

T.V. Sadova

Candidate of Law Sciences

Associate Professor of

Department of Criminal Right,

Trial and Criminalistics, Ivano-

Frankivsk Faculty of the

National University «Odesa Law

Academy»

PROTECTION OF A RIGHT FOR PERSONAL INVIOABILITY DURING SOME COERCIVE ACTIONS

A right for freedom and personal inviolability is one of major civil laws of man, affirmed by the Constitution. The article 29 of the Constitution of Ukraine sets the concrete grounds of limitation of this right – exceptionally by the decision of the court and only on the grounds and order, set by a law. At the same time this right the frequent by becomes the object of violations from the side of workers of law enforcement authorities, that is caused by blanks which exist in a current criminal-processual legislation. Norms which regulate the order of realising of identification and getting samples for expert examination are far from being perfect and need improving.

The purpose of this article is a decision of separate problems which arise up during application of realization of identification and getting samplis for expert research in Ukraine and making suggestions as to their solving.

In Ukraine the problem of observance of human rights during some coercive actions were probed by D.L. Vasilenko, V.G. Kovalenko, L.M. Loboyko, E.D. Luk'yanchikov, V.T. Malyarenko, M.M. Mikheenko, V.T. Nor, O.V. Kaplina, V.L. Subfalling, V.M. Tertishnik, V.P. Shibiko et al.

Identification and getting samples for expert research are consequent actions which are related to the limit of right for citizens on body (corporal) security, as can be carried out in the forced order. A

right on bodily (corporal) security is guarded by many international documents. Basic principles of defence of human rights at identification are marked, in particular, in General declaration of human rights, International pact about civil and political laws (item 7), to European convention about defence of rights and basic freedoms of man (item 3; 5), Declaration about protecting of all persons from tortures and other cruel, sunhuman or such which humiliate dignity of types of conduct or punishment and others.

By a basic standard in relation to the realising idebtification and getting samples for comparative research in obedience to international documents we belive prohibition on a feasance (or omittance) persons which take part in the noted consequent actions, any actions, which would pull humiliation of honour and dignity of identified person or a person for which take away standards, and inflicted harm its health.

A concept of «identification» is the object of research of many Ukrainian and Russian legislators, each of which has the vision in relation to his decision. Thus, Russian scientist I.L. Petrukhin considers that under identification it is necessary to understand an investigation action, which consists in the review of human body a person which conducts an inquest, by an investigator or public prosecutor in the presence of witnesses, in necessary cases with bringing in oa specialist, in particular, a doctor, with the purpose of exposure on the body special signs, tracks of crime, other signs and properties which have an evidential value in the cases [1, p. 129]. According to V.M. Tertishnik, identification consists of a review and research of an investigator (by a person which conducts an inquest), and on occasion and independently by a medico-legal expert or a doctor from the body of a living person for the purpose of getting and verification of proofs [2, p. 499]. Yu.N. Belozerov and V.V. Ryabokon' believe identification to be an investigation action which is carried out with the purpose of exposure on the body of a living man of tracks of crime or special signs, if the realizing of medico-legal examination is not needed here [3, p. 25].

The realizing of identification is regulated by the article 193 of CPC of Ukraine the release of which is given out us extremely

unsuccessful, as from its maintenance it is possible to draw a conclusion that identification is carried out only with the purpose of exposure of the special signs, that, on the essence, abandons all other aims of this investigation action out of eyeshot. In the release of ч.1 item of a 258 project of CPC identification can be carried out for an exposure on the body of tracks of crime or special signs, if for this purpose it is not needed to conduct medico-legal examination. A new release though is the best, however and it does not engulf possibility of realizing of identification with the purpose of exposure of other signs and properties which matter in business, and also intoxication [4].

With the purpose of removal of this blank in a law consider a necessity to change the release of the p.1 article 193 of CPC of Ukraine, specifying the complete list of aims with which it can be conducted identification, on the following:

«At a necessity of exposure on the body of the suspected, defendant, a victim or a witness of the special signs, tracks of crime, other signs and properties which matter in the case, and also an investigator takes away a kef about it a decision and conducts identification ».

The noted article contains position that at identification actions which humiliate honour and dignity of person or danger for his health are shut out. By this part the norm of law in relation to the conducting the noted investigation action is resulted in accordance with the requirements of international standards, mentioned higher. It is understood however, how such non-admission must be guaranteed. Consider that it is necessary to foresee in a law concrete responsibility of a person which conducts identification, for the feasance of such actions, in fact only then defence of rights of the identified will be assured to a full degree.

The authors of project of CPC in the article in relation to identification foresee possibility of realization of jiggling of presence or absence on the body of a person, that is identified, tracks of crime or special signs by photographing, videotape recording or other hardwares, thus images demonstration of which can be examined as touchy for an

identified person are saved in the sealed up kind and get a court [4]. It follows to complement this position, to our opinion, by prohibition to conduct filming, that related to baring of human body, without the consent of of identified person to its realization. The conducting of jigging and filming a consent boldly can be attributed to the categories of actions, which humiliate honour and dignity of person which is added to identification, that is why a norm is indicated must contain the direct pointing on their prohibition.

Due to an item 193 CPC of Ukraine, identification can be carried out in relation to the suspected, defendant, victim or witness. If a person declares about the waiver of conducting of identification, it can be conducted in the forced order. However foreseen the forced identification is the Ukrainian criminal-procedural law. In this connection to this day it is one of the most sharp problems, CPLD from identification, is admission of application of compulsion, above all things, in form physical influence, to the participants of process, which renounce its conducting. Not because of actuality of this problem, the level of its developed can not be named sufficient. Consider that item 193 CPC of Ukraine must be complemented the proper positions, as operating its release does not foresee conducting of forced identification, although in the theory of criminal-procedural right for identification examined as an investigation action, related to application of compulsion. An operating release of the article can be foundation for the appeal of decision about the leadthrough of identification in the forced order.

As practice of organs of pre-trial investigation testifies, identification must be frequent by all victims, rarer – suspected and defendants, identifying witness – phenomenon exceptional [5, p. 51]. Possibility of application of compulsion in relation to a defendant or suspected does not cause doubts on condition of presence of information that on their body probably there are tracks of crime, special signs and other signs which matter the case. That touches a victim and witness, the unique idea about possibility of application of compulsion in relation to these participants of process is not. The opinion of many scientists,

identification of the victim and witness it is possible only from their consent, and application to them of compulsion would be illegal; separate authors consider that forced identification is legitimate, but in every case it is needed to be based on an investigation situation, and forced identification is possible only in the case of the special necessity; some scientists suggest to foresee in the law getting approval of public prosecutor for forced identification of a victim, others – except for a victim and in relation to a witness [5, p. 52]. In the opinion of I.L. Petrukhina, in default of consent of a victim and witness on identification, that is related to baring of their body, an investigation action can not be conducted in the forced order, even it and complicated crime detection and establishments guilty to a great extent [1, p. 140]. Other do not divide the indicated point of view. V.M. Tertishnik notices on this occasion, that in justice the principle of equality of citizens operates before a law and court. A law does not contain prohibition of forced identification of any category of citizens especially. In the opinion of the author, forced identification it can be applied both to a witness and to any citizens which have on the proper moment no judicial status (mentally patients, very young, other persons) if actual grounds are needed for this purpose. [2, p. 503]. In our opinion, such position of V.M. Tertishnik is not correlated with international position to defence of human rights. Consider that forced identification of the victim and witness it must be conducted in exceptional, expressly certain law cases. The grounds of a forced identification victim, in our opinion, a presence of the grounded suspicion is in relation to unverity of his certificates, if there are sufficient grounds to consider that the conducting of forced identification will find out fact sheets in support or refutation of such suspicion. A witness can be identified forcedly, if there are sufficient grounds to consider that on his body tracks of crime or other proofs which matter in business can be found, and also for the estimation of veracity of his testimonies. Except for that, forced identifying of the noted participants of process must be carried out only on condition getting decret, as given an investigation action foresees the serious intruding in the sphere of rights and freedoms of citizens. It is

considered necessary to affirm these positions in a law.

The European court of human rights occupies position in support limitation of the forced actions during identification. The European court, examining a complaint in business in relation to the leadthrough of the forced interference with the organism of man, underlined that Convention did not forbid possibility of the forced interference which would help in investigation of crime in principle. However much any interference with physical integrity of person with the purpose of receipt of proofs must be an object exceptionally of careful verification. Consequently, the forced application of medical preparation resulted in a volume, that all of consideration of business in relation to a declarant purchased unfair character. In addition, application of preparation, in opinion of court, was violation of his right not to testify against itself [6, p. 192-193]. Consequently, as we see, the Court forbids the forced physical interference without careful verification of grounds for his application. The best for the leadthrough of such verification, in our opinion, a judicial body, which, considering and weighing all grounds, can allow or say no in a grant permission on application of the radical forced actions, is impartial. Its position touches selecting of standards for comparative research.

Coming from the mentioned considered to complement the article 193 of CPC of Ukraine part fifth, which expounds in such release:

« Identifying the suspected and defendant can be conducted forcedly. Forced identification of the victim conducted at presence of the grounded suspicion in relation to unverity of his certificates, if there are sufficient grounds to consider that the leadthrough of forced identification will find out fact sheets in support or refutation of such suspicion. A witness can be identified forcedly, if there are sufficient grounds to consider that on his body tracks of crime or other proofs which matter in business can be found, and also for the estimation of veracity of his testimonies. Forced identifying of the victim and witness conducted in decision of court».

Identification can be of two kinds: investigation and medico-legal. Investigation identification conducts investigator after taking away of

the proper decision. An investigator is not right to be present at identification persons of other sex, when it is related to the necessity to bare a person which is subjected to identification. An investigator has a right to engage in conducting identification medico-legal expert, a doctor, a specialist, and also witnesses.

These persons also must be of one sex with the identified person. Although a law does not contain a requirement about obligatoryness of presence of witnesses during the leadthrough of identification, investigation identification is usually conducted after their participation. With the purpose of defence of rights of the identified it follows him to give possibility to give up participation of *понятих* and right for taking of witnesses. Grounds for acceptance the identified one of such decisions must be marked in the protocol of identification. Except for that, consider a necessity to deprive the identified at that rate. This position must be explained investigators to the leadthrough of identification, about what a mark must be done in protocol over the signature of the identified. Medico-legal identifying is conducted by a medico-legal expert or a doctor independently. It is considered that sense of shame for a man must not arise up during the review of their body by a doctor or expert, that is why a law does not require that these persons necessarily were of the same sex with the identified. For a conducting medico-legal identification witnesses, usually, are not attracted. In our opinion, the identified is given a right for taking of the indicated persons with the obligatory pointing of reasons in protocol, and also right to require providing of presence of witnesses at pleasure.

Suggestions are mentioned predefined, foremost, that during the leadthrough of identification it is necessary to provide terms, which eliminate causing of harm life, health, honour and dignity of citizens. A physical compulsion to identified is an extreme measure to which it is possible to be succeeded only in exceptional cases at presence of statutory grounds, when all of possibilities are outspent for persuasion, elucidation of necessity of identification as a mean of opening of truth in criminal business, here can not be found out circumstances which are subject establishment with the help of other facilities of finishing telling.

Impermissible is surgical interference, and also applications technical, chemical or other facilities which are dangerous for life and health of the identified [1, p. 143-144].

Standards for expert research in obedience to the article 199 of CPC of Ukraine are taken away after the decision of investigator. Standards for expert research can be selected for a defendant, suspected, suffering and witness, although it straight is not marked in a law. In the case of waiver of grant of standards in a voluntarily order standards can be taken away forcedly. Because of the forced character of this investigation action, it needs, in our opinion, in more wide legal regulation. V.M. Tertishnik in the textbook writes, that the leadthrough of this investigation action is carried out after general requirements by analogy with a coulisse [2, p. 592]. In our opinion, after the character given an investigation action has more general lines from identification, than with a coulisse, consider that is why, that requirements in relation to a leadthrough these two consequence actions must be analogical. At first, in a law it follows to fasten position about non-admission during selecting of standards for comparative research of actions, which humiliate dignity of person which they are taken away for, or dangerous for its health. Secondly, it is necessary to provide the presence of witnesses at will of person for which take away standards. One of the basic requirements in relation to the leadthrough of this investigation action there must be providing of rights and freedoms of man. It follows also to complement the article 199 the list of participants of the criminal legal proceeding, standards can be got in which. CPC of other countries, in particular Russian Federation forbids the leadthrough of forced відібрання of standards for comparative research for a victim and witness (item 202 CPC of RF), as these persons are not added criminal pursuit [7, p. 411]. In Ukraine this question is debatable, the level of his development needs leadthrough of the detailed research. After the operating release of floor 199 CPC of Ukraine standards for comparative research it is possible to take away in any of participants of process after the decision of investigator, which, concordantly p. 5 article 114 of CPC is obligatory for implementation. Such obligatory talks that in the case

of disagreement to give to come to the heel the decision of investigator application of compulsion is voluntarily possible. However, as already was by us it is marked during consideration of question in relation to identification, a compulsion, especially physical, must be used only in exceptional cases, when by other ways, getting proofs is impossible, at presence of the grounds detailed for this purpose. A necessity and presence of grounds for application of compulsion must be checked up a court, one decision of investigator obviously not sufficiently, as at that rate will take a place gross violation of quarantinable norms.

Conclusion: according to the conducted research, the basic requirement of international documents as to conducting of identification and getting samples for expert research there is prohibition of realization of actions, which caused humiliation of honour and dignity of identified person or the person whose samples are taken, and whose health was harmed. This position needs legislative fixing. Besides, responsibility for such actions should be provided. Coercive identification and getting samples for expert research of witness and victim needs direct judicial control.

