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PRINCIPLES AND CONDITIONS OF APPOINTMENT AND CONDUCT OF FORENSIC EXAMINATIONS ARE DURING CRIMINAL PROCEECING

The article is devoted to the investigation of the basic principles of the appointment and conduct of forensic examination in criminal proceedings. The author in his study determines the basic principles of the appointment and conduct of forensic examination and their application in rule-making. The conditions for appointing and conducting judicial expertise in the course of criminal proceedings have been established.

Key words: *forensic examination, principles of forensic examination, forensic examination conditions.*

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Expert activity is the system of judicial and organizational procedures, forensic examinations related to the conduct. Progress of this activity directly depends on a number of fundamental ideas about which it is accepted to talk as about principles.

Researches of questions devoted appointment and conduct of forensic examinations carry debatable and in a great deal fragmentary character, that does not allow to make the complete and

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integral picture of them. This scientific problems, related also with research of principles of appointment and conduct of forensic examination, are given, examined in labours of domestic and foreign scientists, namely: S. V. Borodina, R. S. Belkina, L. M. Golovchenko, V. G. Goncharenko, Yu. M. Groshevogo, N. I. Klimenko, V. O. Konovalovoy, V. K. Lisichenko, V. G. Lukasiewicz, N. P. Maylis, Yu. K. Orlova, O. R. Rosinskoy, T. V. Sakhnovoy, M. Ya. Segaya, M. O. Selivanova, F. N. Fatkullina, V. U. Shepit'ka, O. R. Shlyakhova. At the same time, problems of maintenance of principles of appointment and conduct are investigational not enough, by the selection of these principles from the conditions of appointment and conduct of examinations [13, a. 128].

Beginning our research, will underline that in quality of principles of appointment and conduct of examination it is possible to name the followings, as: *1) Providing of right for personality is at appointment and conduct of examination; 2) Publicness of forensic examination; 3) Availability the expert's conclusion; 4) Independence and autonomy of expert is during the conduct of research; 5) "Contentionness" of examination; 6) Validity and timeliness of appointment of examination.*

Will ground each of them: *1) Providing of right for personality is at appointment and conduct of examination.* During disclosing of this principle should be emphasized, that we adhere to position, according the list of basic rights and freedoms of citizen, fastened in Constitution of Ukraine, are not exhaustive. For each there must be well-to-do possibility to appeal to the rights which did not enter to this list, and for judges is possibility of verification of observance of such rights [1].

Human dignity – it is not dignity that a particular person can produce on the basis of his own, actual individual qualities, but the one, that belongs to every personality without the account of its achievements, status and features. Even those people who, due to their physical or mental condition, are not capable of socially meaningful behavior, have the right to claim social respect. It is not halted as a result of them «not worthy behavior» [11, a. 108–109].

The article 29 Constitution of Ukraine, provides, that everybody has a right on freedom and bodily security [1]. Encroachment upon physical inviolability very often is simultaneously related to encroachment upon dignity of personality. Simple limitation of individual freedom proves to be correct, if it is based on a law or pursues legitimate public interest. Imprisonment provides for, that a person against its will is long time retained in a certain place. In Convention about protecting of human rights and fundamental freedoms from 04.11.1950 certain pre-conditions of legal imprisonment, which consist in the following are foreseen: 1) execution of a sanctions, imposed by a court sentence; 2) arrest of person which refuses to comply with procedural duty; 3) pre – trial detention; 4) detaining in custody of minor; 5) arrest of persons which make a danger for society; 6) imprisonment for the purpose of deportation or extradition [5].

In the article 32 Constitutions of Ukraine are set that nobody can subjected to interference in his or her personal and family life, except for cases, foreseen Constitution of Ukraine [1]. Complication of this question consists in that there was not a concept of private (personal) life in a soviet period. Because of it, there are not certain limits of the personal life of person even in the theory of civil law. It is unconditional that the protection is not a certain type of action, but any circumstances and actions that constitute a personal and family life and do not violate the interests of others.

An idea speaks out in literature, that at determination of limits of the personal life it is necessary to go out from that the personal life is a right to be leave at peace [11, p. 128]. In a criminal process

the row of guarantees of protecting is foreseen from the disclosure of secret of the personal life of citizens. Information which make the secret of the private, family, personal life of citizens can be used in the field of the criminal legal proceeding, as a legislator goes out from public (state and community interest). For now, it is possible to talk only about partial realization of guarantees of the above-mentioned rights in a criminal judicial legislation and other legislation, for example, in a law "On a psychiatric help" from 22.02.2000 1489-III [3]. Yes, there are not convincing guarantees of realization of right for a victim on just access to justice, as he does not own those rights on the stage of pre-trial investigation at appointment examinations which are owned by a defendant. Not a few cases, accordingly with which persons, placed in psychiatric permanent establishment for the conduct of forensic examination, at once test intensive treatment strong psychotropic drugs.

2) Publicness of forensic examination. The publicness as means principle, that protecting of society and citizens from criminal trespasses is the duty of the state in the person of its law enforcement authorities. That touches forensic examination in a criminal process, the publicness, in our view, shows up in that public expert institutions or those experts activity of which is licensed can carry out examination only. In other words investigation judge, court (judge) at appointment of examination obliged to provide the proper conditions of its conduct: judicial conditions (issue a judicial document about appointment of examination, to carry out the choice of expert (expert establishment), to provide the guarantees of rights for the participants of process at appointment and conduct of examination); gnosiological conditions (to define the subject of examination, volume of materials, necessary an expert for research).

3) Availability the expert's conclusion. This principle is predefined the duty of court to substantiate the verdict in evidence in lawsuit. This duty of court spreads on the conclusion of expert. Regardless of difficulties, which are caused by the estimation of scientific validity of conclusion of expert, court, investigator obliged to estimate such conclusion of expert from point of relativity, admission, sufficientness and authenticity. This principle is related to the question about the addressee of evidence. As noticed O. O. Eysman: "Evidence collected in case, are addressed not only to the investigator and not only court; they must be clear and accessible to all participants of process, all present at the courtroom, finally, to all society" [14, a. 88].

4) Independence and autonomy of expert is during the conduct of research. Before to begin the analysis of maintenance of this principle, it follows to specify some starting positions in this question. Foremost it would be desirable to mark that examination is conducted after the appeal of side of criminal proceeding or on the instructions of investigation judge or court, if for finding out of circumstances which matter for criminal proceeding, the special knowledges are needed. In maintenance of this principle independence of expert must be included in the process of expert research, thus independence must mean freedom of choice the expert of research method, from the list of generally accepted in this kind or type of examination, and also freedom estimations of the got results, which conclusions are formed on the basis of.

To maintenance of this principle also, in our view, must enter norms which guarantee an expert freedom against prejudice, and also norms of legislation, which provide an expert the novelty of perception of objects of examination and other materials, given him in disposing of investigator and of court.

5) "Contentionness" of examination. In a general view under contentionness in a criminal process understand the dispute of participants of process concerning the produced prosecution under control a court. The conditions of realization of this principle is a separation of functions of

prosecution, defence and decision of case, in essence, and also principle of equality of rights for the participants of judicial trial [10, a. 173]. Thus, appointment of examination is taken at discretion of investigation judge or court, that a court or investigation judge may refuse in satisfaction the petition. But only in case that appointment and conduct of examination will not result in establishment of substantial for case circumstances. The contentionness of examination shows up also in that during criminal proceeding of side can take part in research of conclusion of expert, to set the expert of question, to take part in formulation of court's questions an expert by the grant of writing questions a court or investigation judge before appointment of examination.

6) Validity and timeliness of appointment of examination. In judicial sense foundation for acceptance of any judicial decision is sufficient information (judicial and unjudicial information), what necessary and sufficient for acceptance of that or other decision. Actual foundation is a receive an investigator, court of information, from which the necessity of acceptance of judicial decision follow out about realization of that or other action which carries certifying (confession of person by a victim, bringing in in quality a defendant) or cognitive character (realization of review, search, producing, is for recognition). In criminal judicial literature practically all scientists under foundation of conduct of examination understand a requirement in the special knowledges for establishment of circumstances which are subject evidence [6; 8; 12]. It follows to develop an idea, expressed T. V. Sakhnovoy in relation to the necessity of determination of grounds of appointment and grounds of conduct of examination [13, s. 90]. It is also possible to talk about material and judicial, about gnosiological and legal grounds of appointment and conduct of examination.

The first circumstance foresees establishment, more frequent all, so-called evidential facts. The second circumstance foresees establishment of circumstances of main fact, financial right stopped up a norm, in quality the sign of corpus delict. First circumstance – a receipt of information from which a requirement follow out in appointment of examination is judicial foundation of realization of examination. Second circumstance – pointing of norms of financial right on the necessity of the use of the special knowledges – we name financial basic for the conduct of examination.

Obviously, that by such actions followings: 1) issuing a procedural document about appointment of examination; 2) implementation of requirements of procedural law on the provision and realization of rights for the participants of process in connection from appointment and conduct of examination; 3) providing of expert necessary and sufficient initial information is for realization of expert research.

It should be noted that a the same circumstance in criminal proceeding can be set by a few consequence (search) actions, including by appointment of examination. It is connect to CPLD, foremost, with the necessity of providing of failsafety evidence for criminal proceeding. Therefore it follows to consent from Yu. K. Orlovim, which considers that the groundless appointment of examination is less dangerous, than un appointment of examination is at presence of for this purpose grounds [12, a. 39]. At the decision of question about appointment of examination it is necessary to take into account possibility of origin of requirement in appointment of examination afterwards, for example, when a defendant is changed by a testimony or witnesses in course of time can not categorically assert already, that damages were inflicted exactly this object.

With reasonableness of appointment of examination the closely associated timeliness. The timeliness of acceptance of judicial decisions is laid down in an article 28 CPC of Ukraine as a requirement of cleverness of terms. During criminal proceeding every judicial action or judicial decision must be executed or accepted in clever terms. On the other hand, some types of examinations

require careful preparation, for example, when the question is about psychologo-psychiatric or forensic accounting examinations. However here necessary it is to take into account intercommunication of terms of conduct of examination and terms of pre-trial investigation. It follows to accede to those authors, which consider that a timeliness means at appointment of examination, that the conduct of it is expedient and effective in that moment when: 1) there is a requirement in the special knowledges; 2) when necessary and sufficient material is collected for realization of examination [6, a. 56; 7, p. 37].

Along with principles it is necessary to select the general conditions of appointment and conduct of examination as a judicial action. The concept of general conditions in the theory of criminal process is examined in relation to the stages of criminal process: stages of pre-trial investigation and stage of judicial trial. Under general conditions in a criminal process the set understand a established by the criminal procedural law requirements, which determine a judicial order which is based on principles of criminal process and expresses the most essential and specific lines of the stage or institute of criminal judicial right [8, p. 246]. In legal literature marked, that general conditions and principles are not identical concepts. Connection of principles and general conditions consists in that those fundamental positions and ideas which are fastened in principles of justice develop and specify the "general conditions of pre-trial investigation". But differentiating of these concepts in a criminal process is not always carried out sufficiently clear, so, for example. M. V. Zhogin, F. N. Fatkullin mark that in the light of criminal judicial legislation and modern requirements to the fight against criminality it is necessary to distinguish substantive provisions which can be examined in quality principles and general conditions of preliminary investigation in a soviet criminal process [9, p. 71].

As the general conditions (rules) for the appointment and conduct of the examination, the following provisions can be distinguished: *1) A decisive role is in appointment and conduct of examination of person, which appointed examination.* To this general conditions we can take rules, fastened in an article 242 CPC of Ukraine, in accordance with which the initiators of appointment of examination is an investigation judge or court, if for finding out of circumstances which matter for criminal proceeding, the special knowledges are needed. The same persons determine the article of examination and limit of acquaintance of expert with materials of criminal proceeding. In addition these persons are under an obligation to appeal to the expert for the conduct of examination in relation to: 1) establishment of reasons of death; 2) establishment of weight and character of bodily harms; 3) determination of mental condition suspected at presence of information, which cause a doubt in relation to his responsibility, limited responsibility; 4) establishment of age of person, if it is necessary for the decision of question about possibility of attracting of it to criminal responsibility, and it is by other method impossible to get these information; 5) establishment of puberty of victim of person is in criminal proceeding in relation to crimes, foreseen the article 155 of the Criminal code of Ukraine; 6) determining size financial losses, harm of unproperty character, harm, an environment, caused criminal offence [2].

2) Freedom and independence of expert during the conduct of examination, it is foreseen in the article 4 Laws of Ukraine "About forensic examination" [4]. However much freedom and independence of expert didn't got the direct expression in CPC of Ukraine which is a substantial gap in a criminal procedural law. This general condition includes rules defining the limits of the expert initiative and the limits of familiarization of the expert with the materials of the criminal proceedings.

3) Order of appointment and conduct of examination in expert and outside the expert establishments. Rules, that determine this general condition is the sequence of action of all participants of appointment and conduct of examination: investigation judge, court, and also expert, defendant (suspected), defender, victim, civil plaintiff, civil defendant and their representatives.

4) That touches participation of defendant (suspected) and his defender, victim, at appointment and conduct of examination, given a general condition means that at appointment and conduct of examination necessarily it follows to adhere to the requirements of norms of right about realization of rights for those participants of criminal process, interests of which are violated at appointment and conduct of examination.

5) Appointment and conduct of examination is only in relation to the begun criminal proceeding at presence of for this purpose grounds. Given general foundation talks that at appointment of examination it follows to adhere to all rules, set a criminal procedural law.

6) General and special rules of estimation of conclusion of expert by an investigator and court. A norm comes forward in quality of general rule of estimation of conclusion of expert an investigator and court, set article 94 CPC of Ukraine, is in accordance with a "investigator, public prosecutor, investigation judge, court on the internal persuasion which is based on comprehensive, complete and impartial research of all circumstances of criminal realization, following a law, estimate every proof from point of belonging, admission, authenticity, and collected cumulative evidence – from point of sufficientness and intercommunication for acceptance of the proper judicial decision" [2]. A rule comes forward the special foundation, set a. 101 CPC of Ukraine: "a conclusion of expert is not obligatory facial or organ, which carries out realization, but disagreement with the conclusion of expert must be explained in the proper a decree, decision, sentence" [2].

Thus, summarizing, it follows to mark the necessity of differentiating of principles from the general conditions of appointment and conduct of examination. Principles of forensic examination in a criminal process are ideas, fastened in the norms of criminal procedural law, which express essence of operating under appointment and conduct of examination and estimation of conclusion of expert as to the source of proofs. The general conditions of appointment and conduct of examination are rules of appointment and conduct of examination, which have general character and fastened in the norms of criminal procedural law. In other words, principles and general conditions are correlated between itself as certain knowledge and method of realization of this knowledge through concrete norms and rule.

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