, the OIA cannot be carried out on an indefinite range

of persons (ruling of 30.10.2014 in the case “Nosko and Nefedov v. Russia”).

In this regard, operational and investigative prosecution should be understood as carrying out operational and investigative measures in respect of a person suspected of committing criminal activity in order to obtain information that can be used for his further criminal prosecution. Such definition is formulated by O. D. Zhuk. (Zhuk, 2004). We believe that in order to exclude provocative activities in carrying out operative and investigative measures against an indefinite range of persons. In addition, the Law “On Operative Investigative Activity” should enshrine the concept of “operational and investigative prosecution”.

In theory and practice of operational investigations, there is no unanimity among experts as to the essence of detention during the conduct of operational and investigative measures. In the academic literature, when examining issues related to the planning of operations for the implementation of controlled delivery or purchase verification, attention is usually paid to detention tactics. In planning and conducting an operational experiment, detention of a person suspected or wanted at the time of detection is regarded as one of the organizational stages of operational and investigative measures, i.e., a certain algorithm of actions by operational personnel. At the same time, questions of the procedural nature of the actual detention are ignored.

A. Shumilov considers detention as an operative investigation measure of restraint in the form of seizure (Shumilov, 2007). N. S. Zheleznyak believes that operational detention and operational search should be attributed to “other operational and investigative measures”, by regulating in the Law on OIA certain conditions (Zheleznyak, 2019).

The problem under consideration is clearly demonstrated by a questionnaire survey of operational officers conducted by S. A. Chumarov. Thus, the following data was obtained in response to the question about what regulatory and legal sources provide grounds and conditions for detention of a person, applied on the basis of the results of the carried out operational and investigative measures: 36% of respondents answered that in the Criminal Procedure Code of the Russian Federation; 24% of respondents indicated that in the Code of Administrative Offences of the Russian Federation; 16% thought that these issues are regulated in the Federal Law “On Police”; 12% answered that in the Law on OIA; 8% thought that in departmental regulations; 4% had difficulty in answering. In our opinion, it should be noted that 96% of the

respondents indicated that they used physical force and special means during detention in the course of the operational and investigative measures (Chumarov, 2014).

Operational investigative bodies officers are actually forced to bring a person detained for a crime to a law enforcement agency for investigation "allegedly with his voluntary consent" (Davydov, 2012), or on spurious grounds to apply to such a person administrative and legal measures in the form of delivery and administrative detention, up to administrative detention.

Application of administrative coercive measures in the form of administrative detention and search to persons subjected to operational-search prosecution, Karl A. M. considers as quite admissible measures (Karl, 2020). V. N. Yashin expresses the opinion on the need to consider the actual detention and delivery to the investigator of a suspected person as administrative detention (Yashin, 2016), i.e. legalization of this procedure of detention. We, on the contrary, fully share the opinion of scientists, who consider such existing practice as illegal (Garmaev, 2005, Chechetin, 2020).

Firstly, in accordance with article 2 of the Law on OIA, the objectives of the OIA are the detection and disclosure of crimes. At the same time, application of administrative coercive measures in accordance with the requirements of article 27.1 of the CAO of the Russian Federation is allowed only to suppress an administrative offense, to identify the offender, and to draw up a protocol on an administrative offense, when it is impossible to draw up at the place of detection of an administrative offense, as well as to ensure consideration of an administrative case.

Secondly, the use of administrative procedures for detention of a person subjected to detective-search measures clearly contradicts the legal positions of the Russian Federation Constitutional Court, which states that

1) if in the process of carrying out operational and investigative measures it is established that in the actions of the suspected person there are signs not of a crime but of an administrative offence, the fulfillment of the operative measures in accordance with the requirements of art. 2 and part 4 of art. 10 of the Federal Law On Operative Investigation Activity should be ceased (Ruling of the Constitutional Court of the RF № 86-O of July 14, 1998 "On case about the check of constitutionality of some provisions of the Federal Law OIA upon the complaint of the citizen I.G. Chernova")

2) administrative detention is a measure to ensure proceedings in cases of administrative offenses, its

application in criminal proceedings is not permissible;

3) detention of an individual is admissible only in accordance with the procedure provided for in the Code of Administrative Offences of the Russian Federation or the Code of Criminal Procedure of the Russian Federation. In order to achieve operational and investigative purposes (Rossinsky, 2018), the Law on OIA does not provide for a coercive measure – detention (Ruling of the Constitutional Court of the Russian Federation of April 15, 2008 № 312-O-O "On refusal to accept for consideration the complaint of citizen Suren Mikhailovich Mikhaylian on violation of his constitutional rights by Article 5 and paragraph 4 of Article 10 of the RF Law "On Police" and also by Article 2 and paragraph 7 of part one of Article 6 of the Law OIA" (document not published).

The Federal Law "On Police" does not solve the issues of operational detention. Since this Law only regulates the activities of internal affairs officers and does not apply to employees of other law enforcement agencies, which under the Law on OIA are empowered to carry out investigative operations. Article 14 of the Federal Law "On Police" allows detention of a certain category of people. At the same time, the law does not allow detention of persons subjected to criminal investigation.

Application of the procedure for detention provided for by the Code of Criminal Procedure to persons actually detained as a result of conducting operational and investigative measures is also problematic. The purpose of factual detention is to suppress the illegal activities of a person and (or) to clarify his involvement in the commission of a crime. For these purposes the actual detention is carried out by operative officers during the performance of operational and investigative measures, such as an operational experiment, controlled delivery or test purchase. The difficulty lies in the fact that the first stages of detention - the actual detention and delivery of a person are not regulated in the Code of Criminal Procedure of the Russian Federation.

I.V. Kruglov, H.V. Bopkhoev very accurately noted that semi-transparent and ambiguous legal regime of "actual detention" activities are used by unscrupulous officials as physical and mental pressure on the detained person in order to obtain from him the necessary information, confession (Kruglov, 2005).

During our study of 327 criminal cases we found that the initial constant of time for drawing up a protocol of procedural detention under Article 91 of the Criminal Procedure Code (from the moment of operational-search and verification activities to the

procedural drawing up of the protocol), in 63% of cases is 24 hours or more. In 22% of cases the decision on procedural detention was made between 6 and 24 hours. In 8 % of the cases the decision on detention was made within 3 to 6 hours. And only in 7% of the cases the detention took place within 3 hours. In 83% of the 580 criminal cases investigated, interviews and other verification activities were conducted in the law enforcement agency after the operational investigative measures.

Thus, in most cases, based on the results of the operational and investigative measures suspected persons were actually detained and taken to a law enforcement agency, where they remained for a long time in an uncertain legal status. This circumstance, in certain cases, leads to abuse of power. (Andreeva, 2018, Trubnikova, 2015, Azarov, 2018).

The legislator has attempted to define the moment of actual detention in criminal proceedings as the moment of actual deprivation of freedom of movement of a person suspected of committing a crime (clause 15 of article 5 of the Criminal Procedural Code of the Russian Federation) carried out in accordance with the procedure established by the Criminal Procedural Code. This definition of the moment of the actual detention has only generated additional discussions among scholars and practitioners in the field of criminal proceedings.

According to P. A. Lupinskaya and V. Yu. Melnikov, the moment of actual detention is a physical apprehension of a person on the spot (P. A. Lupinskaya, 2005, V. Yu. Melnikov 2020). The second perspective is that the moment of actual detention should be considered as the moment of delivery to the investigator (Tsokolov, 2006, mirnov, 2017). The authors of the third point of view believe that the moment of detention is the moment of drawing up a protocol of procedural detention of a suspect and only after the initiation of a criminal case (Kim, 2011).

The situation is not clarified by the Constitutional Court of the Russian Federation. In the ruling, the Court only repeated the provisions of the Criminal Procedure Code, focusing on the fact that Article 92 of the Criminal Procedure Code of the Russian Federation directly obligates to indicate in the protocol of detention the exact time in accordance with the requirements of clause 15, article 5 of the Criminal Procedure Code of the Russian Federation (Ruling of the Constitutional Court of the Russian Federation of 18 October, 2012, № 1902-О “On refusal to accept for consideration the complaint of Elena Vyacheslavovna Alekseeva concerning the violation of her constitutional rights by paragraphs 11

and 15 of Article 5, Articles 91 and 92 of the Code of Criminal Procedure of the Russian Federation”).

It seems correct that the moment of actual detention should be considered as the physical detention (capture) of the person on the spot. It is from this very moment to the person, in case of disobedience may be applied coercive measures in the form of: physical force; combat fighting techniques; special means; weapons (V. I. Plokhova, 2019). Noteworthy, the moment of actual detention, as a possible initial stage of procedural (legal) detention, is considered only to the detention of a suspect of a crime in criminal proceedings. Therefore, the issues of actual detention of a person subjected to operative-investigative prosecution need additional legislative regulation.

According to V.A. Gusev and V.F. Lugovik, the solution of this issue should be comprehensive. For this purpose, it is necessary to provide in Art. 15 of the Federal Law "On OIA" the right of officers engaged in OIA to seize, deliver and search persons who are reasonably suspected of committing a crime (Sokolovskaya, 2017). Detention and registration procedures should be regulated in detail. It is necessary to differentiate between the notions of “detention of a suspect” as a criminal procedural decision and “actual detention” as an administrative and operative-search action consisting in the seizure and delivery of a suspected person (Gusev, 2014, Gusev, 2019).

A. E. Chechetin considers that the issue can be resolved by immediate decision to initiate a criminal case, and in taking urgent investigative measures in accordance with Article 157 of the Code of Criminal Procedure of the Russian Federation (Chechetin, 2019).

The position of L.V. Golovko seems correct that in fact, there can be only one "detention" and one "search" as a reaction to unlawful behavior, which requires strict or not too strict state punishment (from a fine to life imprisonment) (Golovko, 2010). The legal nature of the institution of detention is a police measure (Golovko, 2017). It is especially important to regulate the procedure of actual detention of a person, regardless of whether the person has committed an offense or a crime.

We share the idea of a unified consideration of the initial stages of detention. We consider reasonable the proposal of S. B. Rossinsky, to adopt a separate federal law "On detention" (Rossinsky, 2019). At the same time, the process of improving legislation should take into account the practice of the ECHR (Trubnikova, 2015), the European Convention, which defines international standards of human rights and



justice (Tarasov, 2019). On the issue at hand, the ECHR has repeatedly drawn attention to the fact that the failure of the police to conduct a search immediately after arrest without good cause raises legitimate concerns about the possible "planting" of evidence (Laijov v. Azerbaijan No. 22062/07 of 10 April 2014; Sakit Zahidov v. Azerbaijan No. 51164/07 of 12 November 2015; Borisov v. Russia (Complaint No. 48105/17) of 9 July 2019).

We believe that the actual detention should be a single measure aimed at suppressing the illegal activities of a person subjected to operational-search prosecution, combined with the immediate production of a personal search. Given the specifics of the OIA, the Law on OIA should enshrine the legal status of a "suspected person" subjected to operational-search prosecution, giving them the right to the assistance of an attorney during public operational and investigative measures (Chupilkin, 2017, Serednev, 2019).

As fairly notes V. A. Sementsov, participation of the lawyer in public operational and investigative measures is connected with necessity of observance of certain conditions, namely: 1) the principal must be aware of the existing legal ban on cooperation of the lawyer with the bodies carrying out OIA; 2) when it is not possible to protect the interests of the principal on a non-contractual basis with the bodies carrying out OIA without participation of the lawyer; 3) if the principal personally participates in carrying out OIA, or in case of threat of a crime against the lawyer himself or his family members (Sementsov, 2020).

The right to the assistance of an attorney should be explained upon completion of operative-search prosecution of covert operational and investigative measures. In fact, in this case there is a transformation of unclassified operational and investigative measures into verification and investigative actions (Chupilkin, 2018).

Consideration of issues of actual detention, using a comprehensive approach, through the lens of law enforcement activity will allow to form a uniform procedure that ensures the implementation of goals and objectives of law enforcement agencies and private interests of an individual subjected to actual detention as a result of operational and investigative prosecution.

## 4 CONCLUSIONS

As a result of this study the authors draw the following conclusions. We propose to introduce into circulation and enshrine in the Law "On OIA" the

concept of "operational-search prosecution". This concept should be understood as operational and investigative measures against a person suspected of committing a criminal offence in order to obtain information that can be used for the further prosecution. These provisions will allow to regulate procedurally activity of operative officers with respect to the suspected person during realization of operational and investigative measures, which in its turn will help to eliminate abuse of authority during realization of operational and investigative measures concerning an uncertain number of persons and detention of a person who is under operational prosecution.

We share the opinion of scientists about the illegality of detention of a person subjected to operational-investigative prosecution in the manner prescribed by administrative legislation. We support the idea of a unified approach to the regulation of the institution of detention by a separate federal law.

We concluded and propose to regulate legislatively: 1) the legal status of a suspected person subjected to operational and investigative prosecution; 2) immediate inspection of the person in the implementation of his actual detention.

We believe that the implementation of these proposals will contribute to ensuring the rights of an individual subjected to operative-investigative prosecution.

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