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Вікторія Василівна Рожнова

Кафедра кримінального процесу
Національна академія внутрішніх справ
Київ, Україна

ДОКАЗИ І ДОКАЗУВАННЯ: ПРО ТЕНДЕНЦІЇ УДОСКОНАЛЕННЯ КРИМІНАЛЬНОГО ПРОЦЕСУАЛЬНОГО ЗАКОНУ

Анотація. *Існування в кримінальному процесі факту, порушення прав та свобод людини, а також можливих зловживань зі сторони органів, які безпосередньо проводять досудове розслідування дає підстави для наукового вивчення зазначеної теми. Такі дії повинні чітко врегульовуватися законодавцем в кримінальному процесуальному законодавстві. Тому основна мета роботи полягає в аналізі доказів і доказування, які сприятимуть удосконаленню кримінального процесуального закону. Для досягнення поставленої мети були використані методи аналізу, філософського вчення, пізнавально-практичні. Встановлено, що відсутність єдиного підходу до інституту допустимості доказів викликає дискусію навколо питання про можливість прийняття процесуальних рішень у кримінальному провадженні на підставі доказів, отриманих з порушенням процесуальної форми, та про юридичну силу таких доказів, тобто щодо того, чи мають вони доказове значення. Аналіз лише деяких із масиву запропонованих за останні роки законопроектів, метою яких є визначення удосконалення кримінального процесуального закону, ефективне виконання загальних завдань кримінального провадження, захист прав, свобод і законних інтересів його учасників тощо, на жаль, засвідчує сумну тенденцію до прагнення змінити правозастосовну практику на краще лише засобами законотворчої діяльності без урахування системних проблем методологічного, правового та організаційного характеру. Серед причин такої ситуації вбачаються і відсутність належного наукового обґрунтування відповідних змін (або ігнорування наявних наукових доробок), суперечливість у теоретичному, методологічному розумінні відповідних категорій, відсутність системного підходу до окремих напрямів реформування з урахуванням не лише суто правових, процесуальних аспектів, а й організаційних. Виявлено, що вплинути на об'єктивний стан речей і процесів неможливо лише засобами законотворчої діяльності, без належного методологічного підґрунтя, системи адміністративно-управлінських та організаційних заходів.*

Ключові слова: правовий інститут, досудове розслідування, кримінальний проступок, конфіскація.

Victoria V. Rozhnova

Department of Criminal Process
National Academy of Internal Affairs
Kyiv, Ukraine

EVIDENCE AND PROOF: TRENDS IN THE IMPORVMENT OF THE CRIMINAL PROCEDURAL LAW

Abstract. *In the criminal proceedings, the fact of violation of human rights and freedoms, as well as possible abuses from the part of the bodies that directly conduct a pre-trial investigation, provides grounds for the scientific study of this topic. Such actions have to be clearly regulated*

by a legislator in criminal procedural law. That is why, the main purpose of the work is to analyse evidence and proof, which contribute to the improvement of criminal procedural law. To achieve this goal, analysis method, philosophical doctrine and cognitive and practical were used. It has been determined that the absence of one approach to the institute of admissibility causes the discussion concerning the question about an opportunity to adopt procedural decisions in criminal proceeding on the basis of evidence obtained in violation of the procedural form, and about legal effect of such evidence, that is, whether they have proof meaning. It has been revealed that it is impossible to affect objective status of thing and processes only by means of legislative activity, without needed methodological foundation, system of administrative-managing and organisational means.

Key words: legal institution, pre-trial investigation, criminal offence, confiscation.

INTRODUCTION

The extensive process of reforming of criminal procedural legislation in Ukraine that began as a part of implementation of the Concept of Judicial and Legal Reform in Ukraine (1992) [1], continued within the implementation of the Concept of Reforming the Criminal Justice of Ukraine (2008) and formally culminated with the adoption of the Criminal Procedure Code (hereinafter referred to as the CPC) on April 2012, but in fact the process has been lasting until today.

Perhaps, it is not that extensive, but reforming of the domestic criminal procedural legislation has become constant in the modern legal system of Ukraine. Seemingly, it may be commended as necessary and quick response of legislator to changes in respective public relations and to objective needs of law enforcement subjects in this sphere [3;4]. However, in 2015, in the Strategy for reforming the judicial system, justice and related legal institutes for 2015-2020, the status of the justice, functioning of the prosecutor's office and the criminal justice as adjacent legal institutes, is assessed as having disadvantages, conditioned by problems in the field of strategic planning and in the legislative process, and by absence of systematic view in the formation of the justice sector democratisation in long, middle and short term [5].

The main source of criminal procedural law is the current CPC that has been in effect since November 20, 2012. Although first amendments had been made on July 5, 2012 [6], that is, before it entered into force. In the years since, each year the CPC of Ukraine (sometimes along with other sources of criminal procedural law of Ukraine) has been amended, supplemented [7].

In general, in a certain way the CPC of Ukraine has been amended by more than 55 laws of Ukraine. Some of them changed normative regulation of certain procedure acts (for instance, of the Temporarily Takeover and search) or introduced procedural mechanisms for the implementation of new criminal law institutes (for example, special confiscation [8]), and some made systemic changes to the normative regulation of criminal procedural activities and its implementation by individual participants of criminal proceedings or at individual stages of the process (for example, Regulation of the Criminal Court of the Supreme Court as a court of cassation [9]).

Separate articles of the CPC of Ukraine for six years of its operation have been repeatedly amended. Thus, art.170 of the CPC of Ukraine has been amended six times (by laws of Ukraine dated April 18, 2013, May 23, 2013; February 12, 2015, November 10, 2016, February 18, 2016), art. 236 of the CPC of Ukraine has been amended four times (by laws of Ukraine dated May 13, 2015, November 10, 2015, October 3, 2017, November 16, 2017) [7].

In this, some articles of CPC of Ukraine have been amended during short periods (for example, articles 170, 174 were amended by laws of Ukraine dated April 18, 2013, and May 23, 2013, article 303 – by laws of Ukraine dated October 3, 2017 and November 16, 2017).

Separate provisions of the CPC that had been amended, after a while were amended again. Thus, for example, wording of p.2 art.132, first paragraph of p.1 art.184, p. 2 art. 234 of CPC of Ukraine at first was amended by law of Ukraine dated October 3, 2017, but respective provisions have been returned in fact to the first version by the law of Ukraine "On Amending the Criminal procedure Code of Ukraine concerning clarification of separate provisions", due to the fact that the changes made by the law of Ukraine dated October 3, 2017 ", greatly complicated the work of the pre-trial investigation bodies in terms of the prompt, complete and impartial investigation" [10].

1. MATERIALS AND METHODS

The matter of the improvement of the legislation in the sphere of criminal procedural proof has always been at the centre of the criminal proceeds science. This question regarding recognition of the rights of participants in the process for the independent evaluation of evidence, in particular, the evaluation of evidence as one of the elements of the criminal procedural proof that is significant for the judicial and investigative activities, is actual [11;12]. Use of different theoretical methods revealed the features of logical interpretation of cognitive evidentiary activity. They are:

– firstly, the distinction of cognitive (and) practical and justifying (logical) activities as separated from each other in time; the first one precedes the second one and, according to the certain scientists, is not included to the content of proof, just provides it;

– secondly, understanding to proof the establishment of "practical truth", which is considered as certain degree of reliability of knowledge about a committed criminal offence;

– thirdly, the understanding as evidence the facts, using which establishes other (evidentiary) facts;

Analyses method revealed that pre-Soviet scientists in the understanding of evidence placed emphasis on the content part, but not on the form of evidentiary facts fixation. The other aspect of the understanding of the essence of cognitive criminal procedural proof activity can be called rational and empirical, when knowledge is obtained through direct or indirect perception using certain mental logical operations and correlates with

experience (as proof inherent to certain subject and to the society in the whole) [13]. It is characteristic for the most of scientific works from the beginning of 20th century and to this day. Despite the fact that in different periods of historic development this interpretation was affected by different philosophical doctrines (which in theory basis, as a rule, had dominant in a state and society ideological component), the main its sense (rational and empirical) has always been decisive that let us highlight it.

Systematic approach provided an opportunity that search for solution of any problem should be systematic, that is, it is needed to consider the whole system, in which a problem has appeared, taking into account all purposes and functions of the system, structure, all the internal and external relations. Systematic approach is the basis of such applied scientific discipline as systematic analysis, which is aimed at development of methods of analysis of systems and solution of its problems [14]. In the procedure of proof activity, the main evidence is the most important and decisive. Law provides an opportunity to substantiate legal positions of parties and court and court's decision only with evidences gained in a framework of trial communication of its participants. Considering the great value of such evidences for the criminal proceeding, the necessity to distinct these evidences from evidences, gained on pre-trial evidence proceeding and the historical traditions, in our opinion, they can be called "trial evidence". Exactly in such way, we suppose, this discussion matter can be solved in the proof theory. The structure of the proof theory consists of two sections: general that describes general knowledge about definitions and types of evidences and process of proof, and special, which is about peculiarities of gathering, examining, evaluation, check and use of evidence during investigation (search) or proof during trial.

2. RESULTS AND DISCUSSION

Some Ukrainian laws, by which also articles of the CPC of Ukraine had been amended, later were repealed by other Ukrainian laws (thus, the law of Ukraine dated January 28, 2014, repealed the law of Ukraine dated January 16, 2014, "On Amendments to the Criminal Procedure Code of Ukraine regarding extramural criminal proceedings", the law of Ukraine dated January 16, 2014, "On Amendments to the Law of Ukraine "On the Judicial System and Status of Judges" and procedural laws concerning additional measures in order to protect citizens' safety"), and separate provisions of the CPC pf Ukraine (including those, which are amendments/supplements) were overturned as unconstitutional (thus, the law of Ukraine dated December 21, 2016, had supplemented article 216 of the CPC of Ukraine with part six, which later by the decision of the Constitutional Court of Ukraine dated April 24, 2018, No 3 was overturned unconstitutional) [15].

Decidedly, such situation has affected quality of criminal proceedings law. According to a fair statement of O. A. Leiba, spontaneous and situational normative dynamics of criminal proceedings legislation of the last years have led to the aggravation of normative and content issues that for five years have been "painful" for the law enforce-

ment and still have not been solved. Moreover, they create new issues, which intensify inconsistency of separate structural elements of criminal procedure legislation or create mutual confrontation between some norms; cause mistakes in setting structural connections using blanket and reference norms; condition violation of law logic in construction of terminology and conceptual categorical apparatus, etc. [16].

Legislative drafting of out parliamentarians aimed at the improvement of the current CPC of Ukraine even for today is very active. However, unfortunately, not all draft laws proposed for consideration or even those ones adopted by Verkhovna Rada of Ukraine and entered into force, really contribute to the achievement of the declared goal. In connection with this, there are new grounds for a critical analysis of the next improvement of (attempts to improve) the criminal procedural law, both from the point of view of compliance with the rules of legislative technique, and in view of the effectiveness of the normative regulation of criminal procedural activities, taking into account the legal and organisational aspects of its implementation.

Thus, there is number of questions about the results of the text analysis of the draft of the Law on Amendments to Certain Legislative Acts of Ukraine on the Simplification of Pre-trial Investigation of Certain Categories of Criminal Offences (№ 7279 dated April 20, 2018) in wording dated November 21, 2018, that was adopted by Verkhovna Rada of Ukraine [17].

This draft law proposes amendments, in particular, to the CPC of Ukraine, insofar as it concerns the peculiarities of pre-trial investigation in the form of criminal misdemeanour investigation, a list of which is defined in the amendments to the Criminal Code of Ukraine (in the wording of the same draft), as well as the peculiarities of trial of the criminal proceedings regarding criminal offences.

Without denying, in general, the urgent need for the adoption and implementation of a law that would provide the material basis and consolidate the procedure for differentiating the criminal procedural form towards the simplification of pre-trial investigation and judicial consideration of certain categories of criminal offences, nevertheless, we note that the draft was criticized, first of all from the Main Scientific Expert Department and the Main Legal Department of the Verkhovna Rada of Ukraine. Along with this, reading the text of the draft gives grounds for additional thinking and critical conclusions.

Thus, among other things, attention is drawn to the efforts of the authors of the draft to establish the features not only of the procedure of pre-trial investigation in the form of enquiry and judicial review of criminal proceedings concerning criminal offences, but also to change the general provisions of the criminal proceedings, the basic concepts of criminal procedural law.

This can be concluded from the analysis of article 298-1 of the draft, which establish the extended list of procedural sources of evidence (in compare with article 84 of the CPC of Ukraine) in criminal proceedings about criminal offences and also the general prohibition on the use of the latter in a criminal proceeding concerning a crime.

Such approach conditions the appearance of the number of questions, answers to which are absent in the text of the draft and in the accompanying documents: do the evidence that are gathered during the pre-trial investigation, by their legal nature is different from the evidence that will be gathered during the enquiry? Should the admissibility of evidence (in particular, in the question of the legality of their procedural source) to be resolved differently in pre-trial investigation and enquiry? Should the source, which is not recognised as a source of evidence in a pre-trial investigation, be recognised as a source of evidence in an enquiry? And on the contrary, the source, which is recognised as a source of evidence in an enquiry, should not be recognised as a source of evidence of pre-trial investigation, but nevertheless, in some cases, be recognised by a decision of an investigating judge?

Also, there is a question concerning the content of the decree of an investigating judge, and concerning judge's power to assent use of procedural sources of criminal proceeding about criminal offence in criminal proceeding concerning a crime (par.3 p.1 art. 298-1 of the draft). What should be a factual ground and condition to adoption of such decision by investigating judge?

It is worth noting that all proposed in art.298-1 additional procedural sources, in particular: explanation of persons, results of medical examination, expert's report, testimony of technical devices and technical means, which have a function of photo and film, video recording or photographic and cinematographic equipment, video recording, can be used (and are being used) in proof as a "classical" source of evidence – documents.

CONCLUSION

Ways of gathering evidence is also under reforms. As a result, the spectrum of evidence for the prosecution in criminal proceedings for a criminal offence is wider than in a criminal proceeding of a crime (Article 300 of the draft, Article 93 of the CPC of Ukraine). Expect investigation (search) provided by the CPC of Ukraine, in criminal proceedings for a criminal offence a number of "other actions" may be conducted resulting in formation of procedural sources of evidence implied by art.298-1 (which as well may be can be conducted before entering into the Uniform Register of Pre-trial Investigations and by decision of investigating judge become sources of evidence in criminal proceeding about a crime).

However, along with this, unlike investigative actions, the procedure for conducting "other actions" in criminal proceedings for a criminal offence has not actually been established. How should the admissibility of the evidence obtained as a result of such actions be resolved (in particular, in the question of observance of the procedure for obtaining them in accordance with the law)?

In general, it is worth noting that analysis of only a few of the drafts proposed in recent years, a purpose of which is to determine the improvement of criminal procedural law, effective fulfillment of general tasks of criminal proceedings, protection of

rights, freedoms and legitimate interests of its participants, etc., unfortunately, shows a sad tendency of changing law enforcement practice for the better only by means of legislative activity without taking into account systemic problems of a methodological, legal and organisational nature.

Among the reasons of this situation are the absence of necessary scientific foundation of respective changes (or ignoring existing scientific developments), the contradiction of theoretical, methodological understanding of respective categories, the absence of systematic approach to the separate directions of reforming with taking into account, not only legal, procedural aspects, but also organisational.

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Victoria V. Rozhnova
Candidate of Juridical Sciences, Assistant Professor
Professor of the Department of Criminal Procedure
National Academy of Internal Affairs
03035, 1 Solomjanska Sq., Kyiv, Ukraine

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