

RESPECT OF HUMAN RIGHTS AND FREEDOMS DURING THE EXAMINATION OF A PERSON WITHIN CRIMINAL PROCEEDINGS: ISSUES OF THEORY AND PRACTICE

EL RESPETO DE LOS DERECHOS HUMANOS Y LAS LIBERTADES DURANTE EL INTERROGATORIO
EN EL PROCESO PENAL: CUESTIONES DE TEORÍA Y PRÁCTICA

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Abstract: Even though it becomes the responsibility of crime official to carry out the investigative phase so as to established commission, such procedure should be done by respecting the fundamental right of everyone. A person's examination within criminal proceedings belongs to a range of investigative actions of restrictive nature. In this regard, the respect of human rights and freedoms becomes especially relevant during its conduction. According to experience in this field, law enforcement officers have questions on determining the subjects of this procedural action, the limits of applying coercion and the involvement of attesting witnesses.

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Systematic analysis of the Art. 241 of the Criminal Procedural Code of Ukraine demonstrated that the provisions set out in this Article are not sufficiently clear. That gives origins to the violations of human rights and freedoms. The authors have made a categorical conclusion about the need to improve the current regulations of the procedure for conducting examination within criminal proceedings. According to the results of the research, the authors have introduced scientifically sound proposals to improve the Ukrainian legislation concerning the procedure for conducting the investigation process.

Keywords: Examination, Coercion, Attesting Witnesses, Prosecutor, Investigator, Victim

Resumen: *Si bien corresponde a los oficiales policiales llevar a cabo la fase de investigación, es cierto que dicho procedimiento debe realizarse respetando los derechos humanos. El interrogatorio, dentro del proceso penal, se desarrolla a partir de una serie de actuaciones investigativas de carácter restrictivo. En este sentido, el respeto de los derechos humanos y las libertades cobra especial relevancia durante su conducción. De acuerdo con la experiencia en este campo, los agentes del orden tienen dudas sobre la determinación de los sujetos de esta acción procesal, los límites de la aplicación de la coerción y la participación de los testigos. El análisis sistemático del artículo 241 del Código de Procedimiento Penal de Ucrania demostró que las disposiciones establecidas en este artículo no son lo suficientemente claras. Eso da origen a violaciones de derechos humanos y libertades. Los autores han llegado a una conclusión categórica sobre la necesidad de mejorar la normativa actual del procedimiento para la realización de la instrucción en el seno del proceso penal. De acuerdo con los resultados de la investigación, los autores presentan propuestas científicamente sólidas para mejorar la legislación ucraniana sobre el procedimiento para llevar a cabo el proceso investigativo.*

Palabras clave: *Interrogatorio, coerción, testigos, fiscal, investigador, víctima*

Summary. *I. Introduction. II. Methodology. III. Discussion and Results. III.1. Discussion. III.2. Results. IV. Conclusions. References.*

I. INTRODUCTION

An important place in the system of procedural actions aimed at collecting evidence within criminal proceedings belongs to investigative (search) actions, which include the examination of a person (the Art. 241 of the Criminal Procedural Code of Ukraine). There are situations of information sufficiency in the practical activities of law enforcement agencies about the committed criminal offense, which includes the identified physical evidence of the crime that are sources of information about its circumstances (21,6%). Such information was mostly obtained during the crime scene search concerning the infliction of bodily injuries (86,3%), as well as during the examination of victims (13,1%) and the person who committed the crime (19,6%). In the practical realities the conduction of investigation at the initial stage of such an investigative (search) action as examination allows us to obtain the necessary information about the circumstances of the committed crime, for example, bodily injuries, the identity of the victim and suspect. For example, we simulate such a situation. The person was injured without witnesses, and the victim was unfamiliar with the attacker and could not provide information about him. The victim may be in critical condition and require urgent medical care. This investigative situation is unfavorable, the most complex and requires a system of target-oriented and coordinated investigative actions, as well as operative and search measures that should provide additional information about the circumstances of the crime and the offender to change the situation for the better. The following primary and urgent investigative actions are carried out at the initial stage in this situation: crime scene search (if known) and inspection of the adjacent territory, examination of the victim and thorough inspection of his/her clothes (finding and recording visible traces of crime and micro-objects), appointment of forensic examinations to answer questions that require special knowledge.

Research purpose and objectives is to determine problematic issues arising in the course of conducting examination and obtaining samples for examination. Authors taking this into account substantiate their own vision on improving the current on regulating the specified investigative (search) actions. Taking into account the set purpose, the objective of the research is to eradicate problematic issues of conducting examinations, in particular those related to:

- (i) Determining the limits of coercion during the examination.
- (ii) Determining the subjects of the examination.

(iii) Identifying cases in regard to the real need to involve attesting witnesses to conduct the examination.

The formulation of the outlined objective is due to the fact that the examination is one of the investigative (search) actions, the regulation of which is imperfect, since the provisions of the Art. 241 of the Criminal Procedural Code of Ukraine are not clearly and unambiguously stated. At the same time, the use of coercion during the examination requires the compliance with certain conditions of interference with human rights, since the practical need to collect evidence sometimes necessitates the compulsory examination of not only the suspect, but also the victim and witness. Coercion within the examination of both the victim, the witness and the suspect may be applied only after all possibilities of convincing the person of the need to carry out this procedural action voluntarily have been exhausted.

II. METHODOLOGY

In the process of writing the article, the authors used both general and special legal research methods, in particular:

(i) Dialectical method, to study the essence and reveal the content of basic concepts such as “examination”, “traces of crime”, etc.

(ii) Comparative and legal, to analyze scientific approaches to the interpretation of certain aspects within the researched topic, as well as the norms of the current and previous legislation in their comparison and opposition.

(iii) Method of abstraction, to single out the most important issues that need to be addressed.

(iv) Method of analysis, to study the essential characteristics of the object with the help of alternate thorough research of its individual aspects. The fact becomes clear that there is a need to carry out a particular method which has already been established. The problem here is not in establishing the method of carrying out the investigation method, but by ensuring that such method is effective and really recognised. Ensure the effective use of the methods of investigation is one thing, ensuring the protection of the right of parties is another. So, with all ramifications and plausible intake, there is no way the examination of the criminal proceedings can be affected without respecting fundamental human rights.

III. DISCUSSION AND RESULTS

It is impossible to get the desired scientific result without mastering the discussion aspects and their generalization among the diversity of scholars' points of view. It is no coincidence that there is the proverb: "As many academicians as there are points of view". In addition, it is important to remember that every scientific point of view has the right to exist, because truth springs from argument. The main objective in this area of research is to highlight the most controversial issues that emphasize the real issue of the article and indicate the urgent need to address them by making legislative amendments and alterations.

III.1. Discussion

Scientific periodicals rightly emphasize that the legislative regulation of the procedure of examination is imperfect, since the purpose and objectives of this investigative (search) action are not clearly defined, which leads to confusion of these concepts in the scientific legal literature; the types of examination and the procedure for their implementation remain insufficiently defined; the factual grounds for its holding are not clearly formulated in the law; there is no procedural regulation of the procedure for conducting a compulsory examination. This allows pre-trial investigation agencies to interpret some provisions of the law at their own discretion, which creates conditions for unjustified restriction of the rights and freedoms of the participants in criminal proceedings involved into investigative (search) actions (Klochuriak, 2013). At the same time, according to V. Topchiy and N. Karpenko (2015, p. 159), it is inexpedient to specify the factual grounds for the examination in the Criminal Procedural Code of Ukraine, since it is impossible to predict all possible cases of this investigative (search) action.

E. Iskenderov (2017, p. 49) made a well-considered conclusion that the procedure for conducting examination within criminal proceedings provided by the Art. 241 of the Criminal Procedural Code of Ukraine contains a number of problematic issues, the presence of which leads to ineffective realization of criminal procedural guarantees of the prosecution as the subject of proving in the pre-trial investigation.

III.2. Results

Criminology has developed a number of rational recommendations as conditions for examination: (i) examination can be made only after initiating

a criminal case; (ii) examination is appropriate when there is no need to appoint a forensic examination; (iii) persons to be examined are the accused, the suspect, the victim, the witness; (iv) if necessary, an expert is involved in the production of examination. What is the difference between examination and inspection or expert study? What caused this new investigative procedure to appear and gain recognition? The answer seems obvious: speed, combined with the lack of surplus criminal procedural regulations, and simplicity arising from the maximal visibility of traces of the crime. It is these features that determine the direction and content of the tactics of examination (Akhmedshin, 2016).

Success in the process of investigating criminal proceedings in many cases depends on the timeliness and quality of such an investigative (search) action as an examination. The conduction of examination in Ukraine has qualitatively changed with the reform of legislation (Dufeniuk & Kuntiy, 2015, p. 298). Nowadays, the procedure for conducting an examination by an investigator or a prosecutor must clearly meet the requirements of the Art. 241 of the Criminal Procedural Code of Ukraine. The analysis of the procedural requirements enshrined in this Article makes it possible to single out the problematic aspects of the regulation of a person's examination.

The first problematic issue is related to the definition of the limits of coercion that may occur during the examination, namely the conditions of interference with the rights of individuals (acts of psychological or physical coercion). The possibility of compulsory examination is provided in Part 3 of the Art. 241 of the Criminal Procedural Code of Ukraine, which stipulates that coercion can be used only if a person refuses to be examined voluntarily. It should be noted that the law establishes a norm on the prevention of actions that degrade the honor and dignity of a person or are dangerous to his/her health. However, the outlined categories are quite estimative. Therefore, the raised issue is surely the interest of scholars. The differentiation of certain conditions for the use of coercion by some processualists should be considered appropriate and relevant (Topchiy & Karpenko, 2015, pp. 50-51; Lukianchykov, 2015, p. 143). We believe that coercive actions are carried out only in case of refusal of a person (suspect, victim, witness) to pass the examination voluntarily. In particular, coercion may be accompanied by the detention of a person. Thus, application of measures of physical influence (force), special means is possible only if there are grounds provided by the Art. 43-45 of the Law of Ukraine "On the National Police". The use of chemicals or medical devices that are hazardous to a person's health is not permitted.

In the context of the raised issue, there is the question concerning the expediency of conducting a compulsory examination of the victim and the

witness. This aspect provokes a lively scientific discussion. Proponents of the legislator's position (on the use of coercion to examine the victim, witness) are convinced that both the suspect, accused and victim, witness may be subject to compulsory examination. This position is, for example, held by S. M. Stakhivskiy (2009, p. 32), I. M. Yanchenko (2008, p. 126) and others. In this regard, D. O. Savvitskiy (2012, p. 25) points out that the grounds for compulsory examination of the victim should be substantiated suspicion of falsity of the testimony and the availability of sufficient data to believe that this will reveal factual data to confirm or refute such a suspicion. Compulsory examination of a witness is possible, if there is evidence to believe that traces of the crime or other evidence relevant to establishing the circumstances of the crime, as well as assessing the veracity of the testimony may be found on his/her body. As we can see, the researcher relates the possibility of a compulsory examination to the verification of the veracity of the testimony of the victim or witness.

Opponents of the expediency of compulsory examination of the victim and witness justify their position by the fact that these persons are not subject to criminal prosecution, they do not commit criminal acts, do not violate the law, which could equate them with criminals who are subjects of permissible and desirable coercion and isolation from society (Antonov, 2003, p. 167).

We consider it appropriate in this discussion to express our own point of view. First, it is necessary from the practical point of view to carry out the examination of the witness and the victim, if they object to its conduction, and especially if an investigator or a prosecutor has doubts about the credibility of their testimony. Such a situation may arise, for example, in the course of investigating a crime under the Art. 152 of the Criminal Code of Ukraine (rape), when an investigator, a prosecutor has factual data that may indicate a simulation, staging of a criminal offense. Secondly, coercive actions are carried out only in case of a person's refusal to pass the examination voluntarily. Therefore, the victim wanting the crime to be detected as soon as possible, will not probably refuse to be examined. Objections to any investigator's actions indicate that the victim is trying to hide certain traces on his/her body.

In this context, it is necessary to cite the statement of the famous scholar I. L. Petrukhin (1989, p. 66) that the possibility of the coercion contained in the norms of criminal procedural law is not addressed to every participant in criminal proceedings. It is directed only against those who are not in solidarity with the law—its norms, prohibitions, permits and therefore seeks to evade the performance of the procedural duties. One should categorically agree with this statement. Therefore, we note that rights of the examined person must be guaranteed while carrying out this investigative

(search) action without objecting to the possible use of coercion in the course of the examination of the victim and witness and emphasizing that such a need may be due to the practical need for collecting evidence. Coercion in the course of the examination both of the victim, the witness and the suspect may be applied only after all possibilities of convincing the person of the need to carry out this procedural action voluntarily have been exhausted.

The second problematic issue is related to the identification of the subjects of the examination. The examination may be conducted: (i) by an investigator (if there is a prosecutor's decision), a prosecutor himself; (ii) by an investigator, a prosecutor with the participation of a forensic expert or a doctor; (iii) by a doctor (Part 2 of the Art. 241 of the Criminal Procedural Code of Ukraine). We should note that Part 2 of the Art. 241 of the Criminal Procedural Code of Ukraine stipulates that "the examination is carried out on the basis of a prosecutor's decision". Scholars express their critical remarks about such a legal requirement. Thus, V. I. Galagan and O. I. Galagan (2013, p. 17) note that there is a natural question in this case: how an investigator should behave, if there is an urgent need to conduct examination of the human body to collect evidence within criminal proceedings after the working day or when the need for the examination arose on a non-working day or a holiday. After all, cases of urgency in case of conducting the examination are not provided as an opportunity to conduct an examination in urgent cases without a prosecutor's decision, followed by notification of a prosecutor about the results along the next working day and sending a copy of the minutes of this procedural action.

In addition, this provision creates a situation when practitioners try to record the traces of the crime by the crime scene search, because it is not always possible to ensure that a person not to destroy traces of the crime or to get rid of the object of illicit benefit before receiving such a prosecutor's decision. However, the pre-trial investigation agency does not follow this rule in practice (Shumeiko, 2015, p. 156). We subsequently pay attention to the procedure of the examination by a doctor, which according to the current Criminal Procedural Code of Ukraine, in our opinion, is ambiguous and contradictory. The possibility of carrying out this action by a doctor is evidenced by the provisions of Part 2 of the Art. 241 of the Criminal Procedural Code of Ukraine, according to which:

«Examination, which is accompanied by exposure of the examined person, is carried out by persons of the same sex, except for its conduction by a doctor and with the consent of the examined person. The investigator or prosecutor may not be present during the examination of a person of the opposite sex, when it is necessary to expose the person to be examined».

Thus, if it is necessary to conduct the examination of a person of the opposite sex than the investigator, prosecutor, there may be two options:

(i) Examination accompanied by exposure of the person, is conducted by the investigator, prosecutor of the same sex with the examined person.

(ii) The investigator, prosecutor invites the doctor for the examination that is planned to be accompanied by the exposure of the person.

Examination by a doctor independently determines the following questions. First, what is the procedural status of the person conducting the examination? Secondly, what is the procedure for involving a doctor by an investigator or a prosecutor? Thirdly, what powers does a doctor have in case of independent examination? Fourth, what kind of procedural document should be drawn up by a doctor after the examination (minutes, conclusion or other)? Fifth, is the participation of attesting witnesses required in case of a doctor's examination?

As one can see, legislative contradictions are manifested in the procedural form of consolidating the examination by a doctor, because the results of the examination must be recorded in the minutes. However, the doctor, as a person who conducts the examination independently, is not authorized to draw up such minutes. This thesis is substantiated by the fact that the minutes in accordance with Part 1 of the Art. 106 of the Criminal Procedural Code of Ukraine is drawn up during the pre-trial investigation by the investigator or prosecutor, who carry out the relevant procedural action. Therefore, we have a contradiction, which is manifested in the fact that, on the one hand, the doctor has the right to conduct the examination, and on the other hand, the doctor is not entitled to draw up minutes on the results of its conduction. The investigator has also no right to draw up minutes of the examination according to the doctor's words, because the minutes are drawn up by the person who carries out the relevant procedural action in accordance with Part 3 of the Art. 106 of the Criminal Procedural Code of Ukraine. The solution to this situation would be the possibility to draw up the doctor's opinion on the analogy with a specialist, provided in paragraph 7 of Part 4 of the Art. 71 of the Criminal Procedural Code of Ukraine. However, the expert's opinion is not a procedural source of evidence (Art. 84 of the Criminal Procedural Code of Ukraine).

Therefore, it should be noted that the procedure for a doctor's examination is currently not defined. The issues of involving a doctor into this action, his status, the procedural form of recording the examination conducted by the doctor himself are not regulated. Besides, the examination by a doctor according to the study of the materials of the criminal proceedings is practically not carried out. Therefore, the provisions of Part 2 of the Art. 241 of the Criminal Procedural Code of Ukraine (concerning

the examination by a doctor independently) is not actually used in investigative and prosecutorial practice.

Given the identified legal contradictions, we believe that the examination should be conducted by an investigator, a prosecutor with the involvement, if necessary, of a forensic expert or a doctor. Carrying out the examination by a doctor independently will indicate a violation of the procedural forms of recording, which, accordingly, may lead to the recognition of the evidence obtained during its conduction as inadmissible. Involvement of a forensic expert or a doctor into the examination provides an opportunity to combine legal and medical knowledge, on the one hand, to correctly and completely identify traces of a criminal offense, special features of the person, and on the other, to correctly reflect them in the minutes. Therefore, we are convinced of the need to make legislative amendments regarding the exclusion of a doctor as a subject that has the right to conduct the examination independently. In case of legislative exclusion of the provision on a doctor's examination, there may be questions about the procedure of procedural actions, accompanied by the exposure of a person. We believe that the examination, which is accompanied by the exposure of the examined person's body, can be carried out in two ways: (i) by an investigator, a prosecutor of the same sex; (ii) an investigator, a prosecutor of the opposite sex with the participation of a forensic expert or a doctor. Examination by a person of the opposite sex is possible only if the person being examined does not object. The stated suggestions make it necessary to amend Part 2 of the Art. 241 of the Criminal Procedure Code of Ukraine.

The third problematic issue is related to the involvement of attesting witnesses into the examination. In particular, representatives of the scientific community have questions about (i) the feasibility of involving attesting witnesses when a person is getting naked; (ii) participation of attesting witnesses in the examination of a person of the opposite sex. The emergence of these issues is a well-founded fact, since the conduction of this investigative (search) action is associated with the restriction of personal rights and freedoms. In this regard, respect for human honor and dignity must be ensured during the examination. The participation of outsiders (attesting witnesses), for ethical reasons, causes a sense of shyness. Thus, the raised issue leads to scientific controversy, the expression of diverse opinions, etc.

Systematic analysis of the provisions of Part 7 of the Art. 223, the Art. 241 of the Criminal Procedural Code of Ukraine leads to the understanding that the obligatory participation of attesting witnesses during the examination must be ensured, regardless of whether it is accompanied by

the exposure of a person's body or not. The conduction of the examination without participation of attesting witnesses is possible in case of application of a continuous video recording of the course of this investigative (search) action. Therefore, the raised issue is quite controversial and should be clarified by scholars. We try to express our own vision on the outlined issue. In general, we believe that the institution of attesting witnesses, not only during the examination, but also during the investigative (search) actions in general, should be revised, in particular, as an atavism of the Soviet period. This issue is not the subject of our study, so we will not consider it in detail. However, there are positive aspects of the participation of attesting witnesses. In particular, their involvement and certification of the fact of the investigative (search) action, its course and results may prevent illegal complaints about the investigator, prosecutor's actions. In addition, the possible shyness of the person being examined should be taken into account, which can lead to a conflict situation. However, such shyness cannot be avoided in any case, because a person must expose his/her body.

Provisions of the Art. 241 of the Criminal Procedural Code of Ukraine guarantee the conduction of the examination with the participation of a forensic expert or a doctor or by a doctor independently. We believe that there is no need to involve attesting witnesses in these cases. However, such a restriction is not provided according to the current legislation, although it is clear that the participation of attesting witnesses in case of a doctor's examination is inappropriate. Qualitative composition of attesting witnesses is important for the observance of the rights of the examined person. They should not be casual friends of the examined person, colleagues; it is desirable that they are close in age persons. The suggestion of V. H. Drozd (2009, p. 10) that the decision to invite attesting witnesses should be agreed with the person, primarily in view of ethical considerations, is theoretically substantiated, but the final decision should belong to the investigator. There may be also the question about the sex of attesting witnesses in the practical plane. Part 2 of the Art. 241 of the Criminal Procedural Code of Ukraine contains prohibition only for the investigator, prosecutor to be present during the examination of a person of the opposite sex, when it is necessary to expose the person's body. The law does not contain a similar prohibition for attesting witnesses, at the same time we believe that for ethical reasons the investigator should guarantee the participation of attesting witnesses of the same sex with the examined person.

IV. CONCLUSIONS

Given the above, we can conclude that the examination is one of the investigative (search) actions, the regulation of which is imperfect, since the provisions of the Art. 241 of the Criminal Procedural Code of Ukraine are not clearly and unambiguously stated. The issues of the procedure of the examination of a person outlined in this article only raise the layer of the issue of regulating this procedural action.

The carried-out analysis allowed us to understand that:

1. First, the use of coercion during the examination requires the compliance with certain conditions of interference with human rights and freedoms.

2. Secondly, the practical need to collect evidence sometimes necessitates the compulsory examination of not only the suspect, but also the victim and the witness, which must be done within the law and with guarantees of the rights of the examined person.

3. Thirdly, the mandatory participation of attesting witnesses must be ensured during the examination, regardless of whether it will be accompanied by getting the person undressed or not. Carrying out the examination without participation of attesting witnesses is possible in case of a continuous video recording of the course of carrying out this investigative (search) action. An investigator, a prosecutor must ensure the participation of attesting witnesses of the same sex with the examined person for ethical reasons.

4. Fourth, the procedure for a doctor's examination is currently not defined. We believe that the examination should be conducted by an investigator, a prosecutor with the involvement, if necessary, of a forensic expert or a physician, but not by a doctor independently. It is advisable to make legislative amendments to Part 2 of the Art. 241 of the Criminal Procedural Code of Ukraine on the exclusion of provisions that provide the powers of the doctor to conduct an examination independently and to improve the provisions on the procedure for examination, which is accompanied by the person's exposure.

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