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The procedure for entering a person's home or other property: Current problems of theory and practice

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■ **Abstract.** The purpose of the research is to analyse the problematic issues of the criminal procedural procedure for trespassing into a person's home or other property and, based on this, to develop scientifically sound recommendations for improving the current legislation and practice of its application. Methodology. The study uses a set of scientific methods, namely: terminological, system-structural, Aristotelian, and comparative legal. The theoretical foundation of the study is the works of Ukrainian and foreign scholars, the provisions of the Criminal Procedure Code of Ukraine, and the practice of its application. The scientific originality of the research is that it: 1) highlights the specific features of the procedures provided for in the Criminal Procedure Code of Ukraine for breaking into a dwelling or other property of a person (with the voluntary consent of the person who owns or uses it; based on a decision of an investigating judge; without a decision of an investigating judge in urgent cases with further obtaining such a decision after breaking into a dwelling or other property of a person); 2) it develops recommendations for their application in practice and identifies areas for improvement. Based on the results of the study, the author developed a set of proposals designed to improve the provisions of the CPC of Ukraine regulating the procedures for entering a person's home or other property and the practice of their application, in particular: 1) recommendations on obtaining and procedural registration of voluntary consent for such penetration are developed; 2) it is established that penetration by voluntary consent is possible during detention by an authorised official and inspection of the scene; 3) it is argued that the recognition of the protocol of the inspection of the

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scene of the incident, conducted with the voluntary consent of the person who owns the dwelling or other property, as admissible evidence depends on the results of the court's interpretation of the relevant provisions of the CPC of Ukraine (such a situation is a favorable environment for the implementation of corruption practices); 4) the position of the Supreme Court, according to which if the investigating judge issues a ruling on granting a specific investigator permission to conduct a search, then the search should be conducted only by this investigator, who has no right to entrust the said investigative (search) action to operational officers, is considered unreasonable; 5) it is proposed to expand the list of urgent cases for conducting an inspection or search in a dwelling or other possession of a person or to clearly regulate in the CPC of Ukraine the possibility of conducting an inspection or search in a dwelling or other possession of a person with the voluntary consent of the owner or user and without further application to the court for obtaining the relevant decision; 6) a proposal was proposed to supplement the CPC of Ukraine with provisions that would provide the possibility of conducting other investigative (search) actions in a person's home or other property (for example, an investigative experiment in a person's home or other property)

■ **Keywords:** breaking into a dwelling or other property of a person; search; inspection; detention of a person; investigative (search) actions; investigator

■ Introduction

Performance of such task of criminal proceedings as protection of the rights, freedoms and legitimate interests of its participants is impossible without observance of the general principles of criminal proceedings, which are a guarantee of the administration of lawful justice. One of such principles is the inviolability of a person's home or other property: "it is not allowed entering a home or other property of a person, conducting an inspection or search therein except for a reasoned court decision, except as provided for by the CPC of Ukraine" (Part 1 of Article 13 of the CPC of Ukraine). This principle follows from Article 30 of the Constitution of Ukraine, which states that "everyone is guaranteed the inviolability of their home. No one may enter a home or other property, inspect or search it except by a reasoned court decision. In urgent cases related to the rescue of human life and property or the immediate prosecution of persons suspected of committing a crime, another procedure established by law for entering a home or other property of a person, conducting an inspection and search therein is possible".

During the pre-trial investigation of criminal offences, and the implementation of measures to stop and further respond to such torts, law enforcement officers frequently require interference with human and civil rights and freedoms, in particular by entering a person's home or other property to inspect, search, detain a person who has committed a criminal offence. When performing penetration, law enforcement officers must comply with the requirements established by law, otherwise, the evidence obtained in this way may be declared inadmissible, and the person who committed the criminal offence will avoid criminal liability. Instead, law enforcement officers may be prosecuted.

Therefore, there is a necessity to ensure an optimal balance of private and public interests in criminal proceedings during investigative (search) and other procedural actions related to penetration into a person's home or other property. However, in practice, such a balance is not always achieved, in particular, due to the overly complicated procedure for entering a person's home or other property, the contradictory nature of certain provisions of the CPC of Ukraine that regulate it, and the ambiguous interpretation of the relevant criminal procedural rules. As a result, law enforcement officers become hostage to the situation: on the one hand, the necessity to perform their powers to counter criminal law violations, and on the other hand, the rules of penetration are not entirely clear, which each subject (investigator, prosecutor, judge, defence counsel) can interpret differently. The decisions of the Supreme Court bring some clarity to this situation, but they do not provide an opportunity to form a well-established judicial practice on penetration into the home or other property of a person, and in some cases contradict the literal interpretation of the provisions of the CPC of Ukraine. Thus, sometimes the attempt to respond as quickly as possible to a committed criminal offence prompts law enforcement agencies to interpret the provisions of the CPC of Ukraine, which regulate the procedure for entering a person's home or other property, in their favour or to ignore them altogether.

The problems of criminal procedural regulation of the grounds and procedure for entering a person's home or other property have been repeatedly explored by scientists, in particular: O.M. Atamanov, V.I. Galagan, V.Y. Kalugin, O.V. Kaplina, L.M. Lohoyko, O.P. Kuchinska, V.V. Porodko, S.M. Tarasyuk,

V.A. Tashmatov, L.D. Udalova, S.S. Chernyavsky and others. Despite this, many problems in this area remained unresolved. Considering the above, it is relevant to explore the issues of criminal procedural grounds and procedures for entering a person's home or other property.

The purpose of the research is to analyse the problematic issues of the criminal procedural procedure for trespassing into a person's home or other property and, based on this, to develop scientifically sound recommendations for improving the current legislation and practice of its application.

The scientific originality of the research is that it: 1) highlights the specific features of the procedures provided for in the CPC of Ukraine for breaking into a dwelling or other property of a person (with the voluntary consent of the person who owns or uses it; based on a decision of an investigating judge; without a decision of an investigating judge in urgent cases with further obtaining such a decision after breaking into a dwelling or other property of a person); 2) it develops recommendations for their application in practice and identifies areas for improvement.

■ Outline of the Main Material

The penetration of law enforcement officers into the home or other property of a person should be considered the entrance to these objects. In the context of applying the provisions of the CPC of Ukraine, penetration mainly concerns the conduct of investigative (search) actions - inspection and search, and detention of a person who has committed a criminal offence. Therewith, entry into a dwelling or other property may not be related to specific criminal proceedings (for example, to obtain some information, compile a report on an administrative offence, provide assistance to citizens, etc.)

The CPC of Ukraine provides three ways (procedures) to enter a person's home or other property:

- 1) by the voluntary consent of the person who owns or uses them (voluntary extrajudicial);
- 2) based on the decision of the investigating judge (court);
- 3) without the decision of the investigating judge in urgent cases with the subsequent receipt of such a decision after entering the home or other property of the person (urgent).

Entering a person's home or other property with the voluntary consent of the person who owns or uses it. By this procedure, before entering, a law enforcement officer shall apply to the person who owns (uses) the dwelling or other property for consent (permission) to enter and further perform some procedural actions.

Voluntary consent to penetration. The right to perform such actions arises only after obtaining the consent of the person who owns the housing or other property of the person. The legislation does not specify in what shape this consent should be obtained (oral or written). In case of a patrol police call, they can enter a person's home or other property to assist, obtain the necessary information, and compile a report on an administrative offence. In such cases, voluntary consent in writing is mostly not obtained. However, for conducting investigative (search) and other procedural actions, the consent must be recorded in writing. It is executed by the owner (user) in writing, it is proof of their voluntary will. Handwritten writing of such consent fixes the fact that a person of their own free will permit to perform some actions in their home or other property. The permit is issued in any form, in particular, in the form of consent/application addressed to the head of a specific body or subdivision of a law enforcement agency with the obligatory indication of the date of this document, information about the owner (user), type of housing or other possession, exact address or location. It is advisable to indicate the exact time of giving such consent. It will allow further assessing the legitimacy of law enforcement actions and avoid some difficulties (for example, if the owner (user) does not provide voluntary consent during the pre-trial investigation or court proceedings).

The court practice developed specific recommendations regarding the voluntariness of consent:

1) does not indicate voluntary consent to enter the home and conduct an inspection, the absence of objections from the person to conduct the specified investigative (search) action [1];

2) the fact that a person first gives voluntary permission to enter and conduct an inspection, and later denies it in the court of the first instance, does not give reasons to state the absence of voluntary consent of the owner [2];

3) to determine the admissibility of evidence obtained during an inspection in a person's home or other possession, if the existence and/or voluntariness of the owner's consent is questioned by a party, the court must be guided by the totality of all circumstances that accompanied this investigative action, including, but not limited to, the availability of written confirmation of such consent [3];

4) it cannot be stated that a person gave voluntary and informed consent to the search of their home, if the person gave it after being detained, was not explained their rights as a suspect, and was not provided with legal assistance [3; 4];

5) calling the police and notifying other persons about a crime committed on the territory of a

person's household indicates voluntary consent to enter the household and excludes the recognition of the evidence obtained as inadmissible on the grounds of lack of such consent.

What procedural actions can be applied to penetration by voluntary consent? This procedure does not apply to the search, since Part 2 of Article 234 of the CPC of Ukraine expressly states that it is performed based on the decision of the investigating judge. Using a voluntary procedure for entering a person's home or other property during detention by an authorised official does not raise any particular objections [5]. Therewith, the most controversial is the issue of conducting a voluntary inspection of a person's home or other property. According to Part 2 of Art. 237 of the CPC of Ukraine, such inspection is performed according to the rules of this Code, provided for the search of housing or other property of a person. Instead, one of the rules of the search is to conduct it based on the decision of the investigating judge, unless there are urgent cases provided for in Part 3 of Article 233 of the CPC of Ukraine. Thus, the inspection of a person's home or other property should be performed based on the decision of the investigating judge, unless, of course, there are grounds for its performance in urgent cases. In some cases, such an inspection cannot be performed even based on the decision of the investigating judge. For example, an inspection of housing or other property that is the scene of the incident, if it should be performed in urgent cases before entering information into the Unified Register of Pre-Trial Investigations (hereinafter – the URPTI). Such conclusions can be reached based on a literal and systematic interpretation of criminal procedural provisions.

Considering the above, it is natural that in the case of inspection of the scene in the home or other property of a person with their voluntary consent without the decision of the investigating judge and the absence of urgent cases, law enforcement agencies interpret the CPC of Ukraine in different ways: in some cases they consider such inspection to be legal, in others – not.

Despite such significant shortcomings of the criminal procedural procedure for conducting investigative (search) actions in the home or other property of a person, in practice, investigators, prosecutors and judges consider it permissible to conduct a voluntary inspection of the scene of the incident in such places. But not always. This method of penetration into a dwelling or other property of a person is used mainly in the case of an appeal of the owner (user) of a dwelling or other property of a person, and other persons to law enforcement officers in connection with the commission of a criminal

offence and the necessity to inspect the scene. The voluntary procedure for entering a person's home or other property, given the literal interpretation of Part 1 of Art. 233 of the CPC of Ukraine, does not require a court order, since this part of the article uses the conjunction “or”, which indicates the alternative options. Despite this, investigators in some cases (in particular, if there is a “recommendation” of the prosecutor) apply to the court for permission to conduct the inspection.

Considering the above, investigators often take risks and inspect a person's home or other property if there is their voluntary consent without the decision of the investigating judge and in the absence of urgent cases. However, the voluntary consent of the person who owns the dwelling or other property is not an unconditional ground for satisfying the request of the investigator (prosecutor) for permission to conduct the inspection and does not affect the decision of the investigating judge. In an attempt to legalise the evidence, investigators are applying to the investigating judge for a relevant ruling. As a result of such a ruling, all evidence collected during the investigative (search) action is admissible, and, thus, they are included in the evidence base (collected evidence based on which a lawful decision is made in criminal proceedings), and the actions of the investigator are considered lawful. Thus, the interference with human and civil rights and freedoms occurred without violations of the law.

Therewith, such legalisation according to the law is allowed in case of urgent cases for inspection provided for by Part 3 of Article 233 of the CPC of Ukraine. Therefore, in the absence of urgent cases, investigators are denied the request for inspection. For example, the investigator, with the voluntary consent of the homeowner, conducted an inspection of the house, during which some items were discovered and confiscated, which were later declared as material evidence and attached to criminal proceedings. Then, the investigator appealed to the court with a request for a ruling on the inspection under Part 3 of Art. 233 of the CPC of Ukraine, but did not indicate the existence of urgent cases provided for by this criminal procedural provision. In the court's opinion, the grounds stated in the petition as “the necessity of obtaining admissible evidence and urgent investigative action to identify and record information about the circumstances of the criminal offence, obtaining and confiscating items used in criminal activities, the risk of destruction or concealment of items used in criminal activities” is not a legal reason for breaking into a person's home or other property under Part 3 of Article 233 of the CPC of Ukraine. Thus, the court dismissed the investigator's petition [6].

Therefore, in the case of inspection of the scene in the dwelling or other property of a person with or without their voluntary consent, if there are no urgent cases, law enforcement agencies interpret the CPC of Ukraine differently:

1) defenders in appeals and cassation complaints often refer to the fact that the inspection of the scene in the dwelling or other possession of a person by voluntary consent and without further legalisation (appeal to the investigating judge for a ruling) is illegal;

2) prosecutors "recommend" the investigator, who conducted such an inspection with the voluntary consent of the person who owns the housing or other property, to perform further legalisation;

3) judges, in some cases, support investigators with their legalisation, and in others – defenders with their complaints. Instead, the Supreme Court is forced to justify in every possible way the admissibility of conducting a voluntary inspection of the scene without further legalisation.

Example 1.

The court of the first instance, substantiating the admissibility of the crime scene inspection report, noted that such inspection was performed considering the urgency in solving the crime and the possibility of harm to the person who reported a serious crime. In addition, witnesses reported that they were invited to the apartment by the convicted Person_1, who was present during the inspection. The Court of Appeal agrees with the conclusion of the court of the first instance and emphasises that when deciding on the admissibility of evidence obtained during the inspection of the scene, it is considered that in each case there is a possibility of eventually losing such an opportunity and not fixing the traces of the crime promptly, thus the panel of judges correctly concluded that the decision of the investigating judge to obtain permission to inspect the apartment of the convicted Person_1, in this case, was unnecessary [7].

Example 2.

The Supreme Court concluded that the courts had correctly established that the grounds for the inspection of the scene (home) was the notification of the death of Person_2. To verify this information and clarify the incident, the inspection of the house was performed, during which they discovered the corpse of the victim with signs of violent death. The place of discovery of the corpse is always considered the place of the incident, regardless of where the death of a person occurred. Thus, the said investigative action was urgent, it was performed to verify the information received, and it did not require prior permission of the court, as rightly stated in the court decisions [8].

In practice, there are situations when law enforcement officers, trying to efficiently detect and investigate a criminal offence, instead of inspecting the scene in a person's home or other property, actually search. The necessity to search may arise from the beginning of the investigative (search) action or arise during its conduct. In such situations, the search is disguised as an inspection of the scene. In this case, the inspection of the scene should be legalised (legitimised) by applying to the investigating judge for a ruling on permission to inspect the scene. The voluntary procedure does not apply to such an inspection. Inspection of the scene in such cases becomes a search in urgent cases, but the name of the investigative (search) action does not change.

The Supreme Court has repeatedly acknowledged the inadmissibility of searching under the guise of inspecting the scene, as this levelled the requirements of judicial control provided for in Article 233, Part 2 of Article 234 of the CPC of Ukraine.

It is explained by the fact that inspection of the scene and search are similar investigative (search) actions.

In the context of the distinction between inspection and search, an interesting decision is the one which states that the inspection of the home did not have the nature of a search since the items discovered were openly on the floor under the table in the bedroom [9]. During the inspection, unlike a search, active coercive search actions cannot be used [10]. For example, the Supreme Court, having assessed the inspection of the scene in the household of Person_3 (case No. 266/4000/14-к), noted that during this investigative action the panels placed on the ceiling were opened, the built-in cabinets and other furniture were inspected, which is a sign of a search. Thus, in the circumstances of this case, the inspection of the scene conducted by the pre-trial investigation authorities is a search [4].

Considering that in practice, the voluntary procedure for entering a person's home or other property does not apply to searches, the work of investigators, in some cases, is paralysed. They can not enter the home or other property of a person for searching if there is voluntary consent of the person who owns the home or other property without the decision of the investigating judge or in the absence of urgent cases related to saving lives and property or the immediate prosecution of persons suspected of committing a criminal offence.

Penetration into the dwelling or other property of a person based on the decision of the investigating judge. It is performed mainly when the person concerned does not give voluntary consent to the entry or there is a high probability that they will

not, and when there are no grounds for entry into the home in urgent cases, or when the investigative (search) action must or can be performed based on the decision of the investigating judge, regardless of the owner's consent to its conduct in their home or other property (search, inspection).

In this case, before entering, it is necessary to obtain a decision from the investigating judge to inspect or search the home or other property of the person. To obtain such a ruling, the investigator (investigator) in agreement with the prosecutor or the prosecutor prepares a request for inspection or search. The petition substantiates the necessity of the said investigative (search) action. The petition must be accompanied by the originals or copies of documents and other materials by which the prosecutor or investigator substantiates the arguments of the petition and an extract from the Unified Register of Pre-trial Investigations about the criminal proceedings within which the petition is submitted (Article 234 of the CPC of Ukraine).

If it is necessary to conduct an urgent search and circumstances allow, the investigator may issue a decision to conduct it in the manner prescribed by Articles 100, 233 of the CPC of Ukraine. Such a decision must specify the purpose of the search and the urgent case that prompted this investigative (search) action without the decision of the investigating judge. This resolution is presented to the person, whose premises or possessions are to be searched. After the search, a protocol is compiled, and a petition for its legalisation is prepared.

If the decision of the investigating judge to inspect the scene has been obtained, but there is a necessity to search the scene, the investigator must prepare a petition and obtain a search warrant to legalise (legitimise) such actions related to the entry into a home or other property of a person. In the petition, the investigator must necessarily indicate what urgent case prompted them to conduct the investigative (search) action in this way.

Therewith, if the inspection of a person's property does not involve breaking, neither the decision of the investigating judge nor the voluntary consent of the person is required. For example, as can be seen from the materials of the criminal proceedings, in particular, the report of the inspection of the scene of the accident, the investigator inspected the cars, as a result of which external damage to these cars was established. During the inspection of the cars, nothing was confiscated from them. It indicates that the purpose of this inspection was to record traces of the criminal offence by visual inspection of both vehicles as objects that retained traces of it, without breaking into them or removing any items from

these vehicles. In such circumstances, these inspections did not have signs of coercive investigative action, were not associated with penetration into another person's property, did not violate the inviolability of another person's property (in this case – vehicles), and therefore obtaining a decision of the investigating judge, and the consent of the owners of vehicles to conduct them was not required [11].

Based on the decision of the investigating judge, issued in the manner prescribed by Articles 246, 248, 249 of the CPC of Ukraine, it allows conducting such covert investigative (detective) action as inspection of publicly inaccessible places, housing or other property of a person by secretly entering them, in particular with using technical means (Article 267 of the CPC of Ukraine).

Entering a person's home or other property without an investigating judge's ruling in urgent cases, followed by obtaining such a ruling after the entry. The third way of penetration is allowed in the presence of urgent cases related to: saving lives and property (for example, in the case of a confirmed fact of hostage-taking, imprisonment or abduction of a person, death threats, threats of destruction of property that may be an object, instrument or means of committing a criminal offence, etc;) with the immediate prosecution of persons suspected of committing a criminal offence (for example, the prosecution of a criminal who has just committed a crime (Articles 207- 208 of the Criminal Procedure Code of Ukraine) or during the execution of a decision to detain a person to bring them to court for the election of a preventive measure (Article 188 of the Criminal Procedure Code of Ukraine).

In the case of using the third method of penetration into a person's home or other property, the prosecutor, detective, and investigator, in agreement with the prosecutor, are obliged to immediately, after such actions, apply to the investigating judge with a request to conduct a search or inspection, but not other procedural actions². The investigating judge considers such a petition by the requirements of Article 234 of the CPC of Ukraine, checking, among other things, whether there were real grounds for entering a person's home or other property without the decision of the investigating judge. If the prosecutor refuses to approve the request of the investigator or the investigating judge to search or the investigating judge refuses to satisfy the request for a search, the evidence established as a result of such a search is inadmissible, and the information obtained is subject to destruction by the procedure provided for in Article 255 of the CPC of Ukraine (Part 3 of Article 233 of the CPC of Ukraine).

First, a protocol for the inspection or search is compiled, to which a petition and a decision on permission to conduct this investigative (search) action must be attached. These procedural documents are attached to the criminal proceedings.

One of the mistakes that result in the court's non-acceptance of the search results as evidence in the proceedings due to shortcomings and errors in the execution and preparation of the protocol of this investigative action is the lack of an indication of the specific grounds that give the right to search without the decision of the investigating judge (by Part 3 of Article 233 of the CPC of Ukraine) [12].

The admissibility of extrajudicial entry into the home is conditioned upon its urgent nature, i.e. the condition of extreme necessity, under which the harm to be averted is greater or proportionate to the harm caused by the entry. If a positive result can be obtained in another way, not related to the application of restriction of the constitutional human right, then the latter is implemented [13].

Only the existence of established and verified facts indicating the urgency of such cases, and confidence that by conducting appropriate procedural actions in a particular dwelling or other possession of a person, the necessary result will undoubtedly be obtained, is a signal that an urgent inspection or search can be initiated. For example, the Shepetivka Police Department in the Khmelnytskyi region received a report that on the premises at the address: ADDRESS_4, a gambling hall with slot machines was identified. Based on Part 3 of Art. 233 of the CPC of Ukraine, to preserve the property that is an instrument, means and object of the crime and which could be destroyed, the investigator, who was conducting criminal proceedings on the fact of gambling business, entered the premises at the specified address, where computers, gaming tables, playing cards, cash and other property, with which gambling business was illegally operated, were identified and conducted an inspection. After that, the investigator applied to the court with a request to search for Part 3 of Art. 233 of the CPC of Ukraine, which was satisfied by the investigating judge [14].

However, quite frequently there are cases when investigators ignore these requirements, and, thus, after the inspection or search cannot obtain a decision from the investigating judge. As a result, the obtained evidence will be declared inadmissible, and the perpetrators can be brought to criminal responsibility.

In this sense, the opinion of V.V. Porodko seems quite fair that it is obligatory to establish and substantiate the conclusion that there is a threat to human life or property or that a person who is being

persecuted on suspicion of committing a crime is in this dwelling in the absence of a court decision. In each case of actions related to the penetration, such a foundation must be established, substantiated and reflected in the documents of fixation, which in criminal proceedings are the protocol of search (or inspection) and the subsequent petition to the court for its conduct [13].

In general, the legislation does not provide precise explanations for the definition of "urgent cases" referred to in Part 3 of Article 233 of the CPC of Ukraine.

One of the urgent cases is associated with the salvage of property. Its interpretation in practice is ambiguous. In one case, the investigator referred to the necessity of "preserving the property that is an instrument, means and object of the crime and which could be destroyed", and his request was granted by the investigating judge [14], and in the second case, the investigator, among other things, noted the "risk of destruction of things used in criminal activity" and such a request was denied [5]. In this regard, the question arises whether the risk of destruction of things used in criminal activity is covered by the emergency. Considering the fact that persons committing criminal offences frequently try to destroy things that were the object, instrument or means of committing a criminal offence and can be considered as material evidence in the future, such a threat certainly exists.

Another urgent case is related "to the immediate prosecution of persons suspected of committing a crime". The position of O.M. Atamanov seems doubtful, according to which, when determining the purpose for entering a person's home or other property in the form of "with the purpose of immediate prosecution of persons suspected of committing a crime", there are often facts of ignoring the legal requirement of "immediacy". Searches under Part 3 of Article 233 of the CPC of Ukraine are conducted a day, a week and even months after the crime. It occurs although "immediate" prosecution can be performed only immediately after the person has committed the crime, and the person pursuing the person encounters obstacles in the process of arresting them, as the suspect is hiding in the respective dwelling or other property of the person [15]. Such a position is not shared by the author considering the following. Part 3 of Article 233 of the CPC of Ukraine refers to the "immediate prosecution of persons suspected of committing a criminal offence". In this case, immediacy refers to the persecution of the person, not the time that has passed since the commission of the criminal offence. A person can be prosecuted both immediately after com-

mitting a criminal offence and much later – in a few days, weeks or even months, for example, if it is necessary to detain them to participate in the consideration of a request for a preventive measure in the form of detention. In such cases, the detention is based on the decision on permission to detain the suspect to bring. Regarding the detention of persons suspected of committing a criminal offence without a warrant, it should indeed be “immediately after the commission of a criminal offence or during the continuous prosecution of a person suspected of committing a criminal offence” (clause 2, part 2, Article 207 of the Criminal Procedure Code of Ukraine), or “if this person was caught during the commission of a crime or attempt to commit it” (clause 1, part 1, Article 208 of the Criminal Procedure Code of Ukraine), or “if immediately after the commission of the crime, an eyewitness, in particular the victim, or a set of obvious signs on the body, clothing or place of the event indicate that this person has just committed a crime” (clause 2, part 1, Article 208 of the Criminal Procedure Code of Ukraine). It all depends on whether there is a decision to detain the person.

Detention of a person suspected of committing a criminal offence without a warrant is allowed in any place, including housing, but only immediately after the commission of the crime or during its continuous prosecution. Therewith, if there is a court order for detention in the form of a ruling, such detention may be performed at any time regardless of the time that has passed since the commission of the criminal offence. Thus, after a specific period (a week, a month), law enforcement officers could identify a person suspected of committing a criminal offence and begin their pursuit, during which they hid in the person's home or other property. Having no time to obtain permission to enter the home, as the person may escape, law enforcement officers under Part 3 of Article 233 of the CPC of Ukraine may enter the home, detain the person and conduct a search.

A search in urgent cases can be performed both with and without the voluntary consent of the owner or user of the dwelling or other property of the person. Therewith, even in the absence of the voluntary consent of the homeowner, the court may grant a search warrant for a search that has already been performed, if it considers that the materials provided by the investigator sufficiently substantiate the urgency of the investigative (search) action.

In practice, when applying these procedures for entering a person's home or other property, other problems arise due to ambiguous interpretations of criminal procedural provisions.

The moment of obtaining the voluntary consent of the owner of housing or other property. A literal interpretation of Part 1 of Article 233 of the CPC of Ukraine demonstrates that the legislator does not explicitly define the moment of obtaining voluntary consent: before or after penetration. However, a logical interpretation of this research provides evidence that such consent must be obtained before penetration.

Entry into a dwelling or other property of a person in urgent cases with the voluntary consent of the owner or user of the dwelling or other property of the person does not turn the urgent procedure into a voluntary one. Therefore, it is unacceptable when an investigator enters a person's home or other property in urgent cases and then tries to obtain or receive the voluntary consent of the person concerned to enter. In fact, in this case, it can only be about penetration in urgent cases. If there were no such cases, then obtaining voluntary consent to penetration after penetration is illegal, as are all procedural actions performed in a person's home or other property. To confirm the fact that there were no violations of the procedure for entering a person's home or other property, it is necessary to question the persons who were present during the inspection.

Who has the right to enter a person's home or other property? Regarding the first two variants of penetration, it should be noted that there is no indication of the subject of penetration, since the legislator in Part 1 of Article 233 of the CPC of Ukraine uses the term “no one”. According to the requirements of Article 235 of the CPC of Ukraine, the prosecutor and investigator have the right to file a petition for a search. Considering the third option of entering a person's home or other property, it should be noted that the literal interpretation of Part 3 of Article 233 of the CPC of Ukraine gives grounds to assert that only investigators, detectives, and prosecutors have the right to enter a person's home or other property in urgent cases.

However, in some cases, there is a necessity to enter the dwelling or other property of a person, other persons, for example, members of the investigative team, special forces, witnesses, experts, witnesses, victims, etc. To detain a group of armed persons who have committed a criminal offence, special forces officers can generally enter a person's home or other property even before the investigator. In this regard, this rule should be interpreted broadly, i. e. other persons may enter the dwelling or other property of a person together with the investigator, detective, or prosecutor. It is necessary to distinguish between the person who is authorised to perform specific procedural actions in a person's

home or other property and the person who can assist or be present during such actions. Therewith, to prevent different interpretations of this provision, appropriate amendments should be introduced to the CPC of Ukraine, providing for the possibility of penetration into the home or other property of a person or other persons.

The Supreme Court in its ruling of January 29, 2019 (case No. 466/896/17) upholds the position that if the investigating judge issues a decision to grant a specific investigator permission to search, then the search should be performed only by this investigator, who has no right to entrust this investigative (search) action to operatives.

As a justification for this position, the Supreme Court provided the following arguments. According to Articles 234-236 of the CPC of Ukraine, a search within criminal proceedings is performed based on the decision of the investigating judge. The investigating judge's decision on permission to search a person's home or other property is executed by the investigator or prosecutor. To obtain assistance on issues requiring special knowledge, investigators and prosecutors have the right to invite specialists to participate in the search, but this does not relieve them of the obligation to personally search.

As can be seen from the materials of the criminal proceedings, by the decision of the investigating judge of the Galician District Court of Lviv dated November 10, 2016, permission to search for the apartment of ADDRESS_1 was granted to the investigator of the Special Investigation Unit of the Galician Police Department of the Main Department of the National Police in Lviv region, Person_1. Thus, according to the terms of the permit, it was Person_1 who was authorised to conduct this investigative action. Despite this, the search in the dwelling of Person_2 on November 23, 2016, was performed by the operational unit of the Carpathian Cyber Police Department of the Main Office of the National Police in the Lviv region without the participation of investigator Person_1.

Assessing these circumstances, the Court of Appeal referred to the presence in the criminal proceedings of the search warrant issued by the investigator based on paragraph 3 of Part 2 of Article 40 of the CPC of Ukraine to the relevant operational unit, and, therefore, indicated the legality of the investigative action.

Therewith, according to the panel of judges of the Supreme Court, such a conclusion is inconsistent with the provisions of Part 1 of Article 236 of the CPC of Ukraine, which does not provide for the possibility of executing the search warrant by anyone other than the investigator or prosecutor. In

addition, according to the terms of the decision of the investigating judge of November 10, 2016, the permission to search was granted to the investigator Person_1, and not to the operational units.

According to the court of cassation, the provisions of paragraph 3 of Part 2 of Article 40 of the CPC of Ukraine on the investigator's right to entrust investigative actions to operational units, in this case, are not applicable, as they explicitly contradict the requirements of the law on the procedure for searching [16].

Such position of the Supreme Court seems to be insufficiently justified, since:

1. The investigator acted lawfully, according to paragraph 3 of Part 2 of Article 40 of the CPC of Ukraine, had the right to entrust investigative (search) activities to operational units.

2. According to Part 2 of Article 41 of the CPC of Ukraine, during the execution of orders of an investigator, detective, prosecutor, an officer of the operational unit shall have the powers of an investigator, and searching shall be within the powers of an investigator. Thus, the officer of the operational unit acted lawfully and performed the role of an investigator during the search.

3. The analysis of the provisions of Chapter 20 "Investigative (search) actions" demonstrates that there is no mention of employees of operational units. The same cannot be stated about Chapter 21 "Covert Investigative (Detective) Actions", in particular, Part 6 of Article 246 of the CPC of Ukraine explicitly states that "the investigator conducting the pre-trial investigation of a criminal offence or, on their behalf, authorised operational units to have the right to conduct covert investigative (detective) actions..."

According to the logic of the above-mentioned decision of the Supreme Court (i.e. by analogy), an operative officer cannot conduct any investigative (search) action on behalf of the assignment, if the conditions of this investigative (search) action provided for by the CPC of Ukraine refer to its conduct by the investigator. Therewith, Chapter 20 "Investigative (search) actions" mainly refers to the right to conduct investigative (search) actions by investigators and prosecutors. For example, "the investigator, the prosecutor has the right to conduct simultaneous interrogation of two or more already interrogated persons..." (part 9 of Article 224 of the CPC of Ukraine), "before presenting a person for identification, the investigator, the prosecutor shall first determine..." (part 1 of Art. 228 of the CPC of Ukraine), "to identify and record information about the circumstances of the criminal offence, the investigator, prosecutor inspects the area, premises,

things and documents” (Part 1 of Article 237 of the CPC of Ukraine). The words “investigator, prosecutor” are used constantly. Part 1 of Article 236 of the CPC of Ukraine (the decision on permission to search a person's home or other property can be executed by an investigator or prosecutor), which is under discussion, is no exception. The CPC of Ukraine does not contain explicit prohibitions on inspection or search by officers of operational units.

It is difficult to understand what determined the adoption of such a court decision (unprofessionalism of judges, corruption of the judicial system or simply excessive subjectivity of the servants of Themis), but such precedents are extremely dangerous, as due to them persons committing criminal offences to avoid criminal liability, and the work of law enforcement officers to protect the interests of the victim of a criminal offence, society and the state is reduced to nothing.

S.M. Tarasiuk rightly notes that such practice in some cases prevents the achievement of a fair result of criminal proceedings, and does not contribute to the protection of the constitutional rights of persons who own housing or those who live in it [17].

Can a person's home or other property be entered for other investigative (search) actions, except for inspection and search?

In investigative practice, there are often cases when there is a necessity to conduct an investigative (search) action in the home or other property of a person, but the legislation does not provide clear guidance on this issue. Thus, it is not clear how the investigator should act when this investigative (search) action is not related to either inspection or search. For example, there is a necessity to conduct an investigative experiment in a person's home or other property. Admittedly, nothing prevents in this case to obtain the free consent of the owner to conduct such procedural actions. However, if the owner does not agree, it would probably be advisable to supplement the CPC of Ukraine with provisions that would allow such investigative (search) actions to be performed by the decision of the investigating judge, by analogy with a search.

Who is authorised to give voluntary consent to enter a person's home or other property?

According to Part 1 of Article 233 of the CPC of Ukraine, voluntary consent to enter a person's home or other property can be provided by the person who owns a such home or other property. What does “person who owns” mean? The term “own” in the dictionary has several meanings: 1) to have something in one's ownership // to have a specific talent, to be distinguished by something (voice, etc.); 2) the same as to possess; 3) to be able to

subdue someone to one's influence, one's will // to master, to encompass someone (about thoughts, feelings); 4) to be able to act, to use something // to know something well; 5) to be able to move parts of one's body [18]. Thus, “to possess” means “to own, to use”. The owner has the right to own, use and dispose of their property (Article 317 of the Civil Code of Ukraine).

The right of ownership of property is considered to be a legally secured possibility of actual domination of the owner over the property, which is not related to using its properties (letter of the High Specialized Court of Ukraine for Civil and Criminal Cases “On the practice of application of legislation by the courts in civil cases on the protection of property rights and other proprietary rights” dated January 28, 2013 No. 24-150/0/4-13). Considering that possession is not associated with using the features of the property, it would be more logical to refer to using a housing or other property. However, one user is not enough, as a person may own a dwelling but not live there. In practice, there are various cases, in particular, when the owner both owns and uses the housing, or has provided it for use to other persons. It is no coincidence that the decision of the investigating judge to permit the search of a person's home or other property must contain information about the person who owns the home or other property and the person in actual possession of it (paragraph 5 of Part 2 of Article 235 of the CPC of Ukraine). The consent to enter a person's home or other property must be given by the person who uses the home or other property, i. e. the user. It usually occurs in practice, as law enforcement officers are mostly called to the scene by users who provide the appropriate permission.

The court practice developed some recommendations on the issue under study, in particular:

1. Inspection of housing or other property of a person can be performed with the voluntary consent of the person who owns it (owns it or uses it on the right of the lease, another right of paid or free transfer for use and possession), provided that there were procedural guarantees that protected the person's ability to express their opinion [19].

2. The law in Part 1 of Article 233 of the CPC of Ukraine requires the voluntary consent of the person who owns the housing, not the owner [20].

3. The inspection of the scene is lawful if it is performed with the voluntary consent of the legal user, not the deceased owner [21]. There are no grounds for declaring inadmissible the evidence obtained based on the inspection of the scene if the permission for access to the household of the deceased person was granted by the victim, who acted

as the legal successor of the property rights of the deceased mother and the potential owner of this property [22].

4. The owner of the dwelling does not have the right to permit to inspect of the part of the dwelling that is rented by another person and used by him [20; 23]. Conducting an inspection of a part of the rented housing with the consent of its owner, but in the absence of the consent of the user, is an unconditional violation of the right of this person to inviolability of housing, which entails the inadmissibility of evidence obtained during this investigative action [23]. Failure to comply with the requirements of Articles 233, and 237 of the CPC of Ukraine during the inspection of a personal wardrobe equipped with a personal lock, which is transferred by the employer for use by the employee, results in the inadmissibility of evidence obtained during the inspection since such a wardrobe corresponds to the criteria of other possession of a person, which is not associated by law with the presence of this person's ownership of such possession [24].

■ Conclusions

Based on the results of the study, the author developed a set of proposals designed to improve the provisions of the CPC of Ukraine regulating the procedures for entering a person's home or other property and the practice of their application, in particular: 1) recommendations on obtaining and procedural registration of voluntary consent for such penetra-

tion are developed; 2) it is established that penetration by voluntary consent is possible during detention by an authorised official and inspection of the scene; 3) it is argued that the recognition of the protocol of the inspection of the scene of the incident, conducted with the voluntary consent of the person who owns the dwelling or other property, as admissible evidence depends on the results of the court's interpretation of the relevant provisions of the CPC of Ukraine (such a situation is a favorable environment for the implementation of corruption practices); 4) the position of the Supreme Court, according to which if the investigating judge issues a ruling on granting a specific investigator permission to conduct a search, then the search should be conducted only by this investigator, who has no right to entrust the said investigative (search) action to operational officers, is considered unreasonable; 5) it is proposed to expand the list of urgent cases for conducting an inspection or search in a dwelling or other possession of a person or to clearly regulate in the CPC of Ukraine the possibility of conducting an inspection or search in a dwelling or other possession of a person with the voluntary consent of the owner or user and without further application to the court for obtaining the relevant decision; 6) a proposal was suggested to supplement the CPC of Ukraine with provisions that would allow conducting other investigative (search) actions in a person's home or other property (for example, an investigative experiment in a person's home or other property).

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Порядок проникнення до житла або іншого володіння особи: актуальні проблеми теорії та практики

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■ **Анотація.** Метою статті є аналіз проблемних питань кримінального процесуального порядку проникнення до житла чи іншого володіння особи та формування на цій підставі науково обґрунтованих рекомендацій з удосконалення чинного законодавства і практики його застосування. Методологія. У статті використано комплекс наукових методів, а саме: термінологічний, системно-структурний, формально-логічний, порівняльно-правовий. Теоретичне підґрунтя дослідження становлять праці українських та іноземних учених, положення Кримінального процесуального кодексу України, а також практика його застосування. Наукова новизна статті полягає в тому, що в ній: 1) висвітлено особливості передбачених у Кримінальному процесуальному кодексі України порядків проникнення до житла чи іншого володіння особи (за добровільною згодою особи, яка ними володіє чи користується; на підставі ухвали слідчого судді; без ухвали слідчого судді в невідкладних випадках із подальшим отриманням такої ухвали після проникнення до житла чи іншого володіння особи); 2) сформульовано рекомендації щодо їх застосування на практиці, а також визначено напрями вдосконалення. За результатами дослідження сформульовано комплекс пропозицій, спрямованих на вдосконалення положень КПК України, що регламентують порядки проникнення до житла або іншого володіння особи, і практики їх застосування, зокрема: 1) сформульовано рекомендації щодо одержання та процесуального оформлення добровільної згоди на таке проникнення; 2) встановлено, що проникнення за добровільною згодою можливе під час затримання уповноваженою службовою особою та огляду місця події; 3) аргументовано, що визнання протоколу огляду місця події, проведеного за наявності добровільної згоди особи, яка володіє житлом чи іншим володінням, допустимим доказом залежить від результатів тлумачення судом відповідних положень КПК України (така ситуація є сприятливим середовищем для реалізації корупційних практик); 4) визнано необґрунтованою позицію Верховного Суду, відповідно до якої, якщо слідчий суддя видає ухвалу про надання певному слідчому дозволу на проведення обшуку, то обшук має проводити лише цей слідчий, який не має права доручати проведення зазначеної слідчої (розшукової) дії оперативним працівникам; 5) запропоновано розширити перелік невідкладних випадків для проведення огляду чи обшуку в житлі або іншому володінні особи або ж чітко регламентувати в КПК України можливість проведення огляду чи обшуку в житлі чи іншому володінні особи за наявності добровільної згоди власника чи користувача та без подальшого звернення до суду за одержанням відповідної ухвали; 6) висловлено пропозицію стосовно доповнення КПК України положеннями, які нададуть можливість проведення не лише огляду та обшуку, а й інших слідчих (розшукових) дій у житлі чи іншому володінні особи (наприклад, слідчого експерименту в житлі чи іншому володінні особи)

■ **Ключові слова:** проникнення до житла або іншого володіння особи; обшук; огляд; затримання особи; слідчі (розшукові) дії; слідчий