

PECULIARITIES OF INTERROGATION VIA VIDEOCONFERENCE ACCORDING TO THE CRIMINAL PROCEDURAL LEGISLATION OF UKRAINE

PECULIARIDADES DO INTERROGATÓRIO POR VIDEOCONFERÊNCIA DE ACORDO COM A LEGISLAÇÃO PROCESSUAL PENAL DA UCRÂNIA

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Ucrânia, também pode ser conduzida através de videoconferência. Este tipo de interrogatório está igualmente previsto a nível legislativo de outros países estrangeiros e tem as suas próprias características. Nesta base, em retrospectiva histórica, os autores realizaram uma análise do desenvolvimento do interrogatório via videoconferência, analisaram a experiência estrangeira de regulamentação legislativa do interrogatório via videoconferência, tendo em conta o que foi

Abstract: A person who committed a criminal offense must be brought to legal responsibility to the extent of his guilt. Establishing a person's guilt must be done by collecting evidence, one of the ways of which is conducting investigative (search) actions. During a pre-trial investigation, the most widespread investigative (search) action is an interrogation, which, according to the current criminal procedural legislation of Ukraine, can also be conducted via videoconference. This type of interrogation is also provided for at the legislative level of other foreign countries and has its own characteristics. On this basis, in historical retrospect, the authors conducted an analysis of the development of interrogation via videoconference, analyzed the foreign experience of legislative regulation of interrogation via videoconference, taking into account what was concluded about the need to improve the legal regulation of this investigative (search) action.

Keywords: Investigative (search) actions. Criminal process. Interrogation via videoconference. Collection of evidence.

Resumo: Uma pessoa que cometeu um delito deve ser levada à responsabilidade legal até ao limite da sua culpa. O estabelecimento da culpabilidade de uma pessoa deve ser feito através da recolha de provas, sendo uma das formas de conduzir ações de investigação (busca). Durante uma investigação pré-julgamento, a ação de investigação (busca) mais generalizada é um interrogatório, que, de acordo com a actual legislação processual penal da

concluído sobre a necessidade de melhorar a regulamentação jurídica desta ação de investigação (busca).

Palavras-chave: Ações de investigação (pesquisa). Processo penal. Interrogatório através de videoconferência. Recolha de provas.

Introduction

Ukraine is faced with the task of creating a state of law, the requirements for compliance with the law in the activities of law enforcement agencies are increasing, which is impossible without improving the criminal procedural legislation. That is why in the context of modern reform of criminal justice in Ukraine as a democratic and legal state, the problem of strict observance of criminal procedural legislation is of particular relevance for criminal procedural science and law enforcement activity (Mykhailenko, 2019, p. 16) and especially during procedural actions. The institution of investigative (search) actions is among the most widespread means of collection and verification of evidence, which ensures both the speed and completeness of pre-trial investigations and the protection of the rights, freedoms, and legitimate interests of individuals (Koniushenko, 2021). In turn, interrogation as a means of obtaining testimony containing relevant information about the crime is the oldest investigative action, and the elements of its procedure are reflected in many historical sources.

Among the system of investigative (search) actions provided for by Chapter 20 of the Criminal Procedure Code of Ukraine of 2012 (hereinafter referred to as the CPC), the legislator singles out interrogation by separate norms, including via videoconferencing. Interrogation plays an important role in practical activity, because by conducting it, a significant number of issues directly related to the collection, verification and evaluation of evidence available in the relevant criminal proceedings are resolved. The given circumstance is of significant importance for making other procedural decisions, for example, the appointment of a psychological examination, if the person behaved inappropriately during the interrogation.

Findings and discussions

The same understanding by the subjects of criminal proceedings of the content of the norm of procedural law does not exclude its implementation with different effects, because the situations in which it is implemented are diverse. Therefore, the effect (result) of the implementation of the same (more or less qualitative) norm may be different. It is difficult to predict how effective the implementation of a specific criminal procedural rule will be in the course of its formulation and adoption. But if it will have properties (including "potential effectiveness") that will testify to its benign quality, the chances of its effective implementation are higher (Kasapoglu, 2019).

An analysis of the legislative provisions gives grounds for asserting that the procedure for conducting interrogation and obtaining relevant information from the interrogated person is not procedurally perfect. For example, in part 1 of Article 95 of the Criminal Procedure Code of Ukraine provides that "testimony is information that is provided orally or in writing during interrogation by a suspect, accused, witness, victim, expert on circumstances known to them in criminal proceedings that are relevant to this criminal proceeding". That is, the legislator outlined the circle of participants in criminal proceedings who can provide relevant information that is important for conducting a pre-trial investigation and establishing the necessary data that can be used as evidence in the future. However, such a legislative approach to determining the list of persons who can provide information is unjustified, since other participants in the criminal proceedings who can testify, for example, a specialist, a legal representative, etc., also take part in the criminal proceedings. Therefore, the question arises: in what status will these persons be, if they did not witness a certain event. In the vast majority of cases, according to the research of D. O. Shyngarova (2017), the specified persons are interrogated in the procedural status of witnesses, however, the dissertation revealed 8 protocols of interrogation of witnesses, 5 specialists and 2 legal representatives. Obtaining testimony from these persons, not in the procedural status of a witness, contradicts the provisions of the current Criminal Procedure Code of Ukraine. The author believes that in order to ensure the rights and legitimate interests of persons of the specified category, it is necessary to supplement Part 1 of Article 95 of the Criminal Procedure Code, a provision that would contain a direct indication of the need for their interrogation precisely in the procedural status of a witness. We cannot support this point of view of D. O. Shyngarova, as it contradicts the prescriptions of Part 1

of Article 65 of the Criminal Procedure Code of Ukraine, which establishes that "a witness is a natural person who knows or may know the circumstances to be proven during criminal proceedings, and who is called to testify." Let's simulate the following situation. During criminal proceedings, a specialist is involved, i.e., "a person who possesses special knowledge and skills and can provide consultations, explanations, information and conclusions during the pre-trial investigation and trial on issues requiring relevant special knowledge and skills" (Part 1 of Article 71 of the CPC of Ukraine). In this aspect, it is important to understand that this person is disinterested in the results of criminal proceedings and there should be no other circumstances that cause reasonable doubts about his impartiality. Otherwise, the specialist must declare self-withdrawal from participation in criminal proceedings. Based on the foregoing, we understand that a specialist cannot be interrogated as a witness and it is advisable to interrogate him in the status of a specialist.

In this regard, due to subjective and objective factors, there are frequent cases in which such information is distorted. This mechanism has a multi-link nature (perception - transmission - fixation), and errors in each of the elements of this structure can lead to significant distortions of information. We believe that the possibility of using technical means of recording criminal proceedings provided by the legislator (Article 107 of the Criminal Procedure Code of Ukraine) is an obstacle to the above-mentioned difficulties. However, the fact that under modern realities, when technical progress has gone far ahead, there is no proper technical support for interrogation. The possibility of using photography, audio and/or video recording during interrogation is directly enshrined in the provisions of Part 5 of Article 224 of the Criminal Procedure Code of Ukraine, however, it is quite difficult to find the real application of these technical means in practice. And this at a time when the lack of a video recording of the interrogation, which is mandatory in many Anglo-Saxon countries, became one of the factors in the use of illegal methods of conducting it. In addition, M. F. Sokyran (2005, p. 226) quite rightly draws attention to the fact that a complete audio and video picture of the interrogation, phonogram and videogram contributes to both the assessment of legality and the tactical correctness of procedural actions, the reliability and completeness of the information transmitted. Audio and video recording materials sometimes record information that is not reflected or incompletely reflected in the interrogation protocol. Therefore, the evidentiary value of phonograms and videograms consists in confirming, and in some cases supplementing,

interrogation protocols. In our opinion, the practice of using video recording during interrogations should be introduced for all participants in criminal proceedings, which, by the way, meets the requirements of procedural interviews.

One of the first to start researching the problems of non-traditional means of proof was Prof. O.T. Bonner (2011, p. 46-48). Although the scientist does not carry out a clear classification of modern sources of information that can serve as evidence in court, he nevertheless indicates some of the most common types of them. The author includes: 1) audio and video recordings; 2) electronic documents; 3) information obtained from global information systems (in particular, the Internet); 4) e-mail; 5) evidence (indication) of special technical means (e.g., devices for recording the consumption of electricity, water, gas, heat; devices for determining the speed of the vehicle or the degree of alcohol intoxication of the driver, etc.); 6) means of "electronic justice" (in particular, video conferences, official websites of judicial bodies, correspondence with judicial bodies by e-mail, automated judicial information systems, etc.).

Foreign experience of legislative regulation of the procedure for conducting remote interrogation

Regulations regarding the possibility of providing relevant evidence remotely are found in the legislation of individual countries of the post-Soviet space, for example, Articles 69, 287 of the Criminal Procedure Code of the Republic of Estonia, Articles 408, 446-5 of the Criminal Procedure Code of the Republic of Kazakhstan, and the international community, but with some differences. Thus, the criminal procedure law of Australia contains only a generalized wording regarding the possibility of using telecommunications for communication between participants in the criminal process. More detailed legislative regulation on this issue is provided for by the Federal Criminal Code of Australia and applies exclusively to the hearing of witnesses who live or are in the territory of another state in criminal cases for sexual offenses against children (Article 272), child pornography (Article 273), as well as terrorist (part of the IAE of the Criminal Code of Australia).

The law of England and Wales allows evidence to be obtained by examination of a witness by videoconferencing in the Crown Court of England and Wales, at the discretion of the judge, only in exceptional cases. Thus, Article 32(2) a and b of the Criminal Justice

Act 1988 provides for the possibility of obtaining witness testimony in criminal cases of intentional and reckless homicides, as well as fraud on a large scale.

Provisions of Article 650 of the Criminal Code of Canada provide for the possibility of the accused participating in the trial by cable television or other means that allow the court and the accused to participate in simultaneous visual communication and oral communication at any part of the trial (Pavlova, 2013, p. 478). Analysis of the legislation of the specified countries leads to the following conclusions. Thus, the regulation of the investigated procedure is carried out not only by the norms of procedural law, but also by substantive law. In addition, unlike Ukraine, it concerns criminal proceedings for a small range of criminal offenses.

In the Italian criminal process, the first attempts at video conferencing took place after the development of the RAI satellite television network system. Thus, interrogations of witnesses were carried out in most cases where there was a need for security measures. However, this type of service was too expensive, and there were opportunities to intercept this information. In Italy, there is a cheaper and more reliable ISDN network, during the operation of which there has not been a single interception or leakage of relevant information. For security reasons, the network of the Ministry of Justice is closed, it uses phone numbers from which it is impossible to determine the location of the relevant participants in the proceedings. In total, more than 100 premises and 30 secret points are equipped with video conferencing systems in Italy. In addition, similar telecommunications terminals are also located in special prisons.

In Germany, where the system of criminal procedure is more similar to the Ukrainian one, the relevant norms and even sections ("Providing information and familiarization with the criminal case", "Provisions on computer files") are fixed directly in the Criminal Procedure Code. Electronic record keeping was introduced to the German criminal process in 2017 by the Federal Law "On the introduction of electronic document management in criminal proceedings and the further development of electronic legal relations", the provisions of which provide for the registration of investigation results in electronic format. A criminal case as an electronic file is formed from procedural decisions and digitized evidence in the form of digital files. In addition, all non-electronic evidence is subject to mandatory digitization by scanning, digital photography or video recording, after which it is attached to the criminal case as files certified with a digital signature. Technologically, electronic document circulation is provided by a specialized secure data

transmission system "DE-MAIL", which connects investigative bodies, the prosecutor's office, the court, lawyers and other participants in criminal proceedings, who can send and receive relevant procedural documents by e-mail (Hlobenko, 2021, p. 193).

A. V. Stolitnii based on the study of electronic systems of criminal justice bodies of the USA ("Oasis", "Magic Lanter", "Fluent"), England ("Transforming Through Technology"), Germany ("INPOL-neu", "rsCASE"), Belgium ("e-Justice", "Tax-on-Web") and the opinions of foreign scientists expressed a proposal to create in Ukraine a Corporate Information and Analytical Automated (Electronic) Criminal Justice System (CIAS KrymiJust), which should cover all stages of criminal proceedings and all subjects of criminal proceedings and maximally integrate the state's electronic information resources in the investigated aspects (Stolitnii, 2017, p. 188). In view of the experience of some countries of the world community, we consider the proposed views of the researcher appropriate. First of all, this is due to the fact that on the pages of legal literature there are views of individual lawyers, according to which an ordinary netbook with a built-in webcam, connected to the "Internet" network, can be used to conduct the specified investigative (search) action via videoconferencing (Knyzhenko, 2015, p. 122). In our opinion, the above-mentioned position of the researchers is not fully consistent with the prescriptions of Part 10 of Article 232 of the Criminal Procedure Code of Ukraine regarding issues of guaranteeing information security.

Prerequisites for the introduction of video conference interrogation into the criminal procedural legislation of Ukraine

The immediate prerequisite for the introduction of the possibility of interrogation via videoconference into the domestic criminal procedural legislation was the ratification by Ukraine of a number of international legal documents, in particular the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of May 29, 2000 and the Second Additional Protocol on Mutual Assistance in Criminal Matters of November 8, 2001, Article 10 and, accordingly, Article 9 of which provide for the possibility of interrogation via videoconference, provided that its use does not contradict the basic principles of the legislation of the requested Party, and also when it has the appropriate technical means for this. This issue was studied and actively discussed among scientists for a long time and was finally resolved at the legislative level with the

adoption of the Law of Ukraine dated June 16, 2011 "On Amendments to Certain Legislative Acts of Ukraine in Connection with the Ratification of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters", on the basis of which the provisions of the Criminal Procedure Code of Ukraine of 1960 were supplemented by Article 85-3 "Application of telephone conference and video conference during investigative action" (Law of Ukraine, 2011). The possibility of interrogation via videoconference is also reflected in Article 232 of the Criminal Procedure Code of Ukraine of 2012. However, in the practical sphere, at the initial stages of conducting investigative (search) actions via videoconference, due to the lack of technical capabilities, it was not widely used. Thus, according to the results of international studies, the rankings of Ukraine for 2013 by indices related to the implementation of information and communication technologies were: technological readiness index (WEF Technological Readiness Index) - 82nd place out of 142 countries; EIU e-Readiness Ranking – 64th place out of 70 countries.

The issues of using technical means and technologies in the criminal process in recent years have attracted increasing attention of scientists and practitioners, since their proper solution determines the effectiveness of the evidence-based activities of law enforcement agencies. In the context of considering this issue, D. A. Litkevych (2020, p. 118) rightly emphasizes that the peculiarities of the procedural form of interrogation, due to the influence of scientific and technological progress, should be recognized as the procedure for summoning for interrogation using technical means of communication, the procedure for recording its progress and results, as well as conducting interrogation via videoconference. These factors have a direct impact on the process of proof in the relevant criminal proceedings. At the same time, video conference interrogation is not only a means of collecting, checking and evaluating evidence, but also in many cases is a key element for making procedural decisions. On the basis of the above, it can be asserted that the further success of the pre-trial investigation depends on the observance of the procedural order of conducting the investigative (search) action under investigation, and therefore scientific support in this direction becomes extremely relevant. As part of such activities, not only the development of modern technologies took place, but also the demonstration of their capabilities. For example, this applies to the 21st century courtroom equipped with modern technologies, the capabilities of which were used for the first time in April 2002 in the District Court of the State of Massachusetts. Then, during the demonstrative process, a

video conference connection was established with three courts located on different continents.

Interrogation via videoconference according to the legislation of Ukraine

The current procedure for conducting interrogation via videoconference, in addition to the Criminal Procedure Code of Ukraine, is also provided for by the Instruction on the procedure for working with technical means of video recording the progress and results of procedural actions conducted via videoconference during a court session (criminal proceedings), approved by Order of the State Judicial Administration of Ukraine No. 155 (15 November 2012), in which the concept of "video conference" is interpreted as a telecommunications technology for interactive interaction between two or more remote participants in court proceedings with the ability to exchange audio and video information in real time, taking into account control data.

A detailed analysis of the outlined definition indicates mostly its technical factors, in connection with which we will directly proceed to the interrogation procedure defined by the provisions of Article 232 of the CPC of Ukraine. Thus, according to N.V. Shulga, from the point of view of cybernetic knowledge, an interrogation via videoconference is a process of receiving and transmitting information from the investigator to the interrogated and vice versa, which takes place with the help of technical means and the application of technologies that provide video and sound transmission from another room. The author also draws attention to the fact that in cybernetic sciences, the purpose of transmitting any information is to obtain new knowledge from the carrier. During the interrogation, the investigator faces a wider range of tasks, which are considered from the point of view of the possibility of solving them during the interrogation (Shulga, 2019, p. 65). In general, supporting the above position, we note that the researcher leaves out of his attention the aspects of information security, which are directly discussed in the prescriptions of part 3 of Article 232 of the CPC of Ukraine. The specified factor becomes especially relevant during the interrogation of persons who, in accordance with the provisions of the Law of Ukraine of December 23, 1993 "On Ensuring the Safety of Persons Participating in Criminal Proceedings" within the framework of the relevant criminal proceedings, law enforcement authorities must ensure appropriate level of security. Such a person must be interrogated via video conference with such changes in appearance and voice that it would

be impossible to recognize him (Part 10 of Article 232 of the Criminal Procedure Code of Ukraine).

Therefore, conducting investigative (search) actions in compliance with the specified conditions requires the necessary professional training in the field of telecommunications technologies.

The outlined aspect directly affects the position of scientists regarding the necessity of involving a specialist as a participant in criminal proceedings in these cases. Thus, some of them, in particular O. O. Bondarenko, S. O. Knyzhenko, T. P. Matiushkova, believe that the selection and use of technical means and technologies that would ensure proper image and sound quality, as well as information security, should rely exclusively on the person who must conduct the interrogation via videoconference (Yukhno, Ablamskyi, Bondarenko, 2017, p. 336; Knyzhenko, Matiushkova, 2015, p. 121). In our opinion, the above views are not undisputed, moreover, provision of Article 232 of the Criminal Procedure Code of Ukraine indicate only the possibility of the use of technical means and technologies by the investigator, prosecutor, investigative judge in the course of conducting the investigated investigative (search) action. Opposite views of lawyers are more acceptable, in particular regarding the fact that in these proceedings the technical component should be assigned exclusively to a specialist (Khoma, 2018, p. 35; Shyngarov, 207, pp. 175–176). We believe that the most detailed proposal about that is provided by T. V. Mykhalchuk, who states that when conducting investigative (search) actions via videoconference, an investigator, prosecutor or investigating judge in order to create full-fledged conditions for receiving and transmitting information at a distance of appropriate quality sound signal and video image, provided simultaneous and complete perception of information from each of the remote places in which events related to the essence and unity of the interrogation tasks take place, must involve a specialist who has special knowledge and skills in the use of appropriate technical means and technologies (Mykhalchuk, 2013, p. 141).

Taking into account the above, *we consider the third part of Article 232 of the Criminal Procedure Code of Ukraine to be supplemented with an additional paragraph, setting it out as follows:*

"3. The selection and use of technical means and technologies that provide adequate image and sound quality, as well as information security, is ensured by a specialist engaged by an investigator, prosecutor or investigative judge (next according to the text of the current edition)".

During pre-trial investigation via videoconference, the technologies and technical means used by the investigator and the prosecutor must be modern and take into account the latest scientific achievements as much as possible. In addition, the Commission Recommendations of the European Communities 94/820/EC of October 19, 1994 concerning the legal aspects of electronic data exchange are devoted to this issue, which reveal issues directly related to the security of electronic data exchange messages, namely the procedure and security measures from the risks of unauthorized access, alteration, delay, destruction or loss of the relevant information.

In order to ensure the efficiency of criminal proceedings, provisions of Part 11 of Article 232 of the Criminal Procedure Code of Ukraine provide for a simplified procedure for obtaining information relevant to certain criminal proceedings via videoconference. A literal interpretation of the prescriptions of this norm indicates that the information that was reported by a person during such an interview has no evidentiary value, but is only informative for the purposes of pre-trial investigation. In our opinion, the legislator's use of the term "interviewing" in the provisions of the legislation, excluding the powers of the inquirer (paragraph 2, part 2, article 40-1 of the Criminal Procedure Code of Ukraine), is inappropriate. In addition, in the provisions of international legal acts, in particular in Article 9 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters dated November 8, 2001, it is about interrogation, not interviewing. In addition, this norm provides for a list of participants in the proceedings who may be interrogated - a witness and an expert. Therefore, the prescriptions of Part 11 of Article 232 of the Criminal Procedure Code of Ukraine should regulate the procedure not of interviewing, but of interrogation.

Conclusions

The conducted research shows that European integration processes determine the need to introduce in Ukraine a system of measures aimed at harmonizing national legislation with European standards in the field of criminal justice. One of these factors is the achievement of scientific and technical progress, the use of which directly affects the effectiveness of investigative (search) actions. The conducted analysis of the procedure of interrogation via videoconference gives reasons to claim that today certain issues of its legal

regulation remain undefined, and therefore require further development and normative consolidation in the provisions of the criminal procedural legislation.

Thus, the current state of interrogation in criminal proceedings has some problematic aspects and does not fully meet modern realities. In this regard, there is a need to make certain changes and additions to the current Criminal Procedure Code of Ukraine.

In particular:

firstly, it is advisable to provide for a provision according to which photography, audio and / or video recording is used during interrogation”;

secondly, to enshrine a normative prescription according to which the investigator, prosecutor, inquirer, in order to ensure the efficiency of criminal proceedings, has the right to conduct a video or telephone conference interrogation of a person who, due to being in a place far from the place of pre-trial investigation, illness, employment or for other reasons, cannot come to the investigator, prosecutor on time.

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