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COMPULSORY COLLECTION OF SAMPLES FOR EXPERT EXAMINATION: BALANCING THE PUBLIC INTEREST AND SAFEGUARDS OF INDIVIDUAL RIGHTS

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Abstract
Drawing on a comparison of the criminal procedure legislation of the Republic of Uzbekistan and the Russian Federation, the article examines the problem of the compulsory collection of samples for comparative (expert) examination. Uzbek legislation permits coercion against persons who evade appearance, provided that the methods used are safe and painless, but it establishes neither judicial control nor a procedure for the destruction of samples. The article systematizes the doctrinal positions on the admissibility of coercion and reviews the rulings of the Constitutional Court of the Russian Federation and the positions of the European Court of Human Rights. It substantiates a differentiated approach to coercion based on the principles of legality and proportionality and on the inadmissibility of degrading the dignity of the individual. A set of measures is proposed: judicial authorization of the compulsory taking of biological samples, a statutory definition of the limits of coercion, enhanced safeguards for vulnerable categories of persons, and regulation of the storage and destruction of samples.

Keywords: Criminal procedure; samples; expert examination; compulsory collection of samples; individual rights; judicial control; presumption of innocence; human dignity; comparative analysis.

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Introduction

Establishing the circumstances of a crime depends largely on whether traces found at the scene or on physical evidence can be compared with objects belonging to a particular person. For this purpose, the expert needs samples for comparative examination. Obtaining them is among the most frequent investigative actions [4] and, at the same time, among the most contentious. It affects bodily integrity, private life, and the honour and dignity of the individual. Where a person refuses to cooperate, the question arises whether coercion is permissible and, if so, within what limits.

The constitutions of the Republic of Uzbekistan and the Russian Federation guarantee liberty and personal inviolability and the inviolability of honour and dignity, and prohibit torture and other degrading treatment [1; 2]. The Constitution of the Russian Federation (the "Russian Constitution") also enshrines the right not to testify against oneself (Article 51(1)) and permits rights to be restricted for the protection of the rights of others, provided that the restriction is proportionate and subject to judicial control (Article 55(3)) [2]. Criminal proceedings must strike a balance between building an evidentiary base and the constitutional guarantees afforded to the individual [3].

In practice, suspects, accused persons, witnesses and victims often refuse to provide samples for fear of being incriminated [4]. Russian legislation contains no provision imposing a duty to provide samples, and none governing their compulsory collection [4]. Uzbek legislation regulates the procedure in greater detail, including the compulsory taking of samples; yet here too, insufficient safeguards for vulnerable categories of citizens, the absence of judicial control and the unregulated procedure for the destruction of samples have been noted [3].

The methodology comprises the methods of analysis and synthesis, induction and deduction, and the comparative-legal and formal-legal methods. The normative basis consists of the criminal procedure legislation of Uzbekistan, Russia, Kazakhstan, Kyrgyzstan and Germany; the rulings of the Constitutional Court of the Russian Federation (the "Constitutional Court"); the positions of the European Court of Human Rights (the "ECtHR"); and the works of national

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and foreign procedural law scholars and forensic scientists. The article builds on the findings of earlier scholarly research and develops its conclusions further.

Under Article 9 of Federal Law No. 73-FZ "On State Forensic Expert Activity in the Russian Federation", samples for comparative examination are objects reflecting the properties or characteristics of a person, animal, corpse, object, material or substance, as well as any other samples that the expert needs in order to conduct the examination and give an opinion [5]. They include traces of teeth, hands, feet, footwear and tyres; samples of biological origin (hair, blood, saliva, semen, sweat and sebum traces); traces of severance on an object (cuts made by cutting pliers, saws or axes); and samples of paint and varnish materials [4]. In the criminal procedure legislation of Uzbekistan the terminology differs, and the term used is "samples for expert examination"; in substance, however, the concepts coincide.

The importance of samples can hardly be overstated. They make it possible to establish whether a person was or was not involved in a crime, to identify cases in which one person committed several crimes, and to test the investigator's hypotheses. In Russian law, samples may be obtained even before a criminal case is initiated, in the course of verifying a report of a crime (Article 144(1) of the Criminal Procedure Code of the Russian Federation, the "Russian CPC") [4; 6]. This provision underscores the importance of the action from the very outset of the proceedings. Yu.A. Kudryavtseva allows samples to be obtained before the initiation of a case only with the voluntary consent of the person concerned. In her view, such samples cannot form the basis of a forensic examination, because they have been obtained by an unauthorized subject from a person who had no procedural status, and they are suitable only for preliminary studies of orienting significance [8]. Sh.E. Parakhatova takes the opposite view: in her opinion, samples obtained at this stage may contain forensically significant information, and therefore compulsory collection at this stage should not be ruled out altogether, provided that the methods used are safe for life and health [3].

Theory distinguishes between free samples (those that came into being outside any connection with the investigation), conditionally free samples (those that came into being in connection with the case but not for the purposes of

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examination, for example, handwritten explanations and receipts) and experimental samples (those obtained specifically for the examination). This distinction is important for resolving the problem of refusal. According to V.A. Zhbankov, where explaining the significance of the action does not help, free and conditionally free samples capable of replacing experimental ones should be sought [9; 3]. The practical recommendation is to provide in advance, in records, motions and receipts, for extended handwritten entries by the person concerned, thereby creating material for examination [4].

The Criminal Procedure Code of the Republic of Uzbekistan (the "Uzbek CPC") empowers the inquiry officer, the investigator and the court to obtain samples. Under Article 190, samples may be obtained from a suspect, an accused, a defendant, a victim, and a person in respect of whom proceedings for the application of compulsory medical measures are being conducted. Where there are grounds to believe that the traces were left by other persons, samples may also be obtained from them [7]. Article 192 of the Uzbek CPC provides for the compulsory collection of samples from suspects, accused persons, defendants and victims who evade appearance, provided that the methods used are painless and safe. Article 196 of the Uzbek CPC establishes safeguards for the protection of individual rights, namely that the methods and the scientific and technical means used must be safe for life and health. The mandatory participants are the inquiry officer, the investigator, the court and the person from whom the samples are taken. The specialist and defence counsel are classed as secondary participants [3]. The investigator must explain to the participants their rights and duties, ensure their personal safety and take from them a written undertaking of non-disclosure, with a warning as to liability; the investigator is also entitled to use audio and video recording, forensic operational photography and other technical means of recording [3].

Article 202(1) of the Russian CPC allows the investigator to obtain handwriting samples and other samples from a suspect, an accused, a witness and a victim, and, under Article 144(1), from other natural persons and representatives of legal entities where it is necessary to verify whether they left traces at a particular place or on physical evidence [4; 6]. Article 202(2) prohibits methods that are dangerous to life and health or that degrade honour and dignity. The law provides

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neither for a duty to provide samples nor for a procedure of compulsory taking. Liability arises only for a victim, under Article 308(1) of the Criminal Code of the Russian Federation. For a witness, it is provided for only in the case of refusal to give testimony [10].

Thus, despite the outward similarity of the two models (in Uzbekistan, the circle of "other persons" under Article 190(2) apparently also covers those whom Russian law calls witnesses and representatives of legal entities [3]), their key difference lies in their attitude to coercion. Uzbek law permits it on certain conditions; Russian law is silent, which gives rise to legal uncertainty. Lacking a prescribed procedure, an investigator risks being accused of violating procedural law or exceeding his or her authority [4]. Evidence, for its part, may be lost, as in the case described by Kolegov and Volosnikov, in which samples of the suspect's sweat and sebum traces were obtained in the course of operational-search measures and, because that method was unlawful, no forensic examination was ordered [4].

Opponents of coercion proceed from constitutional guarantees and from the absence of a penalty for refusal. V.A. Zhbankov holds that, since no liability has been established for refusal by a suspect or an accused, the investigator is not entitled to take samples by compulsion and may only explain the significance of the action [9]. It has been noted that the right not to testify against oneself is exercised not only through refusal to give testimony but also through refusal to submit one's body to bodily examination, personal search and the taking of samples, and that coercion has therefore become impossible since the adoption of Article 51(1) of the Russian Constitution [11]. A.V. Skibinsky permits only persuasion and recommends that the person's consent be recorded by a handwritten entry in the record [12]. D.K. Brager points out that the compulsory collection of samples inevitably involves violence and a restriction of the right to personal inviolability [13; 3].

Proponents of coercion (O.Ya. Baeva, D.A. Solodova, V.V. Kalnitsky, E.R. Rossinskaya, A.G. Filippova and A.S. Shatalova [3]) accept it under certain conditions. E.R. Rossinskaya considers it possible to obtain by compulsion only those samples whose nature allows it, and only in exceptional cases [14]. I.L. Petrukhin proceeds from the premise that a person who is being exposed has an

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interest in concealing traces, but that this person's stance must not impede the establishment of the truth. In his view, coercion does not violate the guarantee against self-incrimination, since that guarantee relates to testimony and not to the seizure of physical evidence [15]. V.T. Tomin and M.P. Polyakov regard the investigator's decision as binding on the suspect and the accused. Samples may be obtained by compulsion (where necessary, after consultation with a physician), but this power must not be abused, and the person must first be persuaded to cooperate [16; 3]. V.V. Kalnitsky permits physical impact proportionate to the status of the person, applied to a minimal degree in the case of witnesses and victims [17]. Where persuasion proves ineffective, V.V. Stepanov permits physical restraint and handcuffs [18]. A.V. Pisarev proposed introducing into the Russian CPC a general provision on the use of physical force against a person who evades compliance, with exceptions, in particular for pregnant women and persons under the age of 14 [19; 3].

Judicial practice leans towards the second position. In its Ruling No. 1297-O of 24 September 2013, the Constitutional Court held that the right to protect one's rights by all means not prohibited by law (Article 45(2)) and the right not to testify against oneself (Article 51(1)) do not preclude procedural actions involving a suspect or an accused, or the use of documents, items of clothing and samples of biological tissue for the purpose of obtaining evidence [20; 4]. The ECtHR regards the right not to testify against oneself primarily as the right of an accused to remain silent, which does not extend to material that may be obtained from the accused irrespective of his or her will [4]. However, the Court consistently distinguishes between therapeutic necessity and the necessity of obtaining evidence in the case of medical interventions, including invasive ones, stresses the importance of procedural safeguards, and requires State authorities not to cross the threshold of the minimum level of severity that brings a complaint within the scope of Article 3 of the European Convention on Human Rights [22; 3]. Article 55(3) of the Russian Constitution permits the restriction of the right to personal inviolability for the protection of the rights of victims, but requires that the restriction be justified and proportionate and that it be subject to judicial control [2; 4].

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At the same time, in Ruling No. 104-O-O of 24 January 2008, the Constitutional Court emphasized that operational-search measures cannot substitute for procedural actions for which the law, in particular Article 202 of the Russian CPC, establishes a special procedure [21; 4]. This rules out a "workaround" route to obtaining samples outside the procedural form.

The more convincing position appears to be the one that permits coercion subject to strict limits. Its key argument lies in distinguishing testimony, as a volitional act, from material that exists independently of the person's will. At the same time, the argument of Kolegov and Volosnikov that coercion is admissible by virtue of the presumption of innocence, because the burden of proof rests on the prosecution (Article 14(2) of the Russian CPC) [4], cannot be regarded as sufficient. The burden of proof determines the allocation of procedural responsibility, but of itself it does not create a power to interfere with bodily integrity.

The law prohibits methods that are dangerous to life and health and methods that degrade honour and dignity [3; 4]. The first criterion is relatively clear: complex samples (blood, biological secretions) must be taken only by an expert, a specialist or a medical professional, and not by a police officer [4]. A method is unlawful if it demeans the personal qualities of the individual, causes shame, or causes or is capable of causing pain and suffering [4]. The publicity criterion appears excessively narrow. Degradation of dignity is possible in a closed procedure as well, as confirmed by the provision of Article 196 of the Uzbek CPC requiring that the participants be of the same sex where the body is exposed [3]. It is more appropriate to define the limits of coercion by the nature and manner of the intervention, and not solely by its publicity.

On the basis of the positions set out above, the following groups of samples may be distinguished:

- samples obtained without penetration of the body (fingerprinting, prints, footwear marks), where coercion amounts to overcoming resistance by brief, painless techniques;
- samples of low invasiveness (saliva, epithelial cells, hair), which the investigator is entitled to take independently, involving a specialist at his or

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her discretion and, where necessary, requesting a medical opinion on the admissibility of taking them;

- samples requiring medical intervention (blood), which may be obtained by compulsion only with the involvement of a medical professional;
- samples involving intrusion into the intimate sphere (semen and other biological secretions): it is these that will most often be invoked in refusals on the ground of degradation of honour and dignity, since they involve interference with intimate space;
- samples requiring active volitional participation (handwriting, voice), which in practice cannot be obtained by compulsion.

The last group explains why, in the case of voice and handwriting, practice looks for workarounds. Officers obtain voice samples in the course of operational-search measures, then declassify and seize them [4]. Tactical techniques for obtaining handwriting samples by means of a pre-prepared text and by distracting the person's attention are also described [4]. Such methods raise doubts as to the admissibility of the evidence in the light of the position of the Constitutional Court [21], and they are no substitute for the lawful procedure. For samples that require the person's will, the route of free and conditionally free samples [9] is preferable to coercion.

The involvement of a specialist is methodologically mandatory where there is a risk of harm to the body. It also ensures the quality of samples suitable for examination [3]. The participation of attesting witnesses is advisable where a conflict is likely during compulsory taking and where a specialist is involved, but it is excluded where the person's body must be exposed. In other cases, the attesting witnesses must be of the same sex as the person from whom the samples are taken [3]. I.R. Astanov proposes supplementing Article 189 of the Uzbek CPC with a provision on the participation of attesting witnesses and, where necessary, of an interpreter for persons who do not know the language of the proceedings [24]. Compulsory measures must be minimally invasive. The prosecutor, for his or her part, is entitled to participate, thereby ensuring control over legality. Defence counsel is classed as a secondary participant [3]. The question of guaranteed access of defence counsel to compulsory taking, and of the possibility of appealing against such an action, deserves a legislative

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solution. No less important an element of procedural protection is the possibility of appealing against the decision on the compulsory collection of samples, the manner of its execution and the actions of officials. The effectiveness of such a mechanism depends on whether the person entitled to appeal, the competent body, the time limits for lodging and considering a complaint, and the legal consequences of establishing violations have been defined. It appears necessary to provide for the possibility of appealing against both the lawfulness of the decision to obtain samples itself and the specific manner of its execution, especially where there are grounds to believe that the measures applied were excessive or violated the person's rights. At the same time, the appeal procedure must take into account the need for the timely obtaining of evidentiary information while ensuring genuine, and not merely formal, protection against unlawful coercion.

Thus, the improvement of Article 189 of the Uzbek CPC should be aimed not only at clarifying the procedure for obtaining samples for expert examination but also at forming a system of interrelated procedural safeguards. Such safeguards should include a differentiated approach to the participation of attesting witnesses, mandatory protection of the person's language rights, the use of the least invasive methods of obtaining samples, a definition of the procedural role of the prosecutor, statutory guarantees of the participation of defence counsel, and the establishment of an effective appeal mechanism. Comprehensive regulation of these matters would make it possible to achieve the necessary balance between the interests of criminal proceedings and the protection of the rights, freedoms and dignity of the individual, and would also make the lawfulness of obtaining samples easier to verify and increase the reliability of their subsequent use in evidence.

The Uzbek CPC contains no special provisions on obtaining samples from minors [3]. Meanwhile, Article 37 of the Convention on the Rights of the Child requires States to ensure humane treatment and respect for the dignity of the child, taking into account the needs of persons of his or her age [23], and Article 26 of the Constitution of the Republic of Uzbekistan enshrines the inviolability of honour and dignity and the prohibition of degrading treatment [1]. It is therefore advisable to specify the procedure for obtaining samples from minors

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in the provisions of Chapters 23 and 60 of the Uzbek CPC. Similar protection is required for women and persons with disabilities. In Russian doctrine, it has been proposed to exempt pregnant women and persons under the age of 14 from coercion [19].

The use of scientific and technical means must be based on the principles of legality and ethics. For the purposes of recording, audio and video recording and forensic operational photography are used where necessary. The Uzbek CPC does not define the procedure for the disposal and destruction of samples. The absence of regulation of the storage, use and destruction of personal data obtained in the course of taking samples contravenes the principle of the confidentiality of private life [3]. Astanov proposes supplementing Article 197[1] of the Uzbek CPC with a provision on the disposal procedure, identifying the persons who are to take part, and also ensuring that the suspect, the accused, the defendant or the victim can be present at the expert examination by means of a viewing window, which in turn strengthens the legal force of the expert opinion and confidence in it [24].

Conclusion

The comparison conducted shows that the problem of the compulsory collection of samples lies at the intersection of two constitutional values: the aims of justice and the inviolability of the person. The Russian model retains a gap: the law provides neither for a duty to provide samples nor for a procedure of coercion, and practice is forced to resort to workarounds that are legally vulnerable and are not supported by the position of the Constitutional Court. The Uzbek model is broader, but it contains no judicial control, no special rules for minors and no regulation of the destruction of samples. Foreign experience does not reject coercion but limits it by procedural safeguards. Coercion is admissible as an exceptional measure if it is necessary and proportionate, is not dangerous to life and health, does not degrade the dignity of the individual, and is carried out under judicial control. The limits of coercion should be defined in a differentiated manner, depending on the invasiveness of the sample. Samples that require the volitional participation of the person (handwriting, voice) cannot be obtained by compulsion; for them, a search for free and conditionally free

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samples is the rational course. The proposed measures will make it possible both to strengthen the safeguards of individual rights and to increase the effectiveness of criminal proceedings.

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