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DISPOSING OF THE PERSON'S HOSPITALIZATION IN THE MEDICAL INSTITUTION FOR THE PERFORMANCE OF JUDICIAL EXPERTISE IN THE CRIMINAL PROCESS

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Summary

The article focuses on the procedures and powers of the criminal investigation body and the prosecutor in situations where hospitalization in a medical institution is necessary, as well as on the procedure for examining forced hospitalization in these institutions.

Internment of a person to a medical institution is a form of deprivation of liberty and must therefore take place only with judicial authorization. This measure can also affect the right to privacy; therefore, it is essential that the entire procedure is followed strictly and without deviation.

The disposition of forced hospitalization in a medical institution for the performance of judicial expertise in the criminal process is the competence of the investigating judge. He must decide based on clear grounds and reasons and strictly follow the legal procedure in such situations. Regrettably, the domestic criminal procedural legislation does not regulate all the necessary aspects regarding internment, its extension and other desired ones that we will explain in the respective publication.

Keywords: prosecutor, criminal prosecution body, request, examination, investigating judge, hospitalization, medical institution, expertise, criminal trial.

Introduction. Hospitalization of the person in the medial institution is a sensitive subject of procedure, which may affect the right to private life and freedom by virtue of Art. 5 and 8 of the ECHR.

A regrettable cause in this segment for the Republic of Moldova is the case *David v. Moldovei* of 27.11.2007 [4], in which the Court reiterates the fact that if a person initially agreed to his hospitalization in a psychiatric institution for the performance of expertise, nothing prevents him later to refuse and leave that institution, so that the continued detention of the applicant from the moment he expressed his intention to leave the hospital constitutes a "deprivation of liberty", therefore interference with the right to freedom. The person expressing the consent from the start is released from a forced hospitalization, having the right to leave the medical institution at any time and no one has the right to prevent this will, as long as a conclusion regarding the forced hospitalization has not been issued in respect of him.

According to Art. 11 paragraph (3) of the Criminal Procedure Code, "*Deprivation of liberty, arrest, forced internment of the person in a medical institution or sending him to a special educational institution, as well as the extension of these measures, are allowed only on the basis of an arrest warrant or a reasoned court decision*". Therefore, when there are legal grounds and reasons for the forced admission of the person in a medical institution, a court order is required.

During the criminal investigation, the investigating judge, who is authorized by law to order forced internment, issues the court decision. This desideratum is regulated in Art. 41 para. (4) of the Criminal Procedure Code – "*The investigating judge ensures judicial control during the criminal investigation by ordering the person's hospitalization in the medical institution*".

At the same time, in accordance with the provisions of Art. 301 paragraph (3) of the Criminal Procedure Code, "*(...), hospitalization of the person in a medical institution for the performance of the judicial expertise, (...) it is done with the authorization of the investigating judge*".

Analyzing the stated provisions, we find that when during the criminal investigation there is the need to carry out a judicial expertise, and the suspect (accused) refuses to be hospitalized for his evaluation and examination, the investigating judge issues a reasoned decision for forced hospitalization for the stated purpose.

Methods and materials applied. Theoretical, normative and empirical material was used in the development of this publication. In addition, the research of the respective subject was possible by applying several scientific investigation methods specific to the criminal procedural theory and doctrine: logical method, comparative analysis method, systemic analysis, etc.

The purpose of the research consists in research and analysis of the internal normative framework, the doctrine and the jurisprudence regarding the disposition of the person's hospitalization in the medical institution for the performance of judicial expertise in the criminal process.

Discussions and results obtained. According to the provisions of Art. 152 paragraph (1) of the Criminal Procedure Code, "*If for the performance of the medico-legal or psychiatric expertise there is a need for long-term supervision, the suspect, the accused, the defendant can be hospitalized in a medical institution. This is recorded in the ordinance or conclusion by which the judicial expertise was ordered*". Therefore, at the criminal investigation stage, if for the performance of the judicial expertise (medico-legal or psychiatric) forensic doctors or psychiatrists need more time to supervise the suspect or the accused, in order to finally give objective conclusions on the object of the expertise, the criminal investigation body is obliged to indicate this fact in the ordinance ordering the expertise.

In other words, the law dictates the fact that when the criminal investigation body orders the medico-legal or psychiatric expertise, it will expose, in the same ordinance, the forced hospitalization of the person in the medical institution.

We consider that the stated aspects do not correspond to the principle of the inviolability of the person, because at the stage of issuing the ordinance ordering the expertise, the criminal prosecution body cannot know how much time an expert doctor needs to perform one or another expertise. Respectively, the determination of the time for carrying out the medico-legal or psychiatric expertise is decided by the expert doctor and not by the criminal prosecution body. Thus, the disposition of expertise that does not require hospitalization (outpatient) or that requires this hospitalization (inpatient) is imposed by medical and not legal judgment.

Based on the above, we are of the opinion that, when the criminal investigation body finds the grounds provided in Art. 142 paragraph (1) of the Criminal Procedure Code, it will issue the ordinance for the disposition of the judicial expertise. If long-term surveillance of the suspect or the accused is necessary for the performance of medico-legal or psychiatric expertise, the criminal investigation body will issue another ordinance ordering forced hospitalization in the medical institution.

This ordinance will be issued in accordance with the provisions of Art.255 of the Criminal Procedure Code. In addition to the conditions mentioned in Art.255 of the CPC, the ordinance for the forced internment of the suspect or the accused must mandatorily include, the reasons for internment, the person's behavior during the procedural actions (for example, during the hearing), analysis of the medical documents of the suspect or the accused (for example, the medical card in which the fact of treating a psychiatric illness is mentioned), the mention of the identification of the suspect or the accused in the records of the narcologist or psychiatrist, the analysis of the statements of other participants in the trial (for example, the statements of the victim or the witnesses from which the inappropriate behavior of the perpetrator emerges) and other matters related to the case.

In the same vein, all the mentioned aspects should be analyzed in relation to the circumstances of committing the illegal act. It is very important for the criminal investigation body to request from the expert institution the information regarding the need for long-term surveillance of the suspect or the accused. If the prosecuting body does not ask for that information, at least it will be obliged to hear the expert doctor to determine the appropriateness of hospitalization. On the other hand, in the long run, this decision has a medical tone, and respectively, only doctors can communicate about the duration of medical investigations. This information must be reflected in the internment ordinance and analyzed together with the other evidence. Only in this way, the criminal investigation body can justify its ordinance and order the forced internment of the suspect or the accused.

In the case *Filip v. Romania* of 14.12.2006 [5], it was found that the applicant was admitted to a psychiatric institution for a period of 88 days. In this case, the Court reiterates that "*one of the elements necessary for the "legality" of detention in the sense of Article 5 of the ECHR is the lack of arbitrariness. Deprivation of liberty is such a serious measure that it is only justified when less severe measures have been analyzed and considered insufficient to protect the personal or public interest that requires detention, in our case transposed by internment. The plaintiff being hospitalized for an indefinite period based on the decision of the prosecutor's office taken without the opinion of an expert doctor having been obtained beforehand. The public prosecutor's office only ordered an expert examination one month after his internment, after receiving the complaint of the applicant who criticized the legality of the security measure on the grounds that such an expert opinion had not been ordered either before or after his 80-day internment. The Court estimates that the prior evaluation by a psychiatrist was indispensable, taking into account in particular the fact that the applicant had no history of mental disorders. In any case, it was not an emergency hospitalization, plus the doctor's request regarding the need to extend the hospitalization period was missing, thus limiting the plaintiff's right without a legal basis, his hospitalization being arbitrary and illegal*".

"In order to obtain the expected results, it is necessary to take into account all the circumstances of the case, the reasons and the purpose of the crime, data regarding the illnesses the person suffered, as well as the previous behavior but also the behavior of the person during the trial" [9, p. 1024]; all these, as a whole will elucidate the complete picture of the suspect/accused's personality for making the correct decision regarding the need for internment.

In support of the mentioned idea the analysis of the following phrase comes *"there is a need for supervision"* stipulated in Art. 152 paragraph (1) of the Criminal Procedure Code. Thus, the question arises – when does this need arise and who actually makes the decision in this regard? It is natural, as we mentioned before, that the need for supervision is decided only by doctors and by no means by criminal prosecution bodies. Namely, from the moment when the doctors will inform the criminal investigation body about the need for hospitalization, only then the presence of the factual basis for the forced hospitalization of the person in the medical institution will be established.

To leave no room for ambiguous interpretations, we consider it necessary that Art. 152 paragraph (1) of the Criminal Procedure Code should be amended and completed in such a way as to provide for the issuance of the reasoned order for the forced admission of the person in the medical institution, other than the order for the disposition of judicial expertise.

After the issuance of the ordinance regarding the forced admission to the medical institution of the suspect or the accused, the prosecutor will submit a reasoned motion to the investigating judge, requesting the authorization of the forced admission. This legal imperative results from Art. 52 paragraph (1) point 16) of the Criminal Procedure Code – "*In the framework of the criminal investigation, the prosecutor, within the limits of his material and territorial competence, addresses in the court of law steps to obtain the authorization ... of the admission of the person to a medical institution for the performance of the judicial expertise*".

From the provisions of Art.152 paragraph (2) of the CPC, it follows that the prosecutor's action constitutes the act of notification of the court empowered to order the internment of the suspect, the accused in the medical institution for the performance of judicial expertise.

The prosecutor's request for hospitalization in a medical institution for the performance of the judicial expertise must include, as the case may be, remarks regarding:

– the deed for which the criminal investigation is carried out, the legal classification of the deed;

– the deeds and circumstances that result in doubt about the state of responsibility of the suspect, the accused or the defendant;

– motivation for the need to take the internment measure;

– justification of its proportionality with the intended purpose.

According to Art. 152 paragraph (3/1) of the Criminal Procedure Code, indication of these aspects in the prosecutor's approach is mandatory. Therefore, in accordance with the provisions of Art. 305 of the CPC, the prosecutor's approach regarding the forced hospitalization of the person in the medical institution is examined by the investigating judge in closed session, with the participation of the prosecutor. In the meanwhile, if the state of health of the person already hospitalized in a medical institution allows him to participate in the court session, than this person, for sure, may participate in this session. In the same way, in this meeting, the defender, the legal representatives and the representatives of the mentioned persons will also participate, under the conditions of the Criminal Procedure Code, and the minutes will be drawn up in this sense.

The investigating judge opens the session and informs the participants about the approach submitted by the prosecutor, after which he will check the powers of attorney of the trial participants. Then, the investigating judge will give the opportunity for the parties to present themselves regarding the submitted approach. The prosecutor has the first word, who will argue his approach, and then the other parties will continue. After the explanations of the participants in the meeting, the investigating judge, checking the merits of the submitted approach, will authorize the forced hospitalization of the person in the medical institution, or will reject the approach as unfounded[1].

In the case of the suspect, his internment in order to carry out the judicial expertise will be ordered for a period of up to 10 days (Art. 152 paragraph (4) of the Criminal Procedure Code). When the person is accused, his hospitalization in a medical institution, for the performance of judicial expertise under inpatient conditions, is ordered for a duration of up to 30 days, with the possibility of extending this term up to 6 months. The deadline is extended by the investigating judge, at the motivated request of the prosecutor, based on the reasoned written request of the doctor who faces difficulties in performing the judicial expertise and needs additional time for it (Art. 152 paragraphs (5), (6) of the Criminal Procedure Code).

"In the case of hospitalization in the psychiatric institution of persons who are not in a state of arrest, they will be guaranteed, mandatorily, all the guarantees provided in Art. 501 paragraph (1) of the Criminal Procedure Code (Art. 490 paragraph (2) of the Criminal Procedure Code)" [8, p.355].

The judge's decision regarding the authorization or rejection of the person's forced hospitalization in the medical institution can be challenged within 3 days from the date of adoption with an appeal in the hierarchically higher court – the Court of Appeal[2]. These provisions are directly indicated in Art. 152 paragraph (2) and Art. 305 paragraph (8) of the Criminal Procedure Code.

These provisions give the parties the possibility of an effective appeal, presenting the arguments and evidence in the hierarchically superior court to request the rejection of the prosecutor's action.

It should be noted that Art. 311 paragraph (1) of the CPC does not expressly provide for the

[1] See the provisions of Art. 305 of the Criminal Procedure Code.
[2] See: Art. 152 paragraphs (2), (7); Art. 305 paragraph (8) of the Criminal Procedure Code.

right to challenge with appeal the conclusion of the investigating judge regarding forced hospitalization in the medical institution. Although the suspect can be forcibly hospitalized in the medical institution for a period of no more than 10 days, he is definitely deprived of this right. For these reasons, we support the amendment and completion of Art. 311 paragraph (1) of the Criminal Procedure Code, therefore the respective provisions also indicate the suspect's right to appeal.

How do we proceed in the situation where the accused is remanded in custody? The answer to this question is provided by the provisions of Art. 152 paragraph (8) of the Criminal Procedure Code, which stipulates that "*If the suspect, the accused is under preventive arrest, his transfer for the performance of the forensic medical expertise in inpatient conditions, is ordered at the request of the prosecutor with the authorization of the investigating judge*". Analyzing the given rules, we find that when the accused is arrested and there is a need for a long supervision in order to carry out the judicial expertise, he can be transferred to the medical institution where this expertise is carried out. If it is decided to transfer the accused in respect of whom the preventive measure of arrest (or house arrest) is applied, what happens to the preventive measure?

Art. 152 of the Criminal Procedure Code do not provide an answer, but we find the solution in Art. 490 paragraph (1) of the same Code: "*Upon ascertaining the fact of illness of the person in respect of whom a criminal investigation is being carried out and who is under arrest, the investigating judge orders, on the basis of the prosecutor's approach, his hospitalization in the psychiatric institution, adapted for the detention of arrested persons, ordering, at the same time, the revocation of preventive detention. About the further improvement of the state of health of the person hospitalized in the psychiatric institution, the administration of the institution immediately informs the prosecutor who leads the criminal investigation in the respective case*".

The Court emphasized in the case *H.L. v. Great Britain* [6], the absence of procedural rules regarding the detention of the incapacitated person, in contrast to the multitude of guarantees that apply in ordinary cases. As a result of the lack of procedural rules, medical staff is assuming full control over the liberty and treatment of a vulnerable individual based only on clinical assumptions, and although the Court did not question their good faith or failure to act in favor of the claimant, the purpose of the existence of guarantees is to protect individuals against professional errors and omissions. The absence of these rules of procedure led, in the opinion of the Court, to the arbitrarily taking of the measure, and therefore to the violation of Art. 5.

Furthermore, the disorder must have such a character or extent, which justifies hospitalization, which, however, cannot be prolonged beyond the presence of these disorders [7].

An important aspect is in the case of solving the forced hospitalization in the medical institution of minors suspected or accused of committing a crime. It should be noted that in the given situation the criminal investigation body would also take into account the provisions of Art. 474-481/1 of the Criminal Procedure Code.

In the meanwhile, it should be noted that at the time of the examination of the approach regarding the forced hospitalization of the minor in the medical institution, the lawyer, the legal representatives, the pedagogue, the psychologist would compulsorily participate. To our mind, a doctor must also participate in this court session, depending on the object of the judicial expertise.

If in the cases regarding minors the participation of the defense attorney is mandatory from the moment of ascertaining the age of the person and the first interaction with the criminal prosecution body, in the procedure of application of coercive measures of a medical nature, the participation of the defense attorney is mandatory from the moment of the adoption of the ordinance by which the judicial expertise was ordered in the inpatient of the psychiatric institution regarding the person concerning whom the procedure is being conducted, if the defender was not previously admitted in this process[3]. In accordance with Art. 494 paragraph (2) of the Criminal Procedure

[3] See the provisions of Art. 494 paragraph (1) of the Criminal Procedure Code.

Code, "*From the moment the defense attorney enters the process, he has the right to meetings with the person whose interests he is defending, without limiting their number and duration, if the state of his health does not hinder the meetings. The defender also has the other rights provided for in Art. 68, which is accordingly applied*". Of course, no one has the right to limit the lawyer's meetings with his client, but in those cases, it is natural to take into account the state of health. We believe that when the lawyer needs these meetings, he will consult his client's doctor as a preventive measure, after which he will decide whether or not it is necessary to talk to him, in order not to worsen the person's health.

Conclusions. From the analysis of the existing normative framework in relation to the discussions and arguments brought through the respective research, we come to the conclusion that the rules of criminal procedure do not include and do not clarify all the situations that may arise regarding the forced hospitalization of the person in the medical institution for the performance of judicial expertise. Thus, we consider that the ordinance on internment is a disposition act separate from the ordinance on disposition of expertise, for which reason it is necessary to complete and amend Art. 152 paragraph (1) of the Criminal Procedure Code. It is necessary to complete and amend Art. 311 paragraph (1) of the Criminal Procedure Code, as it grants the suspect the right to an effective appeal. In the event that the accused is arrested, and regarding him forced hospitalization in the medical institution will be authorized, the respective preventive measure is to be revoked.

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