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# CUESTIONES POLÍTICAS

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## Procedural and organizational and tactical features of the search

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### Abstract

In the scientific article on the basis of the analysis of the current legislation and points of view of scientist's procedural and organizational and tactical features of carrying out search are investigated, essence and maintenance of activity of participants of the specified investigative (search) action is found out. A methodological system is used, which includes the following levels: philosophical, general scientific and special scientific. Emphasis is placed on maintaining a balance between the tasks of protecting the rights of the individual during investigative (search) actions in the home or other property of the person and the effective fight against crime. Based on the analysis of procedural legislation and scientific literature, the rights and responsibilities of the suspect and other participants in the investigative (search) action are summarized. Emphasis is placed on increasing the importance of the investigator in providing procedural guarantees to the person during the search, as well as on improving the tactics of the specified investigative (search) action. Relevant proposals have been submitted to the criminal procedure legislation of Ukraine and to the tactics of conducting a search.

**Keywords:** investigation; criminal proceeding; investigative (search) actions; evidence; search.

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## Características procedimentales y organizativas y tácticas de la búsqueda

### Resumen

En el artículo sobre la base del análisis de la legislación actual y los puntos de vista de los científicos, se investigan las características procesales, organizativas y tácticas de la realización de la búsqueda; se encuentra la esencia y el mantenimiento de la actividad de los participantes de la acción (búsqueda) especificada de investigación. Se utiliza un sistema metodológico que comprende los siguientes niveles: filosófico, científico general y científico especial. Se hace hincapié en mantener un equilibrio entre las tareas de protección de los derechos de la persona durante las acciones de investigación (cateo) en el hogar u otros bienes de la persona y la lucha eficaz contra el delito. Con base en el análisis de la legislación procesal y la literatura científica, se resumen los derechos y responsabilidades del sospechoso y otros participantes en la acción de investigación (búsqueda). En las conclusiones del caso, se hace hincapié en aumentar la importancia del investigador para brindar garantías procesales a la persona durante la búsqueda, así como en mejorar las tácticas de la acción investigativa (búsqueda) especificada. Se han presentado propuestas pertinentes a la legislación de procedimiento penal de Ucrania sobre las tácticas de realizar un registro.

**Palabras clave:** investigación; proceso penal; acciones de investigación (cateo); prueba; registro.

### Introduction

Of particular importance in criminal proceedings are investigative (search) actions that may be carried out in the home or other property of a person, as their conduct is always associated with restriction of constitutional rights to inviolability of housing or other property, privacy, inviolability of property rights. It is during their implementation that the state must create the necessary conditions for the fullest possible realization of constitutional rights, no one should interfere in the field of human rights, except in cases expressly provided by law.

One of the important procedural means of obtaining evidence is a search, the procedure for which is determined by Art. Art. 234 236 of the Criminal Procedure Code of Ukraine. The essence of this investigative (search) action is to forcibly inspect housing, other property of a person, individual citizens in order to find and seize objects relevant to criminal proceedings, as well as to establish the location of wanted persons and their detention.

The main difference between a search and other investigative (search) actions is its coercive and investigative nature (Shepitko, 2007). First of all, it is about the application of criminal procedural coercion, i.e., the set of responsibilities of the participants in criminal proceedings and the implementation of the tasks of the judiciary. The investigator, regardless of the consent of the searched person, will conduct an inspection of the premises and things belonging to him (Byshevets, 2015). The admissibility of such measures is determined only by a reasoned court decision (Constitution of Ukraine, 1996). The law stipulates that no one has the right to enter a person's home or other property for any purpose. This can happen only with the voluntary consent of the person who owns them, or on the basis of the decision of the investigating judge, except in urgent cases provided for in Art. 30 of the Constitution of Ukraine (Constitution of Ukraine, 1996), parts 1, 3 of Art. 233 of the Criminal Procedure Code of Ukraine (Criminal Procedure Code of Ukraine, 2012).

In law enforcement practice, there are numerous examples of non-performance or improper performance of duties by authorized and other professional participants in criminal proceedings during this investigative (search) action, which negatively affects the rights and legitimate interests of other participants in criminal proceedings, achieving each criminal proceeding. Some violations and omissions are the result of imperfect legal regulation of the search procedure, others – incorrect (conscious or unintentional) interpretation of legal provisions by authorized subjects of criminal proceedings, there are many cases of choosing the wrong tactics. These aspects of procedural and organizational and tactical nature actualize their research.

### **1. Methodology of the study**

The methodological basis of the article consists of general and special methods of scientific knowledge, the use of which is determined by the purpose, object and subject of research (Vasylevych *et al.*, 2021). General scientific methods are presented in the work mainly by methods of formal and dialectical logic (analysis and synthesis, methods of induction and deduction, ascent from concrete to abstract and from abstract to concrete, system-structural method and others). The dialectical method provided clarification of the essence and content of the search in the system of investigative (search) actions, rights and responsibilities of its participants.

The formal-logical method was used in determining the basic legal concepts and categories that make up the content of a scientific article, to interpret the concepts of «commonwealth», «housing», «tactics», to identify problems that arise during the search, and develop ways to solution. With

the help of system-structural, formal-dogmatic and hermeneutic methods the analysis of norms of the current criminal procedural legislation and practice of its application, interpretation of provisions of the corresponding normative-legal acts and materials of judicial practice is carried out. The method of theoretical and legal modeling allowed to substantiate the proposals aimed at improving the procedural order and tactics of the search.

## **2. Analysis of recent research**

Various aspects of the researched issues in the criminal process are the subject of scientific works of criminologists and proceduralists of the modern period (Klymchuk, 2021; Ilyuk, 2020; Dyakov, 2016; Budzievsky, 2013; Dekhtyar, 2014; Saltevsy, 2006). Despite the significant amount of research devoted to the search, many issues related to the conduct of this investigative (search) action remain controversial or partially resolved.

These include: the procedural impossibility of conducting a search at the initial stage of the investigation in the absence of sufficient information about the identity of the searched person; identification of things and documents that need to be removed; tactics of simultaneous searches in one criminal proceeding, etc.

The purpose of the article is to study the criminal procedural status of persons involved in the search, highlight the features of tactical and regulatory nature to ensure the constitutional rights of participants in this investigative (investigative) action, the admissibility of their restrictions, identify gaps in legislation that require doctrinal analysis and regulatory settlement.

## **3. Results and discussion**

The main purpose of the search is to identify and obtain documents and items relevant to criminal proceedings. Thus, in accordance with Part 1 of Art. 234 of the Criminal Procedure Code of Ukraine search is conducted in order to identify and record information about the circumstances of a criminal offense, finding a weapon of criminal offense or property obtained as a result of its commission, as well as establishing the location of wanted persons» (Criminal Procedure Code of Ukraine, 2012).

We share the view of some scholars on the need to improve the legal regulation of the search by expanding the purpose of its search – finding other items and documents relevant to criminal proceedings or securing a civil lawsuit (Shevchishen, 2018). After all, this is the goal of the investigator in many cases.

Among the officials authorized to conduct investigative (search) actions in the home, the exclusive role belongs to the investigator. He is a representative of the state and a person who is endowed with state powers, is responsible for the legality and timeliness of the investigative (search) action. During the pre-trial investigation, all investigative (search) actions are performed by the investigator in charge of the relevant materials of the pre-trial investigation.

In particular, in Art. 236 of the Criminal Procedure Code of Ukraine refers to the exclusive right of the investigator and prosecutor to execute a decision on a permit to search the home or other property of a person (Komarnytska, 2016). The Supreme Court in its decision in case № 466/896/17 of 29 January 2019 noted that the Criminal Procedure Code clearly defines the range of persons entitled to be present during the search, and also clearly indicates that the search is authorized to be conducted exclusively by an investigator or prosecutor who has been granted such a right by a court decision.

If the search is carried out by persons other than the investigator or the prosecutor, these actions should be considered a significant violation of the conditions of the search, the results of such a search, in accordance with the requirements of Art. Art. 86, 87 of the Criminal Procedure Code of Ukraine, cannot be used during the adoption of procedural decisions, and the court cannot refer to them as evidence during the adoption of a conviction (case № 466/896/17 of January 29, 2019).

In practice, there are often cases in which the decision of the investigating judge on the permission to search the home or other property of the person indicates the name of the investigator or prosecutor to conduct it. However, the investigator or prosecutor is later joined by a group of self-proclaimed police operatives, joined by a group of prosecutors, masked special forces and machine guns not mentioned in the ruling. What can a person do in such circumstances? Next to nothing. While the investigator reads the decision to the person or gives it to him to get acquainted with himself, the search has already begun.

Often, the person who gives the decision for review is not the investigator specified in the decision, but is only the investigator in the established investigative task force. In this case, in our opinion, the person has the right to request a decision to establish an investigative task force and check whether the decision states the name of the investigator. At the same time, people who are not specified in the resolution are already in the person's home or other property. Thus, in practice, the requirements of Part 1 of Art. 236 of the Criminal Procedure Code of Ukraine are often not enforced.

There are cases when an investigator arrives for the purpose of a search, whose name is not specified in the decision of the investigating judge,

and presents a decision to establish an investigative task force in which he appears, but this decision does not contain any initial data, ie may be printed in an unknown place, and the decision itself is forged. Given the current criminogenic situation in the country, any unknown persons may enter the apartment, who may later kill the owner or cause bodily harm or illegally deprive him of his property.

One of the main participants in the criminal proceedings, who may be invited to conduct an investigative (search) action in the home, is the suspect. In Part 1 of Art. 42 of the Criminal Procedure Code of Ukraine defines a list of grounds for recognizing a person as a suspect, which is exhaustive.

Thus, the suspect has the right to conduct the investigation of the investigating judge's decision on permission to conduct it, to check the proper certification of the decision, the validity of the decision, the correctness of the address, owner (owner) of housing or other property and receive a copy; to check the IDs of law enforcement officers who arrived to conduct an investigative (search) action; require information about other persons involved in its implementation.

Receive legal assistance from a lawyer; to ensure the safety of their lives and health, respect and dignity; demand the replacement of witnesses in case of their interest in the results of criminal proceedings; to use the native language, to receive copies of procedural documents in the native or other language of the person, and if necessary to use the services of an interpreter; voluntarily give out things that are wanted; refuse to answer questions; give explanations or refuse to give them at any time; ask questions, express their suggestions, comments and objections to the search procedure, which are recorded in the minutes; unimpededly record the conduct of investigative (search) action with the help of video (in compliance with the law).

To appeal against decisions, actions or inaction of the investigator, prosecutor; to declare petitions and objections; to get acquainted with the protocol of the search, to demand inclusion in the protocol of all remarks concerning violation of norms of the current legislation during its carrying out; receive a second copy of the search report together with a description of the seized documents and temporarily seized items attached to it; to demand measures to prevent the announcement of the circumstances of his private life revealed during the search; to ensure the safety of property in housing or other property, and the inability of third parties to access it.

During the search of the suspect's home, his responsibilities to ensure the procedural order of the relevant action and the achievement of its purpose by the investigator and prosecutor are also specific. The analysis of the legislation allowed to single out the following responsibilities of the suspect during the search of his home: if there is a request of the investigator, the

prosecutor - must be present during the investigative (search) action; in the case of a decision of the investigating judge on a permit to search a dwelling or other property - to comply with the legal requirements of the investigator, prosecutor regarding the possibility of unimpeded entry into the dwelling or other property; not to interfere with search operations.

If there is a ban, do not communicate with other persons; to leave the place of the search until its completion and to take any actions that interfere with its conduct, without the permission of the investigator or prosecutor; be subjected to a personal search; not to disclose without the permission of the investigator, prosecutor information that became known to him in connection with participation in the investigative (search) action, as well as information that constitutes a secret protected by law; not otherwise interfere with the search.

Taking into account the composition of persons who may be invited to participate in the search, the legislator in the current Criminal Procedure Code of Ukraine pointed to the possibility of involving a lawyer to participate in this action. This possibility meets the requirements of international law, which provide for the right of any person involved in criminal proceedings to seek legal assistance.

The defense counsel's request for his participation in the investigative (search) action must be mandatory for the investigator. A person whose home is searched, regardless of whether he or she is in the procedural status of a suspect or a witness, requires the right to protection. The absence of a report on an investigative (search) action should be considered a significant violation of the right to defense (Milova, 1998). If previously only a suspect could use the right to legal aid during a search at the pre-trial investigation stage, now other persons interested in this investigative (search) action, including the homeowner, can count on it. The investigator, the prosecutor has no right to prohibit the participants in the search to use the legal assistance of a lawyer or representative. Thus, the investigator, prosecutor is obliged to allow such a lawyer or representative to be searched at any stage of its conduct (Part 3 of Article 236 of the Criminal Procedure Code of Ukraine) (Criminal Procedure Code of Ukraine).

An investigator or prosecutor may invite a victim whose procedural status is defined in Art. 55 of the Criminal Procedure Code of Ukraine. The rights and obligations of the victim arise from the moment of filing a statement about the commission of a criminal offense against him or a statement about his involvement in the proceedings as a victim.

Usually, the victim's participation in the search is carried out on his initiative, namely on the basis of a request to be involved in this action. The expediency and possibility of the victim's participation in the search shall be decided in advance by the investigator or prosecutor authorized to conduct it.



During the investigative (search) action in a person's home, situations may arise in which it is necessary to involve a person whose rights and legitimate interests may be limited or violated during these actions (Part 3 of Article 223 of the Criminal Procedure Code of Ukraine). The legislator has identified a new participant in criminal proceedings, namely another person whose rights or legitimate interests are limited during the pre-trial investigation, ie a person against whom (in particular, his property) the procedural actions specified in the Criminal Procedure Code of Ukraine (paragraph 161 part 1 Article 3 of the Criminal Procedure Code of Ukraine).

Nevertheless, the range of persons who fall under the criterion of «another person whose rights or legitimate interests are restricted during the pre-trial investigation» is not specifically defined. We believe that such persons during the investigative (search) action in the home may include: the owner of the home or other property in which the investigative (search) action is carried out; persons subject to pre-trial investigation but not informed of the suspicion; extras during the identification; a person who is in the home or other property at the time of the search, but is not its owner.

In our opinion, the legislator's omission is the lack of a clear definition of measures to be taken by the investigator to ensure the presence of relevant persons. In accordance with the provisions of criminal procedure law, it was concluded that such measures include: prohibition of investigators to leave the place of search for the period of this procedural action if they were already in housing or other property at the time of arrival of the investigator; summoning investigators of these persons to participate in the investigative (search) action.

At the same time, it is inadmissible to forcibly escort these persons to the place of investigative (search) action or impose a fine on them in case of non-appearance, as these measures to ensure criminal proceedings apply only to the suspect, accused or witness (Part 1 of Article 139, Part 3 of Article 140 of the Criminal Procedure Code of Ukraine).

Having identified the procedural features of initiating and conducting a search in criminal proceedings, we turn to its organizational and tactical aspects.

The necessary stage of the search is preparatory. This stage begins with the collection, verification and evaluation of evidence that indicates that items or items relevant to criminal proceedings are found in a particular place or person. One of the necessary conditions is the imaginary construction of a dynamic model of the planned investigative (search) action. This will help to predict the situation of future action, the degree of participation (movement) of objects and participants, their own actions, as well as their behavior and other participants (Budzievsky, 2013).

In accordance with Part 3 of Art. 234 of the Criminal Procedure Code of Ukraine, the investigator in consultation with the prosecutor or the prosecutor applies to the investigating judge with a request to conduct a search and carries out a number of organizational measures (Criminal Procedure Code of Ukraine, 2012). There are cases when the preparatory stage of the search begins with the results of other investigative (search) actions, including covert ones.

At the initial stage of the investigation, there may be cases when there is a lack of sufficient materials necessary to substantiate the grounds for the search. Therefore, when applying to the investigating judge with a request to conduct a search, the investigator and the prosecutor must be sure that they will be able to justify the expediency of the search.

We consider it appropriate to increase the list of grounds for intrusion into housing or other property of a person. To this end, Part 3 of Article 233 of the Criminal Procedure Code of Ukraine should be supplemented with such grounds as «prevention of loss and destruction of material evidence and traces of crime».

In view of our proposal, this article will be edited as follows «An investigator, coroner, prosecutor has the right to enter the dwelling or other property of a person until the decision of the investigating judge is made only in urgent cases related to saving lives and property or directly prosecuting persons suspected of committing a criminal offense, preventing loss and destruction. material evidence and traces of the crime... ».

Also the necessary condition for a quality search is a thorough preparation of the investigator to conduct it, which includes: a) preliminary collection and analysis of the necessary information, including that characterizing the person being searched; profession and occupation; skills, habits; lifestyle; usual routine in the family, family composition, relationships in the family and with neighbors, the presence of the cottage, garage, vehicle and their location, connections and acquaintances, etc.); place of search (address of the building, its planning; size and condition; possibility of covert approach; nature of the area); wanted objects and documents (the most typical places to hide them, possible methods of camouflage, etc.); b) development of a tactical plan (choice of search time and method of penetration into the premises to be searched; selection of search participants, division of responsibilities and their instruction; security measures; protection of the search site; preparation of vehicles, etc.); c) providing the investigative and operative group that will conduct the search with the necessary technical means (investigator's suitcase, ultraviolet illuminators, means of photo and video shooting, means of packing the seized items, etc.).

The general provisions on search tactics set out in the forensic literature make it possible to formulate certain recommendations of a preparatory

nature in criminal proceedings: detailed organization of searches of several objects in case of sufficient grounds to believe that the crime was committed by members of an organized criminal group; careful division of powers among the members of the investigative task force, clarification of their rights and responsibilities; application of technical means of fixation.

In our opinion, the institute of those who are a relic of the past, because now the use of technical means is able to completely replace these people in the relevant investigative (search) action. We consider it appropriate to exclude the obligation of witnesses when searching or inspecting a person's home or other property. To this end, paragraph 2 of Part 7 of Article 223 of the Criminal Procedure Code of Ukraine should be deleted, namely: «Search or inspection of housing or other property of a person actions».

The search should be sudden (the offender can destroy things and traces) and carried out at the appropriate stage of the investigation depending on the current investigative situation (Denisyuk and Shepytko, 1999), and its results can be used during further interrogation of suspects and others. investigative (search) actions. The suddenness of the search is one of the most important organizational and tactical principles. The search should always be unexpected both for the searched person and for other persons interested in the results of the investigation in the case (Saltevsky, 2006).

Before choosing the organizational and tactical methods of the search, the investigator must solve a number of tasks, namely: to determine the objects to be searched (search objects); items and documents to be searched (search items); the sequence and specific timing of each investigative (search) action. These tasks are solved on the basis of analysis of materials of criminal proceedings. In the process of investigating criminal offenses, the organizational and tactical features of the search of the suspect's home are important.

The objects of search are most often: stolen, misappropriated (things and documents of the victim, vehicle or its parts); tools and means used in committing a criminal offense; records and correspondence, which may indicate the names of the participants and their possible location; clothes and shoes that could be on the face during the commission of a criminal offense; means of camouflage of the person, as well as the stolen (for example, fake license plates when stealing a vehicle).

It is impossible to conduct a search without the factual grounds specified in the criminal procedure legislation. However, some scientists, for tactical reasons, suggest conducting a search of the premises when the investigator knows in advance that it does not contain objects that are important for the investigation of a criminal offense. The investigator's goal is to «lose vigilance» of the searched persons, to hide the relevant search objects in advance. In the future, after waiting for some time, the searched persons,

being in a deception, are quite free to handle objects of interest to the investigation. It is at this point that the investigator is recommended to conduct a re-search (Ivanov, 2004). We strongly disagree with this position.

The expected effect can be achieved in another way. During the interrogation of a person who has information about the location of the searched objects, the investigator may say that he is aware of the futility of the search, as interesting to the investigation weapons, objects, documents and valuables that may be relevant to the criminal case.

The degree of persuasiveness of this argument depends on the level of creative abilities of the investigator. However, a prerequisite for such actions of the investigator is in fact not to conduct a search for some time.

It should be noted that in the situation of conducting a search with the participation of defense counsel there is a problem with the quality of recording the video of the progress and results of the investigative (search) action. O. Shkilnyuk and V. Shmarovoz rightly point out that sometimes a large number of documents are seized during searches, but it is not standardized whether their content and details should be recorded in a video recording.

It is allowed to use as video recording devices to record the search of mobile phones or video recorders, which are the personal property of law enforcement officers. Because the memory cards of such video recorders usually also store the personal information of the phone owner, this means that only a copy of the search record is used.

This state of affairs contradicts Part 3 of Art. 107 of the Criminal Procedure Code, because in the materials of criminal proceedings must be kept original copies of the technical record of the search (Shkilnyuk and Shmarovoz, 2018).

According to the analysis of criminal proceedings, video recordings of searches in criminal proceedings are often carried out by operatives who are unable to ensure their qualified conduct and proper use of video equipment. Video recording of the whole process of investigative (search) action is not always provided. The most common reason is the lack of additional batteries and their qualified maintenance during long searches (Shkilnyuk and Shmarovoz, 2018).

It should be emphasized that the right to unimpeded recording of the search by video belongs to the defense, but it is clear that the subject of this procedural right should be a representative of the person in whose home or other possession is investigative (search) action (Vegeera-Izhevskaya, 2018). In our opinion, the involvement in the search of not only the suspect's lawyer, but also a representative of a natural or legal person, for example, when it comes to searches in complex or multi-storey buildings, will not

only control the actions of authorized participants in criminal proceedings. persons, but also contribute to the effectiveness of this investigative (search) action. The legitimacy of such actions will be facilitated by the definition in the criminal procedure legislation of the relevant rights of a natural or legal person in the case of an investigative (search) action in the premises and in the territory belonging to it.

## Conclusions

Thus, what is stated in the article allows us to draw certain conclusions of the procedural and organizational and tactical nature of the search.

The procedural procedure for submitting, considering and resolving motions to conduct certain investigative (search) actions, as well as the actual procedure for conducting them, has features related to the restriction of the rights and legitimate interests of the person. Analysis of the provisions of the Criminal Procedure Code of Ukraine, which regulate the procedural procedure of search, shows that they have a vague terminological definition, cause shortcomings in law enforcement in the activities of investigators, limit the procedural capabilities of participants in criminal proceeding.

In our opinion, the search procedure in criminal proceedings needs to be improved. In this regard, we have proposed and justified amendments to the current criminal procedure legislation. In particular, we consider it appropriate to increase the list of grounds for intrusion into the home or other property of a person, as well as to exclude the obligation of witnesses when searching or inspecting the home or other property of a person.

During the search, the priority is to respect the constitutional rights of the individual, the inalienable conditions of legality, validity, expediency and effectiveness of their conduct. The prosecution's adherence to these conditions determines the admissibility of the evidence collected, the assertion and enforcement of procedural rights of the defense, other participants in the investigative (search) action present during its conduct, prevention of disproportionate restrictions on the constitutional rights of relevant persons, and proper implementation of criminal proceedings.

The use by authorized subjects of the criminal process of relevant systematic and generalized knowledge during the initiation and conduct of a search, making legislative changes to the current criminal procedure legislation will help achieve the purpose of the search and the objectives of specific criminal proceedings.

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