

OBTAINING SAMPLES FOR EXAMINATION IN CRIMINAL PROCEEDINGS: A COMPARATIVE ANALYSIS

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Annotation. This article explores the procedures for obtaining samples for examination in criminal proceedings, focusing on the practices in Ukraine, the Netherlands, and France. It aims to identify commonalities and differences in legislative frameworks and procedural practices across these jurisdictions, highlighting their implications for human rights. While the practice of obtaining samples is essential for criminal investigations, it must be balanced with the rights of individuals. The research reveals that while Ukraine's Criminal Procedure Code outlines sample collection procedures, it lacks detailed regulations that ensure the protection of rights during this process. In contrast, the Dutch and French legal systems provide clearer frameworks and protections, influenced by the European Court of Human Rights (hereinafter referred to as the ECHR) rulings.

The ECHR has established important principles regarding the collection of biological samples, emphasizing the necessity of consent and the need to avoid arbitrary interference with individual rights. This comparative analysis underscores the importance of aligning Ukrainian legislation with the ECHR standards to safeguard human rights effectively. The findings suggest the need for a more precise legal framework in Ukraine that differentiates between sample collection and other investigative actions, ensuring transparency and protection of individual rights. Ultimately, the study calls for legislative reforms in Ukraine, inspired by successful practices in the Netherlands and France, to create a more robust and rights-respecting framework for obtaining samples in criminal proceedings.

Key words: samples, forensic examination, criminal proceedings, human rights, European Court of Human Rights practice, legal regulation.

1. Introduction.

The collection of samples for conducting forensic examinations in criminal proceedings is an important stage of the investigation that directly impacts the administration of justice. A drawback of Ukrainian legislation, revealed during its enforcement, is the lack of clear and detailed regulation of procedures for collecting samples, which can lead to legal conflicts, violations of citizens' rights, and a decrease in the effectiveness and efficiency of pre-trial investigations. By examining the legal systems of the Netherlands and France, it has been established that these countries have more developed procedures that ensure a balance between the needs of pre-trial investigations and the protection of human rights. It is important to conduct a comparative analysis of foreign practices and domestic experiences on this issue to identify positive practices and opportunities for improving Ukrainian legislation.

2. Analysis of scientific publications.

The analysis of the current state of scientific research on the issue of obtaining samples for examination in criminal proceedings shows that, unfortunately, these matters in Ukraine have not been systematically studied at the monographic level. However, certain aspects of the criminal

procedural regulation of this issue have been addressed by domestic legal scholars such as I.V. Hlovyuk, V.I. Halahan, O.V. Kozak, V.P. Shybiko, and others. The majority of scientific works focus on specific types of samples for examination and particular investigative situations that may arise. For example, P.E. Antoniuk, A.O. Antoshchuk, O.V. Baulin, N.S. Karpov, and L.T. Kotlyarenko have explored certain aspects of obtaining biological samples and their use in criminal proceedings.

At the same time, the conducted analysis shows that the existing developments do not cover all aspects of the research, indicating the need for a deeper and more systematic study of this topic. This necessitates further research in this area with the aim of improving legislation and practices for obtaining samples for examination.

3. The aim of the work.

The aim of this article is to analyze the process of obtaining samples for forensic examination in criminal proceedings in Ukraine, the Netherlands, and France, to identify common features and differences in legal regulation and procedures, to investigate their implications for criminal proceedings, and to formulate recommendations for improving the appropriate Ukrainian legislation to establish an effective practice for obtaining samples during pre-trial investigations in Ukraine.

4. Review and discussion.

In the course of investigating criminal offenses, the investigative authorities often encounter the need to obtain various samples for conducting forensic examinations. These samples are objects used in comparative studies and help establish a connection between different material objects or individuals. Such samples may include physical evidence, documents, as well as samples obtained from living persons or corpses for the purpose of identification or determining their group affiliation. They play a crucial role in the investigative process, as they help clarify important circumstances of the case and ensure proper evidence collection [2, p. 507].

Obtaining samples is an investigative action governed by strict rules established in the Criminal Procedure Code of Ukraine. In particular, the procedure for obtaining samples of objects and documents is regulated by Chapter 15 of the Criminal Procedure Code of Ukraine ("Temporary Access to Objects and Documents"), which includes Articles 160–166 [1]. These articles outline how and under what circumstances an investigator may gain temporary access to objects or documents that have evidential value for criminal proceedings.

Regarding the collected biological samples, such as blood, saliva, or other biological materials, this process is governed by Chapter 20 of the Criminal Procedure Code of Ukraine ("Investigative (Search) Actions"), which includes Articles 241–245 [1]. These provisions define the procedure for obtaining biological samples from individuals for expert examinations, which is an important element in establishing facts in criminal proceedings. This procedural approach helps ensure the protection of individuals' rights and guarantees legality during the collection of evidence.

Ukrainian legislation does not provide an exhaustive list of objects that can be used as samples for expert examinations. Although, in our opinion, the absence of such a list is a justified position of the legislator, as various situations arise during the investigation of criminal offenses that require a flexible approach. A clear definition of the types of samples could complicate the work of law enforcement agencies and limit the possibilities of the investigation. In addition, a fixed list would not have a significant positive impact on the protection of citizens' rights in the criminal process, as the main guarantee of their protection lies not in a limited list of samples, but in the strict adherence to the procedure for obtaining them.

As these provisions are contained in Chapter 20 of the Criminal Procedure Code of Ukraine, which outlines the procedure for conducting investigative (search) actions, the collection of samples for expert examinations can be definitely classified as an investigative action. This means that after obtaining samples, a forensic examination must be appointed, which will use specialized

knowledge to analyze the samples. The use of expert examinations is compulsory, as it is impossible to reasonably and accurately determine the affiliation of the samples to a specific object without expert conclusions.

O.I. Krytska aptly observes that, from the perspective of the outcome of the action performed, samples collected for expert examination acquire full evidential value only when they are included in the expert report. Thus, the samples themselves do not possess legal force until they are analyzed and interpreted by an expert. This highlights the importance of proper and professional sample selection, as well as adherence to procedural norms at all stages of the examination, since any violations may affect the reliability of the conclusions and their evidential weight in criminal proceedings [3, p. 104].

Moreover, Ukrainian legislation provides for the possibility of obtaining samples for expert examination in a covert manner in accordance with Article 274 of the Criminal Procedure Code of Ukraine, which regulates the covert collection of samples necessary for comparative analysis. This method of obtaining samples is used only in cases where their open collection under the procedure established by Article 245 of the Criminal Procedure Code of Ukraine could cause significant harm to the criminal proceedings. Covert collection of samples is carried out based on a ruling by an investigative judge following a request from the prosecutor or investigator, which has been agreed upon with the prosecutor.

Generally, the procedure for obtaining samples for expert examination is an important stage of the pre-trial investigation. It ensures the collection of necessary evidence for the proper conduct of the examination, which can be crucial for establishing the truth in criminal proceedings. The prerequisite for obtaining samples is the appointment of a forensic examination: either at the request of a party to the criminal proceedings or by the decision of an investigative judge, in accordance with Article 244 of the Criminal Procedure Code of Ukraine.

We consider that a comprehensive approach to the regulation of procedural actions regarding the collection of samples is an important condition for ensuring effective investigation. At the same time, attention should be paid to the need for further improvement of the procedure for covert collection of samples, particularly to ensure an adequate balance between the interests of the investigation and the protection of the rights of individuals involved in the criminal process.

Analyzing the provisions of Article 245 of the Criminal Procedure Code of Ukraine, we can conclude that several categories of individuals may participate in the process of obtaining samples for expert examination. Firstly, these include the investigator, inquiry officer, or prosecutor, who directly initiates and conducts the sampling process. Secondly, they are individuals from whom the samples are taken, namely the suspect, accused, victim, or witness. It is important to note that the collection of samples can only be conducted after the initiation of a pre-trial investigation and only concerning individuals who have a procedural status in the proceedings. Until the commencement of the proceedings, such an investigative (search) action is inadmissible [1].

The third group consists of experts or specialists who may be involved in the sample collection process, particularly to ensure medical or technical aspects. For instance, when it comes to collecting blood samples or other biological materials, this must be performed exclusively by qualified medical professionals to ensure quality and safety. Such an approach is necessary to comply with both professional standards and the rights of individuals from whom the samples are taken. Additionally, an expert may participate in the collection of voice samples, for example, in conducting phonoscopic examinations [1].

The fourth group of participants consists of the defense attorneys for the suspect or accused. Although their presence is not mandatory during this investigative action, it is desirable, as it ensures oversight of the procedure and may help avoid potential complaints regarding unlawful or inadequate sampling. The involvement of witnesses during this investigative (search) action is also not mandatory according to the current Criminal Procedure Code of Ukraine [1].

Regarding the legal basis for obtaining samples for expert examination, it consists of a ruling by the investigator (prosecutor) or a decision by the investigative judge. Such a ruling is comprised of

three parts: the introductory, descriptive-motivational, and dispositive parts. The introductory part includes information about the prosecutor, investigator, the place and time of the ruling's issuance, as well as other procedural details. The descriptive-motivational part presents the circumstances of the criminal offense, justification for the necessity of sampling, and relevant references to the provisions of the Criminal Procedure Code of Ukraine. The dispositive part indicates the decision on the collection of samples and specifies the personal details of the individual from whom these samples will be taken [1].

The direct collection of samples begins after all participants are familiarized with the ruling and have signed documents confirming their acknowledgment. The investigator or prosecutor takes actions to ensure the sampling, involving, if necessary, relevant specialists. The protocol of the investigative (search) action records all circumstances of the sample collection, including the type of samples, their quantity, methods of packaging, and any possible refusal of the individual to provide samples voluntarily, along with the reasons for the refusal [1].

It is important to mention that the process of the selection of samples for their examination must comply not only with the requirements of current legislation but also with moral and ethical standards. Therefore, the legislator explicitly prohibits any actions that may degrade a person's honor and dignity or pose a threat to their health. Additionally, investigators and prosecutors are not allowed to be present during the collection of samples from individuals of the opposite sex if it involves the necessity of exposing the body.

From the perspective of evidentiary value, expert conclusions, that are based on samples obtained with violations may be deemed inadmissible by the court or called into question. This specifically pertains to the provisions of Part 3, Article 245 of the Criminal Procedure Code of Ukraine, which refers a person's refusal to voluntarily provide biological samples and the possibility of their forcible extraction.

This provision raises doubts in light of the practice of the ECHR, for example, the case of "Funke v. France", where the inadmissibility of compelling a person to provide evidence that may be used against them was emphasized. The Court also draws attention to the need to respect the right to privacy, particularly in cases involving a person's physical integrity [4].

Given the practice of the ECHR, particular care must be taken when addressing the issue of compulsory collection of biological samples, ensuring an appropriate balance between investigative needs and the protection of human rights.

Identifying the practical difficulties that arise in the application of this provision, it should first be noted that the current legislation lacks both a clear definition of the term "biological samples" and a regulated procedure for their compulsory collection. Moreover, the term "compulsion" in the context of its application by the state does not also appear, which complicates law enforcement. As A.V. Shulzhenko points out, state compulsion is not a form of punishment but rather an attempt to address issues related to the appointment of forensic expertise, which is part of the procedural execution of a court ruling [5, p. 129].

Indeed, during the process of sample collection, it is important that the actions of law enforcement officers do not cross the line of cruelty and do not degrade a person's honor and dignity, as highlighted in scientific research [5, p. 129]. It should be considered that this process is a one-time occurrence and closely resembles the standard procedure for providing tests in medical institution. This eliminates the possibility of it being equated with inhuman or degrading treatment.

However, considering that the ECHR emphasizes the assessment of the circumstances of each specific case in its decisions, it is essential to approach the implementation of compulsory collection of biological samples responsibly. Unlawful actions may negatively impact the pre-trial investigation, as they can undermine the validity of its results.

Although the arguments presented may deny the statement that conducting investigative action such as the compulsory collection of biological samples constitutes an automatic violation of human rights, there is a risk that such actions may contravene widely recognized norms of the European Convention on Human Rights. This highlights the need to improve legislative regulation

in this area to ensure a balance between the interests of pre-trial investigations and individual rights [6, p.101].

At the same time, the practice of the ECHR gives clear guidelines regarding the permissible level of coercion that law enforcement agencies of states party to international treaties may employ to fulfill their obligation to society in the fight against crime.

With regards to the limits of compulsory intervention in the human body to obtain evidence during the investigation of criminal offenses, an important precedent is the ECHR ruling in the case of "X. v. the Netherlands" dated December 4, 1978. In this decision, the Court notes that although a compulsory blood test may be considered a violation of the right to private life, it may also be deemed necessary to protect the rights of others [7, p. 178].

The Court classifies a blood test as a "minor intervention" and emphasizes the need to provide certain safeguards for the individual at the time of such intervention. In particular, it notes that:

- A blood test can only be conducted upon the order of a prosecutor, their deputy, or another authorized police official, ensuring oversight of the process;
- The blood test procedure must be performed exclusively by an accredited physician, who, in turn, has the right to refuse to carry out the test for exceptional medical reasons, thereby ensuring compliance with medical standards and the rights of the patient.

We reasonably believe that the legislator did not pay sufficient attention to such a specific investigative (search) action as the collection of samples for examination (Article 245 of the Criminal Procedure Code of Ukraine), as its legal regulation follows the procedure established for another investigative action, bodily examination (Article 241 of the Criminal Procedure Code of Ukraine). Moreover, the procedure for court authorization of this investigative action refers to the procedure defined for temporary access to items and documents (Articles 160–166 of the Criminal Procedure Code of Ukraine) [8, p. 44]. Although, such an approach is inappropriate, because bodily examination and temporary access to items and documents have different goals, objectives, and significantly differ in terms of the degree of interference with an individual's private life.

It is quite appropriate to agree with the opinion of S.O. Koropetska, who claims that the collection of biological samples cannot be equated with a bodily examination, as these actions differ in purpose, procedural order, and the degree of impact on a person's private sphere [9, p. 15]. For example, a bodily examination is aimed at determining the state of health or the presence of bodily injuries, while the collection of samples serves for subsequent use in forensic analysis and involves interference with intimate aspects of life, which requires special caution and proper legal regulation.

It is also incorrect to compare the procedure for temporary access to items and documents with the compulsory collection of samples, particularly biological ones. These procedural actions differ significantly in their nature, purpose, and mechanisms of implementation. Temporary access is aimed at ensuring the possibility of seizing certain material objects, whereas compulsory collection of biological samples involves direct interference with a person's physical integrity, making it a more sensitive procedure from a human rights perspective.

In our opinion, the legislator should more clearly differentiate the procedures for collecting samples for expert examination from other investigative actions, such as personal searches and temporary access to items and documents. As these procedural actions have fundamentally different natures and purposes, it would be advisable to include more detailed regulations for each in the Criminal Procedure Code of Ukraine. This would help to avoid legal confusion and ensure the protection of citizens' rights during investigative activities.

In the new edition of the Criminal Procedure Code of Ukraine, it is advisable to establish a detailed procedural order for the collection of samples for expert examination, differentiating them by key characteristics. For example, it would be beneficial to distinguish between "biological samples" (such as saliva, blood, semen, buccal epithelium) and "samples of biological origin" (such as voice samples,

handwriting). Moreover, it is essential to take into account the limits of interference with individual rights and freedoms, relying on the practice of the ECHR in this area.

This approach will ensure clarity and transparency in the process, reduce the risks of abuse, and guarantee the protection of human rights, which is particularly important in the context of the state's legal regime. Systematization and specification of legislative norms in this area will contribute to enhancing the effectiveness of pre-trial investigations and increasing public trust in law enforcement agencies.

The process of collecting samples for expert examination in criminal proceedings in France is regulated by the Code of Criminal Procedure (Code de procédure pénale) [10], particularly Article 60, which states that if technical or scientific examinations are necessary, law enforcement authorities have the right to involve qualified individuals. In particular, a judicial officer or, under their supervision, police officers may engage specialized technical and scientific services without needing an additional request for their services.

Moreover, according to Article 60, individuals engaged to conduct examinations are required to take a written oath to faithfully perform their duties. They may open sealed items, keep an inventory of them, and record the results in a report prepared in accordance with Articles 163 and 166 of the Code [10]. These individuals have the right to provide oral notifications of their findings to investigators in cases of urgent necessity.

After conducting the examination, the judicial officer, at the prosecutor's request, is obliged to provide the results of technical and scientific examinations to individuals suspected of committing an offense, as well as to victims [10].

The procedure for obtaining samples, particularly biological ones, for examination is a crucial element of criminal investigations in France. It stipulates that samples can only be collected by qualified medical professionals, and the process must adhere to all necessary legal standards. Important guarantees of individuals' rights include the obligation to inform them of the reasons and purposes for collecting samples, which contributes to the protection of human rights.

Thus, the process of collecting samples for examination in France is based on clear legal norms that ensure a balance between the effectiveness of investigations and the protection of individual rights, which is an important aspect of criminal justice.

Therefore, Ukraine and France have common features in their approaches to the collection of samples for expert examination within criminal proceedings. Firstly, both jurisdictions have a clear legislative foundation governing this investigative action, that regulates the rights and obligations of participants in the process. For example, this is stipulated by Article 245 of the Criminal Procedure Code of Ukraine, while in France, it is governed by Article 60 of the Code [10].

Secondly, in both countries, the involvement of specialists in the collection of samples is mandatory. In France, law enforcement agencies can engage individuals with the necessary qualifications, according to Article 60, while in Ukraine, medical professionals may be involved for this purpose.

However, there are significant differences between Ukraine and France that impact the effectiveness of criminal proceedings. Firstly, the regulated procedure for collecting samples in France is more detailed, providing greater legal certainty and transparency for all participants in the process. For example, French legislation clearly defines the procedures that must be followed and the conditions under which compulsory collection of samples can take place. In contrast, Ukraine faces conflicts and ambiguities in its legislation, which can lead to violations of human rights and result in expert conclusions being deemed inadmissible as evidence.

The effectiveness of sample collection for expert examination in Ukraine and France differs significantly. The French model, with its well-defined procedures, ensures a higher level of protection for individuals' rights and transparency in the process. This, in turn, fosters greater public trust in law enforcement and the judiciary. In Ukraine, despite the existence of legislative acts regulating these actions, the lack of clear procedures can lead to abuses by officials and violations of human rights.

Based on international experience, there are several ways to improve Ukrainian legislation that can be proposed, such as: developing detailed mechanisms for sample collection that regulate all stages of this procedure and protect individuals' rights, including the ability to appeal law enforcement actions. In addition, mechanisms should be created to oversee law enforcement activities during investigative actions to prevent abuses and violations of citizens' rights. These measures would enhance the effectiveness of criminal proceedings in Ukraine and ensure greater compliance with European standards.

In the Netherlands, the process of collecting samples for analysis, including DNA testing, is regulated by the Code of Criminal Procedure (*Wetboek van Strafvordering*) [11], specifically Article 151a. According to it, the prosecutor may, on their own initiative or at the request of the suspect or their defense counsel, order DNA analysis aimed at comparing DNA profiles.

According to Article 151a, the prosecutor may request cellular material from the suspect or a third party for DNA analysis. Cellular material can only be collected with the explicit written consent of the suspect or third party, except in cases covered by Article 151b or in cases involving missing persons. Cellular material can only be collected from the suspect after one or more fingerprints have been taken and the person's identity has been confirmed in accordance with Article 27a [11].

If it is a question about involving a group of 15 or more individuals, cellular material can only be requested after obtaining written permission from the investigating judge upon the prosecutor's application. In cases where a third party has gone missing as a result of a crime, DNA analysis can be conducted based on cellular material retrieved from that person's belongings. The prosecutor appoints an expert from a laboratory designated by a general decree to conduct the DNA analysis. The expert must submit a reasoned report on the results to the prosecutor. The prosecutor is also obligated to inform the person from whom the cellular material was collected about the results of the analysis as soon as possible if the analysis was conducted on collected material [11].

Furthermore, the prosecutor may, on their own initiative or at the request of the suspect, order DNA analysis. If the suspect refuses to give consent, the prosecutor can issue an order for the collection of cellular material, provided that the suspect is heard and their right to defense (involving legal counsel) is ensured.

So, the process of collecting samples for examination in criminal proceedings in Ukraine and the Netherlands has both common features and significant differences that affect the effectiveness of criminal proceedings. In both Ukraine and the Netherlands, the legislation provides for the possibility of collecting samples for examination within the framework of a criminal investigation. In both countries, the primary goal of this process is to gather evidence to establish the true circumstances of criminal cases. In the Netherlands, according to Article 151a of the Code [11], the prosecutor may initiate DNA analysis and request the collection of cellular material from the suspect. Similar provisions are set out in Ukrainian legislation.

The main difference is in the procedural aspects. In Ukraine, obtaining samples often requires the suspect's consent, whereas in the Netherlands, the prosecutor may issue an order for their collection even without consent if the suspect refuses. It allows for faster investigation processes in the Netherlands, whereas in Ukraine, delays may occur due to the need for obtaining consent. Additionally, in the Netherlands, the process includes the possibility of conducting DNA analysis on cellular material retrieved from the suspect's belongings. This is not explicitly provided for by Ukrainian legislation, which may limit the capabilities of law enforcement agencies in evidence collection.

The Dutch model which allows the prosecutor to promptly make decisions about obtaining samples, seems more effective for expediting investigations.

Among the positive aspects of regulating the procedure for collecting samples for examination within the framework of criminal proceedings in the Netherlands, one can highlight the clarity of procedures, which helps maintain a balance between the rights of the suspects and the effectiveness of the investigation. The use of experts to conduct specialized analyses and the prosecutor's oversight of this process also contribute to the objectivity and quality of the collected evidence.

To enhance the effectiveness of pre-trial investigations in Ukraine, it is advisable to consider implementing provisions that allow the prosecutor to initiate the collection of samples without the prior consent of the suspect in certain cases, such as depending on the severity of the investigated crime.

Furthermore, it is advisable to establish clear rules for the work of experts conducting specialized analyses, as well as to create a mechanism for the faster collection of evidence without infringing on the rights of suspects. This could enhance the quality of criminal investigations and increase trust in the justice system in Ukraine.

5. Conclusions.

Research has shown that in Ukraine and EU countries, there are clear legal regulations governing the sample collection process. However, the practical implementation of these norms can vary significantly.

In both Ukraine and certain EU countries, a primary requirement is respect for human rights, particularly the right to privacy, which is crucial when obtaining samples.

The differences in legislation, such as the procedures for obtaining samples with the consent of the suspect or through a prosecutor's order, impact the speed and effectiveness of investigations. EU countries demonstrate more effective models that allow for a quicker response to the needs of pre-trial investigative bodies, which could be beneficial for improving Ukrainian legislation.

Based on international experience, Ukraine should consider the possibility of integrating elements that allow for more prompt collection of samples while taking into account individual rights. Adhering to international standards in the sample collection process not only improves criminal justice but also strengthens public trust in law enforcement agencies.

Based on the conducted analysis, several key proposals can be identified for improving Ukrainian legislation regarding the collection of samples for examination. Firstly, it is essential to implement clear norms regulating the sample collection procedures to reduce delays in pre-trial investigations. In our opinion, legislators should distinctly separate the procedures for sample collection from other investigative actions, such as searches and temporary access to items and documents. Given that these procedural actions have fundamentally different natures and purposes, it would be advisable to establish separate, more detailed regulations for each within the Criminal Procedure Code of Ukraine. This would help avoid legal confusion and ensure the protection of citizens' rights during investigative activities.

In the new edition of the Criminal Procedure Code of Ukraine, it is important to provide a detailed procedural framework for the collection of samples for examination, distinguishing them by key characteristics. For instance, it would be beneficial to differentiate between "biological samples" (such as saliva, blood, semen, buccal epithelium) and "biologically derived samples" (such as voice samples, handwriting, etc.). It is also important to consider the limits of interference with individual rights and freedoms, based on the case law of the ECHR in this area.

Given the practice of the ECHR, special attention should be paid to the issues of forced collection of biological samples, ensuring an appropriate balance between the needs of the investigation and the protection of human rights.

Secondly, the implementation of monitoring and evaluation mechanisms for the effectiveness of the sample collection process will allow for prompt responses to issues and the necessary adjustments to legislation.

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