

Comparative analysis of the legislative standards of examination by the Criminal Procedure Code of Ukraine and the Russian Federation

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Abstract

The scientific article is devoted to the investigation of the examination of a person as a form of investigative actions, which is provided in Russian and Ukrainian legislations. The subject of the study is the criminal procedural legal relations between the participants of examination based on the norms of the Criminal Procedure Code (CPC) of Ukraine and the Criminal Procedure Code (CPC) of Russian Federation (RF). Objectives of the study - the analysis of the existing legislative norms in the criminal procedural codes of RF and Ukraine, as well as, on their basis, the development of new and improving of existing procedural, organizational and tactical measures used in the examination of a person aiming to improve its quality and effectiveness are the subject of the examination. The methodology of the article consists of comparative, formal-logical, statistical and sociological methods. The shortcomings and gaps in its legislative implementation are noted and ways of their solution are presented. The author's approach to conducting examination of a person is proposed with the aim of improving the regulatory and legal regulation of the conducting the examination in the CPC of Ukraine.

Keywords: procedural actions; examination of a person; distinguishing characteristics; traces of crime; witnesses; compulsion; protocol.

JEL Classification: K14, K30, K41

1. Introduction

In most democratic countries of the world the level of protection of the rights, freedoms and legitimate interests of citizens is measured by their normative security and criminal law protection, which becomes of particular importance in the investigation of the facts of encroachment on the life, health or property of

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citizens, as this is due to gross violation of natural rights of a person, causing moral, physical or property damage⁴.

The issues of the institute of the examination are to a certain extent investigated in the works of both domestic criminalists and processists as well as scientists of CIS (Commonwealth of Independent States), such as: N.R. Bobechko, Y.V. Gavrilin, V.G. Drozd, N.V. Karpenko, S.S. Klochuryak, V.I. Maryniv, N.I. Porubov, I.L. Petrukhin, T.V. Sadova, S.O. Safronov, S.M. Stakhivsky, V.M. Tertishnik, V.V. Topchy, Y.G. Torbin, Y.M. Chornous, I.M. Yanchenko and others.

No doubt, the achievements of these scientists are important for conducting examinations in criminal proceedings. At the same time, the examination of the institution of examination as a type of procedural action has not been fully carried out currently, issues arising during its compulsory carrying and other equally important issues that arise during the investigation of criminal cases have not been solved.

As is shown by summary of the unified register of court decisions of Ukraine within 2013-2018 the examination was conducted in less than 7% of cases during the investigation of criminal proceedings with a general criminal focus, and issues that could have been resolved during the examination were resolved by conducting a forensic examination. Specified underlines the importance of our research. Therefore, the task that we set before the writing of the scientific article is the analysis of the norms of the Ukrainian and Russian criminal procedural legislation and the possibility of implementation of the mentioned positive criminal procedure norms of examination into the CPC of Ukraine.

We are building our research on the characteristics of the criminal procedure rules governing the procedure of conducting the examination under the legislation of Ukraine and the Russian Federation, according to the following criteria: the concept and grounds for conducting; subject of conduct; subject and deadlines of conduct; the object of the examination and its properties; the list of participants; compulsion; respect for the rights and freedoms of participants; fixing the results.

2. Methodology

The methodology of the article consists of comparative, formal-logical, statistical and sociological methods. Within the examination, the analysis of criminal cases, during the investigations of which the examination was conducted and employees of the investigative bodies of the National Police of Ukraine were interviewed on the specifics of examination of a person, was carried out. Also used summary from the unified register of court decisions of Ukraine within 2013-2018 of conducting of examinations during the investigation of criminal proceedings with a general criminal focus.

⁴ Mudrak I., Podobnyi O., Vaschuk O. (2019). *Compensation of damages to victim of criminal offence under Criminal Procedure Code of Ukraine*, „Juridical Tribune – Tribuna Juridica”, Volume 9, Issue 2, June 2019, p. 377.

3. The concept and procedural basis of examination under the legislation of Ukraine and Russia

First of all, we should find out what exactly scientists understand by the examination.

Criminal procedural legislation of Ukraine means by examination an investigative (search) action carried out in relation to a suspect, witness or victim in order to find traces of a crime or distinguishing characteristics on their body, if it is not necessary to conduct a forensic medical examination (Part 1 of Article 241 of the CPC of Ukraine).

The Russian procedural legislation states that the examination is an investigative action that is carried out with the aim of finding on the body of the suspect, accused person, victim, and witness with his consent, except for cases where the examination is necessary to assess the credibility of his testimony, distinguishing characteristics, traces of the crime, injuries, detection of intoxication or other properties and signs that are relevant to the criminal case, if this does not require the forensic examination (part 1 of article 179 of the CPC of the Russian Federation).

In general, insignificant number of examinations conducted in Ukraine is due to the complexity of the procedure for obtaining permission to conduct, namely the need to initiate before the prosecutor and obtain an appropriate act. Delays in getting the acts to conduct examinations, primarily at night or weekends, lead to the loss of efficiency of the specified procedural steps or reduce its effectiveness to nothing, as particular tracks or appearances on the human body are kept for a short time (traces of injection, intoxication, etc.) or can change or disappear (subungual content, the presence of external substances or objects on the body), and its conduction without the order is the basis for recognition of evidence inadmissible.

Next, find out the bases of the examination. As was mentioned above, the legal bases for conducting an examination under the laws of Ukraine is the order of the prosecutor, which the prosecutor makes in order to supervise the pre-trial investigation. This rule is spelled out by the legislator in the disposition of Art. 241 CPC of Ukraine.

In the resolution, the prosecutor has the right to entrust the examination to the investigator conducting the pre-trial investigation or the operational unit. The actual ground for the examination is the information on the presence or absence on the body or clothing of the person being examined the traces of the crime or distinguishing characteristics for the purpose of their further fixation.

According to the Russian legislation, the investigator's order is the legal basis, the actual is the information on the presence of distinguishing characteristics on the human body, traces of a crime, injuries, identification of intoxication or other properties and signs relevant to the criminal case.

Analyzing the legal basis for the examination, we consider the legislation of Russia more loyal to the investigator, as he, as a procedurally independent person conducting the pre-trial investigation, is given the right to independently

take decision on this procedural action. Therefore, in our opinion, it is the granting of such a right to an investigator in Ukraine which will contribute to the improvement of the process of pre-trial investigation and its effectiveness in terms of the timeliness of the examination.

Let's consider also an example when there is a need for an examination during the trial. How should the judge act in this case? The examination is not provided among the judicial actions in the criminal procedural legislation of Ukraine. Meanwhile, when it is positive in Russian legislation that at the trial stage an examination, which is carried out in accordance with Part 1 of Art. 290 CPC of the Russian Federation, on the basis of a court ruling or decision in the cases provided for in the first part of Article 179 of the CPC of the Russian Federation, is allowed.

Therefore, in our opinion, it is quite logical that Ukrainian legislation provides for the possibility of conducting examinations during a trial. The legal basis for such an examination will be a court order (in the form of a determination). By this procedural document, the court has the right to entrust the examination to the prosecutor or the investigator. Similar is the expansion of the range of objects "Ukrainian examination", which should include the body of the accused.

4. Participants of the examination

According to the legislation of Ukraine, the subjects of the examination, if necessary, may involve a forensic expert or a doctor.

According to the CPC of the Russian Federation, if it is necessary, the investigator involves a doctor or other specialist in the process of the examination. Such a statement, in our opinion, is much broader than that mentioned in the Ukrainian legislation. Indeed, agreeing with S.A. Safronov, who notes that when deciding on the type of examination that is needed to be carried out, it is necessary to take into account that experts and doctors approach it more closely from a medical point of view, without paying attention to the need to establish distinguishing characteristics⁵. Therefore, in our opinion, in order to establish a complex of traces of a crime, it is recommended to conduct an examination by the person conducting the investigation with the involving of specialists in other fields, for example, a specialist in forensic ballistics, a biologist and others. An example is the leaving on the hands of an inspected person traces of gunpowder, when the crime was committed with the use of firearms or traces of biological origin, for example, in criminal proceedings about rape.

It should be noted that in accordance with Part 7 of Art. 223 of the CPC of Ukraine, when conducting an examination by an investigator, the prosecutor is obliged to invite at least two disinterested persons (witnesses), who are clarified

⁵ Сафронов С.О. (1999). Методика розслідування умисного заподіяння тяжкого і середньої тяжкості тілесних ушкоджень: автореф. дис. ... канд. юрид. наук: спец. 12.00.09. Київ, 1999. С 16-17 [Safronov S.A. *Methodology for the investigation of intentional infliction of grievous and moderate bodily harm*: PhD thesis. Kiev, 1999. 16-17].

with the right to make remarks about the examination and the correctness of its fixation, which are recorded in the protocol

As for the participation of witnesses in the examination under the CPC of the Russian Federation, their participation is not mandatory. Here one should be guided by the rule provided for by Part 2 of Art. 170 of the Criminal Procedure Code of the Russian Federation, where the investigator, at the request of the participants in criminal proceedings or on his own initiative, decides on involving the witnesses in the investigation. In our opinion, the Russian legislation in this matter is more advanced and this provision emphasizes the procedural independence of the person conducting the examination.

It should be noted that for conducting such investigative (search) action as examination, the qualitative group of witnesses is important to obtain a positive result of mentioned proceeding. It is desirable that the witnesses were the persons who are not familiar with the examined person, better close in age. This will help to remove or reduce the psychological tension of a person. In our opinion, one should agree with the proposal of V. G. Drozd, who notes that it is reasonable to coordinate the issue of the invitation of witness with the person basing on ethical considerations, but the final decision depends on the investigator⁶. It is necessary to realize that not for every person it is a pleasure that his naked body is being examined not only by the investigator but also by witnesses who are strangers invited in from the street.

In our opinion, when conducting an examination, accompanied by exposing the body of the person being examined, especially if such examination is carried out by a doctor or a forensic expert, the participation of witnesses should not be mandatory.

5. Approaches to the purpose and object of examination

From the point of view of the European Court of Human Rights⁷, in order to establish the lawfulness of any case of interference with the physical integrity of a person, in order to obtain evidence, in particular, the following factors must be taken into account: how violent was the medical intervention to obtain the necessary evidence; a threat to the health of the suspect; the method of medical intervention and the resulting physical pain and mental suffering; the availability of medical supervision and possible consequences for the health of the victim. All this concerns examination.

The purpose of the examination is to carry out a set of procedural actions in strict accordance with the requirements of the criminal procedure law aimed at achieving the purpose of the examination. The Ukrainian legislator defines the

⁶ Дрозд В.Г. (2009). Організаційні і тактичні аспекти розслідування умисних тяжких тілесних ушкоджень: автореф. дис... канд. юрид. наук: спец. 12.00.09; К.: Київський національний університет внутрішніх справ 2009. С.10-11 с. [Drozd V.G., *Organizational and tactical aspects of the investigation of intentional grievous bodily harm*. (PhD thesis). Kiev. 2009. 10-11.].

⁷ Jalloh v. Germany: Judgement of ECHR dated July 11, 2006, application № 54810/00.

purpose of the examination as the search for traces of a criminal offense or distinguishing characteristics. The Criminal Procedure Code of the Russian Federation, in addition to the aforementioned two, added to it as well bodily injuries and detection of the state of intoxication, as well as other properties and characteristics that are relevant to the criminal case.

It should be noted that during the preliminary investigation establishing the presence or absence of intoxication of the person under the CPC of Ukraine is possible only at carrying out the forensic examination. In our view, the widening of tasks of the examination in establishing of the presence or absence of intoxication with taking of positive norms of the Russian legislation will contribute to the speed, completeness and objectivity of pre-trial investigation in Ukraine. In the majority of cases, special knowledge is required to conduct such an examination, thus we believe it is necessary to provide the code of criminal procedure of Ukraine with the possibility to carry out examinations to establish the state of intoxication of the person with the mandatory participation of forensic medical expert or doctor.

Our research on distinguishing characteristics that could most often be detected during the examination showed that the interviewed investigators include: tattoos (64.7%), stigmas (57.3%), birthmarks (54.8%), features of the body structure (41.4%), scars (40.4%), traces of surgical and plastic surgeries (31.5%), foreign objects implanted into the body (increase (correction) of lips, face lifting, eyelash extension, eyebrow tattooing etc.) (23.1%).

Respondents attributed the following to the crime traces: bite marks (54.3%), cuts (51.2%), abrasions (42.9%), burns (41.3%), bruises (32.1%), frostbite (39.7%), fractures (21.3%), other injuries on the human body (17.9%), the presence on the body of a substance (15.6%), etc.

Under the laws of both states the body of an alive person is the object of the examination, the difference is only in the procedural status of the persons being examined. Thus, in the CPC of Ukraine such are the suspect, witness and victim; in Russian - the suspect, the accused, the victim and the witness with his consent, except for the cases where the examination is necessary to assess the credibility of his testimony. Therefore, first of all, what should be paid attention to is that only a person who has a certain procedural status in criminal proceedings is subject to examination. This raises a logical question: "Is a person, whose procedural status has not been yet determined, subject to examination?". Especially, if the Russian legislator permits an examination before the start of a pre-trial investigation. A similar question arises from V.N. Tertyshnik – generally, could there be an examined person who has no procedural status, for example, not questioned as a witness, or a person who, due to his mental disabilities cannot be a witness, suspect, accused at all?⁸

⁸ Тертишник В.Н. (2010). Гарантии истины и защиты прав и свобод человека в уголовном процессе Украины: дис. ... доктора юрид. наук: спец. 12.00.09. Д., 2010. С. 276. [Tertishnik V.N. *Guarantees of truth and protection of human rights and freedoms in the criminal process of Ukraine* (Doctor of law thesis). Dnipro, 2010, p. 276].

In general, one can agree with I.L.Petrukhin, who insists that the examination of citizens who do not have any procedural status in criminal proceedings is unacceptable⁹. If you follow the letter of the law, then such a conclusion, according to V.N. Tertishnik, has the right to exist. For example, in accordance with Part 1 of Art. 65 of the CPC of Ukraine witness is an individual who is aware of or may be aware of the circumstances to be proved in the course of criminal proceedings and called to testify¹⁰. Hence the question arises, if we do not know for sure whether the information about certain circumstances are known or can be known to a person and the person refuses to testify, is it subject to such examination?

According to S.S. Klochuryak not only a person himself has distinguishing characteristics, but also features of clothes could be attributed to them. This follows from the semantic interpretation of the concept of "characteristics" as a distinctive quality, signs by which you can learn about someone or something, that is, they could be objects of both living and inanimate nature. These characteristics include: unusually large or small sizes of clothes, unusual cut or style, the presence of various parts and accessories (buttons of unusual shape, buckles, brooches-monograms, monograms, applications, etc.); bright color of clothes or colored garments; mismatch of clothing time of year. Special characteristics include shoes, for example, a very high platform, an unusual type of footwear for these places. There are special characteristics and objects that are constantly worn by a person with him: glasses, umbrellas, canes, bags and briefcases, jewelry¹¹.

According to V.V. Topchiy and N. I. Karpenko, the object of examination could be only the body of an alive person, and all other things (the objects) are to be investigated by other investigative actions – visual inspection, presentation for identification, examination. At the same time, these scientists give an example, that the most common in practice is the examination that is followed by an examination of the clothes, using a separate protocol, in which, besides general descriptions of the clothing, must be specified the amount of injuries, their shapes, sizes and locations; types of injuries (through bole, scuffs, burns, etc.); the nature of the edges of the holes (levels, winding) the presence and location of traces of

⁹ Петрухин И.Л. (1985). Свобода личности и уголовно-процессуальное принуждение. М. Наука, 1985. 239 с. [Petrukhin I.L. *Personal Freedom and Criminal Procedure Coercion*. М.: Science, 1985, p. 143-145].

¹⁰ Тертишник В.Н. (2010). Гарантии истины и защиты прав и свобод человека в уголовном процессе Украины: дис. ... доктора юрид. наук: спец. 12.00.09. Д., 2010. 473 с. [Tertishnik V.N. *Guarantees of truth and protection of human rights and freedoms in the criminal process of Ukraine* (Doctor of law thesis). Dnipro, 2010, p. 277-278].

¹¹ Ключуряк С.С. (2013). Цель и задачи проведения освидетельствования по УПК Украины. *Международный научно-практический правовой журнал «Закон и жизнь»*. 2013 № 3. С. 25-27. [Klochuryak S.S., *The purpose and objectives of the survey on the CPC of Ukraine*. "International Scientific and Practical Legal Journal "Law and Life"". 2013. No. 3, p. 25-27].

biological origin and other particles¹². These statements, from our point of view, contradict each other, and the question about the study of clothing, which is on the face of the examined person remains the most controversial.

So, let us disagree with the opinion that the object of examination is the body of an alive person, and all other things (objects) are subject to the investigation by other investigative actions. After all, the clothes of the examined person may preserve the traces of the crime or contain distinguishing characteristics. Consider a situation when during the examination on the clothes of the person who is to be examined, the traces of the crime or distinguishing characteristics are found. In this case, the legislator has determined the examination of the entire body of the person subject to the examination, and the question of the clothing of the person is not disclosed. In other words, it is characteristic of the "Ukrainian examination" that the investigator must apply to the investigating judge for temporary access to things in order to identify the traces of the crime or distinguishing characteristics on the clothes of the person being examined. Having received the decision, to carry out the seizure of such things, then - to inspect this clothing visually. The described procedure is too long. As an exception, we offer one of the tasks of the examination to prescribe the inspection of things that are on the examination. If the clothes contain traces of a crime or distinguishing characteristics that require additional research, the clothing must be seized, as indicated in the protocol.

As studies of the judicial practice of Ukraine show, the examination has a greater efficiency in the investigation of criminal proceedings when pre-identified (marked) means are used to document criminal activity. In particular, during the investigation of certain crimes in the sphere of official activity and crimes in the sphere of narco-trafficking, psychotropic substances, their analogues and precursors. So, one of the proofs of the suspects' guilt is the availability of evidences that substances have been found on their body (hands) that appeared as a result of contact with previously identified (marked) means, first of all, banknotes. These substances, as the investigative-judicial practice shows, are fixed by means of the inspection of the scene of the incident or bodily search, which is not quite acceptable. Therefore, in this case it is reasonable to conduct an examination of the person.

6. Volunteering and coercion during the examination

As for the moment of conducting, according to the Ukrainian legislation, the examination is carried out only after the start of the pre-trial investigation, as is

¹² Топчий В.В., Карпенко Н.В. (2015). Проблемные вопросы освидетельствования и принуждения для его проведения. *Международный юридический вестник: сборник научных трудов Национального университета государственной налоговой службы Украины*. Вып.1 (2) 2015 С. 43-44. [Topchiy V.V., Karpenko N.V. *Problematic issues of examination and coercion for its conduct*. "International Law Gazette: a collection of scientific papers of the National University of the State Tax Service of Ukraine". Issue 1 (2) 2015, p. 43-44].

declared in Part 3 of Art. 214 of the Criminal Procedure Code of Ukraine, an exception to the general rule is the inspection of the scene. Russian legislation envisages the examination prior to the commencement of a pre-trial investigation in cases that do not tolerate delay (part 1 of article 179 of the Code of Criminal Procedure of the Russian Federation). We consider in this case the position of the Russian legislator is quite rational because as a result of the examination signs of a crime could be detected and, as a result of its conduct, it is possible to raise the question of the start of a pre-trial investigation. Thus, in our opinion, the Ukrainian legislator should be allowed to conduct an examination in exceptional cases prior to the commencement of the pre-trial investigation, which will prevent the loss of traces of the crime and increase the effectiveness of the pre-trial investigation process itself.

The voluntariness of the investigated procedural steps is demonstrated by the fact that in most cases, persons subject to the inspection agree to his holding voluntarily. However, this does not exclude the possible objections of these persons to participate voluntarily in the conduct of the proceedings. In this regard, the question on the permissibility of the use of coercion in the course of the meeting arises. Compulsory inspection is enshrined in the legislation of both states. Thus, according to the part 3, article 241 CPC of Ukraine, on the presentation to the person the order for examination, which he is offered to go voluntarily, in the case disagreement with it, the examination is carried out compulsorily.

This is discussed in Part 2 of Art. 179 of the CPC of the Russian Federation, which states that the order to conduct an examination is obligatory for the person being examined, otherwise such examination is carried out by means of coercion. First of all, it concerns physical coercion, its boundaries and grounds to the participants of the process who refuse voluntary examination. Thus, Y.G. Torbin believes that since the Russian criminal procedural legislation does not envisage the consent or disagreement of a person, the possibility of his compulsory examination not only contradicts with the law, but inevitably follows from it¹³

Coercion can be divided into mental, that is, legal psychological impact on the intellectual, emotional and volitional sphere of the suspect, the victim, the witness in order to induce to fulfill the requirements of the law regarding the examination, and physical - the legal physical impact applied to the suspect, victim, witness against his will aiming at forcing to comply with the requirements of the law regarding the examination in case of refusal to perform these actions voluntarily. The appliance to these persons of measures of procedural coercion and respect for the rights of citizens in criminal proceedings is regulated by the International Covenant on Civil and Political Rights¹⁴

¹³ Торбин Ю.Г. (1971). Криминалистическое исследование тела и одежды подозреваемого в совершении преступления. М., 1971. С. 15-17. [Torbin Yu.G. *Forensic investigation of the body and clothing of a suspect in a crime*. Moscow, 1971, p. 15-17].

¹⁴ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

According to S.S. Klochuryak, the preliminary use by the investigator of all the means at his disposal is a prerequisite before conducting a compulsory examination¹⁵. Y. N. Chernovus notes that if a person refuses to voluntarily carry out an investigative action, the investigator should: establish psychological contact with the person; to form his confidence in preserving the secrecy of the pretrial investigation, ensuring the safety of his life and health; using the method of persuasion to persuade a person to think about the desirability of his voluntary participation in the production of investigative action; apply technical means only with the consent of the participant of the investigative action, etc. The need to apply legal restraints arises only if the participant ignores the investigative action of the corresponding order of the law. When the goal of the investigative action is essential and in no other way it can be achieved, compulsory inspection measures can be applied in circumstances of extreme necessity¹⁶.

It is necessary to agree with the opinion of I.M. Yanchenko, who notes that the procedural features of the examination should be the same regardless of the procedural status of the person at the time of the specified investigative action. In the case of procedural necessity and the deficiency of other opportunities to establish the facts that are essential for the investigation, it is considered permissible to conduct a compulsory examination of the accused (suspect) and the victim (witness)¹⁷.

By the definition of the circle of persons with respect to whom coercion is possible during the examination, the discussion between the processual scientists continues: according to some, the suspect, the accused, the victim and the witness may be subject to compulsory examination¹⁸, others categorically deny the possibility of using coercion in examining the victim and the witness¹⁹. T.V. Sadovaya believes that the victim's compulsory examination should be carried out if there is a reasonable suspicion about the unreliability of his testimony and a witness can be examined compulsory if there are sufficient grounds to believe that

¹⁵ Ключуряк С.С. (2012). Межі процесуального примусу при проведенні освідування у кримінальному судочинстві. *Форум права*. 2012. № 4. С. 465-467. [Klochuryak S.S., *The boundaries of procedural coercion during the examination in criminal proceedings*. "Forum of law". 2012. No. 4, p. 465-467].

¹⁶ Черноус Ю.М. (2005) Слідчі дії: поняття, суть, напрями розвитку та вдосконалення: дис. ... канд. юрид. наук. Київ, 2005. 245 с. [Chernous Yu.N. *Investigative actions: concept, essence, directions of development and improvement* (PhD thesis). Kiev, 2005, 145-147].

¹⁷ Янченко І.М. (2008). Освідування як самостійна слідча дія з ознаками кримінально-процесуального примусу. *Вісник Харківського національного університету внутрішніх справ*. 2008. Вип. 43. С. 121-123. [Yanchenko I.M. *Examination as an independent investigative action with signs of criminal procedural coercion*. "Bulletin of Kharkov National University of Internal Affairs". 2008. Issue. 43, p. 121-123].

¹⁸ Стахівський С.М. (2009). Слідчі дії як основні засоби збирання доказів: науково-практичний посібник. К.: Атіка, 2009. С. 23-24 [Stakhivsky S.M. *Investigative actions as the main means of collecting evidence: scientific and practical allowance*. Kiev: Atika, 2009, p. 23-24].

¹⁹ Маринів В.І. (2003) Правові засади освідування особи. *Вісник прокуратури*. 2003. № 12 (30). С. 72-73. [Maryniv V.I., *Legal basis for the examination of a person*. "Bulletin of the prosecutor's office". 2003. No. 12 (30), p. 72-73].

evidence of crime can be found on his body, as well as for evaluation of the credibility of his testimony²⁰.

I.L. Petrukhin rightly states that the use of coercive measures, especially those related to restriction of liberty, are permissible only in cases expressly specified in the law, since neither the analogy of procedural law nor the expansive interpretation of the law in such cases is acceptable, as the position of the person cannot be worsened by the gaps in regulatory material²¹

The CPC of Ukraine provided for coercion to a person who voluntarily refused to take an examination. But it should not be forgotten that any coercion against a person could be justified by the tasks of combating crime, since these tasks can be successfully solved only with strict observance of the rights and legitimate interests of citizens. Any physical or mental effect, coercion that can be applied, is not morally justified.

So, we can attribute the examination to the procedural actions of a coercive nature. The determination of the scope of coercion rests directly with the investigator or prosecutor who participates in its conduct. In our opinion, coercion should be applied by the persons of the same sex as the person being examined. In other words, coercion is applied to men by men, and in relation to women by women.

7. Procedural registration of the results of the examination

According to the results of the examination, a protocol is drawn up and a copy of such a protocol is given only to the person who was forcibly examined (part 5 of article 241 of the CPC of Ukraine).

As for the position of the Russian criminal procedural legislation, in all cases, according to the results of the examination carried out during the pre-trial investigation and court review, a protocol is drawn up, only in the case of an examination accompanied by nudity, when such examination is carried out by a doctor or other specialist, an act is made (2 article 290 CPC of the Russian Federation).

According to Part 4 of Art. 241 of the CPC of Ukraine, the fixation of the course of the examination could be carried out by video recording, photography or other technical means. The images, the demonstration of such materials can be

²⁰ Садовая Т.В. (2010). Защита прав человека при освидетельствовании и получении образцов для экспертного исследования. *Конституционно-правовой статус человека и гражданина в Украине: м-лы Межрегиональной научно-практической конф., посвященной провозглашению Всеобщей декларации прав человека*. Л.: ПЮИ ЛьвГУВД, 2010. С. 184-185. [Sadovaya T.V. *Protection of human rights during the examination and receipt of samples for expert research*. "Constitutional and legal status of a person and citizen in Ukraine": materials of the Interregional scientific and practical conference dedicated to the proclamation of the Universal Declaration of Human Rights. L.: PUY of the LSUUA, 2010, p. 184-185].

²¹ Петрухин И.Л. (1985). Свобода личности и уголовно-процессуальное принуждение. М. Наука, 1985. С. 143-145 [Petrukhin I.L. *Personal Freedom and Criminal Procedure Coercion*. М.: Science, 1985, p. 143-145].

considered as offensive to the person being examined, therefore they are stored in a sealed form and can only be provided to the court during the trial.

Fixing the examination conducted in accordance with Art. 179 of the CPC of Russian Federation is similarly done with the use of photography or video. However, when such an examination is associated with a nudity, the fixation occurs only with the consent of the examinationed. It is fully justified because the recording of a specified procedural action can be regarded by the person being examined as such, which can humiliate his honor and dignity, because the legislator does not provide for the consent of such a person. This issue is decided at the discretion of the person conducting the procedural action. We consider this statement to be erroneous, since such fixation often causes objections from the person who is to be examined, which may be the reason for the suppression of his psychological state or deterioration of his health. According to V.I. Maryniv, the use of photography for fixing distinguishing characteristics and traces located on the open parts of the body, which may disappear over time (traces of beatings, bruises), is possible only with the direct consent of the person to be examined. It is unacceptable to use photography for fixing signs or injuries that are on parts of the body that are usually covered by clothing²². We consider this statement true. Compliance with ethical standards and human rights for respect of the dignity must be respected when fixing traces and special signs that are located on closed and intimate parts of the body through photography and video recording. Although this is not specified in the CPC of Ukraine, however, photographing and examination in the event of exposure of the person being examined appears to be carried out only with his consent.

If it is possible to show the location of numerous traces of crime, bodily injuries or distinguishing characteristics on the body of the person being examined only with his exposure, then it is recommended to put the received photographs, negatives or digital media in a separate envelope, seal and sign: "For the court". With this kind of fixing the traces of the crime and distinguishing characteristics it is ethically not to photograph the person being investigated. However, this should be booked to the protocol. At the same time, it should be recognized as unacceptable photographing of the person being examined in nude, unless it is caused by the need to collect evidence²³.

After the examination and drawing up of the inspection report, a photo or video is put in the envelope which is signed by all participants in the procedural action and it is properly sealed by the person who prepared the protocol. This envelope is further attached to the criminal proceedings in accordance with the procedure established by the legislation and is preserved in its entirety until the case is resolved in court.

²² Маринів В.І. (2003) Правові засади освідування особи. *Вісник прокуратури*. 2003. № 12 (30). С. 74-75. [Maryniv V.I., *Legal basis for the examination of a person*. "Bulletin of the prosecutor's office". 2003. No. 12 (30), p. 74-75].

²³ Бобечко Н.Р. (2011). Основи загальної та юридичної психології : курс лекцій. К.: Правова єдність, 2011. С. 112-115 [Bobechko N.R., *Fundamentals of general and legal psychology: a course of lectures*. К.: Law community. 2011, p. 111-115].

8. Conclusion

Thus, the examination allows the investigator to directly perceive the objects in order to identify the traces of the crime and clarify the circumstances relevant to the criminal proceedings, to get an idea about the mechanism of the crime and the identity of the criminal, to put forward versions and correctly determine the direction of the investigation. Success in detecting and investigating crimes largely depends on the timeliness and quality of the examination.

Along with this, the value of the examination during the pre-trial investigation is quite large. Examination of a person allows to clarify the following questions: whether there are distinguishing characteristics on the body, injuries, if yes, which ones and where, whether there are particles of certain substances on the body that a person could take from the scene or bring to him; or there are signs showing his professional affiliation or signs of struggle on the human body; the number of injuries, their appearance, shape, nature and location, etc.

Given the above and positive experience we allow ourselves to offer the author's wording of article 241 of the CPC of Ukraine:

“1. The investigator, the prosecutor, or another official authorized by them during the pre-trial investigation, as well as the court, during the trial, examines the suspect, accused, victim or witness in order to find traces of the crime and (or) distinguishing characteristics, and also the existence or deficiency of intoxication, if it is not necessary to conduct a forensic medical examination.

2. The examination is carried out on the basis of the procedural decision of the prosecutor or investigator, drawn up in the form of a decision or court on the basis of his decision, during the trial and, if necessary, with the participation of a doctor or other specialist. The examination is carried out with the obligatory participation of the doctor in cases of the need to establish the existence or absence of a state of intoxication. The investigator has the right to conduct an examination before the start of the pre-trial investigation in urgent cases related to the need to prevent the loss of evidence.

3. At least two disinterested persons - attesting witnesses may be involved in the conduct of the examination as decided by the person conducting the examination.

4. Before the beginning of the examination, the decision of the prosecutor or the investigator should be presented to the person who is to be examined. After that, the person is suggested to voluntarily pass an examination, and in case of his refusal, the examination is carried out forcibly. Coercion related to exposing the body of the person being examined is used by persons of the same sex as the person who is subject to examination.

5. The examination, which is accompanied by the exposure of the person being examined, is carried out by persons of the same sex, with the exception for its conduct by a doctor and with the consent of the person who is to be examined. The investigator, prosecutor or other official authorized by them, as well as witnesses, are not allowed to be present during the examination of a person of another sex, if this is due to the need to expose the person to be examined. During the examination an inspection and removal of things that are on the person

who is subject to examination could be conducted. If the clothes contain traces of a criminal offense that require additional investigation, the clothing must be seized, as indicated in the protocol. In the future, the issue of seized clothing is solved as for the temporarily seized item.

6. If necessary, the examination could be recorded by photographing, videotaping or other technical means, with the voluntary consent of the person to be examined. The image or video, the demonstration of which could be considered as offensive to the person being examined, is stored in a sealed form and can only be provided to the court during the trial.

7. A protocol on the conduct of the examination in accordance with the requirements provided for their preparation should be drawn up. The person in respect of whom the examination was carried out should be provided with a copy of the protocol of the examination.”

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