

LEGAL REGULATION OF FORENSIC HISTORICAL AND ARCHEOLOGICAL EXAMINATIONS IN UKRAINE

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The article content deals with the first attempt to systematically analyze the legal regulation of forensic historical and archaeological examinations in Ukraine. The analysis is based on the synthesis of elements from various sciences ensuring the implementation of forensic examinations in a relevant area. Currently, in Ukraine, forensic historical and archaeological examinations are at a formative stage, therefore the system of legal and scientific support for historical-archaeological research necessitates in-depth research. At present, there are no special monographs, textbooks, manuals dedicated to the systematic analysis of forensic historical and archaeological examination, and thus, the author of this article suggests her view of the issue, which is a component of forensic expert support of justice in Ukraine. The coverage of this issue requires a comprehensive multi-level combination of knowledge from law, forensic science, history, archeology and some other sciences.

Keywords: *legal regulation, forensic examination, historical and archaeological examinations, monuments, forensic archaeologist.*

Introduction

Preservation of archaeological heritage for future generations is viewed as one of the main directions of global cultural policy in the modern world, as an integral rule for solving a number of tasks of contemporary development. With regard to Ukraine, archaeological heritage is one of the vital components of the historical and cultural heritage, evidence of its cultural wealth and depth of national historical memory. The Constitution of Ukraine stipulates that cultural heritage is protected by law and the State ensures the preservation of historical monuments and other objects of cultural value (Article 54 of the Ukraine Constitution).

Aim

The Article Aim is to analyze current legal regulation which ensures the implementation of forensic historical and archaeological examination.

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Discussion

The culture of any nation belongs to those basic values that carry not only material and non-material heritage, but also a certain genetic code. They distinguish and, at the same time, unite people, allow them to be proud of their ancestors and are an incentive for becoming the same object of pride for descendants. However, cultural heritage, although multiplying every year, also requires preservation and protection. The significance of this function of the state and its citizens is evidenced, among other things, by the fact that almost all modern democratic states guarantee preservation and multiplication of cultural heritage at the level of constitutions and special laws. Ukraine is no exception in this aspect where an extensive legislative environment has been formed to protect the cultural heritage of Ukrainians and other people of our country [1, p. 31].

It is absolutely clear that forensic historical and archaeological examination combines both provisions of forensic science, and archeology — (from “archo” and “logy”) — it is a science that studies historical development of society based on material remains of life and activities of people: material archaeological monuments from the Stone Age to the Middle Ages [2]. Therefore, for a proper understanding of the essence of the legal framework of historical and archaeological examination, it is vital to take into account legal regulations governing these types of activities. In this article, we will study peculiarities of legal regulation of forensic historical and archaeological examination.

Forensic historical and archaeological examination is a new type of forensic examination within the system of expert support of justice in Ukraine. To be precise, this category is included in the List of types of forensic examinations and expert specialties in which qualification of a forensic expert is awarded to experts of forensic science institutions of the Ministry of Justice of Ukraine [3] in accordance with the Order of the Ministry of Justice No. 243/5: *On the Approval of Amendments to Some Regulatory Legal Acts on Forensic Activities* dated January 20, 2021. Currently, in accordance with the Order of the Ministry of Justice of Ukraine No. 2770/5: *On Amendments to the Order of the Ministry of Justice of Ukraine No. 53/5 dated October 8, 1998* [4] of 05.08.2021, provisions of the Instructions on Appointing and Performing Forensic Examinations and Scientific and Methodological Guidelines on Preparing and Appointing Forensic Examinations and Expert Research are complemented by rules on historical and archaeological examination [5].

It should be stressed that with independence proclamation, Ukraine devotes much attention to issues of spirituality, national education, preservation and use of cultural values. The first steps to provide protection of cultural heritage in independent Ukraine were taken with adoption of *The Basics of Ukrainian Legislation on Culture* dated February 14, 1992 [6]

(expired on the basis of the Law of Ukraine No. 2778-VI dated 14.12.2010). In turn, the Resolution of the Cabinet of Ministers of Ukraine No. 466 dated August 12, 1992, approved the Regulation on the State Register of National Cultural Property [7], which, alongside everything else, defines the concepts: *historical monuments*, *archeological monuments* etc. The Resolution also obliged ministries, other central bodies of state executive power, public associations and individual citizens, who are in charge of or own objects of national cultural heritage, to ensure their preservation; prohibited denationalization, privatization, and export of objects of national cultural heritage abroad. These legal regulations have laid the groundwork for cultural heritage protection and development of appropriate state policy [1, p. 32].

At the same time, the Verkhovna Rada passed a number of regulations (on administrative offenses, property, privatization, state border, local self-government, export, import and return of cultural values, etc.) designed to protect cultural values within the limits of their authority as well as punish law violators.

The adoption of the Ukraine Constitution dated June 28, 1996, has become an important stage in normalizing legal support for cultural heritage protection. As stated in Art. 11 of the Basic Law, the state contributes to consolidation and development of the Ukrainian nation, its historical awareness, traditions and culture, as well as the development of the ethnic, cultural, linguistic and religious identity of all indigenous people and national minorities of Ukraine. According to the fourth section of Article 54 of the Ukraine Constitution [8], cultural heritage is protected by law. In agreement with the fifth section of the same article, the state ensures preservation of historical monuments and other objects of cultural value, takes steps to return to Ukraine the cultural values of people located beyond its borders [1, p. 32].

In 2000, the Verkhovna Rada of Ukraine adopted the Law: *On Protection of Cultural Heritage*, which imposes state management of cultural heritage protection on the Cabinet of Ministers of Ukraine and competent state authorities (central, local), defines their functions (Articles 3–6), ensures formation of scientific and methodological as well as advisory councils for the development of principal areas of cultural heritage protection, allows to involve experts, the public, to monitor the condition of monuments and access excursions, etc. The Law title appeals to *cultural heritage* as a set of cultural objects inherited by humanity: it is a much broader term in contrast to *cultural values*, since the latter must be found in *heritage*. It is a tribute to an essential document of modern time *The Convention on the Protection of the World Cultural and Natural Heritage* approved by UNESCO in 1972, but ratified in Ukraine only in 1988 [9, p. 340].

Legal protection of objects of cultural heritage starts with their identification, research and inclusion in the State Register, irrespective of ownership type, according to the categories of national and local significance. At present, the list of monuments is compiled by the territorial principle, that is, for each region of Ukraine individually. At the same time, numerous cases of

destruction of cultural monuments, illegal excavations and export of archaeological finds outside Ukraine as well as their illegal sale to private collections revealed failure to address the majority of issues associated with archaeological heritage protection. In light of this, on March 18, 2004, a separate Law: *On Protection of Archaeological Heritage* [10] was adopted, which contains multiple proposals of researchers and public members. The law, in particular, includes definitions of such concepts as *archaeological heritage of Ukraine*, *archaeological exploration* and *archaeological excavations*, *scientific research on archaeological heritage*, etc.; regulates powers of authorities of cultural heritage protection; procedure for granting permits and approvals by cultural heritage protection authorities. For the first time, the Law clearly outlines the rights and responsibilities of archaeological heritage researchers and the legal status of archaeological expeditions. On the other hand, the first section of Art. 18 of the Law highlights that finds received as a result of archaeological research are state property. And in conformity with the second section of the same article, in accordance with Ukrainian legislation, finds are protected by the state on an equal basis with the objects of Ukrainian museum fund from the moment of their discovery until transfer to storage. What is more, the Law sets obligations for legal entities and natural persons who use or own archaeological objects [1, p. 34].

It is worth noting that the Law: *On Protection of Archaeological Heritage* amended other laws on cultural heritage protection. In particular, Art. 298 of the Criminal Code of Ukraine regarding the imposition of criminal liability for intentional illegal spoiling, destruction or impairment of historical or cultural monuments was amended.

The first section of Article 298 of the Criminal Code of Ukraine strengthened liability for illegal archaeological activity. Namely, the illegal conduct of archaeological explorations, excavations, other earth or underwater works at the site of archaeological heritage shall be punishable by a fine up to 100 tax-free minimum incomes, or restraint of liberty for a term up to two years, or imprisonment for the same term, with deprivation of the right to occupy certain positions or engage in particular activities for a period of up to three years or without it (Article as amended by Law No. 2518-VI dated 09.09.2010) [11]. However, individual scientists uphold the opinion that a specified punishment cannot be called a sufficient protective mechanism and does not protect monuments primarily from *black archaeologists*, who conduct illegal excavations in order to find movable objects originating from objects of archaeological heritage [1, p. 35].

It is also worth emphasizing the Land Code of Ukraine [12] which has undergone negative changes on the basis of Law No. 1423-IX: *On Amending some Regulations of Ukraine on Improving the Administration and Deregulation System in Land Relations* dated 04.28.2021. Article 186¹ is excluded from the Land Code of Ukraine, which provisions from section 3 stipulated that “the land management project regarding the allocation of the land plot ... for historical and cultural purpose, a land plot located on the territory of historical area of

settlements, a land plot where objects of cultural heritage are located, is also subject to approval with the body for cultural heritage protection”. With disappearance of this rule, the body in charge of cultural heritage protection is deprived of the mechanism to monitor objects of cultural heritage (in particular, archeological monuments). There is a probability that land plots where archeological monuments are located may be illegally transferred into possession and used. For example, for agricultural purposes or construction.

Archaeological heritage is an essential component of cultural heritage, as is also evidenced by signing of international treaties and conventions. Today, Ukraine has ratified a number of international conventions on protection, preservation and multiplication of cultural heritage. In particular, the European Convention on the Protection of the Archaeological Heritage (revised) [13], the Convention on the Protection of the Underwater Cultural Heritage [14], etc., have been ratified. In conformity with the Constitution of Ukraine and the Law: *On International Agreements of Ukraine*, the indicated international acts are part of national legislation and shall be enforceable. In addition, a number of bilateral agreements in the field of culture have been adopted, which also help to enhance cultural heritage protection and return cultural monuments that are currently abroad due to various reasons [15, p. 82].

Having declared intention to become a member of the European Union, our state is gradually adapting its national legislation to the EU one. The European Convention on the Protection of the Archaeological Heritage plays a major role in this process. The document is the second edition of the Convention adopted on May 6, 1969. The need for its update was linked to the rapid development of new territories as well as settlements in Europe and the threat of destruction of archaeological heritage, and also multiple cases of illegal excavations and, as a result, abduction and transfer of artifacts found while excavations. For a common understanding by different states and clarification of legal terminology, the Convention defines the main concepts and objects of archaeological heritage, contains a list of obligations for participating state-parties and fundamental measures required for protection and maintenance of archaeological heritage objects. An integral part of archaeological heritage protection in accordance with the Convention is research, creation of scientific reports based on its results, maps and schemes of objects location, organization of international scientific forums, etc. Participating parties are also obliged to prevent the illegal trafficking of archaeological heritage objects, carry out educational activities among population, exchange specialists and technologies, etc. [16, p. 220].

All of the above-mentioned legal regulations contain provisions related to protection and preservation of archaeological monuments which can be objects of forensic historical and archaeological examination. Forensic archaeologists in one way or another should keep in mind the specified provisions while professional activity. With specific regard to forensic examination, forensic activity in Ukraine is governed by certain legal regulations. The legal foundations for

organization and conduct of forensic examinations in Ukraine are determined by the system of regulations of current legislation, which include: the Constitution of Ukraine [8], international treaties and agreements on mutual legal assistance and cooperation, the Civil Procedural Code of Ukraine [17], the Criminal Procedural Code of Ukraine [18], the Commercial and Procedural Code of Ukraine [19], the Code of Ukraine on Administrative Offenses [20], the Code of Administrative Proceedings of Ukraine [21], the Customs Code of Ukraine [22], the Law of Ukraine: *On Judicial Examination* [23], the Law of Ukraine: *On Enforcement Proceedings* [24], the Law of Ukraine: *On Bar* [25], departmental instructions, in particular, the Instructions on Appointing and Performing Forensic Examinations and Scientific and Methodological Guidelines on Preparing and Appointing Forensic Examinations and Expert Research, approved by Order of the Ministry of Justice of Ukraine No. 53/5 dated 08.10.1998 and registered in the Ministry of Justice of Ukraine under No. 705/3145 on 03.11.1998 [5].

Article 1 of the Law of Ukraine: *On Judicial Examination* laid down the definition of forensic examination: “research based on specific expertise in the field of science, technology, art, crafts, etc., on objects, phenomena and processes aimed at providing a conclusion on issues that are or will be the subject of court proceedings” [23]. General provisions governing forensic expert activity are quite similar in a wide range of codes. It is impossible to consider in detail rules in various types of court proceedings within the context of this article. For example, let us take a look at provisions enshrined in the Criminal Procedural Code. As stipulated in the first section of Art. 242 of the Criminal Procedural Code of Ukraine [18], expert examination shall be conducted by an expert upon request of a party to criminal proceedings, or on commission from the investigating judge or court, when special knowledge is necessary to find out circumstances of importance for criminal proceedings. Forensic examination as one of means of gathering evidence, contributes to a multidisciplinary, full and objective investigation of circumstances relevant to criminal proceedings, to adoption of legal and reasoned court decisions. Such procedural action is possible in cases when it is not expedient to establish circumstances important to a criminal offense with the help of other means of proof, identify the perpetrator (s) and prove his/her involvement in a crime, determine the nature and amount of the damage caused, as well as, if necessary, focus on issues arising while criminal proceedings and belonging to the expert’s area of expertise. As stated in the first section of Article 69 of the Criminal Procedural Code of Ukraine, an expert in a criminal proceeding is a person who possesses scientific, technical or other specific expertise, has the right in accordance with the Law of Ukraine: *On Judicial Examination* to carry out forensic examination and who is entrusted to research objects, phenomena and processes containing information on circumstances of criminal offense commission, provide a conclusion on issues emerging while criminal proceedings and related to the area of his/her expertise.

Provisions specified in the aforementioned legal regulations extend to the implementation of all types of forensic examinations, but each expert specialty has its own characteristics. The Scientific and Methodological Guidelines on Preparing and Appointing Forensic Examinations and Expert Research determine the list of objects of forensic historical and archaeological examination, dividing them into two groups: land plots with material remains of humanity existence in past eras, regardless of their state of preservation, as well as accounting and research documentation on historical (subsurface) and/or archaeological objects of cultural heritage. The Guidelines also include approximate list of solvable issues being addressed within the framework of forensic historical and archeological examination. It should be highlighted that the above-mentioned list is not exhaustive and the commissioner of forensic examination may address other issues to a forensic scientist for resolution [5].

In guidelines, attention is also drawn to the issues of conducting a multidisciplinary examination: “determination of the limits of destruction/spoiling within the chronological group, the cultural value possessing a historical significance, rarity level, preservation, attribution of archeological objects and determination of the amount of expenses for archeological research on an archeological heritage object are carried out while multidisciplinary construction-appraisal, historical-archeological and art examination in order to measure the value of a monument/ the amount of damage caused to the state as a result of destruction, spoiling and damaging of archeological heritage objects” [5]. However, despite the existence of the enshrined rule in scientific and methodological guidelines, in practice, we face certain issues due to lack of guidelines on multidisciplinary research.

The peculiarity of forensic historical and archaeological examination is the necessity for considering the procedure for reporting to the Institute of Archaeology of the National Academy of Science of Ukraine and the Ministry of Culture of Ukraine on excavations.

Provisions of Article 11 of the Law of Ukraine: *On Protection of Archaeological Heritage* [10] stipulate that an archaeologist performing archaeological research in the territory of Ukraine shall submit a scientific report on excavations carried out while the previous field season to the authority that issued the permit and the state archival institution or the archival unit of the state scientific institution determined by the Cabinet of Ministers of Ukraine before the start of the next field season. The requirements for compilation and procedure for submitting a scientific report shall be approved by the Academic Council of the Institute of Archeology of the National Academy of Sciences of Ukraine.

This peculiarity of forensic historical and archaeological examination is also considered in the Scientific and Methodological Guidelines

On Preparing and Appointing Forensic Examinations and Expert Research. Within the document on the appointment of historical and archaeological examination of land plots by the authority (person) who appointed forensic examination (engaged an expert), it is obligatory to

specify permission or prohibition to include information on the stage of its implementation and results of forensic report, which in conformity with the Law of Ukraine: *On Protection of Archaeological Heritage* shall be sent to the Institute of Archeology of the National Academy of Sciences of Ukraine and the Ministry of Culture of Ukraine. Such warning is expedient in order to avoid disclosure of information constituting investigation secrecy.

To assess the amount of damage caused to the state by spoiling, damaging or destruction of a monument, a forensic archaeologist should currently be guided by the Methodology of Expert Monetary Valuation of Monuments (hereinafter – the Methodology) [26] approved by the Cabinet of Ministers of Ukraine Resolution No. 1447 dated 26.09.2002. In accordance with the Methodology, the expert monetary valuation of archeological monuments is based on the costs of archaeological research works at values established by the State Building Committee and the Ministry of Culture of Ukraine. That is the worth of scientific information that can be obtained while research on archeological monument, and, therefore, it is the main component of the monument property value. Meanwhile, for example, N. I. Minaieva puts emphasis on existing imperfections: impossibility of its full application in practice while monuments evaluation. The author stresses that this Methodology on evaluating archeological monuments lacks a scientific approach in determining coefficients and does not take into account the complexity of evaluating finds before the excavation of the whole monument, when it will no longer be a monument, and the very concept of monument evaluation would make no sense [27, p. 6].

In view of the fact that in modern Ukraine archaeological heritage is recognized as one of the most precious assets of our people, it is vital to impose such penalties so that no one even has an intention to destroy “witnesses of the distant past” (archeological monuments). For property valuation of archeological monuments, it is required to apply a comparative approach, that is to carry out a comparative analysis with similar, already studied, monuments. The coefficients suggested in the methodology should be approached with a certain scientific justification. For example, one of the coefficients for measuring the value of a mound is thought to be an embankment. Thus, according to the proposed Methodology [26], the value of the mound increases if it is turfed, and decreases in case of its partial plowing. This is an excuse for plowing and destroying ancient burial mounds. Although the scientific and historical value of any plowed mound can substantially exceed the significance of an unplowed one. Conditional historical embankment (primary) [27, p. 7] should be taken into account to determine the value.

Currently, due to active hostilities on the territory of Ukraine, a certain number of archaeological sites have been damaged, damaged or even destroyed. Ukrainian researchers do not yet have access due to the military conflict, which makes it impossible to study the monuments and assess the amount of damage caused. At the same time, upon completion of the military conflict, the issue of conducting similar forensic examinations will be relevant.

Conclusion

As can be seen, the system of current legislation, regulating organization and conduct of forensic historical and archaeological examination in Ukraine, consists of a wide range of legal regulations on archeology and forensic activity. While professional activity, a forensic archaeologist must be guided by the whole set of acts in the research on objects. Due to the fact that the area of forensic historical and archaeological examination is new, there is a necessity to develop scientific and methodological support to meet the needs of justice in Ukraine. The methodologies should cover all issues that are part of the research subject of forensic historical and archaeological examination. This circumstance also induces to elimination of gaps in the legislation and clarification of controversial issues and inaccuracies.

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ԴԱՏԱՊԱՏՄԱԿԱՆ ԵՎ ՀՆԱԳԻՏԱԿԱՆ ՓՈՐՁԱՔՆՆՈՒԹՅՈՒՆՆԵՐԻ ԻՐԱՎԱԿԱՆ ԿԱՐԳԱՎՈՐՈՒՄԸ ՈՒԿՐԱԻՆԱՅՈՒՄ

Սիյոնոկ Կ.Պ.

Հողվածում խոսքը գնում է Ուկրաինայի դատարանական և հնագիտական փորձաքննությունների իրավական կարգավորման համակարգված վերլուծության առաջին փորձի վերաբերյալ: Յույց է տրվում, որ վերլուծությունը հիմնված է տարբեր գիտությունների տարրերի սինթետիկ վրա, որոնք ապահովում են համապատասխան ոլորտում դատական փորձաքննություններ: Հեղինակը հետամուտ է լինում Ուկրաինայում դատարանական և հնագիտական փորձաքննության ձևավորմանը՝ նշելով, որ ներկայումս պատմահնագիտական հետազոտությունների իրավական և գիտական ապահովվածության համակարգը պահանջում է խորը ուսումնասիրություն:

Նշվում է, որ այս պահին չկան հատուկ մենագրություններ, դասագրքեր, ուսումնական ձեռնարկներ՝ նվիրված դատարանական և հնագիտական փորձաքննության համակարգային վերլուծությանը, և արդյունքում՝ հողվածի հեղինակն առաջարկում է խնդրի վերաբերյալ իր սեփական տեսակետը, որը հանդիսանում է Ուկրաինայում արդարադատության դատափորձագիտական ապահովման անբաժանելի մասը: Հեղինակը գալիս է այն եզրահանգման, որ այս հարցի ըմբռնումը պահանջում է իրավագիտության, քրեագիտության, պատմության, հնագիտության և մի շարք այլ գիտությունների իմացության համալիր բազմամակարդակ համադրություն:

Բանալի բառեր. իրավական կարգավորում, դատական փորձաքննություն, պատմահնագիտական փորձաքննություններ, հուշարձաններ, դատահնագետ:

ПРАВОВОЕ РЕГУЛИРОВАНИЕ СУДЕБНО-ИСТОРИЧЕСКИХ И АРХЕОЛОГИЧЕСКИХ ЭКСПЕРТИЗ В УКРАИНЕ

Силенок К.П.

В статье речь идет о первом опыте системного анализа правового регулирования судебно-исторических и археологических экспертиз в Украине. Показано, что анализ основан на синтезе элементов различных наук, обеспечивающих проведение судебных экспертиз в соответствующей области. Автор прослеживает становление судебных историко-археологических экспертиз в Украине, отмечая, что в настоящее время система правового и научного обеспечения историко-археологических исследований требует углубленного изучения. Отмечается, что, на текущий момент, не существует специальных монографий, учебников, учебных пособий, посвященных системному анализу судебно-исторической и археологической экспертизы, и, как следствие, автор данной статьи предлагает свой взгляд на проблему, являющуюся составной частью судебно-экспертного обеспечения правосудия в Украине. Автор приходит к выводу, что осмысление данного вопроса требует комплексного многоуровневого сочетания знаний из права, криминалистики, истории, археологии и некоторых других наук.

Ключевые слова: правовое регулирование, судебная экспертиза, историко-археологические экспертизы, памятники, судебный археолог.

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