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Vitalii Areshonkov – Ph.D in Law,
Senior Scientific Researcher, Doctoral
Student of the Doctoral Programme
and Post-Graduate Military Course
of the National Academy of Internal
Affairs

PROBLEMS OF THE LEGAL REGULATION OF PURPOSE AND CONDUCT CRIMINALISTIC (FORENSIC) EXAMINATION IN THE CRIMINAL PROCEEDINGS IN UKRAINE

In this article on the basis of analysis of the current criminal procedural legislation and scientists' points of view in this area are detected the existing problems of legal regulation of appointment and conduct criminalistic (forensic) examinations in criminal proceedings. These unresolved issues can be referred in the way in which the criminal proceedings, the parties may attract an expert and in which cases the defense or the victim can file a petition to the prosecutor or investigator to involve expert, shortage in the text of many articles which are related to the appointment and conducting forensic examinations mentions of the victim, which also have the right to obtain expert opinion, without certainty the status of recurring, additional, complex of fees forensic examination and etc. On this basis, the necessity of making certain changes to the current legislation and proposed specific recommendations to eliminate gaps, which the author believes should positively influence the process of attracting expert, performing the studies and achieve the ultimate objectives of criminal proceedings.

Keywords: criminal procedural law; criminal proceedings; forensic expertise; criminalistic examinations; forensic expert; expert conclusion.

The effectiveness of law enforcement detection and investigation of crimes, including as regards the appointment and conduct criminalistic (forensic) examination, primarily depend on the quality of criminal procedural law. It is clear, that the high quality of legislation in this area is the key provision of criminal proceedings independent, qualified and objective expertise, which in turn should contribute to rapid, full and impartial investigation and trial of criminal proceedings.

In general, the legislation of Ukraine on judicial examination is consisted of a number of regulations, including departmental. But Criminal Procedure Code of Ukraine (hereinafter – the Code of Ukraine) and the Law of Ukraine «On forensic examination» are major.

According to the Law of Ukraine «On forensic examination» we should emphasize that it was adopted in 1994 and since that time has not significantly changed. During that time there were found some of its shortcomings, which had been repeatedly in scientific sources, as well as, scholars and practitioners, namely lack of clear terminology system, the lack of features of appointment and conduct forensic examinations, existing between the provisions of other regulations on conducting forensic examinations and many others [1, p. 158]. That is why today there is an urgent need for radical change by taking its new edition.

Based on the fact that the website of the Ministry of Justice of Ukraine for the purpose of public discussion, for quite a long time is a bill entitled «On forensic activities», this process has already started and we hope soon reach its logical conclusion – the adoption by the Verkhovna Rada of Ukraine, taking into account the proposals submitted to its improvement, which probably accumulated over a long period.

Despite the fact that the new Code of Criminal Procedure of Ukraine contains a number of positive innovations, which include the empowerment of use in proving the Institute of Forensic Examination, we suppose, still, in terms of regulation of appointment and conduct forensic examinations requires certain revision. Primarily this is due to the presence of imperfections which contained, in certain provisions or the lack of regulation of some aspects of mentioned problems at all, which ultimately results in part of their application in practice and therefore causes practical problems.

In general, the appointment and conduct forensic examinations in criminal proceedings, including the improvement of the legal regulation of this issue, were engaged in both domestic and foreign scholars, including: T. V. Averyanova, R. S. Belkin, V. G. Honcharenko, A. V. Ishchenko, N. I. Klimenko, I. V. Pyrih, O. R. Rosinska, M. J. Segay, E. B. Simakova-Yefremyan, L. D. Udalova, M. G. Scherbakovskyy and others. Most scientists and experts are unanimous on the issue of problems that need to have legislative solution, but on such direct ways of solving their views contains some contradictions, sometimes quite essential.

In this context, the aim of this article is to identify existing problems of legal regulation of appointment and conduct criminalistic (forensic) examination in Ukraine and develop recommendations to address them.

The main principles of judicial expertise in criminal proceedings, including forensic enshrined in the CCP of Ukraine. Such principles regarding the appointment and conduct criminalistic (forensic) examination and involvement of experts for this purpose, in one way or another, provided for in Articles 69–70 (on the possibilities expert during his expertise and responsibility), 101–102 (regarding the conclusion expert and its contents), 242–245 (relative grounds examination, involving experts manner different participants of the criminal process and obtain comparative samples), 274 (concerning secret obtaining samples for examination) and 332 (concerning the examination at the trial stage) [2].

One of the articles, which, in your opinion, requires a revision is Article 242 («Foundations of the examination»), which provides for grounds other than their own cases always carry it out.

According to Article 75 of the previous Code of Ukraine which was published in 1960, the main basis of the examination remains a need for special knowledge to answer questions that are relevant to the criminal proceedings. However, some of the provisions of paragraph 1, Article 242 is difficult to agree. Thus, in this part states that expert examination is conducted at the request of parties to criminal proceedings or on behalf of the investigating judge or the court. In this edition, as in many other articles, firstly, do not mention of the victim, his representative or legal representative, who also have the right to

obtain expert opinion, however, that the Chapter 3, CCPs Ukraine to certain aspects of criminal proceedings include, secondly, there are contradictory wording concerning «treatment» to the prosecution expert.

Article 110 of the CPC of Ukraine («procedural decision»), in Section 3 states that the decision prosecutor accepted in the form of regulations, as part of 7 is assumed that the resolution of these persons adopted within the competence under the law, is binding the physical and legal entities. So still need to talk about assignments, not on appeal.

In addition to part 1 Article 242, which states that the examination is conducted, to determine the circumstances which are relevant to the criminal proceedings, requires special knowledge except «circumstances» and provide «facts» because the word «circumstance» for its etymology in the plural provides only a set of conditions under which something happens. Thus the first sentence of paragraph 1 of Article 242 is proposed as follows: «The examination which is conducted by experts at the request of the defense, the victim, his representative or legal representative or on behalf of the prosecution or the investigating judge of the court, to determine if facts or circumstances relevant to the criminal proceedings, requires special knowledge».

In considering article 242 CCP central issue is whether to provide for all cases of mandatory appointment of expertise. In Part 1 of this article clearly states that the examination is carried out by an expert, at the request or instruction of the persons to determine the circumstances relevant to the criminal proceedings, requires special knowledge. For example, in case of death of a person, just such a circumstance, you need to find out and that is important for the criminal proceedings and will establish its reasons, it is not necessary to devote a separate article in the present case.

And all that expertise can be called compulsory? Whether it is mandatory to conduct such forensic as fingerprint when found at the crime scene fingerprints hands on the subject, which probably touched offender or handwriting or technical expertise documents of crimes related to the forgery of documents, etc.?

On this occasion commented Criminal Procedure Code of Ukraine, edited by V. M. Tertyshnyk, provides for at least eight additional cases in which necessarily must assign expert [3, p. 359].

Among them, establish the presence of sexually transmitted diseases, the finding counterfeit banknotes, the finding sex as rape proceedings, subject to the determination of origin of firearms or knives and others.

Among scientists there are different points of view on the given question, for example, several authors propose to extend the range of mandatory cases to appoint expert examination and, therefore, provide in Article ones when using special knowledge established evidence and circumstances of the proceedings that directly indicate presence or absence of evidence of a crime [4, p. 80]. There is a view on the need to supplement the list of cases, mandatory appeal to experts for examination provisions concerning forensic psychological examination for a complete and comprehensive study of man, and widening the circle of persons to whom an appeal is binding to the forensic expert, psychological examination, such as witness and victim [5, p. 359]. Some authors did not see the need to make any changes to the said Article 242 of the CCP of Ukraine.

In our view, part 2 of the article, you can delete all of the text. This is because, as already mentioned, the fact that part 1 of this article all these cases in fact includes, but is simply too much details is required. Moreover, paragraph 3 of Part 2, to determine the suspect's mental state in certain circumstances provided for in Article 509 CCP ("psychiatric examination"), and paragraph 4 to establish the age of a person is appropriate to transfer Article 486, which are provided comprehensive psychiatric and psychological examination of the minor suspect or accused.

In Article 243, which provides for the involvement of experts also need to make some additions. So it is not clear from the text of the article, firstly, how (which document) sides of the criminal proceedings may involve an expert; secondly, in some cases, the defense or the victim can file a petition to the prosecutor or investigator to involve expert; thirdly, the investigating judge by its ruling may appoint an examination at the request of the defense or the victim, if the latter prove that the concerns raised were not allowed to give full and proper response, but it is not clear how they will know about it if the output is in the prosecution to review records of the proceedings of the accused.

To comply text of Article 243 is proposed in paragraph 1 to provide that the prosecution is appointed the expertise by reasoned decision, which must contain certain information, by analogy with Article 196 CCP Ukraine 1960 («Order an examination»). Also note that when the examination is appointed by the prosecution at the request of the defense or the victim, the latter should be made aware of the expert opinion on which is drawn up. In that case they can in case of disagreement with the questions that were posed to the expert or disagreement with those who is an expert apply for an examination investigating judge.

In Part 2 of Article 243 is necessary to provide that in the case involving experts of side protection or victim or his representative on a contractual basis examination is conducted on their application which must contain the information necessary for its implementation (surname of an expert, experts or the name of the institution, experts which are ordered conduct examination, questions that are put to the solution; the objects to be investigated; the materials presented expert, etc.). In addition, we must provide the conditions under which to submit petitions of side protection to involve expert – lack of funds for the examination, in accordance with this paragraph exclude from article 244 («Consideration of investigating judge the motion to attract the expert») and when material evidence or document is necessary to be provide for examination are to be the subject of the prosecution.

Also in this part need to provide that in the case of self-involvement of the expert for examination side protection or victims, if necessary, to provide expert additional materials that are found in the materials of the criminal proceedings, these persons may submit the motion to the prosecution to the expert such materials. In case of failure to meet the requirements of such a request the defense or the victim (representative, legal representative) will be able to apply the investigating judge.

In consideration of this proposal called Article 243 need to change the following: «The order to attract the expert or granting him additional materials».

Article 244 CCP Ukraine that provides an investigating of judge review the request for the involvement of experts is new in comparison with the previous Code. This article requires the removal of the contradiction between paragraphs 1 and 6, as in the first – the defense have the right to contact the investigating judge only in case of a failure of the prosecution to attract the expert and the sixth, in addition to the said prescribed cases where such refusal is essentially being, but experts were not put relevant questions or have doubts completeness or reliability of the conclusions.

Unlike the previous CCP in which Article 199 («Preparation of samples for expert research») was envisaged that the seizure and removal of samples necessary for an expert study provides investigator through a ruling, the new CCP article 245 («Getting samples for examination») is allowed both parties to criminal proceedings.

Among scientists, this rule causes some criticism. For example, A. I. Lozovyi and E. B. Simakova-Yefremian believe that one can only imagine what will select samples of an accused who pursues escape punishment for the crime, and these «standards» will study the expert. Instead, they offer a sampling function put on the investigating judge [6, p. 199].

Totally agree with this statement, we cannot, because then that of equal opportunities for parties to criminal proceedings and the principle of competition, which is just declared in the current Code of Ukraine, can we talk? As an axiom of criminal proceedings is precisely what the defense insists acquitted the accused, the prosecution and the opposite – bringing him to justice.

To resolve this issue, we introduce to Article 245 or Article 101 («The expert opinion») Code of Ukraine a provision under which responsibility for providing to the expert to undertake a study of acceptable physical evidence and other materials that should be credible and the person, who gave them, should be responsible for that.

Thus, in addition to inadmissible evidence we have indicates «other material that is untrue». By «other materials» refers to the volume of those samples for examination, for example, for

handwriting is given the comparative samples of handwriting or signature suspect that are not the exhibits.

At the same time, if in the case of deliberate forgery by an official of comparative samples, objects or other materials of the criminal proceedings that are provided to the expert examination such actions can be qualified under Article 366 («Forgery») of the Criminal Code of Ukraine, on side of protection or victim need to amend the Criminal Code, for example, to provide the relevant article in Chapter 18 («Crimes against justice»).

Therefore, since the current CCP of Ukraine provides for an examination by the court during the trial and the possibility to call experts for examination, if one party for the examination will give inaccurate materials and it will contribute to the conclusion of the latter, the court should be appointed expertise, which by its essence is repeated. Due to the latter objective answers will be obtained to these questions and thus will determine which of the current opinions of the expert can be used are not reliable comparative samples. If the investigation finds that the samples were inaccurate and provided the expert intentionally, that person will be attracted to criminal liability.

Moreover, in our view, in paragraph 1 of Article 245 should be provided the base for taking samples for examination. In the previous Code in Article 199 stated that the investigator had the right to order the seizure or taking of samples, and after weaning protocol made, the same procedure is proposed provide in Article 245. In order to have the defense and the victim had reason to collect samples for examination we offer to provide following order: the defense or the victim submit a request to take the necessary samples to investigating judge. If the investigating judge satisfies it, he brings his decision, which sends the person who filed the petition. This will be the basis for taking the necessary samples of the defense.

Article 332 («Examination by court decree») CCP of Ukraine also needs to be clarified, in particular it is proposed to provide t another case of the appointment a court examination regardless of whether the request of the parties, and some way to fix the status of another examination with defining some of its features.

So, it is proposed in part 2 of the second paragraph to provide following case of appointment of a court examination regardless of whether the submitted applications, «available expert opinion is grounded to believe arbitrary or contrary to other materials proceedings or otherwise questionable in its accuracy». Accordingly, the existing second subparagraph becomes the third.

A separate part of the same article should also include the following: «In the first and second cases provided by part two of this article the court decides instructs the re-examination, which is carried out in another expert institution, other experts or other experts than the initial examination (examinations)».

Moreover, this article requires one more supplement. Since its text, as well as the text of Articles 243, 244 is not provided, which data, except the issues raised in the examination, it should include judge decision about examination, offered the following data clearly stated. For example, the possibilities of using methods that are fully or partially change or destroy the facility provided by others.

Another issue that we think need its settlement is the lack of clear regulation CCP of Ukraine and the appointment of additional, repeated, complex and commission examinations. Although, in our opinion, they should be required by law, since, as the practice of criminal justice in our country, such expertise is often appointed and is essential means of establishing the truth in criminal proceedings. By the way, on the need to consolidate the status of such examinations repeatedly emphasized many researchers and practitioners, even before the current CCP of Ukraine [7, p. 78; 8, p. 204].

In a way further examination under paragraph 7 of Article 101 of the current CCP are replaced by the opportunity to go to court each side with a request to call an expert for questioning during the trial to clarify or supplement its conclusion. However, in this case, firstly, there is unclear why only during the trial, and if a clarification or modification of expert opinion or the injured parties need to pre-trial proceedings? Second, there are cases where without a study in the laboratory expert cannot supplement his answer to question him in the examination. That's why we offer to provide and call for expert

examination to clarify or supplement its conclusion and the appointment of additional expertise.

Similarly, in a certain way under Part 8 of Article 101 of the current CCP provide for such types of examinations as a complex and commission. However, in the interpretation of this article, namely «if the examination involved several experts, they are entitled to draw one conclusion or the individual conclusions» is not clear about exactly what kind of expertise goes it is not revealed specifics of such research and not demarcated cases where a conclusion shared and when not.

These questions, in varying degrees are required its settlement, moreover, that this kind of expertise as commission, can be an effective means of resolving the situation, which notes I. V. Pyrih when one and the same evidence can be simultaneously about 'the objects of research experts which were appointed expertise which various aspects of the criminal proceedings [9, p. 116]. In fact, when the defense takes the motion the prosecution about examination, specifying the particular expert or expert institution to carry it out, and the prosecution, at the same time, disagrees with the proposed expert or institution, such expertise can be real compromise to resolve the existing contradictions.

In addition, we agree with the proposals of some authors about the need to supplement the provisions of the CCP of Ukraine on: an expert to conduct separate studies in the presence of the suspect, accused, investigator and other persons in cases provided by law [6, p. 194; 7, p. 77–78], providing opportunities somehow experts to implement evidence-based proposals for the areas of prevention, received the results of expert studies [7, p. 79], and withdrawal from the CCP of Ukraine provisions for prevention expert on liability for knowingly false conclusion and refuse without good reason to perform their duties [10, p. 56] or at least indicate to the expert not on the «warning», and that the expert known provisions of Articles 385 and 384 of the Criminal Code of Ukraine, which amend the Code of Ukraine.

In the case of the removal of said gaps and other applicable law regarding the appointment and conduct criminalistic (forensic) examination have a positive impact both on the process and the involvement of experts performing the studies and to achieve the final objectives of criminal proceedings.

REFERENCES

1. Lozovyi, A. I. & Simakova-Yefremian, E. B. (2014). Aktualni pytannia reformuvannia zakonodavstva u sferi sudovo-ekspertnoi diialnosti v Ukraini [On the Problems of Reforming the Legislation in Forensic Expert Activity in Ukraine]. *Teoriia ta praktyka sudovoi ekspertyzy i kryminalistyky – Theory and Practice of Forensic Expertise and Criminalistics*, issue 14, 157–166. Retrieved from http://nbuv.gov.ua/j-pdf/Tpsek_2014_14_26.pdf [in Ukrainian].
2. Kryminalnyi protsesualnyi kodeks Ukrainy, Zakon Ukrainy Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy u zviazku z pryiniattiam Kryminalnoho protsesualnoho kodeksu Ukrainy [Criminal and Procedural Code of Ukraine, Law of Ukraine On amending legislative acts according to adopting Criminal and Procedural Code of Ukraine]. (2012). *From 19th November 2012*. Kyiv: Palyvoda A. V. [in Ukrainian].
3. Tertyshnyk, V. M. (2007). *Naukovo-praktychnyi komentar do Kryminalnoho protsesualnoho kodeksu Ukrainy [Scientific and Practical comment to Criminal and Procedural Code of Ukraine]*. Kyiv: A. S. K. [in Ukrainian].
4. Lozovyi, A. I., & Simakova-Yefremian E. B. (2010). Problemy normatyvno-pravovoho rehulyivannia sudovo-ekspertnoi diialnosti u kryminalnomu protsesi Ukrainy [Problems of normative and legal regulation of forensic and expert activity in criminal proceeding of Ukraine]. *Biuleten Ministerstva yustytzii Ukrainy – Bulletin of Ministry of Justice in Ukraine*, 11, 74–83. Retrieved from http://nbuv.gov.ua/j-pdf/bmju_2010_11_13.pdf [in Ukrainian].
5. Kurdiukov, V. V. (2012). *Deiaki pytannia oboviazkovoho provedennia ekspertyzy v konteksti reformuvannia kryminalnoho sudochynstva Ukrainy [Issues of obligatory conducting expertise in the context of reforming of criminal proceeding in Ukraine]*. *Advokat*, 7, 15–18. Retrieved from http://nbuv.gov.ua/j-pdf/adv_2012_7_3.pdf [in Ukrainian].
6. Lozovyi, A. I., & Simakova-Yefremian E. B. (2011). Problemni pytannia pryznachennia ta provedennia sudovoi ekspertyzy

v proekti novoho Kryminalnogo protsesualnogo kodeksu Ukrainy [Issues on assigning and conducting forensic expertise in the project of new Criminal and Procedural Code in Ukraine]. *Teoriia ta praktyka sudovoi ekspertyzy i kryminalistyky – Theory and Practice of Forensic Expertise and Criminalistics*, issue 11, 190–200 [in Ukrainian].

7. Tsymbal, P. V., & Omelchuk, L. V. (2013). Perspektyvy udoskonalennia instytutu sudovoi ekspertyzy u kryminalnomu protsesualnomu zakonodavstvi Ukrainy [Aspects of improving institute of forensic expertise in Criminal and Procedural Legislation]. *Yurydychnyi chasopys Natsionalnoi akademii vnutrishnikh sprav – Law Periodical of National Academy of Internal Affairs*, 1, 75–81 [in Ukrainian].

8. Klumenk, N. I. (2012). Problemni pytannia sudovoi ekspertyzy v kryminalnomu protsesualnomu kodeksi Ukrainy [Issues of forensic expertise in Criminal Procedural Code of Ukraine]. *Aktualni problemy zastosuvannia novoho kryminalnogo protsesualnogo zakonodavstva Ukrainy ta tendentsii rozvytku kryminalistyky na suchasnomu etapi – Topical issues of using new Criminal Procedural Legislation of Ukraine and tendencies of development of Criminalistics nowadays: materials of Ukrainian scientific and practical conference* (pp. 204–205). Kharkiv: KhNUVS [in Ukrainian].

9. Pyrih, I. V. (2013). Klasifikatsiia sudovykh ekspertyz ta problemy vdoskonalennia zakonodavstva [Classification of forensic expertise and issues on improving of legislation]. *Kryminalistyka i sudova ekspertyza – Criminalistics and forensic expertise*, issue 58 (2), 112–117 [in Ukrainian].

10. Simakova-Yefremian, E. B. (2013). Problemni pytannia zastosuvannia novoho Kryminalnogo protsesualnogo kodeksu Ukrainy pid chas pryznachennia ta provedennia sudovoi ekspertyzy [Issues on using new Criminal Procedural Code in Ukraine during assigning and conducting of forensic expertise]. *Kryminalistyka i sudova ekspertyza – Criminalistics and forensic expertise*, issue 58 (2), 58–59 [in Ukrainian].

Арешонков В. В. – кандидат юридичних наук, старший науковий співробітник, докторант докторантури та ад'юнктури Національної академії внутрішніх справ

Проблеми правової регламентації призначення та проведення криміналістичних (судових) експертиз у кримінальних провадженнях в Україні

Розглянуто проблеми правового характеру, пов'язані з призначенням і проведенням криміналістичних (судових) експертиз у кримінальних провадженнях. Обґрунтовано необхідність внесення окремих змін до чинного кримінального процесуального законодавства. Запропоновано конкретні рекомендації щодо усунення наявних прогалин правової регламентації цього питання.

Ключові слова: кримінальне процесуальне законодавство; кримінальне провадження; судова експертиза; криміналістична експертиза; судовий експерт; висновок експерта.

Арешонков В. В. – кандидат юридических наук, старший научный сотрудник, докторант докторантуры и адъюнктуры Национальной академии внутренних дел

Проблемы правовой регламентации назначения и проведения криминалистических (судебных) экспертиз в уголовном производстве в Украине

Рассмотрены проблемы правового характера, связанные с назначением и проведением криминалистических (судебных) экспертиз в уголовных производствах. Обоснована необходимость внесения некоторых изменений в действующее уголовное процессуальное законодательство. Предложены конкретные рекомендации по устранению существующих недостатков правовой регламентации данного вопроса.

Ключевые слова: уголовное процессуальное законодательство; уголовное производство; судебная экспертиза; криминалистическая экспертиза; судебный эксперт; заключение эксперта.