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Legal Status Of Forensic Biologist During Pre-Trial Investigation

Abstract. *The current research paper studies and analyses the rights, duties, and prohibitive measures of a forensic biologist at the stage of pre-trial investigation according to the current legislation of Ukraine.*

This research paper's purpose is to reveal the legal status of forensic biologist during a pre-trial investigation of criminal proceedings.

In criminal proceedings for murder, grievous bodily harm, rape, robbery, kidnapping, etc., traces of biological origin are significant physical evidence. One of the most effective ways to prevent such crimes is preventive activities of public administration entities, society, and ensuring the irreversibility of punishment of guilty people in the crime which is conducted with the participation of a forensic biologist, in most cases, after conducting a forensic examination.

Key words: *expert, prohibition measures, forensic biological examination, legal process, legal duties, legal rights.*



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Research Problem Formulation. Modern crime in Ukraine is characterized by a high level and unfavorable structure¹. 2013-2014 years were marked by an escalation of quantitative and qualitative measures of crimes against life and health of a person, and 2015-2019 years by further stabilization of slightly reduced indicators. Crimes against a person's life and health, and especially their violent segment, which has reached 96% over the years, are characterized by a high degree of public danger².

The State of Ukraine, in accordance with provisions of the Constitution, undertook the duty to protect the highest social values: the life and health of a person and a citizen³.

Traces of biological origin are quite common and essential physical evidence in criminal proceedings, which are associated with the participation of a person in them⁴.

¹ Zlochyny proty zhyttia ta zdorovia osoby: kilkisno-yakisni pokaznyky za 2013-2019 rr / O. Starko. *Istoryko-pravovyi chasopys*. 2020 [in Ukrainian].

² Kryminalohichnyi analiz stanu zlochynnosti v Ukraini / V. Beschastnyi. *Pidpriemstvo, hospodarstvo i pravo Kryminolohiia*. 2017. №1 [in Ukrainian].

³ Stan nasylnytskoi zlochynnosti v Ukraini / S. S. Shum. *Pravo ta derzhavne upravlinnia*. 2021 [in Ukrainian].

⁴ Osoblyvosti zbyrannia u dosudovomu provadzhenni biolohichnykh slidiv liudyny / Ya. V. Furman, V. V. Yusupov, L. T. Kotliarenko, R. S. Dmytruk. Kyiv : Natsionalna akademiia vnutrishnikh sprav, 2016 [in Ukrainian].

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LEGAL STATUS OF FORENSIC BIOLOGIST DURING PRE-TRIAL INVESTIGATION

The current research paper studies and analyses the rights, duties, and prohibitive measures of a forensic biologist at the stage of pre-trial investigation according to the current legislation of Ukraine.

This research paper's purpose is to reveal the legal status of forensic biologist during a pre-trial investigation of criminal proceedings.

In criminal proceedings for murder, grievous bodily harm, rape, robbery, kidnapping, etc., traces of biological origin are significant physical evidence. One of the most effective ways to prevent such crimes is preventive activities of public administration entities, society, and ensuring the irreversibility of punishment of guilty people in the crime which is conducted with the participation of a forensic biologist, in most cases, after conducting a forensic examination.

Key words: expert, prohibition measures, forensic biological examination, legal process, legal duties, legal rights.

It is possible, in most cases, to prosecute a person suspected of committing such a criminal offense only after conducting a forensic examination.

However, examinations are not carried out in some impersonal form, but by specially trained and certified officials, in this case, expert biologists. Their legal status during the pre-trial investigation in the court process is not perfect and needs generalization.

The main task is to form the legal status of forensic biologist during the pre-trial investigation on the basis of the theory of administrative law, criminal procedure, and current legislation.

Analysis of Essential Researches and Publications. Literary resources contain information about the legal status of the forensic expert during the pre-trial investigation, but there is practically no information related to the legal activities of the forensic biologist, which is significant in preventing misunderstandings and protecting the rights of the biological expert in the performance of their duties.

Since, the participation of an expert in criminal proceedings significantly affects the capabilities of the parties to criminal proceedings in collecting, checking and evaluating evidence to ensure a quick, complete and impartial investigation, the purpose of the research paper is to study measures and powers of the forensic biologist during a pre-trial investigation, indicating the rights and responsibilities of the expert biologist, which ensure the fulfillment of tasks assigned to them in compliance with the basic principles by which forensic expert activity is carried out, namely, the principles of legality, independence, objectivity, and completeness of research.

Main Content Presentation. The legal status of the forensic biologist during pre-trial investigation of a criminal proceeding is a set of legal elements that characterize the place, role, and competence of the biological expert in the legal process since these people have rights and obligations legally granted and necessary to achieve tasks set before them. The legal status of the biological expert is a guarantee of the independence of the expert and the correctness of their conclusion.

The legal elements of the legal status of the forensic biologist in a criminal proceeding at the stage of a pre-trial investigation include their legal duties and rights, prohibitive measures, when the expert is expressly prohibited from taking certain actions, and their legal responsibility for improper performance of their official duties, or abusing them.

An expert in criminal proceedings is a person who possesses scientific, technical or other specific expertise, has the right in accordance with Law of Ukraine "On Forensic Examination" to carry out an examination and who is entrusted with conducting a study of objects, phenomena and processes that contain information about circumstances of the crime of a criminal offense, and give a conclusion on issues that arise during criminal proceedings and relate to the field of their knowledge⁵.

A forensic examination is a study by an expert on the specific expertise of material objects, phenomena and processes, which contain information about circumstances of the case, that is being conducted by pre-trial investigation bodies or a court⁶ 5.

According to Art. 75 of Criminal Procedure Code of Ukraine, an examination is appointed in those cases when scientific, technical or other specific expertise is needed to solve certain issues during proceedings.

⁵ Osoblyvosti zbyrannia u dosudovomu provadzhenni biolohichnykh slidiv liudyny / Ya. V. Furman, V. V. Yusupov, L. T. Kotliarenko, R. S. Dmytruk. – Kyiv : Natsionalna akademiia vnutrishnikh sprav, 2016 [in Ukrainian].

⁶ Naukovo-praktychnyi komentar novoho Kryminalnoho protsesualnoho kodeksu Ukrainy. Kharkiv / A. Hetman ta in. : Pravo, Natsionalnyi universytet «Iurydychna akademiia Ukrainy imeni Yaroslava Mudroho» Natsionalna akademiia pravovykh nauk Ukrainy, 2012. 681 s. [in Ukrainian].



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STATUT JURIDIQUE DE BIOLOGISTE JUDICIAIRE PENDANT L'ENQUÊTE PRÉLIMINAIRE

L'article examine et analyse les droits, les obligations et les mesures prohibitives d'un biologiste judiciaire au stade de l'enquête préliminaire conformément à la législation ukrainienne en vigueur.

L'objectif de cet article est de révéler le statut juridique d'un biologiste judiciaire au cours de l'enquête préliminaire d'une procédure pénale.

Dans le cadre d'une procédure pénale pour meurtre, lésions corporelles graves, viol, vol qualifié, enlèvement, etc., les traces d'origine biologique sont des preuves matérielles importantes. L'un des moyens les plus efficaces de prévenir de tels crimes est l'activité préventive des sujets de l'administration publique, de la société et garantissant l'irréversibilité de la peine des personnes coupables de crimes qui est menée avec la participation d'un biologiste judiciaire, dans la plupart des cas, après procéder à un examen judiciaire.

Mots clés : expert judiciaire, mesures prohibitives, examen biologique judiciaire, procédure judiciaire, obligations légales, droits légaux.

Specific expertise in this case should be considered as such knowledge which is professionally possessed by a narrow circle of specialists and which does not belong to generally known and publicly available. In other words, the subject of an expert's research can be any facts and circumstances, the clarification of which requires in-depth knowledge in one or another field of science, technology, art or craft, practical work experience that corresponds to the current scientific and practical level⁶.

The organization of examinations and registration of their results is carried out in accordance with procedure determined by Criminal Procedure Code of Ukraine, Civil Procedure Code of Ukraine, Economic Procedure Code of Ukraine, Code of Administrative Procedure of Ukraine, Code of Ukraine on Administrative Offenses,

Customs Code of Ukraine, Laws of Ukraine "On Forensic Examination", "In Executive Proceedings", Instruction on Appointment and Conduct of Forensic Examinations and Expert Research and Scientific and Methodological Recommendations on Preparation and Appointment of Forensic Examinations and Expert Research, as well as other legal acts on forensic examination.

The peculiarities of objects of biological origin are that they almost remain at the scene, on the clothes of criminals, victims and other carrier objects, and can act as physical evidence. Specialist biologists, who participate in investigative actions and operational search measures must actually remove any object of biological origin, the exception being corpses and separate organs with which a forensic medical expert works. Simultaneously, objects of biological origin, the source of which is the human body (blood, hair, tissue particles, fat, saliva, sperm) are seized by a specialist and sent for biological examination. Another physical evidence is the smell of a person, which can be considered as a derivative of a biological object since the main part of it is formed by the body's secretory secretions (skin).

Common biological objects are plants and their parts, animal skin derivatives, etc. They are also sent for forensic biological examination.

Let us pay attention to the characteristics of expert biologist's activity during the study of individual objects of biological examination. For instance, when conducting immunological studies, an expert biologist first establishes the presence of traces of biological origin, namely blood, saliva, sweat, sperm, urine, and establishes their species and group affiliation. In case of the study of objects of plant origin, the question of the object's nature is resolved, if necessary for the investigation, it is established whether the detected particle belongs to a certain genus (species) or a comparative study of several objects is carried out in order to establish their belonging to the same genus (species). When conducting an examination of a hair study, an expert biologist determines the nature of the microobject (i.e., whether the microobject is hair), species belonging to the hair (i.e., it belongs to a person or an animal), and, if necessary, a comparative study of hair is carried out. When conducting molecular genetic research, gender is established and the person is identified. The task of cytologic examination is to establish the presence of cells and determine their species, group and sex. As for competence of a forensic biologist, it is necessary to refer to the theory of administrative law, because it is this branch of law that specializes in this issue. According to administrative scientists, competence is a complex of interrelated elements (goals, tasks, subject of vocation and powers) characterizing specifics of activity of a specific public administration subject determined by its place in public administration. In turn, administrative powers are understood as administrative duties and rights of a subject of public administration, granted to him in a legal manner and necessary to achieve tasks set before them⁷.

⁷ Naukovo-praktychnyi komentar novoho Kryminalnoho protsesualnoho kodeksu Ukrainy. Kharkiv / A. Hetman ta in. : Pravo, Natsionalnyi universytet «Iurydychna akademiia Ukrainy

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**RECHTLICHER STATUS
DES FORENSISCHEN
BIOLOGEN WÄHREND
DER VORGERICHTLICHEN
UNTERSUCHUNG**

Die aktuelle Forschungsarbeit untersucht und analysiert die Rechte, Pflichten und Verbotsmaßnahmen eines forensischen Biologen in der Phase der vorgerichtlichen Untersuchung gemäß der geltenden Gesetzgebung der Ukraine.

Der Zweck dieser Forschungsarbeit besteht darin, den rechtlichen Status des forensischen Biologen während einer vorgerichtlichen Untersuchung eines Strafverfahrens aufzuzeigen.

In Strafverfahren wegen Mordes, gefährlicher Körperverletzung, Vergewaltigung, Raub, Entführung etc. sind Spuren biologischen Ursprungs ein bedeutender körperlicher Beweis. Eine der wirksamsten Möglichkeiten, solche Verbrechen zu verhindern, sind vorbeugende Maßnahmen der öffentlichen Verwaltung, der Gesellschaft und die Sicherstellung der Unumkehrbarkeit der Bestrafung der Schuldigen an der Straftat, die unter Beteiligung eines forensischen Biologen durchgeführt wird, in den meisten Fällen nach der Durchführung einer forensische Untersuchung.

Schlüsselwörter: Sachverständiger, Verbotsmaßnahmen, forensisch-biologische Untersuchung, Gerichtsverfahren, gesetzliche Pflichten, gesetzliche Rechte.

The legal status of an expert biologist is not an exception to this rule, because the expert as a participant in procedural proceedings, is endowed with a procedural status that arises from the moment of their involvement in the proceedings.

The competence of an expert biologist is understood as their knowledge and experience in the field of theory and methods of examination, as well as the range of powers granted to them by law and issues that the expert can solve on the basis of their specific expertise. The competence of the forensic biologist includes the examination of traces and objects of biological origin, namely blood, secretions, hair, body tissues and cells, plants and their parts, and objects of animal origin.

According to the current legislation, the expert biologist is obliged to: declare self-recusal in the presence of circumstances stipulated by the legislation; accept the examination entrusted to them: personally conduct a full research, give a well-founded and objective written conclusion on questions raised, and if necessary, clarify it. The expert biologist is obliged to conduct research directly, i.e., the expert must conduct the examination personally without the involvement of other people. If there is a need to involve other specialists to conduct a certain study, the expert must notify the person who appointed the examination or the head of the expert institution about this, since the expert is not legally entitled to carry out these procedural actions personally; ensure the preservation of the object of examination. If the research is related to the complete or partial destruction of the object of examination or change of its properties, the expert must obtain permission for this from the body (person) who appointed the examination (engaged the expert); not to divulge without permission of the body (person) who appointed the examination (recruited the expert), information that became known to them in connection with the performance of their duties, or not to inform anyone other than the body (person) who appointed the examination (involved the expert), or the court about the course of the examination and its results. In the event of a court decision to terminate the examination, the expert must immediately return the case materials and other documents used for the examination⁸.

While performing these duties, the expert biologist has the right to: familiarize themselves with case materials relating to the subject of the examination. The expert biologist has the right to familiarize with those materials of the criminal proceedings that are related to the subject of the examination.

The expert determines the scope of materials independently. The investigating judge or the court is obliged to provide for perusal at the request of the expert the materials of the criminal proceedings, which are related to the subject of the research in the amount determined by the expert himself. At the same time, the expert biologist has no right to analyze the materials of the proceedings, collect evidence, choose what to research and independently choose the initial data for conducting the research; submit an application for the provision of additional materials and samples, and other actions related to the examination; with the permission of the body that appointed the examination, engaged the expert to be present during the execution of procedural and executive actions and to ask questions to participants of the process concerning the examination's subject or object, and to conduct

imeni Yaroslava Mudroho» Natsionalna akademiia pravovykh nauk Ukrainy, 2012. 681 s. [in Ukrainian].

⁸ Osoblyvosti zbyrannia u dosudovomu provadzhenni biolohichnykh slidiv liudyny / Ya. V. Furman, V. V. Yusupov, L. T. Kotliarenko, R. S. Dmytruk. – Kyiv: Natsionalna akademiia vnutrishnikh sprav, 2016 [in Ukrainian]; Pro vnesennia zmin do Instruksii pro osoblyvosti zdiisnennia sudovo-ekspertnoi diialnosti atestovanykh sudovymy ekspertamy, shcho ne pratsiuut u derzhavnykh spetsializovanykh ekspertnykh ustanovakh. Nakaz Ministerstvo Yustytzii Ukrainy vid 07.-9.2015. № 1659/5. Zakonodavstvo Ukrainy. 2019 [in Ukrainian].



separate studies in their presence; to indicate in the expert's opinion the facts discovered during the examination that are relevant to the case, but about which the expert was not asked questions, and circumstances that contributed (could contribute) to the commission of the offense⁹.

In addition, the expert biologist has the right to point out their own initiative those circumstances that are significant to the case and about which the expert was not asked questions, but subject to the following requirements: if these circumstances were discovered based on the use of their specific expertise and do not go beyond the limits of the expert's competence; if they are revealed during the expert research and arise from it; if they are relevant to the circumstances established by the expert during their research and are directly related to them, i.e., they reveal, supplement, clarify circumstances that are the subject of this examination. Moreover, the expert has the right independently, on the basis of their experience and knowledge, based on the course and results of the conducted research, to point out these circumstances in their conclusion: in case of disagreement with other members of the expert commission, draw up a separate conclusion.

If during the commission forensic examination (by two or more forensic experts) forensic experts reached an agreement, they sign a joint opinion. If forensic experts do not agree, several conclusions are drawn up in accordance with the position of forensic experts; provide written answers to questions put to them during explanations and testimony; appeal, in accordance with the procedure established by law, the actions and decisions of the body (person) that appointed the examination (engaged the expert), which violate the rights of the expert or the procedure for conducting the examination; to ensure security if there are appropriate grounds; to receive a fee for conducting an examination and in accordance with legislation, compensation (reimbursement) of expenses for the work performed and expenses related to a summons to provide explanations or testimony, in the event that this is not their official duty. The expert may refuse to conduct the examination if the materials provided to them are insufficient to fulfill the duties assigned to them, and additional materials are not provided, or if questions raised are beyond their specific expertise¹⁰.

In our opinion, prohibitive measures are an integral element of the legal status of an expert biologist. In particular, the expert is prohibited from: conducting an examination without a written instruction of the head (deputy head) of expert institution, the head of the structural unit; entrusting the examination to another person; independently collecting materials to be examined, as well as selecting initial data for conducting the examination, if they are reflected in the materials provided to them ambiguously; solving issues that go beyond the specific expertise of the expert biologist and clarification of legal issues; entering into contacts with persons not provided for by the examination procedure, if such persons are directly interested in the results of the examination; storing case materials and objects of expert research outside the office¹¹.

Furthermore, in our opinion, an integral factor in the legal status of the forensic biologist during a pre-trial investigation and in a trial is his legal responsibility for improper performance on their official duties or abuse of

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STAN PRAWNY BIOLOGA SĄDOWEGO W TRAKCIE POSTĘPOWANIA PRZYGOTOWAWCZEGO

Obecny artykuł naukowy bada i analizuje prawa, obowiązki i środki zakazujące biologa sądowego na etapie postępowania przygotowawczego zgodnie z obowiązującym ustawodawstwem Ukrainy.

Celem niniejszego artykułu badawczego jest ujawnienie statusu prawnego biologa sądowego w toku postępowania przygotowawczego w postępowaniu karnym.

W postępowaniu karnym dotyczącym zabójstwa, ciężkiego uszczerbku na zdrowiu, gwałtu, rabunku, porwania itp. ślady pochodzenia biologicznego stanowią istotny dowód rzeczowy. Jednym z najskuteczniejszych sposobów zapobiegania tego typu przestępstwom są działania prewencyjne organów administracji publicznej, społeczeństwa oraz zapewnienie nieodwracalności ukarania osób winnych przestępstwa, które odbywa się przy udziale biologa sądowego, w większości przypadków po przeprowadzeniu badania kryminalistycznego.

Słowa kluczowe: biegły, środki zakazu, kryminalistyczne badanie biologiczne, proces prawny, obowiązki prawne, uprawnienia prawne.

⁹ Osoblyvosti zbyrannia u dosudovomu provadzhenni biolohichnykh slidiv liudyny / Ya. V. Furman, V. V. Yusupov, L. T. Kotliarenko, R. S. Dmytruk. – Kyiv: Natsionalna akademiia vnutrishnikh sprav, 2016 [in Ukrainian].; Pro vnesennia zmin do Instruksii pro osoblyvosti zdiisnennia sudovo-ekspertnoi diialnosti atestovanykh sudovymy ekspertamy, shcho ne pratsiuiut u derzhavnykh spetsializovanykh ekspertnykh ustanovakh. Nakaz Ministerstvo Yustytisii Ukrainy vid 07.-9.2015. № 1659/5. Zakonodavstvo Ukrainy. 2019 [in Ukrainian].

¹⁰ Pro sudovu ekspertyzu. Zakon Ukrainy. Holos Ukrainy ofitsiine vydannia vid 21.04.1994 [in Ukrainian].

¹¹ Stan nasylnytskoi zlochynnosti v Ukraini / S. S. Shum. Pravo ta derzhavne upravlinnia. 2021 [in Ukrainian].

them. According to Art. 14 of Law of Ukraine “On Forensic Examination”, the forensic expert may be subject to disciplinary, material, administrative or criminal liability on the grounds and in the manner prescribed by law. For providing a knowingly false conclusion, for refusing without valid reasons to perform duties assigned to the expert, as well as for disclosing data that became known to them during the examination, the expert bears criminal liability in accordance with the current legislation. Criminal liability of the expert for a knowingly false conclusion and for the expert’s refusal to fulfill duties assigned to them is a guarantee of the reliability of the expert’s conclusion and their proper performance of their professional duties. For malicious evasion of appearance before the bodies of the pre-trial investigation or court, the expert bears administrative liability in accordance with the current legislation. For violations committed during the examination that do not entail criminal or administrative liability, the expert may be held disciplinary in accordance with current legislation. In case of causing property damage by their actions during the examination, the expert bears material responsibility in accordance with the current legislation¹².

Conclusions: thus, the legal status of the forensic biologist during a pre-trial investigation of a criminal proceeding is a set of legal elements that characterize the place, role and competence of a biological expert in the legal process.

Legal elements of the legal status of the forensic biologist in a criminal trial at the stage of pre-trial investigation include legal duties and rights, prohibitive measures, when the expert is expressly prohibited from performing certain actions, and their legal liability for improper performance of their official duties, or abuse them.

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¹² Naukovo-praktychnyi komentar novoho Kryminalnogo protsesualnogo kodeksu Ukrainy. Kharkiv / A. Hetman ta in. : Pravo, Natsionalnyi universytet «Iurydychna akademiia Ukrainy imeni Yaroslava Mudroho» Natsionalna akademiia pravovykh nauk Ukrainy, 2012. 681 s [in Ukrainian].



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