

## Artículo de investigación

**Some aspects of specific forensic examinations in respect of underage suspects****НЕКОТОРЫЕ АСПЕКТЫ НАЗНАЧЕНИЯ ОТДЕЛЬНЫХ СУДЕБНЫХ ЭКСПЕРТИЗ ОТНОСИТЕЛЬНО НЕСОВЕРШЕННОЛЕТНЕГО ПОДОЗРЕВАЕМОГО**

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It has been emphasized that while investigating criminal offenses committed by minors, special attention is paid to the appointment of forensic examinations, in particular, comprehensive psychological and psychiatric examination and psychological examination. An investigator, a prosecutor should know which of these examinations is appropriate to appoint and what questions should be put to the expert for decision. If the questions are worded incorrectly or not fully, then this will lead to the expert's findings, which do not help in establishing the truth and do not disclose all necessary information about juvenile suspects.

Taking into account the provisions of the Art. 486 of the Criminal Procedural Code of Ukraine, we'd like to emphasize that psychological and psychiatric examination is appointed in cases where there are grounds for it, namely the determination of a juvenile suspect's mental illness or a delay in mental development and his ability to fully or partially realize the importance of his actions and to guide them in a specific situation. If criminal proceedings materials indicate on the decrease of a minor's level of

**Анотація**

У статті акцентовано увагу, що під час розслідування кримінальних правопорушень, вчинених неповнолітніми, особливу увагу слід приділяти призначенню судово-медичних експертиз, зокрема, комплексній психолого-психіатричній експертизі та психологічній експертизі. Слідчий, прокурор повинні знати, яку саме із цих видів експертиз доцільно призначити, та які запитання необхідно поставити експертів для вирішення. Якщо запитання будуть сформульовані неправильно або в неповному обсязі, це призведе до надання експертом висновку, який не дасть змогу розкрити усієї необхідної інформації про неповнолітнього підозрюваного. Задля уникнення подібних негативних наслідків під час вирішення питання про призначення зазначених видів судових експертиз неухильно слід дотримуватися вимог ст. 486 КПК України, де безпосередньо і передбачено з якою саме метою вони призначаються.

Методологія дослідження ґрунтується на системному підході, який визначається специфікою теми статті, а також пов'язаний з

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development, as well as in order to clarify the socio-psychological traits of a minor, it is necessary to conduct psychological examination. The methodology of the research is based on a systematic approach, determined by the specifics of the article's topic and related to the use of general and special research methods. The comparative and legal method and the method of legal analysis have been used in the study of legislative norms regulating the procedure of the appointment of forensic examinations. The formal and logical method has been used to differentiate the criteria of the subject matter of comprehensive psychological and psychiatric examination and psychological examination, which are assigned in regard to juvenile suspects.

**Key words:** Comprehensive psychological and psychiatric expert examination, forensic examination, juvenile suspect, psychological expert examination.

## Introduction

In the twentieth century, the international community recognized the need for a fundamentally different attitude towards children than adults, the priority of the status and interests of children, their importance for the well-being and survival of all mankind. International legal acts on human rights provide for that children deserve better living conditions, care and comprehensive protection by any State. The idea of caring for children, special protection, solicitude and safeguards due to their physical and mental immaturity was developed in special documents on the rights and interests of children (Bogomiagkov, 1980, p. 29). For example, the 1959 Preamble to the Declaration of the Rights of the Child proclaims that the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth. The need for such special safeguard was indicated in the Geneva Declaration of the Rights of the Child of 1924 and recognized in the Universal Declaration of Human Rights, as well as in the charters of specialized agencies and international organizations dealing with the well-being of children (DRC, 1958). According to Article 1 of the Convention on the Rights of the Child, a child means "every human being below the age of eighteen years unless under the law of the country, majority is attained earlier. Moreover, according to paragraph 1 of Article 3 of the Convention, in all actions concerning children, whoever undertake them,

використанням загальних і спеціальних методів дослідження. Порівняльно-правовий метод і метод юридичного аналізу були використані при вивченні законодавчих норм, що регламентують порядок призначення судових експертиз. Формально-логічний метод використовувався для диференціації критеріїв предмета комплексної психолого-психіатричної експертизи та психологічної експертизи, які призначаються стосовно неповнолітніх підозрюваних.

**Ключові слова:** комплексна психолого-психіатрична експертиза, неповнолітній підозрюваний, психологічна експертиза, судова експертиза.

the best interests of the child shall be a primary consideration (CRC, 1989). In addition, according to the provisions of paragraph 5.1 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), the juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

Therefore, the provisions of the above international legal acts enable to state that the safeguard of the rights, freedoms and legitimate interests of juveniles who have committed a criminal offense is quite important. In this matter, forensic examinations are no less significant, since in most cases their conduct affects both the objectivity and comprehensiveness of the entire investigation, and the application of an appropriate preventive measure to an underage suspect. In the study, the authors argue that some of them require consideration in details.

*The purpose of the article* is to study certain types of forensic examinations in criminal proceedings concerning underage suspects.

## Materials and methods

The research methodology is based on a systematic approach, due to the specifics of the

topic of the article. In the study, general scientific and special methods are used. The comparative legal method and the method of legal analysis enable to study legal regulations on the order of forensic examinations. The technical legal method enables to distinguish criteria of the subject of comprehensive psychological and psychiatric examination and psychological examination of the underage persons.

### Results and their discussion

Investigative and judicial practice frequently requires to age assessment of a person who has committed a socially dangerous act. As a rule, this is determined by: a) entries in the birth certificate; b) entries in the passport; c) entries in a certified extract from the civil registration book. In the event that these documents are absent and cannot be obtained, a forensic medical examination shall ascertain the age of the person. In view of this, paragraph 4 of Part 2 of Article 242 of the CPC of Ukraine provides for that the investigator or public prosecutor shall be required to prepare an appropriate motion to the investigating judge for the conduct of examination in respect of ascertaining the age of a person in so far as it is necessary to dispose the issue relating to his/her criminal liability whenever it is impossible to have such information otherwise (CPC, 2012).

It should be noted that in accordance with paragraph 6 of the decision of the Plenum of the Supreme Court of Ukraine no. 5 of 16 April 2004, a forensic medical examination considers a person's birthday to be the last day of the year, pointed by an expert. When ascertaining the age by the minimum and maximum number of years, the court decides on the basis of the minimum age ascertained by the expert (Resolution, 2004). In practice, in some cases, documents ascertaining the age of the person raise doubts as to whether the actual age is the same as in the "passport." In this case, the Supreme Court of Ukraine recommends courts to order a comprehensive forensic examination with the involvement of a wider circle of specialists with special knowledge necessary for a thorough, complete and comprehensive study of the circumstances to be established in the criminal proceedings against juveniles.

According to paragraph 18 of the resolution of the Plenum of the Supreme Court of Ukraine "On the court practice in proceedings on the application of compulsory educational measures" no. 2 of 15 May 2006, if there is reason to believe that the underage person's

intellectual development has not reached the age (14, 16 or 18 years), which corresponds to the data of the birth certificate or other document, a comprehensive psychological-psychiatric-pedagogical examination shall be conducted to confirm or disprove this. If the examination conclusion confirms that an underage person has mental or cognitive retardation (not related to a mental disorder) to such a degree that his development does not correspond to the age evidenced by birth documents, the court shall consider recognizing the underage person as having not reached the age of criminal liability and the use of coercive educational measures is possible (Resolution, 2006). Therefore, the investigator, public prosecutor shall be required to establish the presence of physical and mental illnesses, since this enables to correctly resolve the issue of applying the necessary measures to ensure criminal proceedings, first of all, preventive measures, as well as to construct further tactics of investigative actions involving a juvenile.

In addition, the Criminal Code of Ukraine explicitly states that if a minor reached the age of criminal liability, but due to a delay in mental development, not related to a mental disorder, during the commission of a socially dangerous act he could not fully recognize the factual nature and social danger of his actions (inaction) or command them, he is not subject to criminal liability. Therefore, establishing the mental development of an underage person is one of the most significant circumstances involved in the subject of evidence in criminal proceedings in relation to this category of persons.

In criminal proceedings, special knowledge of psychologists is used in three forms: 1) forensic examination; 2) expert involvement; 3) consultation - reference and consulting activity (Kostitskii, 1990, p. 118). Moreover, a psychologist involved in criminal proceedings, by the nature of his/her work, shall deal with juveniles of the same age. Establishment of criminal action motivation is often complicated by underage suspects attempts to alleviate their situation, frequently complaining of a crime in a state of insanity or passion. Such claims of these persons are verified by conducting both psychological and psychiatric, as well as comprehensive psychology-psychiatric examinations, designed to establish the presence or absence of a state of extreme emotional disturbance and the ability of a suspect to be aware of his/her actions and be in control of them (Safuanov, 2003, p. 63-64).

According to Section VI of the Scientific and Methodological Recommendations on the preparation and conduct of forensic examinations and expert studies, approved by the Order of the Ministry of Justice of Ukraine no. 53/5 of 08 October 1998 (as amended on 26 December 2012), the object of psychological examination is mentally healthy persons. This examination enables to establish the specificities of mental activity and their manifestation in the behaviour of a person that are of legal importance and have certain legal effects.

On the positive side, Article 486 of the CPC of Ukraine clearly stipulated when to conduct a comprehensive psychological or psychiatric examination, and when a psychological one. For example, in accordance with the provisions of Part 1 of Article 486 of the CPC of Ukraine, comprehensive psychology-psychiatric examination is assigned if it is necessary to find out whether the underage suspect or defendant has a mental disease or his/her mental development is inhibited, and whether he is able to fully or partially realize the meaning of his/her actions and be in control of his/her actions in a specific situation.

Taking into account modern practical realities, the authors completely agree with the statement of F. S. Safuanov that a comprehensive forensic psychology-psychiatric examination is one of the most complex subject types of expertise. This is determined both by the ambiguity of its legal significance, and the need to apply special knowledge not only in general, medical and social psychology, but also in theoretical and practical disciplines such as the psychology and abnormal psychology of children and adolescents, developmental psychology (Safuanov, 1998, p. 82). The need for such an examination is associated with the specificities of the teenage period, in particular with increased irritability and excitability, a tendency to emotional outbursts, fantasizing, and mood instability, that can mask a mental illness beginning. At the same time, parents and teachers consider the presence of painful symptoms in the behaviour of an underage person as a manifestation of indiscipline or mischief (Gukovskaia, Dolgova, Minkovskii, 1974, p. 28).

If there is evidence of a mental retardation that is not associated with a mental disorder, it shall be also established whether the underage person could fully realize the actual nature and social danger of his/her actions (inaction) or control them. The need for establishing these facts and

circumstances is focused on in the Resolution of the Plenum of the Supreme Court of Ukraine "On the Ukrainian court practice of the application of the Law on Juvenile Crimes" no. 5 of April 16, 2004 (Resolution, 2004).

During a comprehensive psychology-psychiatric examination, for an investigation an investigator, public prosecutor shall ask an expert the following questions: 1. Did the underage suspect suffer from any psychiatric disorder during the commission of the offense alleged? 2. Was he in any emotional state? If so, what psychological reasons caused this state and could this state be noticeable to others? 3. Does an underage suspect have a mental retardation unrelated to a mental disorder? 4. Could the underage suspect, during the commission of the act incriminated to him, be aware of the meaning and social danger of his/her actions or be in control of them? If so, to what extent? 5. Does the juvenile suspect suffer from any mental disease now? If so, is compulsory medical treatment needed? 6. Does the underage suspect have individual psychological characteristics? If so, did such features influence his/her behaviour during the commission of the offense alleged and how significant? 7. Was the juvenile suspect capable of taking his/her actions correctly and foreseeing them, taking into account his/her individual psychological characteristics, level of mental development during the commission of the offense alleged?

If necessary, the range of questions during the conduct of a comprehensive psychology-psychiatric examination can be expanded. For example, the investigator, public prosecutor may doubt whether the underage suspect, due to his/her individual psychological characteristics and level of mental development, reproduce the actions that took place during the commission of a socially dangerous act. In view of this, the question can be raised: "Is an underage suspect capable of reproducing the actions that have taken place during the commission of a socially dangerous act due to his/her individual psychological characteristics and level of mental development?"

Furthermore, a comprehensive psychology-psychiatric examination holds a special place enabling to establish the presence or absence of strong emotional disturbance of an underage suspect. This is very important for classifying a crime, for example, under Article 116 of the CC of Ukraine "Intentional murder committed in the state of extreme emotional disturbance."

It should be noted that foreign researchers suggest expert psychologists to solve the problem of identifying diagnostic and individual features of a person by using modern automatic methods, such as point analysis, evaluating and reviewing the results of online surveys, proactive situational analysis of criminal behaviour, background analysis of criminal situations, variance analysis of random personal characteristics (Hollien H., 1994; Annika M, Svein M, 2014; Clive R., 2012).

According to V. V. Melnyk, V. V. Yarovenko and N. A. Kurmaev, an outpatient forensic psychiatric examination should be conducted first and only after that, depending on its results, a forensic psychological or psychological psychiatric examination should be decided (Mel'nik, YArovenko, 1990, p. 106; Kurmaeva, 2010, p. 209). However, the authors argue that the conduct of these two separate examinations does not make any sense, since they are interrelated by the subject of the study (in both cases, the psyche of a person is examined) while they differ mainly in the list of the expert's assignments. At the same time, the subject of a comprehensive psychology-psychiatric examination, as a rule, is two groups of questions, namely: 1) the mental health of a person (competence of an expert psychiatrist); 2) individual psychological characteristics of a person (competence of an expert psychologist) (Bogomyagkov, 1990, p. 9).

According to Part 2 of Article 486 of the CPC of Ukraine, if the investigator, prosecutor needs to find out the level of development, other social and psychological personal traits of the underage suspect or defendant which should be taken into account imposing a punishment or enforcing a measure of restraint of educational nature, then psychological examination shall be assigned.

According to V. V. Sokurenko, the forensic psychological examination is a study conducted by an experienced person, an expert, based on special knowledge (in psychology) for the purpose of obtaining an opinion that, after appropriate verification and evaluation by the investigator or court, will be evidence in criminal proceedings. This examination finds out: a) whether juvenile suspects with signs of mental retardation are able to fully recognize the meaning of his/her actions and how able to control them; b) whether the accused, victims and witnesses are able to adequately perceive the circumstances and give correct evidence about them; c) whether a person has or has not at the time of the crime a state of extreme emotional

disturbance or other non-pathological emotional states (severe fear, depression, emotional stress, frustration) that can significantly affect his/her consciousness and activity; d) leading motives in human behaviour and the motivation of individual acts as important psychological circumstances that characterize a person; e) individual psychological characteristics of a person that can significantly affect his/her behaviour and the formation of intentions for committing a crime (Sokurenko, 2017, p. 211).

V. G. Nor and M. V. Kostytskiy argue that a forensic psychological examination is ordered if there is evidence of an underage person's mental retardation, but his/her mental health is not in doubt or is confirmed by the conclusion of a forensic psychiatric examination. The conduct of this examination requires consideration of some questions, such as: whether an underage person has signs not related to mental disease, mental retardation, and if so, what exactly they manifest; given the state of mental development of an underage person, whether he/she could fully realize the meaning of his/her actions; given the state of mental development of an underage person, to what extent he/she is in control of his/her actions? (Nor, Kostickij, 1985, p. 31).

It should be noted that the mental retardation may be due to: a) social or pedagogical neglect; b) the presence of a sensory defect (low vision, partial deafness); c) isolation of the child; d) organic brain disease; d) the resulting traumatic brain injury; g) somatic disease and others (Enikeev, 2004, p. 165).

Having regard to the requirements of Article 486 of the CPC of Ukraine, the authors consider it necessary to emphasize that in practice, cases of conducting a comprehensive psychology-psychiatric examination and psychological examination require distinguishing. For example, a comprehensive psychology-psychiatric examination is conducted in cases that require determining the presence of an underage suspect's mental disorder or mental retardation, as well as his/her ability to fully or partially realize the meaning of his/her actions and be in control of his/her actions in a specific situation (namely, at the time of committing a crime). If the materials of criminal proceedings indicate a decline in underage person's development or the socio-psychological personal traits of the juvenile should be found out, then a psychological examination shall be assigned.

## Conclusions

The results of the study suggest that in the investigation of criminal offenses committed by underage persons, forensic examinations, such as a comprehensive psychology-psychiatric examination and psychological examination holds a special place. It is important for the investigator, public prosecutor to know which of these examinations shall be conducted and what questions the expert needs to be addressed. Improper or incomplete formulation of the questions leads to the expert's opinion that does not contribute to the establishment of truth and does not disclose all the necessary information about the underage suspect.

## Bibliographic references

- Bogomiagkov, Yu. S. (1980). On the issue of partial sanity in the theory of Soviet Criminal Law. In *The efficiency of combating crime and the improvement of legislation according to the Constitution of the USSR* (pp. 9-10). Ufa.
- Gukovskaia, N.I., Dolgova, A.I., Minkovskii, G.M. (1974). *Investigation and court proceedings of cases of juvenile crimes*. M.: Jurid. lit. 208 p.
- Declaration of the Rights of the Child (Proclaimed by the UN General Assembly Resolution 1386 (XIV) of 20 November 1959). [https://zakon.rada.gov.ua/laws/show/995\\_384?lang=ru](https://zakon.rada.gov.ua/laws/show/995_384?lang=ru).
- Enikeev, R. Z. (2004). *Problems of evidence in the activities of counsel for the crimes of minors* (Dissertation for the degree of Candidate of Juridical Sciences (Ph.D.) in speciality 12.00.09). Ufa, 273 p.
- Convention on the Rights of the Child of 20 November 1989 (International document). *Legislation of Ukraine*. Verkhovna Rada of Ukraine. Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_021](https://zakon.rada.gov.ua/laws/show/995_021).
- Kostitskii, M.V. (1990). The use of special psychological knowledge in the Soviet criminal procedure (Dissertation for the degree of Candidate of Juridical Sciences (Ph.D.) in speciality 12.00.09). Lviv, 457 p.
- Criminal Procedure Code of Ukraine (Law of Ukraine no. 4651-17 of April 13, 2012). *Legislation of Ukraine*. Verkhovna Rada of Ukraine. Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17/page>.
- Kurmaeva, N. A. (2010). Problems of the assignment and conduct of comprehensive psychological examinations in criminal cases involving underage persons. *Actual Problems of Russian Law*, 4, 206-216.
- Lavdarenko, L. I., Plesneva, L. P. (2019). The international legal principle of proper ensuring of interests of an underage person and the problems of its implementation in Russian criminal proceedings. *Prologue: Law Journal*, 2, 28-36.
- Melnik, V. V., Yarovenko, V. V. (1990). *Theoretical foundations of forensic psychological examination*. Vladivostok: Publishing House Far East University, 1990. 160 p.
- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules") of November 29, 1985. *Legislation of Ukraine*. Verkhovna Rada of Ukraine. Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_211](https://zakon.rada.gov.ua/laws/show/995_211).
- Nor, V. G., Kostitskii, M. V. (1985). *Forensic psychological examination in criminal proceedings*. K.: Higher School, 54 p.
- Instruction on the order and conduct of forensic examinations and expert studies, and Scientific and methodological recommendations on the preparation and order of forensics and expert studies (Approved by Order of the Ministry of Justice of Ukraine no. 53/5 of October 08, 1998 (in the wording of the order of the Ministry of Justice of Ukraine of 26 December 2012)). *Legislation of Ukraine*. Verkhovna Rada of Ukraine. Retrieved from <https://zakon.rada.gov.ua/laws/show/z0705-98>.
- On the practice of juvenile crimes law application by courts (Resolution of the Plenum of the Supreme Court of Ukraine no. 5 of 16 April 2004). *Bulletin of the Supreme Court of Ukraine*, 5, 4.
- On the practice of consideration by courts of cases regarding the application of compulsory educational measures (Resolution of the Plenum of the Supreme Court of Ukraine no. 2 of 15 May 2006). *Legislation of Ukraine*. Verkhovna Rada of Ukraine. Retrieved from <http://zakon2.rada.gov.ua/laws/show/v0002700-06>.
- Safuanov, F. S. (2003). *Psychology of criminal aggression*. M.: Sense, 300 p.
- Safuanov, F. S. (1998). *Forensic psychological examination in criminal proceedings*. M., 118 p.
- Sokurenko, V. V. (2017). Key areas of psychological support of law enforcement. *Personality, Society, Law: Psychological Issues and Ways to Solve Them* (Abstracts of International Scientific and Practical Conference dedicated to the memory of prof. S.P. Bocharova (pp. 41-42). (Kharkiv, March 30, 2017). Ministry of Internal Affairs of Ukraine, Kharkiv National University of Internal Affairs; H.S. Kostjuk Institute of Psychology of National Pedagogical Academy of Ukraine; European Union Advisory Mission to Ukraine. Kharkiv: KhNUiA.

Annika Melindera, Svein Magnussen. Psychologists and psychiatrists serving as expert witnesses in court: what do they know about eyewitness memory? *Psychology, Crime & Law*. Vol. 21, no. 1, 2014. p. 53-61. 30.

Clive R. Hollin. *Psychology and Crime: An Introduction to Criminological Psychology*. Routledge Publishing, London, UK, 2012.

Hollin H. *The Acoustics of Crime. The new Science of Forensic Phonetics*. USA: University of Florida, 1994. 370 p.

Proceedings 25th Annual 1991 IEEE International Carnahan Conference on Security Technology. October 1-3, 1991. Taipei. Taiwan. 789 p.

Psychology and Law: The Past, Present, and Future of the Discipline. *Psychology, Crime & Law*. Vol. 19, no. 8, 2013. p. 643-647.