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## **ВІДБІР БІОЛОГІЧНИХ ЗРАЗКІВ ДЛЯ ЕКСПЕРТИЗИ ВІДПОВІДНО ДО ЗАКОНОДАВСТВА УКРАЇНИ ТА ЙОГО ВІДПОВІДНІСТЬ СТАНДАРТАМ ЄС**

**Анотація.** Аналіз слідчої та судової практики показує, що деякі адвокати розцінюють відмову особи надати добровільно біологічні зразки для експертизи як виконання її права не свідчити проти себе. Аналіз положень окремих рішень Європейського суду з прав людини дозволяє зробити висновок, що фізична недоторканність особи охоплена поняттям «приватне життя», що охороняється статтею 8 Конвенції про захист прав людини та основоположними Свободи та стосуються найбільш інтимних аспектів приватного життя, а примусове медичне втручання, навіть незначне, є втручанням у це право. Отже, у статті наведено кримінально-процесуальну характеристику отримання біологічних зразків для експертизи. Автори проаналізували та відповіли на питання: які саме зразки слід віднести до біологічних, і чи можна відмовитися від добровільного надання біологічних зразків на експертизу відповідно до реалізації права не свідчити проти себе. Розглянуто можливість отримання біологічних зразків для експертизи від особи, яка не є учасником кримінального провадження або не набула процесуального статусу. У статті також йдеться про законність отримання зразків для експертизи до подання інформації до Єдиного реєстру досудових розслідувань. Запропоновано алгоритм дій щодо отримання біологічних зразків для експертизи, включаючи примусове замовлення. Були використані такі загальнонаукові методи дослідження: діалектичний метод правових явищ, за допомогою якого вивчалось поняття та правова природа біологічних зразків для експертизи; порівняльний метод – у процесі порівняння норм Кримінально-процесуального кодексу України (КПК) з нормами Європейського суду з прав людини (ЄСПЛ) та рішень ЄСПЛ тощо

**Ключові слова:** слідчі дії, отримання зразків, процесуальне розпорядження, кримінальне провадження, законодавство України

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## **TAKING OF BIOLOGICAL SAMPLES FOR EXPERTISE UNDER THE LEGISLATION OF UKRAINE AND ITS CONFORMITY WITH EU STANDARDS**

**Abstract.** *The analysis of investigative and judicial practice shows that some lawyers regard the refusal of a person to provide voluntarily biological samples for examination as an execution of his/her right not to testify against him/herself. Analysis of the provisions of separate Judgements of the European Court on Human Rights allows us to conclude that the physical integrity of a person is covered by the concept of “private life” protected by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and concerns the most intimate aspects of private life, and compulsory medical intervention, even insignificant, constitutes an interference with this right. Therefore, the criminal-procedural characteristic of obtaining of biological samples for expertise is given in the article. The authors analyzed and answered the questions: which particular samples should be attributed to biological ones, and whether it is possible to refuse to voluntarily granting of biological samples for examination in accordance to the realization of the right not to testify against him/herself. The possibility of obtaining of biological samples for examination from a person who is not a party to criminal proceedings or has not acquired procedural status has been considered. The article as well deals with the legality of obtaining of samples for examination before submitting information into the Unified Register of Pre-trial Investigations. The algorithm of actions of obtaining of biological samples for examination, including the compulsory order, is proposed. The following general scientific research methods were used: the dialectical method of legal phenomena, with the help of which the concept and the legal nature of biological samples for examination were studied; the comparative method – in the process of comparing the norms of the Criminal Procedural Code of Ukraine (CPC) with the norms of the European Court of Human Rights (ECHR) and decisions of the ECHR, etc.*

**Keywords:** *investigatory action, obtaining of samples, procedural order, criminal proceedings, Ukrainian legislation.*

## **INTRODUCTION**

An expertise is one of legal means of collecting, verification and evaluation of evidence during the proving process in the preliminary investigation stage. An expert's report is a procedural source of evidence and the actual data contained therein is relevant for particular criminal proceedings is considered to be evidence [1]. The evidence contained in the expert's report is evaluated as admissible if obtained according to the rules foreseen by the CPC [2]. That is, the evidence obtained as a result of expertise may be recognized inadmissible by the court if the procedure of obtaining of samples for examination was violated [3] (execution of procedural actions requiring prior court warrant without such a warrant or in case of violation of substantial terms of the warrant (s.1 p. 2 Art. 87 of the CPC)), or if samples for the expertise are obtained with significant violation of human rights and freedoms (torture, cruel, inhuman or disregarding treatment or punishment – s.2 p. 2 art. 87 of the CPC) [2].

The procedural rules for obtaining of samples for the expertise depend on what concrete samples should be obtained [4]. After analyzing the provisions of Article 245 of the CPC, we can conclude that the legislator

divides all samples for examination into: samples from belongings, samples from documents, biological samples from a person. According to p. 2 and p. 3 Art. 245 of the CPC obtaining of biological samples from a person voluntarily should be carried out on the basis of a decision of a prosecutor, and obtaining of samples from belongings and documents, and biological samples in a compulsory order – on the basis of the warrant issued by an investigating judge [2]. The other requirements and limits on the obtaining of samples are not foreseen in the legislation of Ukraine.

In most European countries the police can require a deoxyribonucleic acid (DNA) sample if they've arrested a person for a criminal offence that carries a possible jail term, or if they intend to charge a person with one of those offences [5]. If a person is a suspect but they don't have enough evidence to arrest him/her or charge, they can ask to give a sample voluntarily, and if a person refuses, they can only get a sample if they go to a judge and get a court order – called a "compulsion order" [6]. In some countries certain elements must be established before an order can be issued. An application for an order (warrant) must be accompanied by a sworn statement showing that the police have reasonable grounds to believe: 1) that one of the specific offences has been committed, 2) that a bodily substance has been found at the crime scene, on the body or clothing of the victim, 3) that the person against whom the order (warrant) is to be executed was a party to the offence, and that a DNA sample from that person is needed to determine whether or not it matches the bodily substance found by the police [7].

## 1. MATERIALS AND METHODS

The theoretical basis of the article is composed of scientific works on criminal procedure. The normative legal basis of this work is: The Criminal Procedure Code of Ukraine (CPC), the European Convention on Human Rights and Fundamental Freedoms (ECHR), the practice of the ECHR. The reliability and validity of this research is also provided by empirical material, which include: analyses of judicial practice of the Supreme Court of Ukraine and other courts of Ukraine; court decisions placed in the Unified State Register of Court Decisions (USRS); results of studying of 193 case files based on the results of consideration of claims, applications and complaints submitted to investigative judges of the court of first instance and summarized data obtained during the survey of 240 judges and 80 assistant judges in Dnipropetrovsk, Donetsk, Zakarpattia, Zaporizhia, Ivano-Frankivsk, Kyiv, Kirovohrad, Luhansk, Lviv, Mykolaiv, Odesa, Poltava, Sumy, Ternopil, Kharkiv, Kherson, Khmelnytsky and Cherkasy regions during 2017-2019 [8].

When preparing the article, the following general scientific research methods were used: the dialectical method of legal phenomena, with the help of which the concept and the legal nature of biological samples for examination were studied; the comparative method – in the process of comparing the norms of the CPC with the norms of the ECHR and decisions of the ECHR; logical-legal method – in the analysis and interpretation of legal norms that regulate the grounds and procedural order of selection of biological samples for examination; sociological method – in the study of legal practice, criminal proceedings and questioning of practical employees, as well as other methods. At the same time, all scientific research methods were applied in correlation, which contributed to the comprehensiveness, completeness and objectivity of this research.

The analysis of the investigative materials of criminal proceedings and interviewing of the law enforcement, who conducted the obtaining of samples for the expertise, made it possible to conclude that the most unresolved issues during the application of Art. 245 of the CPC are: 1) vagueness of the current legislation in distinguishing which particular samples of a person should be attributed as biological; 2) correlation of the refusal to provide voluntarily biological samples for conducting an examination with the right not to testify against oneself; 3) the ambiguity of the practice of taking biological samples for examination from a person who is not a party to criminal proceedings or has not acquired a procedural status; 4) the lack of clear legislative rules regarding the possibility of obtaining of samples for examination before submitting the information into the Unified Register of Pre-trial Investigations (hereinafter referred to as the URPI); 5) the absence of a clearly regulated procedure for obtaining of biological samples for examination in the CPC of Ukraine [2].

## 2. RESULTS AND DISCUSSION

### 2.1. *Characterization of a biological sample from the standpoint of legislation*

The vagueness of the current legislation in distinguishing which particular samples of a person should be attributed as biological also affects the procedural order of their obtaining, as far as separate investigators obtain such samples as fingerprints, samples of voice, samples of handwriting without consent of the prosecutor or a judicial order (warrant) because they consider such samples to be not biological. In other cases, investigators request to the prosecutor or investigative judge to take an order (warrant) for obtaining of

biological samples. Human biological samples are defined as constituent parts of a human body, or human biological material, including organs and parts of organs, cells and tissues, and body fluids [9].

Different legal acts issued in Ukraine use different terms for designation of the category “biological samples”. In particular, the Rules for Conducting Various Types of Forensic Examinations, approved by the Order of the Ministry of Health No. 6 [10], contain a number of relevant provisions. Thus, in section 1.11.2 of the Rules for Conducting Forensic Medical Examinations (Research) such terminology as “... blood samples, excrements and other biomaterials...” is used. The term “samples of biomaterials” is used in section 1.5 of the Rules. This document does not contain a definition of what it is considered to be biological materials, but from its contents it follows that they include liquid blood, gall, urine, saliva, muscles, parts of the internal organs, bones, tampons and strokes with the contents of the vagina, oral cavity, etc. In section 1.9 of the Rules the term “objects of biological origin” is used, among which bits of organs and tissues of a person are indicated. As we see, in these documents the term “blood samples” coincides with the term “samples of biomaterials”. In turn, the latter also contains parts of the organs and tissues of a person, and here it coincides with the term “objects of biological origin”. Therefore, it can be summarized that biological samples in medicine include specimen of liquids and tissues from the human body.

The variety of types of biological (clinical) samples is sufficiently described in methodological recommendations “The Order of Taking, Transporting and Storing the material for Research by a Polymerase Chain Reaction Method”, approved by the Order of the Ministry of Health No. 662 [11], in particular, blood (plasma); materials from the urogenital tract of women; materials from the urogenital tract of men, including sperm; urine; spinal cord fluid; mucus fluid; allocation of the conjunction; material from the human respiratory tract (swabs from the nasal cavity, oropharynx, sputum, etc.); saliva; biopsy and autopsy material, etc. In accordance with the provisions of the Instruction on the Procedure for Detecting Signs of Alcohol, Drugs or Other Intoxication or Staying Under the Influence of Medicine that Reduce the Attention and Speed of Reaction in the Drivers of Vehicles, approved by the Order of the Ministry of Internal Affairs of Ukraine and the Ministry of Health of Ukraine No. 1452/735 [12], samples of the biological environment are selected for the laboratory study to determine the narcotic substance or psychotropic substance in a person (Section 12. The subject of study of the biological environment may be saliva, urine and serum from the surface of the lips, skin of the face and hands. Section 13. Blood may be used for the study of the biological environment if it is not possible to take samples of the biological environments specified in paragraph 12).

According to Art. 3 of the Law of Ukraine “On the United State Demographic Registry and Documents Confirming the Citizenship of Ukraine, Identification of a Person or its Special Status” [13], biometric data is personal data collected on the basis of fixing its characteristics that have sufficient stability and significantly differ from similar parameters of other persons (biometric data, parameters – digital person's signature, digital face image of a person, digital fingerprints). From the contents of p. 2 Art. 26 (“Creation of Information Resources by the Police”) of the Law of Ukraine “On the National Police” [14] we can see that biometric data includes fingerprints and DNA samples, the collection and accumulation of which the police perform through accomplishing the banks of data. Additionally, fingerprints and DNA samples can be sent as objects (samples) for examination. Thus, the difference in terminology, used in legal acts, some contradictions among them do not allow fully to understand the meaning of the term “biological samples”. Therefore, it should be noted that, until it is clearly set out at the legislative level, the problem of correct interpretation of the provisions of Article 245 of the Criminal Procedural Code will remain unresolved.

In our opinion, until the relevant amendments to the legislation are made, the biological samples of a person are all the samples related to the person's vital functions as a biological being: samples of fingerprints, handwriting, speech and voice of a person, samples of dental imprints, prints of any surface of the human body (lips, elbows, feet, etc.), smell traces of a person, as well as all samples of biological origin in their classical sense (saliva, blood, sperm, sweat, hair, nails, etc.) [3], and their obtaining must be carried out according to p. 3. Art. 245 of the CPC. Analysis of some Judgements of the ECHR, in particular: “PG and JH against the United Kingdom” [15] and “Saunders v. the United Kingdom” [16] allowed to reach the conclusion that biological samples of a person are all samples related to the person's livelihoods. In the Judgement “PG and JH v. The United Kingdom” samples of voice are considered as something like blood samples, hair or other physical samples. And in the Judgement “Saunders v. the United Kingdom” [16] the ECHR decides that samples of blood, hair or other tissues, as well as materials that are produced in the process of the vital functions of the body, such as, for example, breathe, urine, voice samples belong to biological material.

The above conclusion is confirmed by the Summary of the Higher Specialized Court of Ukraine on Civil and Criminal Cases on June 3, 2016, “On the judicial practice of investigative judges dealing with investigative actions” [17], where it is noted that “there have been cases of errors in judicial practice in application of the provisions of the CPC. For example, for the examination of the recording and sound, the investigator submitted



to the investigating judge a request for the obtaining of the voice sample of the suspect M., who refused to speak loud during procedural actions with his participation with the use of audio fixation. On March 12, 2014, the investigating judge of the Dniprovsky District Court denied in a request, because the investigator did not provide sufficient proofs for believing that the voice is a biological product of human life. We cannot agree with the above court order, since the Art. 245 of the CPC uses the general concept of “samples for expertise” and two derivative concepts from “samples from belongings and documents” and “biological samples”. Therefore, the affiliation of the voice to the biological samples does not belong to those circumstances that must be proved in the court. In addition, Art. 245 of the CPC foresees a single procedure for deciding the requests for the compulsory obtaining of samples from belongings and documents and biological samples, while the procedure for the obtaining of such samples is regulated by Art. 241 of the CPC [18-20].

According to this classification it is not clear to what category samples for a dactyloscopy (fingerprint) examination should be taken and what procedural order should be implemented for their obtaining. Dactyloscopic examination is a kind of trassological examination whose main task is to identify the person through his/her fingerprints of the hands (feet) left on the crime scene. Biological samples for examination are blood, urine, hair, sperm, etc. Samples from belongings and documents include the traces left on them, or these same belongings and documents, identified in Art. 98 and art. 99 of the Criminal Procedural Code of Ukraine. Having analyzed the foregoing, we should conclude that samples for the dactyloscopic examination cannot be attributed to one or another group. The ambiguous understanding of samples for a fingerprint examination leads to the fact that, for example, in acts of taking of dactyloscopic prints for a fingerprint examination, such prints are sometimes referred to as objects or documents. This is due to the fact that they are formed as a result of pressing a sheet of paper to the previously treated surfaces of the fingers. In this way, they immediately appear on the paper after being pressed, separated from a person, stored and used like evidence without person’s consent as documents or material evidence.

Therefore, one part of the lawyers (namely 26 (36%) of the 72 questioned investigators, prosecutors, judges and defence lawyers working in the city of Kyiv and Kyiv region) did not consider them to be biological samples, while the other (35 of the respondents (49%) – that biological samples are obtained only for conducting examinations requiring special knowledge in the field of biological sciences, which do not include dactyloscopy. Those, who support these options, consider that obtaining of dactyloscopic prints is simply the access to belongings and documents of a person. But there are no fingerprints of a person on a paper until the dactyloscopy is done. This approach is unacceptable, as far as treating a person or parts of his/her body as a thing, object, or document always humiliates the honour and dignity of a person.

Thus, fingerprinting is a process of taking fingerprints, and dactyloscopy is a science that studies papillary patterns of phalanges of fingers in order to distinguish a person. Proceeding from this, the biological components in the fingerprints are sufficient, and due to them with special paints, capable to fix colourless cavernous secretions of papillary lines, the combination of which is stable, restorative and unique for everyone, the prints are always biological samples of a person. In fact, they are special signs of a person for the detection of which the investigator is authorized to carry out examination (Part 1 of Article 241 of the CPC of Ukraine). Therefore, fingerprinting should be carried out in accordance with the rules of conducting this investigative (search) action. If a person refuses to provide voluntarily his/her fingerprints, the investigating judge shall decide on their compulsory obtaining after the consideration of the request of a party to criminal proceedings. In this case, the requests, orders and records should refer to the forced (compulsory) obtaining of biological samples – fingerprints, and not to temporal access to them as belongings or documents, since they cannot be considered as things, but biological samples.

## *2.2. Voluntarily and compulsory obtaining of biological samples*

The analysis of investigative and judicial practice shows that some lawyers regard the refusal of a person to provide voluntarily biological samples for examination as an execution of his/her right not to testify against him/herself, as provided for in Art. 18 of the CPC. A systematic analysis of the provisions of the Criminal Procedural Code and separate Judgements of the ECHR [21] allows us to conclude that the physical integrity of a person is covered by the concept of “private life” protected by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) [22] and concerns the most intimate aspects of private life, and compulsory medical intervention, even insignificant, constitutes an interference with this right (Decision “X and Y v. the Netherlands” [23]), but such interference is usually justified in accordance with Clause 2 of Art. 8 of the Convention as urgency to prevent a crime (“Tirado Ortiz and Losano Martin v. Spain” [24]).

Biological samples are considered by the ECHR as physical or objective tests used in forensic analysis and not subjected to the right not to testify against oneself (“PG and JH v. The United Kingdom” [15]), but

such procedures should not reach even the minimum level of cruelty for which they would constitute a violation of Art. 3 of the Convention (“*Tirado Ortiz and Losano Martin v. Spain*” [24]). In order to obtain such samples, the suspect is usually asked to passively withstand a slight violation of his physical integrity or receive a sample that is produced in the course of the natural life of the body (“*Saunders v. The United Kingdom*” [16; 25]), without the risk to health (“*Yalloh v. Germany*” [26]). In addition, under our national law, the right not to testify against oneself is understood as the right of a person not to speak anything about suspicion or accusation against him/her, and to refuse to answer questions at any time, therefore, in the process of taking of biological samples for expertise, a person may take advantage of the aforementioned right only when obtaining samples of voice and handwriting [27-29].

Before conducting a compulsory obtaining of biological samples, the person indicated in the order (warrant) of the investigating judge must show the order (warrant) to the person who is subjected to the compulsory sampling and hand over a copy of an order (warrant) to him/her (Part 3 Article 245, Part 2 Article 165 of the CPC). As neither Art. 245 of the CPC, nor Art. 241 and Art. 160-166 of the CPC provide the procedure for the compulsory obtaining of biological samples for examination, we consider that practical workers during the conduct of this procedural action should be guided by the provisions of Art. 28 of the Constitution of Ukraine [30], Art. 11, 143 of the CPC and the above-mentioned Judgements of the ECHR.

In our opinion, the compulsory obtaining of biological samples should be carried out by analogy with Art. 143 of the CPC, which regulates the execution of the warrant on taking into custody, namely: in the case of failure by the person subjected to compulsory obtaining of biological samples to give such samples, physical measures may be applied to him/her. The use of physical measures must be preceded by a warning about the intention to apply them. In case when it is impossible to avoid the use of physical measures, they should not exceed the measures necessary to comply with the warrant to compulsory obtaining of biological samples. In our opinion, the direct taking of biological samples should only be carried by a doctor (forensic specialist). The results of compulsory obtaining of biological samples should be described in a record of proceedings (Part 3 Article 245, Part 5 Article 241, Article 104 of the CPC). Providing a copy of the relevant record to the person, who was subjected to compulsory obtaining of the biological samples, is obligatory.

The legislator in Art. 245 of the Criminal Procedural Code of Ukraine allows obtaining biological samples for examination from a person who actually owns them. Consequently, the investigator can take biological samples from persons, who are parties to the criminal proceedings, but not from persons, who do not belong to any of the parties (for example, a witness) or did not at all obtain procedural status. This conclusion is fully coherent with the above-mentioned Summary of the Higher Specialized Court of Ukraine on Civil and Criminal Cases, “On the judicial practice of investigating judges dealing with investigative actions” [17], which states: “It is controversial that the investigating judges decide the requests for obtaining of biological samples for examination from a person who is not a party to criminal proceedings”. For example, the investigating judge of the Kyiv District Court of Odessa by his Order on June 27, 2014, denied the request for the compulsory obtaining of biological samples for examination from N., as the procedural status of this person in criminal proceedings has not been determined.

However, there has been different approach in judicial practice. For example, the investigating judge of the Pechersk District Court of Kyiv in his Order on May 13, 2013, granted the request for forced obtaining of fingerprints from the police officer S., since the court assessed that S. can use his status of a police officer as an opportunity to avoid giving samples. S. also does not relate to any of the parties to the criminal proceedings. Art. 245 of the Criminal Procedural Code of Ukraine does not define the list of persons from whom samples for examination can be obtained. However, the systematic approach to interpreting the provisions of Articles 245 and 163 of the Criminal Procedural Code (the provisions on temporary access to belongings and documents) gives grounds for concluding that samples for examination in criminal proceedings may be obtained from a person who actually owns them, regardless of whether this person is a party to criminal proceedings. Therefore, we cannot agree with the practice of those investigating judges, who refuse to accept requests for the forced obtaining of samples for examination solely on the grounds that the person, who actually possesses such samples, is not a party to criminal proceedings.

Uncertainty among the theorists and practitioners about the lawfulness of obtaining samples for examination before submitting the information to the Unified Register of Pre-trial Investigations is due to the fact that the obtaining of samples for examination is not considered by a group of lawyers to be an investigatory action. Therefore, it is believed that the prohibition, which is regulated in part 3 Art. Article 214 of the Criminal Procedural Code, is not applied to the execution of the obtaining of samples for examination. Art. 214 p. 3 of the CPC of Ukraine: “Conducting pre-trial investigation (that means – conducting of any investigatory action) before submitting the information in the Register or without such entering shall not be permitted and shall entail liability established by law. Inspection of the place of crime may be carried out before submitting the

information in the Unified Register of Pre-Trial Investigations which shall be done immediately after completion of the inspection”. In this scientific and practical dispute, we support the position of those scholars, who consider that obtaining samples for examination prior to submitting the information to the Unified Register of Pre-trial Investigations is not legal and we agree with the conclusion of the Higher Specialized Court of Ukraine on Criminal and Civil Cases, where it stated that obtaining of biological samples for conducting an examination is an investigatory action.

Further, the Court stated that “one of the grounds for refusal to satisfy the request for compulsory obtaining of samples for examination was the lack of legal grounds for conducting of investigative actions. Thus, the investigating judge of the Kuybyshevsky District Court of Zaporizhzhia Region in the Order on November 19, 2013, refused in satisfaction of M.'s request for the compulsory obtaining of biological samples. On November 18, 2013, M. appealed to the law enforcement with a statement about a running-down accident, committed by G. Also, in her statement, M. requested for medical examination of G. for alcohol intoxication, which was not carried out by the law enforcement officers. After that M. appealed to the investigating judge with a request for compulsory obtaining of biological samples for examination to fix a degree of alcohol intoxication of G. A report on the running-down accident on M. was not submitted to the Unified Register of Pre-trial Investigations. The police officer presented in court all the documents, which indicate that the consideration of the application of M. was terminated in connection with the absence of corpus delicti of any criminal offense in the actions of G., but G. was brought to administrative responsibility under p. 1 Art. 122 of the Code of Ukraine on Administrative Misdemeanors. We should agree with this position of the court, since the Criminal Procedural Code considers obtaining of samples for examination to be a type of investigative actions, which can only be carried out after submitting the information about the criminal offense to the Unified Register of Pre-trial Investigations (with the exception of such investigatory action as the inspection of the crime scene)”.

### *2.3. Procedural order for obtaining of biological samples for expertise*

System analysis of the Criminal Procedural Code, investigative and judicial practice gives us grounds for determining the following procedural order for obtaining of biological samples from a person:

1) passing a resolution of the prosecutor on the obtaining of biological samples from a person (Part 3 Article 245, Part 2 Article 241 of the CPC). The necessity of submitting of such a resolution is envisaged in Part 3 of Art. 245 of the Criminal Procedural Code of Ukraine, which regulates that such investigative action is carried out in accordance with the rules provided in Art. 241 of the CPC, namely: on the basis of the resolution of the prosecutor. It seems that the legislator focused on such a procedure to increase the prosecutor's responsibility for the observance of individual rights and freedoms and, at the same time, the need to exclude the possibility of abusing such a right. Nevertheless, in practice there are cases when such a procedural action is carried out without any methodological justification for the disclosure of a criminal offense, and is used in connection with another “hidden” motive – creating the effect of law enforcement dominance by interfering in privacy;

2) presentation of the resolution of the prosecutor to a person, who is subjected to obtaining of biological samples (Part 3 Article 245, Part 3 Article 241 of the CPC). The necessity of such a presentation is regulated in Part 3 of Art. 241 of the Criminal Procedural Code and must be fixed in the records of the obtaining of biological samples;

3) offering a person to provide voluntarily the necessary biological samples (Part 3 Article 245, Part 3 Article 241 of the CPC). The agreement or refusal of a person to provide voluntarily biological samples should be fixed in the proceeding's records, because the absence of a fixed refusal to provide voluntarily the biological samples by a person is considered by the investigating judges as the absence of the circumstances, which substantiate the arguments of the request for the compulsory obtaining of biological samples for examination. For example, the investigating judge of the Nosivsky district court of Chernihiv region in his Order on January 18, 2013 refused to satisfy the request of the investigator on the forced obtaining of biological samples from the victim S., since the investigator did not introduced substantial evidence that victim S. refused from the voluntary giving of biological samples: during the court hearing it was established that victim S. did not receive the copy of the resolution on the appointment of molecular genetic expertise and did not know about the necessity to give biological samples for expertise.

In the case of a person's refusal to provide voluntarily biological samples: the investigator, after adjusting with the prosecutor, the public prosecutor or representatives of the defence party, appeals to the investigating judge with a request for the compulsory obtaining of biological samples from a person for conducting examination (part 3 Article 245, Article 160 of the CPC); consideration of a request for the compulsory obtaining of biological samples from a person for examination and delivering the order by the investigating

judge (Article 3, Article 245, Article 163, 164 of the CPC). Consideration of the above-mentioned request must take place with the participation of the party to the criminal proceedings, who filed the request and the person, who is subjected to the compulsory obtaining of biological samples. Failure to appear to the court hearing of a person who is subjected to compulsory obtaining of biological samples without valid reasons or failure to inform the court of the reasons for non-arrival is not an obstacle to the consideration of the request. The investigating judge after the court hearing delivers the order on the compulsory obtaining of biological samples from a person for expertise (examination), if the party to the criminal proceedings, who filed the request, proves the existence of sufficient grounds to consider that biological samples belong to the concrete individual, and, in themselves or in combination with the other evidence, are essential for establishing important circumstances in criminal proceedings. The corresponding order must meet the requirements of Art. 164 of the Criminal Procedural Code;

4) obtaining of biological samples for expertise (examination) (Part 3 Article 245, Part 2, 4 Article 241, Part 7 Article 223 of the CPC). The obtaining of the above-mentioned samples is carried out by the investigator or prosecutor with the participation of a forensic expert or doctor if necessary. It has still been a discussion among the theorists and practitioners whether biological samples can be taken from an individual by operational units on the basis of an investigator's warrant. Such uncertainty is due to the fact that separate lawyers refer the obtaining of samples for examination as well as exhumation to the procedural rather than to the investigative actions, and the investigator and the prosecutor according to Art. 36, 40-41 of the Criminal Procedural Code have the right to assign only the conduct of investigatory (search) actions. We agree with the position of the Higher Specialized Court of Ukraine, which stated that obtaining of biological samples for examination is an investigative (search) action, and we believe that, in the case of the order (warrant) from an investigator or prosecutor, operation officers are authorized to conduct the obtaining of biological samples. At the same time, many issues remain unresolved regarding the procedure of obtaining samples itself, which can be used by the defence as an abuse of their right in an attempt to declare the evidence obtained on its basis inadmissible.

At the time of obtaining of biological samples for examination, at least two identifying witnesses must be present, but their participation can be replaced by the use of continuous video recording of this investigative action (Part 7 Article 223 of the CPC). If obtaining of biologic samples is accompanied by denudation of the individual, it is conducted by an individual of the same sex, with exception for a doctor, and upon consent of the individual examined. Investigator, public prosecutor has no right to be present when an individual of other sex is being examined, if the examination involves the necessity to denude the individual examined. During the taking of biological samples actions that humiliate the honour and dignity of a person, or are dangerous for his/her health, are not allowed. Before conducting a compulsory obtaining of biological samples, a person indicated in the order of the investigating judge must show the script of the corresponding order to a person who is subjected to the forced obtaining of samples for examination, and hand over a copy of the judge's order to a person (Part 3 Article 245, Part 2 Article 165 of the CPC). As far as neither in Art. 245 of the CPC, nor in Art. 241 and Art. 160-166 of the CPC the procedure of compulsory obtaining of biological samples for examination is regulated, we consider that the law enforcement during the conduct of this investigative action should be guided by the provisions of Art. 28 of the Constitution of Ukraine, Art. 11, 143 of the Criminal Procedural Code and separate Judgments of the ECHR.

In our opinion, the compulsory obtaining of biological samples should be carried out by analogy with Art. 143 of the Criminal Procedural Code, which regulates the execution of the warrant on compulsory appearance (taking into custody), namely: in the case of failure by the person, subjected to compulsory obtaining of biological samples, to execute legal requirements of the Order on compulsory obtaining of biological samples, physical measures may be applied to him/her. The use of physical measures must be preceded by a warning about the intention to apply them. If it is impossible to avoid the use of measures of physical impact, they should not exceed the measures necessary for the execution of the Order on compulsory obtaining of biological samples and should be minimal to the individual;

5) making a record on obtaining of biological samples (Part 3 Article 245, Part 5 Article 241, Article 104 the CPC). The record of obtaining of biological samples shall be drawn up as prescribed in the Criminal Procedural Code. A copy of the record of obtaining of biological samples is handed over to the individual who has been forcibly examined [31].

## CONCLUSIONS

Summarizing the above, we can draw the following conclusions:

1) as long as no changes are made to the legislation, the biological samples of a person are considered to be all samples related to the vital activity of a person as a biological being, and their obtaining must be



carried out in accordance with Part 3 of Art. 245 of the Criminal Procedural Code;

2) refusal to provide voluntarily biological samples for expertise (examination), except for samples of voice and handwriting, should not be regarded as the exercise of the right not to testify against oneself;

3) biological samples can be taken from persons, regardless of their procedural status and being a party to the criminal proceedings;

4) obtaining of biological samples for examination is an investigative action which is prohibited until the data are submitted to the Unified Register of Pre-trial Investigations;

5) we have offered a procedural order for obtaining of biological samples for examination, including a compulsory order as well.

## REFERENCES

- [1] Forr, C., Schei, B., Stene, L.E., Ormstad, K., & Hagemann, C.T. (2018). Factors associated with trace evidence analyses and DNA findings among police reported cases of rape. *Forensic Science International*, 283, 136-143.
- [2] Criminal Procedural Code of Ukraine. (2012). Retrieved from <http://zakon3.rada.gov.ua/laws/show/4651-17>.
- [3] Antoniuk, P.Ye. (2017). Compulsory obtaining of biological samples from a person in criminal proceedings: Organizational and tactical aspects. In *Actual Problems of Criminal Law, Procedure, Criminalistics and Inquiry: All-Ukrainian scientific-practical conference*. Khmelnytskyi: NADSPU.
- [4] Álvarez Buján, V. (2018). Article 24 of the Spanish Constitution and the DNA evidence in criminal proceedings. *Revista Espanola de Derecho Constitucional*, 114, 131-161.
- [5] Larregue, J. (2020). On “Truth”, DNA and criminal defense lawyers displaying credibility in the legal field. *Societes Contemporaines*, 118(2), 133-165.
- [6] Shariff, A.A.M., Azhar, A., Rajamanickam, R., Manap, N.A., Hussein, S.M., Said, M.H.Md., Halim, A.H.A., & Markom, R. (2019). Analysis on admissibility of DNA evidence in Malaysian syariah courts. *Academic Journal of Interdisciplinary Studies*, 8(4), 159-169.
- [7] Vailly, J., & Bouagga, Y. (2020). Opposition to the forensic use of DNA in France: the jurisdiction and veridiction effects. *BioSocieties*, 15(3), 394-419.
- [8] Shapovalova, I.S. (2020). *Application by an investigative judge of the case law of the European Court on Human Rights in the exercise of judicial control in criminal proceedings*. Dnipro: Dnipropetrovsk State University of Internal Affairs.
- [9] Tomoszek, M. (2020). Which principles for expert testimonies derive from the right to fair trial? *Casopis pro Právni Vedu a Praxi*, 28(1), 55-70.
- [10] Order of the Ministry of Health of Ukraine No. 6 “On the Development and Improvement of the Forensic Service of Ukraine”. (1995, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0248-95#Text>.
- [11] Order of the Ministry of Health No. 662 “About the Statement of Methodical Recommendations “The Order of Taking, Transporting and Storing the material for Research by a Polymerase Chain Reaction Method”. (2013, July). Retrieved from <https://zakon.rada.gov.ua/rada/show/v0662282-13#Text>.
- [12] Order of the Ministry of Internal Affairs of Ukraine and the Ministry of Health of Ukraine No. 1452/735 “About the Statement of the Instruction on the Order of Detection in Drivers of Vehicles of Designation of Alcoholic, Narcotic or Other Intoxication or Being under the Influence of the Medicines Reducing Attention and Speed of Reactions”. (2015, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/z1413-15#Text>.
- [13] Law of Ukraine No. 5492-VI “On the United State Demographic Registry and Documents Confirming the Citizenship of Ukraine, Identification of a Person or its Special Status”. (2012, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/5492-17#Text>.
- [14] Law of Ukraine 580-VIII “On the National Police”. (2015, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/580-19#Text>.
- [15] Judgement of the ECHR “PG and JH v. the United Kingdom”. (2001, September). Retrieved from <https://swarb.co.uk/pg-and-jh-v-the-united-kingdom-echr-25-sep-2001/>.
- [16] Judgement of the ECHR “Saunders v. the United Kingdom”. (1996, December). Retrieved from <https://swarb.co.uk/saunders-v-the-united-kingdom-echr-17-dec-1996/>.
- [17] Summary of the High Specialized Court of Ukraine on Civil and Criminal Cases “On the Judicial Practice of Investigative Judges Dealing with Investigative Actions”. (2016). Retrieved from [http://sc.gov.ua/ua/golovna\\_storinka/opriljudneno\\_uzagalnennja\\_ta\\_pravovi\\_poziciji\\_vssu.html](http://sc.gov.ua/ua/golovna_storinka/opriljudneno_uzagalnennja_ta_pravovi_poziciji_vssu.html).
- [18] Buley, N.V., Bondaletov, V.V., Makushkin, S.A., Bondaletova, N.F., & Kozyrev, M.S. (2016). Public administration and municipal governance and its significance for a modern democratic society. *International Journal of Economics and Financial Issues*, 6(8Special Issue), 220-224.
- [19] Markovska, A., & Isaeva, A. (2007). Public sector corruption: Lessons to be learned from the Ukrainian experience. *Crime Prevention and Community Safety*, 9(2), 118-129.

- [20] Hrechanina, O., Isayeva, G., Kolesnikova, O., & Isakova, Y. (2020). Relations between familial hypercholesterolemia and early ischemic heart disease: An analysis of medical documentation data. *Serbian Journal of Experimental and Clinical Research*, 21(4), 343-349.
- [21] Shamrai, V.V., Ivchuk, Yu.Yu., Tarasenko, V.Ye., & Fedorov, H.O. (2020). Topical issues of the application of the case-law of the European Court of Human Rights in the criminal process of Ukraine. *Amazonia Investiga*, 9(29), 6-14.
- [22] Convention for Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from <https://rm.coe.int/1680063765>.
- [23] Judgement of the ECHR “X and Y v. the Netherlands”. (1985, March). Retrieved from [https://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/x%20and%20y%20v%20the%20netherlands\\_EN.asp](https://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/x%20and%20y%20v%20the%20netherlands_EN.asp).
- [24] Judgement of the ECHR “Tirado Ortiz and Lozano Martin v. Spain”. (1999). Retrieved from <http://echr.ketse.com/doc/43486.98-en-19990615/>.
- [25] Drozd, V., Rusnak, Iu., Olishevskiy, O., & Hapoti, V. (2019). Obtaining samples for examination in criminal proceedings: Problems of normative regulations and law enforcement. *Georgian Medical News*, 7-8, 129-134.
- [26] Judgement of the ECHR “Yalloh v. Germany”. (2006). Retrieved from <https://swarb.co.uk/jalloh-v-germany-echr-11-jul-2006/>.
- [27] Rogalska, V.V. (2017). Procedural order of obtaining of biological samples for expertise. “*Theory and Practice of Criminal Procedural Proving*”: All-Ukrainian Scientific-Practical Conference. Ivano-Frankivsk, Ukraine.
- [28] Mishchenko, T.M. (2021). The threat of penetration of corrupt connections of organised crime to the authorities and management: Current realities in Ukraine. *Legal Horizons*, 14(2), 9-15.
- [29] Onlanbekova, G.M., & Abdrasulov, E.B. (2015). Principles of interaction of judicial power and prosecution agencies as reflection of objective regularities of their business cooperation. *European Research Studies Journal*, 18(4), 121-128.
- [30] Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.
- [31] Rogalska, V.V., & Yevpak, M.O. (2017). Refusal to voluntarily provide biological samples for examination in accordance with the right not to testify against oneself. In “*Actual Problems of Improvement of Criminal Legal Legislation*”: All-Ukrainian scientific-practical conference. Odesa: Legal Literature.

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