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SCIENTIFIC CONCEPTS OF INADMISSIBILITY OF EVIDENCE IN CRIMINAL PROCEEDINGS

НАУКОВІ КОНЦЕПЦІЇ ВИЗНАННЯ ДОКАЗІВ НЕДОПУСТИМИМИ У КРИМІНАЛЬНОМУ ПРОЦЕСІ

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The article studies different periods of the development of scientific concepts of an inadmissibility of evidence in criminal proceedings. As it is evident from the investigative practice, the effectiveness of evidence depends on the improvement of regulatory framework of criminal proceedings both in general and pre-trial investigation or court proceedings in Ukraine; in particular, such institutions of evidence law as admissibility, relevance, reliability of evidence, etc., clarity of legal provisions of domestic and international legal norms, availability of relevant by-laws in this area. It has been noted that entitled different conventional names relevant concepts of recognition of evidence as inadmissible in criminal proceedings have been developed in chronologically different periods. It is established that each of these concepts has become a significant scientific achievement and today is of a high theoretical and practical importance for specifying and supplementing the conceptual framework, determining the criteria for inadmissibility of evidence, improving the current criminal procedure legislation of Ukraine, as well as for the development of the national science of criminal procedure and law of evidence; historical formation and legislative standardisation thereof has been much slower. It is emphasized that the quality of evidence in criminal proceedings, its suitability for proving certain circumstances has always aroused appropriate interest and discussion among scholars and experts in the field of criminal procedure law.

It is concluded that the complexity and versatility of the institutions of admissibility and inadmissibility of evidence in their procedural and applied manifestations have given rise to a large number of approaches, doctrines, concepts ("broken mirror", "fruit of the poisonous tree", etc.), which are a significant scientific achievement in the process of formation and historical development of the law of evidence, they are of considerable theoretical and practical interest from the perspective of clarifying and supplementing the conceptual framework, determining the criteria for inadmissibility of evidence, improving the current criminal procedure legislation of Ukraine, developing the national science of criminal procedure and law of evidence.

Legal and legislative regulation of the concepts of an admissibility of evidence is an effective and necessary factor for the improvement of the efficiency of criminal process and is subject to further analysis and improvement.

Key words: evidence, concepts of inadmissibility of evidence, pre-trial investigation, fruit of the poisonous tree, law of evidence, adversarial proceedings, historical development of law of evidence.

В статті досліджено різні періоди розвитку наукових концепцій визнання доказів недопустимими у кримінальному процесі. Як вбачається із слідчої практики, від досконалості нормативної регламентації кримінального провадження загалом та досудового розслідування і судового провадження в Україні, зокрема таких інституцій доказового права, як допустимість, належність, достовірність доказів тощо, чіткості правових приписів вітчизняних і міжнародно-правових норм, наявності відповідних підзаконних актів у цій сфері, залежить ефективність доказування. Звернено увагу, що під різними умовними назвами в хронологічно різні періоди були розроблені відповідні концепції визнання доказів недопустимими в кримінальному провадженні. Констатовано, що кожна із цих концепцій, стали суттєвим науковим доробком і сьогодні мають вагоме теоретичне і практичне значення для уточнення й доповнення понятійного апарату, визначення критеріїв недопустимості доказів, удосконалення чинного кримінального процесуального законодавства України, а також розвитку вітчизняної науки кримінального процесуального та доказового права, історичне становлення та законодавче унормування яких відбувалося значно повільніше. Підкреслено, що якість доказів в кримінальному провадженні, їх придатність для доказування певних обставин завжди викликала відповідний інтерес і дискусію серед учених і фахівців у галузі кримінального процесуального права.

Зроблено висновок, що складність і багатогранність інститутів допустимості й недопустимості доказів у їх процесуальному та прикладному прояві породили численну кількість підходів, доктрин, концепцій («розбитого дзеркала», «плодів отруйного дерева» тощо), які стали підґрунтям розвитку доказового права, й відіграли важливу роль при розробці норм чинного кримінального процесуального законодавства України, а також розвитку вітчизняної науки кримінального процесуального права.

Правова регламентація та законодавче унормування концепцій допустимості доказів є дієвим і необхідним чинником підвищення ефективності кримінального процесу та підлягає подальшому аналізу й удосконаленню.

Ключові слова: докази, концепції визнання доказів недопустимими, досудове розслідування, плоди отруйного дерева, доказове право, змагальність сторін, історичний розвиток доказового права.

Since the times of Ancient Rome, there has been a well-known expression "Audiatur et altera pars" ("Let the other side be heard as well"), which enshrined the principle of adversarial proceedings in the ancient court and provided that each party has the right to be heard and to present relevant evidence to prove its innocence. The quality of such evidence, its suitability for proving certain circumstances has always aroused appropriate interest and discussion among scholars and experts in the field of criminal procedure law. Certain aspects of inadmissibility of evidence in criminal proceedings have been studied by O. Malakhova [1], V. Drozd [2; 3; 4], V. Vapniarchuk [5], S. Ablamskyi [2], L. Havryliuk [2; 3], V. Burlaka [3], M. Huzela [6], L. Loboiko [7], M. Stoianov [8], and others. However, the review of these works reveals that in the course of the emergence and historical development of the law of evidence and adversarial criminal procedure, scientists and experts in procedure have been studying the institutions of evidence law such as admissibility and inadmissibility of factual data relevant to criminal proceedings and subject to proving. Under different nominal terms, in chronologically different periods, the relevant concepts and theories of these notions have been developed, which undoubtedly have become a significant scientific achievement and today is of high theoretical and practical importance for specifying

and supplementing the conceptual framework, for determining the criteria for inadmissibility of evidence, for improving the current criminal procedure legislation of Ukraine, and for developing the national science of criminal procedure and law of evidence, the historical formation and legislative standardisation thereof has been much slower.

Therefore, **the purpose** of the article is to study the development of scientific concepts of inadmissibility of evidence in criminal proceedings and their impact on the formation of legal framework for the concept of admissibility of evidence.

Main material. In the theory and law application practice, the problem of determining the admissibility of evidence is ambiguously solved. The complexity and versatility of the admissibility of evidence in its procedural and applied manifestations have formed a variety of approaches, doctrines and concepts [8].

One of them is the concept of "asymmetry of the rules of admissibility of evidence".

It is based on the existing difference in the scope of procedural rights between the prosecution and the defence regarding the formation of the evidence base in criminal proceedings, as always emphasised by its supporters (apologists), calling for compliance with the rules of favor defensionis. In their opinion, these rules create equal conditions for the functioning of the adversarial principle in criminal proceedings, and the concept of "asymmetry of the rules of admissibility of evidence" is precisely among the components of the institution of favor defensionis.

O. V. Malakhova considers it possible to integrate into the criminal procedure legislation of Ukraine the "asymmetry of the rules of admissibility of evidence", which implies the possibility of the defence to use exculpatory evidence obtained in violation of the procedural form. In support of the above, the scholar notes that the CU in Article 62 excludes the possibility of using evidence obtained in violation of the procedural form to substantiate the prosecution's position, but does not exclude the possibility of using such evidence to substantiate the defence's position [1].

We believe that this interpretation of the provisions of Article 62 of the CU is quite broad, which leads to their arbitrary reading with the risk of violating the principles of legality in criminal proceedings.

According to V. V. Vapniarchuk, the concept of "asymmetry of the rules of admissibility of evidence" is based on different possible legal effects of violations committed during the receipt of evidence for the prosecution and the defence. The opponents of the application of "asymmetry" in resolving the issue of admissibility of evidence believe that the requirements for admissibility should be the same for both the prosecution and the defence; no grounds for double standards in the collection, presentation and evaluation of incriminating and exculpatory evidence should arise; the prosecution and defence will be unequal, which will create an asymmetry of the rights of participants in criminal proceedings [5].

In our opinion, the analysis of the provisions of the above concept should take into account the requirements of Article 24 of the CU, which states that citizens have equal constitutional rights and freedoms and are equal before the law. There can be no privileges or restrictions based on race, skin colour, political, religious and other beliefs, gender, ethnic and social origin, property status, place of residence, language or other characteristics [9]. The same is reflected in paragraph 3 of Article 7 (General Principles of Criminal Proceedings) of the CPC of Ukraine [10].

We believe that the inconsistency of the concept under consideration is primarily due to the essence of the admissibility requirements, which should be the same for both the prosecution and the defence (Dura lex sed lex). The possibility of applying double standards for the collection, presentation and evaluation of incriminating and exculpatory evidence in criminal proceedings contradicts the provisions of legal certainty.

The next is the concept of "honest mistake". Its provisions have not been the subject of a broad discussion by domestic scholars on the possibilities of its implementation in the national criminal procedure legislation, since they stem from the concept of "ruthless exclusion of evidence" and, according to M. V. Huzelo, in cases where the law enforcement body did not know or, under reasonable assumption, could not have known that its actions were illegal, the evidence obtained as a result of such actions does not lose its admissibility. In the Ukrainian criminal procedure studies, the question of the possibility of substantiating the regulatory framework for this concept has not been considered [6]. The same definition is given by V. Vapniarchuk [5].

It should be noted that it is quite illogical and unlawful to assess the admissibility of factual data collected by a law enforcement body depending on the subjective side of the unlawful actions committed by it. In this situation, the only important thing is that such factual data (evidence) has been collected in violation of the law, and suspicion and accusation cannot be grounded on evidence obtained illegally (Article 17(3) of the CPC of Ukraine). It is this circumstance that should be assessed when determining the admissibility of such factual data.

The *silver platter* doctrine is borrowed from the US case law and, in our opinion, can be implemented in the domestic criminal procedure legislation after appropriate amendments and additions are made to it. Its essence implies that the factual data obtained in violation of the law by a person not designated by the criminal procedure law (CPC of Ukraine) as a party to criminal proceedings may be accepted and used by the court in criminal proceedings as evidence. It corresponds to the content of the formation of the evidence base and the legal position of the subject of proof, since, in our opinion, the collection of factual data relevant to proof in criminal proceedings may be carried out by both procedural and non-procedural (non-traditional) means and methods. In this case, the matter concerns compliance with the procedural form and the competence of the subject who received such factual data. The issues of compliance with the procedural form of obtaining factual data relevant for evidence in criminal proceedings are not uncontroversial and debatable in the theory of domestic criminal procedure. For several years in a row, a lively discussion has been going on in the pages of legal publications regarding the decision of the Constitutional Court of Ukraine in the case on the official interpretation of the provision of the CCU, Article 62, part 3, of 20 October 2011 (case No. 1-31/2011).

The Constitutional Court of Ukraine has ruled that an accusation of committing a crime cannot be based on factual data obtained as a result of operative-search activities (hereinafter – OSA) by an authorised person without observing constitutional provisions or in violation of the procedure established by law, as well as obtained by a person not authorised to carry out such activities by taking deliberate actions to collect and record them using measures provided for by the Law of Ukraine "On Operative-Search Activities" [11].

This position of the Constitutional Court of Ukraine was ambiguously perceived by domestic scientists and experts in procedure. According to the well-known legal scholar L. M. Loboiko, it is generally unnecessary to set requirements for data received by individuals (citizens) not in connection with criminal proceedings. No one has yet cancelled the rule that citizens can do anything that is not prohibited by law. It makes no sense to limit the actions of citizens to the procedural form. They should not have to study and to know throughout their lives the grounds and procedure for obtaining evidence in criminal proceedings. It is sometimes difficult even for investigators and prosecutors to assess whether their actions comply with the law. Establishing a procedural form

of obtaining evidence by citizens will lead to the fact that violation of the rules due to ignorance may always be grounds for non-recognition of the data as evidence. The procedural form of obtaining data does not always guarantee the reliability and evidentiary value of the data obtained, even when the data is collected by an authorised person. What can we say about citizens? [7].

We consider these remarks to be reasonable, since the issue of recognising the collected factual data as evidence and establishing its admissibility based on the results of direct examination falls within the exclusive competence of the court during the litigation.

This legislative provision expands the potential range of sources and limits of possible factual data that may be collected by the parties to criminal proceedings, including by unconventional means, provided that they are introduced and legislatively enshrined in the CPC of Ukraine. We agree with this position insofar as such factual data may be recognised by the court as admissible, but subject to appropriate amendments to the current criminal procedure legislation. The issue of information obtained by non-procedural means, its significance in the OSA and problems with its admissibility in criminal proceedings was studied more extensively in our previous monograph study [4], and the problem of compliance with the procedural form in the formation of the evidence base, including non-traditional methods, will be discussed further.

The "*broken mirror"* concept has not found further scientific substantiation and development, nor legislative consolidation in Ukraine, and is quite difficult to apply in practice.

According to V. V. Vapniarchuk, its essence is the approach to the evaluation of evidence from the perspective of not a single array of information contained in a source provided for by law, but relatively independent blocks, each of which is linked by a single content and confirms or refutes one or more circumstances to be proved in criminal proceedings (if a mirror is broken, you can see what is visible in each of its parts). According to the advocates of this concept, the use of rules for differentiating the effects of violations of the procedure for obtaining evidence is legitimate only in cases where such violations do not concern the entire evidence, but only a separate block [5].

The "*broken mirror"* concept does not provide for a differentiated approach to the effects of violations of the criminal procedure law when collecting factual data (evidence), therefore we consider it unpromising for further research and regulatory development in Ukraine.

Next, the concept of "*significance of violation of the criminal procedure law in the course of forming the evidentiary base of the legal position of the subject of proof"* is to be considered. The name of the concept itself contains an indication of "material violations of the criminal procedure law". The CPC of Ukraine in Part 2 of Article 87 (Inadmissibility of evidence obtained as a result of a significant violation of human rights and freedoms) lists the acts that the court shall recognise as significant violations of human rights and fundamental freedoms. Since it refers to material violations of the criminal procedural law, this gives grounds to believe that the position of the concept of "significance of violation of the criminal procedure law in the course of forming the evidentiary base of the legal position of the subject of proof" in this part has been practically enshrined in the CPC.

According to V. V. Vapniarchuk, its essence is to use a differentiated approach to the effects of violations of the criminal procedure law in the formation of the evidentiary base of the legal position of the subject of proof (when collecting evidence) by dividing them into significant and insignificant ones, which lead either to the unconditional inadmissibility of evidence or to the possibility of restoring its admissibility [5].

In the theory of national criminal procedure, the concept of "substantial" and "non-substantial" violations of the criminal procedure law is also used by scholars and experts in criminal procedure law frequently. With regard to the effects of violations of the criminal procedure law in forming the evidence base in criminal proceedings, O.S. Osetrova argues that "non-substantive violations of the criminal procedure law cannot be the ground for inadmissibility of evidence if such violations are eliminated during the pre-trial investigation or during court proceedings" [12].

Since Ruling No. 9 of the Supreme Court of Ukraine "On the Practice of Application of the Constitution of Ukraine in the Administration of Justice" of 01 November 1996 establishes that not any violation of the law causes the inadmissibility of evidence, but only that which is directly related to the form of collection and recording of factual data established by the procedural law, it is necessary to legislate and regulate the problematic issue of which procedural violations are substantial (significant) and which are non-substantial (insignificant) [13], therefore, it is possible to consider the possibility of implementing the provisions of this concept (in this part) into the national criminal procedure legislation only after that.

The provisions of the "*fruit of the poisonous tree"* doctrine have been widely discussed by domestic theorists and experts in criminal procedure law. It is very similar to the concept of *"significance of violation of the criminal procedure law in the course of forming the evidentiary base of the legal position of the subject of proof"* and also depends on the significance of the violation of human and civil rights and freedoms. It is well known that on the way to European integration, Ukraine's criminal proceedings take into account international standards for the inadmissibility of factual data (evidence), which have been successfully used by the ECHR in its case law for a long time. One of such standards is the concept (doctrine) of *"fruit of the poisonous tree"*, which is fully consistent with the doctrine of the US evidence law, as it was created on the basis of precedent-setting decisions of the US Supreme Court in the 20s of the XX century.

According to this concept, when deciding on a fair trial, the ECHR assesses the admissibility of the entire chain of evidence, not each individual piece of evidence. In doing so, the ECHR proceeds from the fact that if one piece of evidence is inadmissible, the court shall decide on the admissibility of all the factual data collected in the course of the trial in general. In such cases, all the collected factual data based on one piece of evidence (information) recognised by the court is inadmissible.

Thus, the above concept requires the establishment of certain causal conditions for its application, and courts should always consider them in their practice, examining the entire collected evidence base as a whole and each piece of evidence separately.

The scientific literature also contains the exclusionary rule, which in its content duplicates the understanding of the "fruit of the poisonous tree" doctrine. Its main provision is the categorical inadmissibility of evidence regardless of the nature of the violations of the law. Just as a spoonful of ink spoils a glass of tea, any violation of the requirements of the criminal procedure law regarding the procedure for obtaining evidence entails its inadmissibility. Scholars are quite critical of the concept under consideration, since this position will lead to the loss of important evidentiary information in case of any violation of the criminal procedure law, including non-substantial ones. We advocate a balanced approach to the effects of violations of the criminal procedure law when collecting factual data (evidence), especially since such violations in the course of criminal proceedings may vary, and we will consider their classification and possible impact on the admissibility of such information in our further research.

Conclusions. To sum up, almost all the concepts developed by theorists and analysed by us are of significant theoretical and practical interest in clarifying and supplementing

the conceptual and categorical apparatus, determining the criteria for inadmissibility of evidence, improving the current criminal procedure legislation of Ukraine, and developing the domestic science of criminal procedure and the law of evidence. The complexity and versatility of the institutions of admissibility and inadmissibility of evidence in their procedural and applied manifestations have given rise to a large number of approaches, doctrines, concepts ("broken mirror", "fruit of the poisonous tree", etc.), which are a significant scientific achievement in the process of formation and historical development of the law of evidence, are of considerable theoretical and practical interest from the perspective of clarifying and supplementing the conceptual framework, of determining the criteria for inadmissibility of evidence, and of improving the current criminal procedure legislation of Ukraine, and of developing the national science of criminal procedure and law of evidence, the historical formation and legislative standardisation thereof in this respect has been much slower. The issue of regulatory framework and legislative standardisation of the concepts of admissibility of evidence is an effective and necessary factor for improving the efficiency of criminal proceedings and is subject to further analysis and improvement.

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