

The use of specialized (medical) knowledge in the criminal process: the practice of the European Court of Human Rights

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ABSTRACT

Aim: This article is aimed at raising awareness and stimulating scientific discussion on the necessity of involving qualified medical professionals in conducting criminal procedural actions that involve intervention in human somatic rights, in order to further improve the legal instruments ensuring compliance with the European Court of Human Rights (hereinafter referred to as the ECHR) standards in this field.

Materials and Methods: In preparing the article, the following issues were worked out: the provisions of international legal acts; legal positions of the ECHR related to the use of medical knowledge in the criminal process; scientific studies of various aspects of the use of medical knowledge in the criminal process. The methodological basis of the research is dialectical, comparative-legal, systemic-structural, analytical, synthetic, complex research methods.

Conclusions: The use of medical knowledge in the criminal process generally takes two forms: (a) expert and (b) ancillary. The expert form, particularly forensic medical examination, must adhere to a set of criteria reflected in the practice of the ECHR. Personal searches involving penetration into human body cavities generally align with the requirements of the European Convention on Human Rights (hereinafter referred to as the Convention), provided certain conditions are met, including medical considerations. The criterion for the admissibility of coercive collection of biological samples for examination is the existence of samples independent of the individual's will.

KEY WORDS: specialized (medical) knowledge, forensic medical examination, collection of biological samples, investigative actions, ECHR practice, criminal process

Wiad Lek. 2024;77(6):1263-1270. doi: 10.36740/WLek202406123 

INTRODUCTION

Criminal procedural activities often involve significant intrusion into the sphere of somatic rights of individuals. Essential to these actions are medical knowledge, the carriers of which typically directly participate in conducting relevant procedural actions. Achieving a reasonable balance between the effectiveness of criminal procedural evidence and unwavering respect for human rights and freedoms during its conduct is impossible without delineating guidelines. Searching for such guidelines for states that recognize European values is entirely justified in the practice of the ECHR.

AIM

This article is aimed at raising awareness and stimulating scientific discussion on the necessity of involving qualified medical professionals in conducting criminal procedural actions that involve intervention in human somatic rights, in order to further improve the legal

instruments ensuring compliance with the ECHR standards in this field.

MATERIALS AND METHODS

The basis for preparing the article was empirical material – the case law of the ECHR, which: (a) is grounded in conventional requirements and European standards in the field of human rights protection; (b) is taken into account in the national legal system during the application of the overarching principle of criminal proceedings – the rule of law. The selection of specific ECHR judgments was determined by their significance in assessing the lawfulness of certain interventions into the sphere of Convention rights during procedural actions involving experts in the field of medicine. In total, 12 ECHR judgments were analyzed. Auxiliary materials included compilations of ECHR case law by specific Convention articles, as well as scientific articles.

During the investigation, a combination of general scientific and specific methods of cognition was used, including the systemic-structural method, the method of generalization, and methods of analysis and synthesis. The systemic-structural method allowed for the formation of a comprehensive view of the system of procedural actions involving experts with specialized (medical) knowledge. The method of generalization was used during the study of ECHR case law to formulate criteria for the lawfulness of procedural actions in light of conventional standards. The methods of analysis and synthesis facilitated the identification of key motifs in the ECHR's positions, which subsequently enabled the formulation of a comprehensive (synthesized) understanding of conventional standards regarding the use of specialized (medical) knowledge in criminal proceedings.

REVIEW AND DISCUSSION

Criminal procedural activities involve the use of various forms of specialized (including medical) knowledge, which can be grouped into two main blocks: a) expert; b) ancillary (consultative). The first block, associated with conducting forensic examination, entails not only autonomy in the expert's participation process (the expert conducts the investigation independently) but also in the evidential value of the results of the medical expert's participation (the expert's conclusion serves as an independent procedural evidence source subject to evaluation along with others on general principles (for example, Part 2 of Article 84, Part 2 of Article 94 of the Criminal Procedure Code of Ukraine). The second block – ancillary (consultative) – encompasses various procedural actions where specialized (medical) knowledge is involved in one form or another, including: examination of a corpse with the participation of a doctor; exhumation; examination involving a forensic medical expert, doctor, or specialist; personal search involving examination of human body cavities; collection of biological samples for examination; participation of a doctor during forced feeding of suspects or accused persons held in detention facilities. The scope of this work does not allow for a comprehensive review of conventional standards for the protection of rights and freedoms within all of the listed procedural actions. Therefore, this work will focus only on specific ones.

1. *The specificity of using expert conclusions on medical issues in the context of implementing conventional guarantees.* The need to examine the specifics of using expert conclusions on medical issues in the criminal process through the lens of conventional standards arises from two factors: firstly, the issues addressed by

the expert touch upon the implementation not only of the right to a fair trial (Article 6 of the Convention), but also various other conventional guarantees. Secondly, the conventional aspects of using expert conclusions through the prism of Article 6 of the Convention regarding medical issues acquire particular substantive significance. For example, the neutrality of experts becomes especially important when determining the limitation of conventional powers (Article 5 of the Convention), particularly in cases of providing psychiatric assistance to individuals involuntarily: "The Court further notes that all the forensic psychiatric reports leading to the involuntary medical treatment of the applicant were drawn up by specialists from the same hospital, without a second, independent opinion being sought." [1].

The specific features of the opinion of an expert on medical issues include:

1) The presence of medical expert activity in a state monopoly, which, however, should not be affected by the impartiality of experts: "...the Court is unable to accept the applicant's arguments that the objectivity of expert opinions in cases of medical negligence can automatically be called into doubt on account of the fact that the experts are medical practitioners working in the domestic healthcare system. On the contrary, the Court has held that it is normal for expert opinions in such cases to be given by medical practitioners (see *Csősz v. Hungary*, no. 34418/04, § 35, 29 January 2008). Moreover, the Court has also held that the very fact that an expert is employed in a public medical institution specially designated to provide expert reports on a particular issue and financed by the State does not in itself justify the fear that such experts will be unable to act neutrally and impartially in providing their expert opinions (see *Letinčić v. Croatia*, no. 7183/11, § 62, 3 May 2016)" [2]. Traditionally, the assessment of the fairness of judicial proceedings is based on the available procedural guarantees: "What is important in this context is that the participation of an expert in the proceedings is accompanied with adequate procedural safeguards securing his or her formal and de facto independence and impartiality" [2];

2) Categorizing forensic medical examinations as one of the tools ensuring positive obligations of the state regarding the realization of the right to life (Article 2 of the Convention): a) obligation to conduct a proper investigation utilizing, among other things, the results of forensic medical examinations: "The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident (a death, caused by the use of force by State agents), including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete

and accurate record of injury and an objective analysis of the clinical findings, including the cause of death (as regards autopsies, see, for example, *Salman v. Turkey* [GC], no. 21986/93, § 106, ECHR 2000-VII; on the subject of witnesses, see, for example, *Tanrikulu v. Turkey* [GC], no. 23763/94, § 109, ECHR 1999-IV; and, as regards forensic examinations, see, for example, *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000)" [3]; b) deeming unacceptable the lack of cooperation between forensic medical institutions, as well as the use of unsubstantiated expert conclusions [4];

3) A special level of requirements for the independence of experts, arising from the significance of the answers they provide to the court: a) Regarding the independence of experts: "A requirement of independence of the effective domestic system set up to determine the cause of death of patients in the care of the medical profession is implicit in this context (see *Byrzykowski*, cited above, § 104). This above all means not only a lack of hierarchical or institutional connection, but also the formal and de facto independence of all parties tasked with conducting an assessment as part of proceedings set up to determine the cause of death of patients from those implicated in the events (see, mutatis mutandis, *Denis Vasilyev v. Russia*, no. 32704/04, § 148, 17 December 2009)" [5]; b) Regarding the increased significance of expert opinion: "The medical reports of expert witnesses are very likely to carry crucial weight in a court's assessment of the highly complex issues of medical negligence, which gives them a particularly special role in the proceedings (see *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 47, 5 July 2007)" [5].

II. *The conduct of a personal search, involving the exposure and/or examination of body cavities, in the context of implementing conventional safeguards.* In the activities of criminal justice agencies, there may be an objective need to carry out procedural actions involving the examination of exposed parts of the body or the inspection of its natural cavities. Within the framework of the national procedural system, this may involve the identification parade (Article 241 of the CPC of Ukraine) or body search (Part 3 of Article 208, Part 5 of Article 236 of the CPC of Ukraine). In the context of conducting these procedural actions, adherence to conventional safeguards becomes particularly important: prohibition of torture (Article 3 of the Convention), right to a fair trial (Article 6 of the Convention), right to respect for private and family life (Article 8 of the Convention).

Conducting a personal search involving the exposure of the individual. The established practice of the ECHR is characterized by an approach according to which procedural actions involving the exposure of an individual are not only subject to scrutiny under Article 3 of the

Convention, but may also, provided that guarantees are upheld, be reconciled with its requirements: "The Court notes that it has already had occasion to apply the principles of Article 3 of the Convention set out above in the context of strip and intimate body searches. A search carried out in an appropriate manner with due respect for human dignity and for a legitimate purpose (see mutatis mutandis, *Yankov v. Bulgaria*, no. 39084/97, §§ 166-67, ECHR 2003-XII where there was no valid reason established for the shaving of the applicant prisoner's head) may be compatible with Article 3" [6]. The justification for such searches may be warranted "on occasion to ensure prison security or to prevent disorder or crime (see *Valašinas v. Lithuania*, no. 44558/98, § 117, 24 July 2001; *Iwańczuk v. Poland*, no. 25196/94, § 59, 15 November 2001; *Van der Ven v. the Netherlands*, no. 50901/99, § 60, ECHR 2003-II; *Frérot v. France*, no. 70204/01, § 38, 12 June 2007; and *Dejneke v. Poland*, no. 9635/13, § 60, 1 June 2017)" [7], and their lawful implementation should be accompanied by due legal procedure, respect for human dignity and a legitimate purpose ("They should be carried out in an appropriate manner with due respect for human dignity and for a legitimate purpose (see *Wainwright*, cited above, § 42; and *Dejneke*, cited above, § 60)"). In the event that the method of conducting a search of a person leads to the deterioration of the already extremely vulnerable situation of the searched person, then it is fully justified, according to the practice of the ECHR, to establish a violation of Article 3 of the Convention, which took place, in particular:

- where a prisoner was obliged to strip in the presence of a female officer, his sexual organs and food touched with bare hands (*Valašinas v. Lithuania*, no. 44558/98, § 117, ECHR 2001-VIII);
- where a search was conducted before four guards who derided and verbally abused the prisoner (*Iwańczuk v. Poland*, no. 25196/94, § 59, 15 November 2001);
- where the search has no established connection with the preservation of prison security and prevention of crime or disorder (*Iwańczuk v. Poland*, no. 25196/94, §§ 58-59; *Van der Ven v. the Netherlands*, no. 50901/99, §§ 61-62, ECHR 2003-II) [6].

In turn, a violation of the established rules for conducting a search of a person, carried out in order to achieve a legitimate goal, although it will not constitute a violation of Article 3 of the Convention, but will indicate incompatibility with another convention guarantee (paragraph 2 of Article 8 of the Convention): "In a case concerning the strip search of visitors to a prisoner which had a legitimate aim but had been carried out in breach of the relevant regulations, the Court found that this treatment did not reach the minimum level

of severity prohibited by Article 3 but was in breach of the requirements under Article 8 § 2 of the Convention (see *Wainwright v. the United Kingdom*, no. 12350/04, 20 September 2006) [6]. The given example once again demonstrates the contiguity of a number of conventional guarantees that may be violated during procedural actions involving the exposure of a person.

Carrying out a personal search related to the examination of body cavities. The complex of measures aimed at obtaining evidence hidden in the cavities of the human body holds particular importance for upholding human rights and freedoms, as well as for achieving the goals of criminal procedural activity. For example, within the scope of examining one of the criminal cases, through the testimony of witnesses, it was established that the accused immediately after the robbery swallowed the victim's expensive necklace. This fact was subsequently confirmed by the results of a medical examination using X-rays [8]. Considering the unique evidentiary value of items that may be hidden in various cavities of the human body, the significant intrusion into an individual's personal space, as well as the substantial impact on the individual's health of the procedure for detecting and retrieving hidden items, it is entirely justified to address the question of striking a balance between achieving the objectives of evidentiary activity and adhering to conventional standards during interventions in the sensitive sphere of human existence. To clarify the factors that should be considered for this purpose, it is necessary to refer to the criteria developed by the practice of the ECHR.

Firstly, it is noteworthy that the lawfulness of conducting procedural actions aimed at detecting and retrieving evidence (for example, a packet containing narcotics) from the body cavities of a person may be assessed by the ECHR in terms of compliance with three conventional standards simultaneously: a) Article 3 of the Convention (prohibition of torture) – the acceptability of the method of detection and retrieval, and the prevention of excessive physical suffering in the process; b) Article 8 of the Convention (right to respect for private and family life) – the proportionality of the intrusion into privacy; c) Article 6 of the Convention (right to a fair trial) – the fairness of using the obtained evidence against the individual, particularly in the context of implementing the defendant's right to remain silent. It is indicative that the described method of obtaining evidence is not a priori considered unacceptable: "Even where it is not motivated by reasons of medical necessity, Articles 3 and 8 of the Convention do not as such prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain from him evidence of his involvement in the commission of a criminal offence." [9].

Secondly, the evidentiary value of procedural sources obtained in this manner necessitates "a strict scrutiny of all the surrounding circumstances": "However, any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual's body real evidence of the very crime of which he is suspected" [9]. Therefore, the decision to carry out the relevant medical intervention must be absolutely balanced and objectively determined by a combination of specific circumstances of the case, including: a) the severity of the committed offense; b) the possibility of obtaining evidence through alternative means (for example, instead of using an emetic substance – waiting for the object to be naturally expelled (see 9, § 19, 77); instead of catheterization for obtaining urine samples – taking a blood sample (see 10, § 72); c) the absence of any risk of lasting harm to the person's health (see *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 94 and 97, ECHR 2005-II, and *Schmidt v. Germany* (dec.), no. 32352/02, 5 January 2006) [9].

Thirdly, the guarantees for adherence to conventional standards during the acquisition of evidence resulting from the examination of body cavities include the following:

a) Minimization of physical suffering during medical procedures: "...the manner in which a person is subjected to a forcible medical procedure in order to retrieve evidence from his body must not exceed the minimum level of severity prescribed by the Court's case-law on Article 3 of the Convention. In particular, account has to be taken of whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention (see *Peters v. the Netherlands*, no. 21132/93, Commission decision of 6 April 1994, DR 77-B; *Schmidt v. Germany* (dec.), no. 32352/02, 5 January 2006; and *Nevmerzhitsky v. Ukraine*, no. 54825/00, §§ 94 and 97, ECHR 2005-II)" [9]. In the opposite case, individuals may experience "feelings of insecurity, anguish, and stress that were capable of humiliating and debasing him," which would lead to the determination of a violation of Article 3 of the Convention [10];

b) Quality medical supervision during the procedural action: "Another material consideration in such cases is whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical supervision (see, for example, *Ilijkov v. Bulgaria*, no. 33977/96, Commission decision of 20 October 1997, unreported)" [9];

c) Prevention of negative and lasting impact of intervention on the person's health: "A further relevant

factor is whether the forcible medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health (see *Ilijkov v. Bulgaria*, no. 33977/96, Commission decision of 20 October 1997, unreported, and, *mutatis mutandis*, *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004)" [9].

III. Collection of biological samples for forensic examination in the context of implementing conventional safeguards. Biological samples collected for forensic examination can play a crucial evidentiary role (for example, in establishing the ownership of DNA materials left at the scene of a crime by a suspect or accused). However, their collection involves a significant intrusion into privacy, similar to the search of a person mentioned earlier. Therefore, the relevance of the entire block of conventional standards outlined above (prohibition of torture (Article 3 of the Convention), right to a fair trial (Article 6 of the Convention), right to respect for private and family life (Article 8 of the Convention) remains pertinent. However, certain issues related to the protection of rights and freedoms gain particular substantive significance, and it is these issues that will be the focus of further investigation.

One of the most debated issues both in academic discourse and within the practice of the ECHR remains the problem of upholding the right to silence when biological samples are forcibly collected. The essence of the right to silence in the context of the right to a fair trial is formulated as follows: "The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, *inter alia*, *Saunders v. the United Kingdom*, 17 December 1996, Reports 1996-VI, § 68; *Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 40, ECHR 2000-XII; *J.B. v. Switzerland*, no. 31827/96, § 64, ECHR 2001-III; and *Allan v. the United Kingdom*, no. 48539/99, § 44, ECHR 2002-IX)" [9]. On the one hand, the lack of consent from the suspect or accused for the collection of evidence by the prosecution, which may later form the basis of the accusation (effectively evidence against the individual), is quite obvious. On the other hand, extending the verbal construct (the right to silence) to categories of a different nature (such as biological material) is impossible without adjustments that organically arise from the legal difference between statements or explanations and objectively existing physiological results of human life activities (such as blood, urine, saliva). Let's try to understand further the guidelines proposed by the existing ECHR practice.

Firstly, at the level of the initial thesis, it can be noted that the ECHR acknowledges a direct connection between the collection of biological samples and the violation of an individual's privacy, which, however, under certain conditions, is deemed permissible: "Thus, while compulsory testing of alcohol levels may be regarded as amounting to a violation of the applicants' private life within the meaning of Article 8 § 1 of the Convention, it may also be seen as necessary for the prevention of criminal offences and the protection of the rights and freedoms of others" [11].

Secondly, different types of evidence originating from an individual require differentiated assessment regarding the observance of the right to silence in the event of their forced collection. Within this particular aspect, the ECHR has repeatedly emphasized the permissibility of compulsory collection of biological samples, such as blood, urine, skin tissues, for DNA analysis: "As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing" [12]. The key parameter that allows for the use of compulsory means to obtain such samples is their existence independently of the will of the accused. This can be understood as the absence of compulsion on the individual to perform any deliberate actions to produce samples (non-verbal analogs of words that cannot be compelled in criminal proceedings): "To obtain such material, a defendant is requested to endure passively a minor interference with his physical integrity (for example when blood or hair samples or bodily tissue are taken). Even if the defendant's active participation is required, it can be seen from *Saunders* that this concerns material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples)" [9]. In such a case, there is no suppression of the individual's will (samples are formed by the body independently), and there is no significant interference with the individual's health.

Thirdly, the practical significance lies in the approach proposed by the applicants within one of the ECtHR decisions regarding the classification of categories covered by the right to silence: "... if a clear distinction could be drawn in every case between the use of compulsion to obtain incriminatory statements on the one hand and "real" evidence of an incriminatory nature on the other" [13]. Thus, according to the de-

scribed logic, obtaining “verbal” evidence despite the individual’s unwillingness to provide it would indicate a violation of the right to silence, whereas obtaining “real” evidence (those that exist independently of the individual’s will) would not.

The issue of using specialized (medical) knowledge in criminal proceedings has been extensively explored in various aspects within scientific research. General procedural principles regarding the utilization of specialized (medical) knowledge during criminal investigations have been analyzed by Yu. Chornous, A. Lisitskyi [14], Yu. Myroshnychenko [15]. Certain aspects of compulsory collection of biological samples for examination in the context of the ECHR practice have been reflected in the work involving one of the authors of this article, I. Titko, in collaboration with O. Kaplina and O. Shylo [16]. An overview of conducting forensic medical examinations, personal searches, or the collection of biological samples for examination from one perspective or another is reflected in the manuals on ECHR practice regarding the application of Article 3 of the Convention [17], Article 5 of the Convention [18], Article 6 of the Convention [19], and Article 8 of the Convention [20]. The national interpretation of the proper legal procedure in the application of specialized (medical) knowledge in criminal proceedings is presented in the works of D. Abbasova [21], A. Nechval [22], M. Hryha [23], L. Basiuk [24]. However, scientific works demonstrate a deficit in comprehensive understanding of the implemented ECHR conventional standards regarding the use of specialized (medical) knowledge in criminal proceedings, which, due to the lack of proper regulation at the national level, require further improvement and implementation into legal practice. This article provides an overview of key standards (requirements) set forth by the ECHR practice for procedural actions directly related to the use of specialized (medical) knowledge in criminal proceedings, including forensic medical examinations, personal searches, or compulsory collection of samples for examination. However, the list of procedural actions provided is not exhaustive, indicating the need for further research.

CONCLUSIONS

1. The main forms of using specialized (medical) knowledge in criminal proceedings include:
a) expert (related to conducting expert examinations); b) auxiliary (consultative) (encompassing a variety of procedural actions involving a medical specialist (personal search, examination, collection of biological samples for examination,

forced feeding, etc.)). Standards for the proper conduct of procedural actions using specialized (medical) knowledge are developed by the ECHR within the framework of applying a number of conventional guarantees: the right to life (Article 2 of the Convention), prohibition of torture (Article 3 of the Convention), the right to liberty and security (Article 5 of the Convention), the right to a fair trial (Article 6 of the Convention), the right to respect for private and family life (Article 8 of the Convention).

2. Among the requirements for conducting forensic medical examinations in the practice of the ECHR, the following can be identified: 1) Medical-expert activities are to be under state monopoly, but this should not compromise the impartiality of the experts; 2) Forensic medical examination is considered one of the instruments ensuring positive obligations of the state regarding the right to life (the necessity of appointing examinations and organizing adequate cooperation between forensic medical and law enforcement agencies); 3) There is a special emphasis on the independence of forensic medical experts, given the significant weight of the answers they provide to the court.
3. According to the ECHR practice, personal searches involving the exposure of the person are permitted only in exceptional cases (such as ensuring the security of detention facilities, preventing mass disturbances, and criminal offenses), and their lawful conduct must be accompanied by due legal procedure, respect for human dignity, and a legitimate purpose. The justification of a personal search involving the examination of body cavities is assessed by the ECHR taking into account the specific circumstances of the case (severity of the offense, possibility of obtaining evidence by alternative means, absence of danger to the person’s health), as well as based on the presence of guarantees, including: a) Minimization of physical suffering; b) Quality medical supervision; c) Prevention of prolonged negative impact on the person’s health.
4. Within the framework of conventional standards, the collection of biological samples for forensic examination holds a pivotal place in terms of respecting an individual’s right to silence (in the context of the right to a fair trial – Article 6 of the Convention). The key criterion for the admissibility of compulsory sample collection for examination is the existence of samples independent of the individual’s will (exhaled air, blood, urine, skin), the collection of which does not involve significant intrusion into the person’s health.

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CONFLICT OF INTEREST

The Authors declare no conflict of interest

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RECEIVED: 18.02.2024

ACCEPTED: 30.04.2024

