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## **ОЦІНКА ДОСТОВІРНОСТІ ВИСНОВКУ СУДОВОГО ЕКСПЕРТА: СВІТОВІ ПРАКТИКИ ТА УКРАЇНСЬКІ РЕАЛІЇ**

**Анотація.** *Вдосконалення діяльності з досудового розслідування та судового розгляду багато в чому залежить від активізації використання спеціальних знань у судово-слідчій практиці й передусім залучення експерта і проведених ним досліджень. Актуальність досліджуваної в статті проблематики обумовлена необхідністю запровадження нових форм і підходів до оцінки достовірності висновків експертів, зокрема із залученням незалежних фахівців відповідної спеціалізації. Метою дослідження є надання аргументів щодо доцільності залучення обізнаних осіб в якості рецензентів для оцінки об'єктивності та повноти експертного дослідження, правильності застосованих експертом методів і методик, обґрунтованості висновку. Задля досягнення зазначеної мети були використані такі загальнонаукові та спеціальні методи дослідження, як формально-логічний, порівняльно-правовий, функціональний, соціологічний, статистичний, системного і формально-юридичного аналізу, правового моделювання та прогнозування. Встановлено, що в у переважній більшості країн світу, окрім України, для допомоги в оцінці достовірності висновків експерта залучається незалежна обізнана особа, яка має спеціальні знання у відповідній галузі. Доведено, що звернення до обізнаних осіб задля оцінки об'єктивності, обґрунтованості, повноти експертного дослідження допомагає з'ясувати причинно-наслідковий зв'язок між виявленими ознаками об'єкта експертизи і встановлюваним фактом, а також дає підстави для визначення належності, допустимості, достовірності й достатності висновку експерта. Водночас, рецензія фахівця не може слугувати джерелом доказів, а має лише допоміжний (консультативний, технічний) характер і може слугувати підґрунтям для призначення повторної (додаткової) експертизи або проведення перехресного допиту експерта та рецензента. Для реалізації прав осіб на справедливе правосуддя запропоновано такий порядок оцінки достовірності висновків експерта запровадити й в Україні, з внесенням необхідних змін до чинного вітчизняного процесуального законодавства щодо надання можливості учасникам кримінального процесу та потерпілому залучати обізнаних осіб в якості рецензентів висновків експерта*

**Ключові слова:** *доступ до правосуддя, обґрунтованість висновку експерта, об'єктивність висновку експерта, обізнані особи, рецензування висновку експерта, оскарження висновку експерта*

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## **RELIABILITY EVALUATION OF A FORENSIC EXPERT'S OPINION: WORLD PRACTICES AND UKRAINIAN REALITIES**

**Abstract.** *Improving the activities of pre-trial investigation and judicial review largely depends on the increased use of special knowledge in forensic investigative practice and, above all, the involvement of an expert and their analysis. The relevance of the subject matter is explained by the need to introduce new forms and approaches to evaluating the reliability of expert opinions, in particular with the involvement of independent specialists of the corresponding speciality. The purpose of this study was to provide arguments regarding the expediency of attracting knowledgeable persons as reviewers to evaluate the objectivity and completeness of forensic analysis, the correctness of the methods and techniques applied by the expert, and the validity of the opinion. To achieve this purpose, the following general scientific and special research methods were used: Aristotelian, comparative legal, functional, sociological, statistical, system and formal legal analysis, legal modelling, and forecasting. It was established that in the vast majority of countries of the world, except Ukraine, an independent, knowledgeable person with special knowledge in the corresponding field is involved to help evaluate the reliability of an expert opinion. It was proved that contacting knowledgeable persons to evaluate the objectivity, validity, completeness of expert research helps establish the causality between the identified features of the object of analysis and the fact that is subject to establishment, and also gives grounds for determining the affiliation, admissibility, reliability, and sufficiency of the expert opinion. At the same time, a specialist's review cannot serve as a source of evidence, but only has an auxiliary (advisory, technical) nature and can serve as a basis for appointing a second (additional) forensic analysis or a cross-examination of the expert and the reviewer. To exercise the rights of individuals to fair justice, it is proposed to introduce this procedure for evaluating the reliability of expert opinions in Ukraine, with the necessary changes in the current procedural legislation of Ukraine to provide an opportunity for participants in criminal proceedings and the victim to attract knowledgeable persons as reviewers of expert opinions*

**Keywords:** *access to justice, validity of the expert opinion, objectivity of the expert opinion, knowledgeable persons, reviewing the expert opinion, appealing the expert opinion*

### **INTRODUCTION**

Technological advance is changing the ways of illegal activities. Criminals actively use modern technological means and innovative technologies, leaving at the same time specific traces, including digital ones. This complicates the work of an investigator or detective in gathering evidence and requires the use of special knowledge. As V.V. Vapniarchuk fairly notes, “the specificity of the expert opinion in the system of other forms of existence of evidentiary information is that

thanks to special knowledge of the expert and analyses conducted by them, it becomes possible to identify hidden information, inaccessible to immediate perception, establish circumstances substantial for criminal proceedings (for example, the sanity of a person, pertinence of an object to cold-arms or fire-arms, pertinence of a certain substance to a narcotic, etc.)” [1, p. 307]. The results of a survey of 125 investigators of the Ministry of Internal Affairs of Ukraine in

the Poltavska, Sumska, and Kharkivska Oblasts indicated that 76.9% of them always involve an expert during the investigation of crimes. 16.2% of respondents reported that they had to appoint a forensic analysis twice (primary and repeated) to solve the same issues. In some cases (2.4%), the expert's opinions even refuted the investigative lead. 85% of respondents noted that the involvement of an expert has a positive effect on their activities and considerably accelerates the collection of evidence.

According to Part 2, Article 84 of the Criminal Procedural Code of Ukraine<sup>1</sup>, expert opinions are procedural sources of evidence, which are evaluated according to their inner conviction by the investigator, detective, prosecutor, investigating judge and court. The criteria for evaluating an expert opinion are its relevance, admissibility, and reliability. The first two criteria are usually clear to the evaluation subjects, while evaluating the reliability of an expert opinion in some cases causes certain difficulties. On this occasion, M.H. Shcherbakovskyi claims that the investigator and the court are incapable of independently evaluating either the scientific validity of the expert's conclusions, or the correct choice and application of analysis methods, or the compliance of the method with modern achievements of this branch of scientific knowledge because for such an assessment they must have the same special knowledge as the expert [2, p. 369]. The same opinion is shared by Canadian [3; 4], Australian [5; 6] and Chinese researchers [7]. At the same time, some scientists even warn about the possible loss of opportunities for the investigator and the court in evaluation of scientific validity of the expert opinion, the effectiveness of the research methods and techniques applied by the expert, objectivity of conclusions through the emergence of new types of forensic analysis and modern high-tech expert methods and techniques [8, p. 318]. Considering the above, O.S. Panievin and H.Ye. Sukhova especially emphasise the importance of evaluating the scientific validity of the expert opinion and the compliance of the analysis with expert methods [9, p. 143].

Notably, the problems of evaluating an expert opinion have been investigated by researchers for more than a hundred years. In particular, as early as the beginning of the 20<sup>th</sup> century, L.Ye. Vladymyrov argued that since judges do not have special knowledge and cannot evaluate the expert opinion unassisted, the reliability and objectivity of the expert opinion should be presumed [10, p. 236], that is, considered true until it is refuted. Yu.K. Orlov noted that due to the lack of special knowledge in the subjects of evaluating the expert opinions, they cannot establish their reliability unassisted, fully trust the expert opinions and overestimate their evidentiary value [11, p.40]. For his part, V.B. Romaniuk warns that unreliable expert opinions can mislead the investigator (prosecutor, judge) and lead to errors in making procedural decisions [12, p. 161].

The problems of using special knowledge in criminal proceedings were addressed by such leading Ukrainian and foreign scholars as H.K. Avdieieva [13], O.I. Haliashina [8], V.A. Zhuravel [13], O.M. Zinin [8], Yu.K. Orlov [11], V.B. Romaniuk [12], O. R. Rossynska [8], V. Ya. Tatsiy [13], M.H. Shcherbakovskyi [2], and others. Despite a fairly wide scope of issues investigated in this area, some issues remain understudied. In particular, this concerns the evaluation of the reliability of the expert opinion, which includes an evaluation of its scientific validity, the effectiveness of the analysis methods and techniques used by the expert, and the objectivity of the expert opinion formulated.

Considering the above, *the purpose of this study* was to investigate the possibility and procedure for evaluating the reliability of expert opinions in Ukraine, the USA, Germany, Italy, France, the Netherlands, Australia, China, the Russian Federation, and other countries, to carry out a comparative legal analysis of the statutory regulation of such activities in different countries, to determine the effectiveness of assessing the reliability of expert opinions as sources of evidence using special knowledge in various forms, to identify issues preventing a qualitative evaluation of the reliability of expert opinion by the prosecution and the court, as well as issues related to the implementation of the rights of the defence and the victim to appeal against the expert opinion, to develop proposals to improve the quality of evaluation of expert opinions based on the reliability criterion.

## 1. MATERIALS AND METHODS

To achieve the purposes of this study, the authors visited the official website of the European Court of Human Rights (ECHR)<sup>2</sup> and selected 15 decisions of the European Court of Human Rights on applications of individuals who failed to challenge the opinions of officially appointed experts in national courts by providing alternative opinions of independent experts involved by them or reviewing the expert's opinions. Additionally, the legal positions of the US Supreme Court were investigated in 17 decisions<sup>3</sup>, which contain recommendations on the procedure for evaluating evidence, including expert opinions. The analysis of the legal opinions of the ECHR and the US Supreme Court in these decisions helped formulate proposals for improving the quality of evaluation of expert opinions according to the reliability criterion. To identify the issues of evaluating the reliability of expert opinions in Ukraine, 45 sentences of criminal courts and 75 decisions and rulings of courts of civil and economic jurisdiction of Ukraine were analysed, in which the defence attempted to challenge the opinion of an officially appointed expert. To determine the role of forensic analysis in the investigation of crimes, 125 investigators of the Ministry of Internal Affairs of Ukraine were surveyed in the Poltavska, Sumska, and Kharkivska Oblasts. An anonymous survey of 220 potential participants in criminal proceedings

1. Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

2. European Court of Human Rights. (n.d.) Retrieved from <https://www.echr.coe.int/Pages/home.aspx?p=home>.

3. Supreme Court of the United States. U.S. Reports. Retrieved from <https://www.supremecourt.gov/opinions/USReports.aspx>.

(150 investigators, 15 employees of intelligence units, 16 prosecutors, 28 advocates, and 11 judges) was conducted to resolve issues regarding the ability to evaluate the scientific validity of the expert opinions unassisted.

To conduct a comparative legal analysis of the procedure for evaluating evidence in conditions of respect for human rights, the relevant legal provisions of numerous international, Ukrainian, and foreign regulations were studied and analysed, namely the Universal Declaration of Human Rights<sup>1</sup>, Convention for the Protection of Human Rights and Fundamental Freedoms<sup>2</sup>, International Covenant on Civil and Political Rights<sup>3</sup>, Constitution Of Ukraine<sup>4</sup>, Criminal Procedural<sup>5</sup> and Civil Procedural<sup>6</sup> Codes of Ukraine, the Law of Ukraine “On Forensic Examination”<sup>7</sup>, Criminal Procedural Code of the Federal Republic of Germany<sup>8</sup>, Criminal Procedural code of Italy<sup>9</sup>, Criminal Procedural Codes of the Russian Federation<sup>10</sup>, Turkmenistan<sup>11</sup>, Republic of Azerbaijan<sup>12</sup>, Republic of Armenia<sup>13</sup>, US Federal Rules of Evidence<sup>14</sup>, Decree of the President of Ukraine No. 837/2019 “On Urgent Measures to Implement Reforms and Strengthen the State” of November 8, 2019<sup>15</sup>.

The study used methods of theoretical analysis and synthesis in the investigation of the content of legal provisions and concepts contained in international regulations, Criminal and Civil Procedural Codes of Ukraine, the Law of Ukraine “On Forensic Examination”, in scientific publications of foreign and Ukrainian researchers, in judgements, decisions, and rulings of courts, which contain the results of evaluating evidence, including expert opinions according to the reliability criterion. The method of systematic analysis was used to clarify the content of human rights to fair justice and the rights of the defence and the victim to appeal the expert opinion and determine ways to implement them in Ukraine.

Formal legal analysis of the provisions of international and Ukrainian legislation on evaluating the reliability of an expert opinion allowed identifying the shortcomings and contradictions inherent in legal acts and formulate proposals for improving legal regulation, namely on the need for regulatory consolidation of the possibility of attracting knowledgeable persons to help evaluate the reliability of an expert opinion and its reasoned appeal. Using the comparative legal method, the experience of individual countries in evaluating the reliability of a forensic expert's opinion as a source of evidence was studied. The method of legal forecasting allowed identifying further likely areas for implementing the procedure for evaluating expert opinions in Ukrainian forensic investigative practice. In the process of solving the problems under study, other separate scientific methods of cognition were also employed, namely Aristotelian (to typify expert errors and their consequences), functional (to establish the influence of unreliable expert conclusions on the procedure of gathering and evaluating evidence-based information), legal modelling (to clarify the state and prospects of implementing the procedure for evaluating expert opinions), sociological and statistical (to analyse the results of applying special knowledge in the work of an investigator, generalising expert errors), etc.

## 2. RESULTS AND DISCUSSION

Making any intellectual and volitional decision, including an expert opinion, has a certain logic and does not exclude the possibility of individual errors. As Jonathan Koehler correctly states, an expert opinion is the result of a person making a certain decision, which, like all other decisions, contains the inevitable potential for errors [14, p. 89]. That is why Anglo-American criminal proceedings pay considerable attention to evaluation of the scientific validity

1. Universal Declaration of Human Rights. (1948, December). Retrieved from <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.
2. The European Convention on Human Rights. (1950, November). Retrieved from <https://www.coe.int/en/web/human-rights-convention/the-convention-in-1950>.
3. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.
4. Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.
5. Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.
6. Civil Procedural Code of Ukraine. (2004, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/1618-15#Text>.
7. Law of Ukraine No. 4038-XII “On Forensic Examination”. (1994, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/4038-12#Text>.
8. Criminal Procedural Code of Germany. (1987, April). Retrieved from [https://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html](https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html).
9. Criminal Procedural Code of Italy. (2011). Retrieved from [https://www.legislationline.org/download/id/4357/file/Italy\\_CPC\\_updated\\_till\\_2012\\_Part\\_1\\_it.pdf](https://www.legislationline.org/download/id/4357/file/Italy_CPC_updated_till_2012_Part_1_it.pdf).
10. Criminal Procedural Code of the Russian Federation. (2001). Retrieved from <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102073942>.
11. Criminal Procedural Code of Turkmenistan. (2009, April). Retrieved from [https://online.zakon.kz/document/?doc\\_id=31344376](https://online.zakon.kz/document/?doc_id=31344376).
12. Criminal Procedural Code of the Republic of Azerbaijan. (2000, July). Retrieved from [https://online.zakon.kz/document/?doc\\_id=30420280](https://online.zakon.kz/document/?doc_id=30420280).
13. Criminal Procedural Code of the Republic of Armenia. (1998, July). Retrieved from [https://www.legislationline.org/download/id/4261/file/Armenia\\_CPC\\_am2006\\_ru.pdf](https://www.legislationline.org/download/id/4261/file/Armenia_CPC_am2006_ru.pdf).
14. Federal Rules of Evidence. (1975, January). Retrieved from [https://www.uscourts.gov/sites/default/files/federal\\_rules\\_of\\_evidence\\_-\\_dec\\_1\\_2019\\_0.pdf](https://www.uscourts.gov/sites/default/files/federal_rules_of_evidence_-_dec_1_2019_0.pdf).
15. Decree of the President of Ukraine No. 837/2019 “On Urgent Measures to Implement Reforms and Strengthen the State”. (2019, November). Retrieved from <https://www.president.gov.ua/documents/8372019-30389>.

of expert opinions because without such an assessment, courts sometimes made unjust decisions. In particular, in the United States, as part of the Innocence Project, which aims to analyse unjust judgements based on the genetic examination opinions, 375 people have been rehabilitated so far (among them, 21 people were sentenced to death, and 44 people have pleaded guilty to crimes that they did not commit). In 259 cases, experts made mistakes when identifying individuals based on DNA [15].

In the United States, according to Rule 702 of the Federal Rules of Evidence, the court, upon evaluating evidence, including expert opinions, involves persons (witnesses) who have special knowledge, skills, experience, and appropriate education to give evidence in the form of an opinion or other form<sup>1</sup>. At the same time, according to the Daubert standard, one of the methods for evaluating evidence-based information is its review [16]. According to the U.S. Supreme Court decision in the case of *Kumho Tire Co. v Carmichael*, “Daubert criteria” should be used upon evaluating the opinions and testimony of experts [17]. The means of evaluating the reliability of evidence-based information of all types in the United States are their peer review and analysis by representatives of the corresponding scientific community [16, p. 39]. William King and Edward Maguire also argued that for a rational assessment of the evidentiary value of an expert opinion, an investigator needs to verify its reliability with the help of another expert [18, p. 159].

Interesting and exemplary were the studies of members of the American Psychological Association Margaret Bull Kovera and Bradley D. McAuliff, who conducted a survey of 554 judges and found that 17% of them always recognise the expert opinions as reliable, regardless of their completeness and correctness of justification. The decision of this part of the judges is not influenced even by negative scientific publications about the unreasonableness of the expert opinions. 12% of judges indicated that they had to deal with unreliable expert opinions, but they found out about this after the procedural decision was made. Having received such results of the study, the scientists concluded that the judges are incapable of evaluating the reliability of the expert opinions unassisted and suggested that the advocates involve a specialist of the corresponding speciality to explain and verify the objectivity of the expert opinions. They also note that to recognise an expert opinion as evidence, Canadian judges can involve another expert to analyse and explain it, and advocates can involve knowledgeable persons to evaluate the reliability of opinions [3, p. 582-584].

The report of the group of advisers to the President of the United States on science and technology indicates the presence of numerous expert errors during the study of various objects. Most mistakes are made by experts in the process of comparative research of analysis objects, when the subjective factor plays the greatest role in the

formulation of an expert opinion [19, p. 3-5]. According to the Federal Bureau of Investigation (USA), the results of microscopic expert examination of hair contain errors in at least 90% of cases [20]. Errors also occur during DNA analysis, when an expert accidentally mixes samples, uses “contaminated” laboratory utensils, or misinterprets the result of the study. The statistical analysis conducted by scientists indicated that the frequency of such errors reaches 1 in 306 cases [19, p. 7-10]. An independent generalisation of criminal proceedings demonstrated that some procedural decisions were made based on erroneous expert opinions obtained using incorrectly selected analysis methods [19, p. 26].

Considering these and other negative examples, scientists and practitioners suggest various measures aimed at eliminating these shortcomings. Thus, scientists at the University of Denver (USA, Colorado) believe that independent review of expert opinions allows identifying substantial methodological shortcomings that misled judges [16, p. 95]. Based on the analysis of materials of the investigation of crimes and court sentences, scientists of the University of Melbourne note the presence of investigative and judicial errors in cases when investigators and judges, upon evaluating the expert opinions on the analysis of hair, lead bullets, hand marks, voice, bites, etc. objects, did not involve knowledgeable persons to analyse unreliable expert opinions, but recognised them as sources of evidence only because the experts had certificates for conducting analysis [5, p. 984].

In the Netherlands, an investigating judge may, at the request of an accused person, invite knowledgeable persons to analyse the opinion of an officially engaged expert. M. Malsch and J. Frekelton note that the courts of the Netherlands, relying on the decision of the European Court of Human Rights, provide an opportunity for the accused to appeal the opinions of an officially appointed expert by hearing another expert proposed by the accused [21, p. 42].

In Germany, in accordance with Part 2, Article 245 of the Criminal Procedural Code of Germany, the court is obliged, at the request of the defendant or prosecutor, to attract a knowledgeable person to obtain new and analyse existing evidence, including the opinion of an officially involved expert<sup>2</sup>. The explanations of the Supreme Court of Germany state that during the evaluation of the expert opinion it is necessary to verify the content and logical validity of the opinions, the correctness of the methods used by the expert and the compliance of these features with expert methods published in the literature. The German Supreme Court strongly recommends that such an evaluation be carried out particularly carefully in criminal proceedings if the defence appeals against the opinion of an officially appointed expert through a review or the opinion of an independent expert, comparing all materials with each other [22].

The United Kingdom Forensic Regulator's newsletter emphasises the importance of expert witness assistance

1. Federal Rules of Evidence. (2021). Retrieved from <https://www.rulesofevidence.org/table-of-contents/>.

2. Criminal Code of Germany. (1871, May). Retrieved from <https://www.gesetze-im-internet.de/stgb/BJNR001270871.html/>.

in evaluating expert opinions and states that such persons are obliged to assist judges and jurors in forming their independent opinions on the validity of expert opinions [23, p. 7]. The UK's Forensic Regulator's Annual Report for 2020 points to the need for a more thorough examination of scientific evidence (expert opinions) in order to adhere more strictly to quality standards and proposes to increase the requirements for the work of independent expert witnesses to help make such an assessment, to the quality standards of forensic examination [24, p. 12]. These proposals are included in the draft law on the activities of the Forensic Regulator and Biometric Strategy, which is under consideration in the parliament [25].

Shaofang Wang, a researcher in the Department of Forensic Science at Wuhan University (China), emphasises the importance of analysing the reliability of an expert opinion in order to avoid mistakes in the investigation of crimes. The author suggests that investigators, judges, prosecutors, advocates, victims, suspects, accused, and other participants in the proceedings, in order to analyse the expert opinions and explain them, involve special subjects – expert assistants and even presents a model of the procedural status of such persons (their rights and obligations, level of education and training). The author also proposed an algorithm for evaluating the reliability of an expert opinion [26].

In Australia, to recognise an expert opinion as a source of evidence upon its evaluation, courts establish whether the parties to the case had access to expert advice on this opinion (especially in criminal proceedings) [5]. According to Article 225 of the Criminal Procedural Code of Italy, each of the parties has the right to involve its “technical consultants” not only to conduct a forensic analysis, but also to review expert opinions<sup>1</sup>.

Notably, an independent review of expert opinions is widespread in the judicial practice of the Russian Federation, where reviewers are private experts and employees of state forensic institutions, and reviews are used both in procedural form (receiving testimony from a specialist or inclusion of a review to the case as a specialist's judgement) and in non-procedural form (written consultations commissioned by the defence and the victim). At the same time, Russian researchers argue that to refute the position of the prosecution, the defence should involve independent specialists to analyse the scientific validity of the expert opinion [27, p. 150; 28, p. 1665].

Thus, the analysis of the legislation and numerous studies of scientists from the USA, Canada, Great Britain, Germany, Italy, the Netherlands, Australia, China, the Russian Federation, and other countries demonstrated that in these countries, to help evaluate the reliability of the opinion of a forensic expert, the investigator and the court involve knowledgeable persons (mainly, they are called

expert witnesses). The defence party engages an independent expert (technical assistant) to conduct an alternative forensic analysis or review the opinion of an officially appointed expert. In some countries (USA, Germany, Italy), if the defence disagrees with the opinion of an officially appointed expert, the involvement of an independent expert to analyse the reliability of their opinion is mandatory. Moreover, in Germany, Australia, and other countries, an expert opinion is recognised by the court as a source of evidence only after it is convinced that the defence party has exercised the right to involve an independent expert or reviewer of an expert opinion.

These provisions are important for implementing the procedure for reviewing forensic expert opinions in the legal system of Ukraine, which is discussed in numerous publications and public discussions [13; 29-31]. Notably, nowadays, in accordance with Paragraph 2 of the Procedure for Reviewing the Opinions of Forensic Experts<sup>2</sup>, the purpose of reviewing opinions is solely to improve the professional skills of experts, improve the quality and validity of their future opinions, and not to help evaluate the expert opinion. Review is not conducted to refute or confirm the opinions. At the same time, the opinion of a forensic expert can only be reviewed by a person who is an employee of a state forensic institution. Moreover, state forensic institutions are not required to report negative results of their review to the persons who commissioned the review. In other words, there is a possibility that the basis of judgements and court decisions may be erroneous expert opinions.

Such monopolisation of the practice of evaluating the results of forensic expert activity is erroneous and does not meet international and European standards. On the other hand, independent review of the expert opinion by a person who has special knowledge in the same area of expertise would make it possible to establish the facts of compliance of the expert research with special methods, verify the completeness of the analysis and the objectivity of the opinions, make sure that the results obtained are justified, etc. Undoubtedly, a review of the expert opinion received by the defence party, the victim, a representative of a legal entity, etc. by directly contacting their chosen specialist who has scientific or other special knowledge in the corresponding field would contribute to establishing the objective truth in the case and would encourage forensic experts to conduct better expert analysis. Furthermore, the prohibition of independent review of the expert opinion may prevent the prosecutor, the head of the pre-trial investigation body, the investigator from fully and impartially investigating the circumstances of criminal proceedings, identifying both those circumstances that incriminate and those that justify the suspect, the accused, as well as circumstances that mitigate or aggravate their punishment,

1. Criminal Procedural Code of Italy. (2011). Retrieved from [https://www.legislationline.org/download/id/4357/file/Italy\\_CPC\\_updated\\_till\\_2012\\_Part\\_1\\_it.pdf](https://www.legislationline.org/download/id/4357/file/Italy_CPC_updated_till_2012_Part_1_it.pdf).

2. Order of the Ministry of Justice of Ukraine No. 335/5 “On Approval of the Procedure for Reviewing the Opinions of Forensic Experts”. (2020, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0131-20#Text>.

providing them with a proper legal evaluation and ensuring the adoption of legal and impartial procedural decisions (Part 2, Article 9 of the Criminal Procedural Code of Ukraine)<sup>1</sup>.

This position is supported not only by legal scholars, but also by practitioners. Thus, a survey of 220 people (including 150 investigators, 16 prosecutors, 15 employees of intelligence units, 11 judges, and 28 advocates) indicated that a total of 75% of respondents are incapable of evaluating the reliability of an expert opinion without the help of knowledgeable persons. This opinion was expressed by 65% of investigators, 64% of prosecutors, 87% of intelligence unit officers, 73% of judges, and 86% of advocates. The overwhelming majority of respondents (78%) consider it necessary to legislate the involvement of knowledgeable persons (independent experts, specialists, reviewers, professionals in a particular field) to help evaluate the reliability of the expert opinion.

The courts of Ukraine, due to the complexity of evaluating an expert opinion without the help of knowledgeable persons, are forced to recognise the importance and legality of independent review of expert opinions. Thus, the Decision of the Supreme Court of Ukraine of 14.01.2021 in case No. 922/2216/18<sup>2</sup> noted that the courts' "failure to consider" the review as evidence violates the adversarial principle, and "the review is not inherently a repeated or additional analysis, as it does not evaluate evidence. The expert who provides the review evaluates, in particular, the methods and completeness of the analysis, the logic of the conclusion". In the verdict of the Svyatoshynskiy District Court of the city of Kyiv dated January 15, 2018 in case No. 759/846/17, it is indicated that according to the results of the analysis of an independent review of the expert opinion as written evidence, the court considered the expert opinion No. 64/9/2016 unfounded, biased, and inconsistent with the legislation of Ukraine<sup>3</sup>.

Thus, in Ukraine, the judicial practice of using reviews of forensic experts' opinions is starting to develop. Moreover, this practice is quite consistent with the ECtHR decisions, which note that it can be difficult to challenge a forensic report without the help of another expert in the corresponding area of expertise, and in such cases, it would be useful to review the expert opinion [32]. In particular, the ECHR decision in the case of *Borgers v. Belgium* (*Borgers v. Belgium*) dated 30.10.1991 stated that the parties to the trial must be given the opportunity to get acquainted

with all the evidence and comment on it, to involve an "independent representative of the national legal system" to influence the court's decision"<sup>4</sup>.

Therefore, to receive assistance in verifying the objectivity and reliability of the expert opinion, each party to the proceedings must have the legal right to contact the appropriate specialist. The specialist may present the results of the analysis of the expert opinion in the form of a written document – a review, consultation, analytical note, expert opinion, etc. Such a document is not a source of evidence, but if errors are found in the expert opinion that affected the wording of the conclusions, it should be considered by the investigator (court) and serve as a basis for appointing a second or additional forensic analysis. An additional forensic analysis may be assigned to verify or clarify disputed information that the reviewer drew attention to upon reviewing the expert opinion.

Legalisation of reviews of expert opinions will not only reduce the number of investigative (judicial) errors, but also prevent illegal actions of incompetent and dishonest reviewers to provide biased reviews by publishing information about them in the review text (last name, education, academic degree, academic title, length of service and place of work, etc.). It would also be appropriate to make provision for the possibility of cross-examination of the reviewer and the executor of the reviewed expert opinion.

The importance of introducing independent review of expert opinions is also confirmed by the fact that the President of Ukraine issued Decree No. 837/2019<sup>5</sup> in which, as urgent measures for the implementation of reforms, the development and submission to the Verkhovna Rada of Ukraine of a draft law on amendments to certain legislative acts of Ukraine on the introduction of peer review of a forensic expert opinion and the introduction of a mechanism for evaluating the quality of legal aid provided using *peer review*. In compliance with this Decree, it would be correct to supplement Part 1, Article 94 of the Criminal Procedural Code of Ukraine<sup>6</sup> with the following text: "To help evaluate the reliability of an expert opinion, it can be analysed (reviewed) by a person who has the appropriate higher education, scientific degree, and practical work experience of at least 10 years in forensic examination. The results of such an analysis do not constitute a source of evidence, but are of an auxiliary (advisory) technical nature, cannot contain an evaluation of the evidence or instructions on procedural decision to be made, but if errors are found in the

1. Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

2. Resolution of the Supreme Court of Ukraine No. 922/2216/18. (2021, January). Retrieved from <https://reyestr.court.gov.ua/Review/94151198>.

3. Judgement of the Svyatoshynskiy District Court of Kyiv No. 759/846/17. (2018, January). Retrieved from <https://reyestr.court.gov.ua/Review/71570540>.

4. Decision of the European Court of Human Rights "Case of *Borgers v. Belgium*". Application No. 12005/86. (1991, October). Retrieved from <http://hudoc.echr.coe.int/rus?i=001-57720>.

5. Decree of the President of Ukraine No. 837/2019 "On Urgent Measures to Implement Reforms and Strengthen the State". (2019, November). Retrieved from <https://www.president.gov.ua/documents/8372019-30389>.

6. Criminal Procedural Code of Ukraine, op. cit.

expert opinion that affected the wording of the conclusions, it should be considered by the investigator (investigating judge, court) and serve as a basis for ordering a second (additional) expert examination or cross-examination of the expert and the reviewer”.

Legalising reviews of expert opinions would also allow the defence to independently gather information and evaluate the reliability of the expert opinion as a source of evidence, which, for its part, would reduce the number of investigative (judicial) errors. The defence's lack of the right to appeal against expert opinions leads to appeals to the European Court of Human Rights, which in its decisions has repeatedly noted cases of violation of the principle of equality of arms, considering the difficulties faced by clients upon trying to challenge the prosecution's expert opinions. In particular, in the ECHR decision in the case of *Khodorkovsky and Lebedev v. Russia* of 25.07.2013, applications Nos. 11082/06 and 13772/05<sup>1</sup>, it is indicated that the court's rejection of reports of specialists made by examining the expert opinions (without examining the objects of forensic analysis), which constitute nothing more than reviews of the expert opinions, is a violation of Article 6 of the Convention (the right to a fair trial). The European Court also believes that to effectively challenge expert opinions, the defence party must be capable of providing alternative expert opinions, and the domestic court's refusal to review expert opinions in court violates the balance between the defence and prosecution parties in the matter of gathering and providing expert evidence and disregards the principle of equality of arms.

## CONCLUSIONS

Based on a comparative legal analysis of the legislation of the countries of the Anglo-American legal system (USA, Canada, Great Britain, Australia), continental (Italy, Germany, Netherlands, Russian Federation, Ukraine), and Far Eastern system (China), which regulate the procedure for evaluating evidence, including expert opinions according to the reliability criterion, it was established that in all these countries, except Ukraine, an independent knowledgeable person is involved with special knowledge in the corresponding area of expertise. Such a person is obliged, orally or in writing, to provide the court, jury, parties to the proceedings and the victim (at their request) with their judgements on the essence of the facts established by the expert, the completeness of the analysis, the correctness of the

methods and techniques used by the expert, and the validity of the conclusions. Contacting knowledgeable persons to evaluate the objectivity, validity, completeness of expert research helps establish the causality between the identified features of the object of analysis and the fact that is subject to establishment, and also gives grounds for determining the affiliation, admissibility, reliability, and sufficiency of the expert opinion as a source of evidence. The involvement of knowledgeable persons to help evaluate the expert opinions is associated with the fact that scientists have proven the presence of errors in expert opinions, which served as the basis for making unfair procedural decisions (even regarding death sentences). If the opinions of an officially appointed expert and an independent expert or reviewer differ, the court cross-examines them to form an unbiased objective opinion regarding the expert opinion. To exercise the rights of individuals to fair justice, it would be advisable to introduce such a procedure for evaluating the reliability of expert opinions in Ukraine.

Generalisation and analysis of the results of the survey conducted among investigators, judges, employees of operational units, prosecutors, and lawyers demonstrated that these persons are incapable of evaluating the reliability of the expert opinion without the help of knowledgeable persons with special knowledge in a particular area of expertise. The overwhelming majority of these individuals support the introduction of amendments to the procedural legislation of Ukraine regarding the possibility for participants in criminal proceedings and victims to attract knowledgeable persons to help evaluate the reliability of expert opinions.

To normalise the procedure for evaluating the reliability of expert conclusions by reviewing them by knowledgeable persons from the same field of knowledge, it is considered appropriate to introduce the necessary changes to the procedural legislation of Ukraine. At the same time, such a review cannot serve as a source of evidence, but only has an auxiliary (advisory, technical) nature. The review cannot contain an evaluation of the evidence or a reviewer's judgement regarding the procedural decision to be made by the procedural person. If errors are found in the expert opinion that affected the wording of the conclusions, the review should be considered by the investigator (investigating judge, court) and serve as a basis for assigning a second (additional) expert examination or conducting a cross-examination of the expert and the reviewer.

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