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Problems of modern evidential law in criminal process

Abstract: It is studied procedural legal nature of the sources of evidence in criminal proceedings. Main points of views expressed in modern in home literature are analyzed. It is expressed the author's vision on this matter. There is suggested to make changes in normative definition of a notion of evidence's sources.

Keywords: theory of evidence; evidential law; evidence; source of proving.

Modern criminal justice overruns with problems and problematic situations. No coincidence that the last decade domestic jurisprudents (especially, specialists in procedure) are often applied to research of fundamental problems of court proceedings: aims, social values, grounds, motivations, principles of criminal process. This topic literally woven with contradictions and the reason of that is imperfective in many relationships the criminal procedure legislation.

In theory of evidence – in studies dedicated to evidential law, in our view, there a lot of problems, which are born with methodologically inconsistent definition of evidence that suggested by creators of the CPC of RF in Article 74. Part 2 if the Article provides: evidence-information on criminal cases recognizes conclusions, material evidence, records and documents. Moreover, a content of the Article shows that contrary to requirements of p. 1 of Article 74 of the CPC of RF evidence are not any information and only those listed in p. 2 of the Article.

There are negative consequences of this definition in publications of the last years. Therefore, even in the textbooks on "Criminal process", in comments to the

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CPC of RF, where have presented an established concepts, notions of evidence and sources of evidence are stated ambiguously[1]. However, without correct definition and consistent using cannot be irreproachable the studies any particular objectives of the criminal process and criminalistics.

As for *procedural sources* of evidential information, in result of transformation of Article 69 of the CPC of RSFSR (it clearly contains procedural informational sources) into Article 74 of the CPC of RF they were lost by many domestic researchers. It is no wonder. If to be agreed with formulations of a lawmaker, according to which testimonies, conclusions, records and others are data then question arises - where are their sources? In searches of an answer on it there are used naturalistic, informative and cognitive, axiological, logic aspects and further, probably, other ones – activity-directed, semiotic, psychological and linguistic.

Dispersed of opinions, which is simply unthinkable in other branches of procedural science, are quite wide. The evidence of that is shown below.

On opinion of S.A. Shafer, new edition of Article 74 of the CPC of RF was a noticeable step towards development of evidence' theory, and there should be refused on usage of the term "source of evidence" [11, p. 71, 73]. Then does the discussed legal category is not existed in criminal process? An author does not take attention that the same steps are not undertaken in other branches of procedural law – civil, arbitrary, and administrative. The notion of information (data) and their sources are clearly differentiated with Article 55 of the Code of Civil Procedure of RF, Article 64 of the Code of Arbitrary Procedure of RF and Article 26.2 of the Code of Administrative Offenses. The same legal constructions also fixed in other domestic and foreign legislative acts, for example, in the Code of Criminal Procedure all states of former USSR. For instance, p. 2 of Article 84 of new Code

[1] Let's compare, for instance, what has written concerning a notion of evidence in book: Criminal process: textbook/edited by V.P. Bozhyev. M.: Yurist, 2011 and Rossinsky S.B. Criminal process of Russia: course of lectures. M.: Eksmo, 2008.

of Criminal Procedure of Ukraine writes: “Procedural sources of evidence are testimonies, material evidence, documents, and reports of an expert”. It concerns not only procedural acts. So, Article 2 of Federal Law of RF no. 149-FZ of 27.07.2006 “On information technologies and protection of information” determines it as “information (data) independently on form of their presentation” [1].

New formulation cannot be called as step back in evidential law. This step would be returning to the period of validity of the CCP of RSFSR 1923, in which a notion of “evidence” was absent. Scientists-specialists in procedure offered to take it off a sense of other norms, for instance from the rule of Article 319 of the CCP of RSFSR – “court bases its sentence only on the data available in the case-file, examined in court session” [10, p. 36].

If to leave aside assertions on ontological (essential) and epistemological (informative and cognitive) approaches to investigation of nature of data formation then one can say that this point of view like a position of lawmakers of Article 74 of the CCP of RF is based on amplification of unity’s concept of actual data and other sources, i.e. such unity, in which first notion takes up second one.

V.T. Tomin being formulated and protected a thesis on “rolling of domestic criminal procedural law to the theory of formal assessment of evidence” is enumerating evidence’ sources, presented by a lawmaker in p. 2 of Article 74 of the CCP of RF. He believed that contrary to position of a lawmaker there are presented just the sources of data, but not the data itself. Tomin considers that it in combination with number of other norms is “not only unnecessary but also harmful” [9, p. 217]. This position is consonant other his ideas that cognition in court proceedings is not legal category. It based on the laws of epistemology, which are corrected with procedural law. In contrary, procedural laws should be corrected with the laws of epistemology [9, p. 216-232].

Author of the article has already expressed on this point of view that hypothetically it might be presented exclusion of the norms of CCP of RF [6, p.

383-384]. Lawmakers of the most part of the states consider reasonable to fix in normative acts the notions of epistemology and logics. There were neither in the Rules of Criminal Procedure of Russian Empire of 1864 nor in the first CCP of RSFSR. However, formulated in Fundamentals of criminal proceedings of the Union of SSR and union republic of 1958 (Art. 16) and re-used in CCP of union republic of former USSR (Art. 69 of CCP of RSFSR), these norms logically entered into structure of domestic evidential law. There is no sense to reject them.

Certainly, there might be appeared not much situations in real criminal process, when in virtue of the various circumstances arise obstacles on the way of legalization and usage available information. But the reason of inadmissibility of evidence is not caused with presence or absence in CCP of RF of the list of their sources.

Number of scientists in procedure proceeds from legal, i.e. literal, interpretation of Article 74 of the CCP of RF. The position of them should be respected if they thoroughly argue their assessments, conclusions and suggestions. However, one cannot be agreed to the latter. So, A.V. Smirnov and K.B. Kalinovsky found the word "source" in one of the norms of the CCP of RF ("… testimonies of a witness who unable to say a source of his/her awareness" – cl. 2 p. 2 Art. 75), elevated to the level of the term and concluded: a source of evidence are the persons provide evidential information. The authors extended the number of the sources added there the following: subjects of proving; persons who have personal legal interest and their representatives; individual and legal entities submitting material evidence and documents; and even attesting witnesses and other persons who participate or is present at production of investigative or judicial actions [8, p. 186]. In this case successfully used (in view of official stylistics) by a lawmaker the word ("source of awareness") has been resulted the distortion of cognitive and informative nature of formation of evidential information. It is obviously that awareness of a witness is provided not only with other persons, but

also with perceptible by him/her events, items and documents. One sufficient question is whether reasonable legal interpretation of imperfect norm?

Search for lost by a lawmaker the sources of evidence made home jurisprudents to develop idea of V.Y. Dorokhov about that these sources are participants of criminal process as without homo sapiens information related to a case cannot appear and be perceived, saved and told to the bodies of investigation and court. He noted in 1981 that "under source of evidence we understood an accused, witness, expert and other persons who have certain procedural status and dispose of evidence" [5, p. 7-8]. Three decades later, V.A. Lazarev repeating this point of view, writes that "… court and parties receive information not from testimonies of a witness or victim, but personally from witness or victim, who are the sources of these information" [7, p. 159].

E.A. Dolya made a step further of others in direction of development of V.Y. Dorokhin's position. Circle of the subjects who dispose of evidence is outlined by the author in Article 74.1, with which he offers to supplement the CCP of RF. Let's citing verbatim its head and p. 1 to make clear our claims: "Article 74.1. Sources of evidence. Sources of evidence are suspected, accused, victim, witness, expert, attesting witness, an inquiry officer, investigator, judge, and an author of other document, which possess information concerning a case" [4, p. 8].

Let's leave aside a search of the responses on such questions as e.g. why is not prosecutor and counsel-defender not included in the formulation suggested, who are also the parties of court session? Why specialists giving like an expert testimonies and conclusions are not a source of evidence? The same might be related to court interpreter, who participates in interrogation of a person not command with court language and testifies correctness of the records. Why have civic plaintiff, civic defendant, representative and legal representative been ignored? Whether is sufficient for this position the fact that these participants of criminal process are interrogated on the rules of witness' interrogation. Do they dispose of information related to a case? Who should be named an author of

document that received with technical device? And one more: whether permissible to equalize the statuses of inquiry officer, investigator and judge who form the evidence, witness and expert who provide information and attesting witness who only testifies this of other circumstances?

I would like to understand what and how really, but not in declarative level, might be strengthened the statuses of participants of criminal process in result of reformations suggested.

However, main is concluded in statement of a fact – methodologically vulnerable formulation of evidence's concept suggested in Art. 74 of the CCP of RF entailed of a lot negative consequences, so that it is difficult sometimes to distinguish in which situations are used the concepts of epistemology and when – philosophic categories of form and content. At this, traditional *procedural forms* of existence of actual data are lost.

Certainly, proving is carried out in unity of cogitative and practical activity. Evidence-data exist in speech (verbal or written) form and cannot exist out of thinking. Certainly, using of achievements of various branches of science enrich scientific notation on evidential law. But, reasoning about naturalistic, cognitive, axiological nature of information in proving must not substitute legal categories.

Preferable and right are presented the positions of authors who differentiate the notions of evidence and their sources and dot change their opinion after adoption of the CCP of RF (B.T. Bezlepkin, A.R. Belkin, V.N. Grigoryev, A.V. Pobedkin, V.T. Tomin and others). The categories of evidential law are not related to ideological ones. In the means of search the truth on criminal cases have nothing changed in ontological and epistemological aspects.

In everyday life in compliance with common scientific ideas, we will unlike identify a newspaper with materials published in it, disc with music sound at its reproduction. It is clear that each publicistic and musical piece have own form and content. In informational cognitive process the listed items might also be characterized from point of view of form and content. Applicably to cognitive

activity in area of criminal proceedings these obvious provisions are interpreted in other way. It suggested covering with one term "evidence" two notions i.e. its procedural form and its content. It seems to be wrong for example an opinion about that "it is possible to separate neither theoretically nor practically the data on the facts from testimonies of witnesses, documents and other means, in which they are contained" [2, p. 83]. *Practically* there cannot be spoken of any separation. But, note: for law enforcers like for the most researchers in area of criminalistics, forensic psychology, forensic medicine, legal informatics and number of other branches of knowledge there is no differences what form and objects are disclosed, fixed, studied and evaluated – the carriers of evidential information or established by them information. It is enough to indicated, for example, to testimonies given in unknown language or unintelligible speech; complicated technical documentations; number signs and features of material evidence that have criminalistical content; insufficiently obvious formulations for the subjects of proving that given by specialists and experts etc. Theoretically, it is possible and reasonable to separate any chain of integral object. Moreover, it is one of the methodological principles of systemic researches.

Certainly, in reality, in practical activity evidence and their sources exist in inseparable union. But these *notions* are ambiguous. Evidence in criminal process is any information (data) that have the features stipulated in law. Like in any other thought-activity they always expressed with language (speech) means. Sources of evidence act that procedural form, in which the evidence is allowed to criminal proceedings.

We emphasized one more that procedural form, procedural sources. Just thousand forms in various branches of procedural law dedicated them, and just *this fact should be reflected in formulation of p. 2 of Art. 74 of the CCP of RF. (it is quite possible that formulation* suggested could be in certain extent to conciliate the positions of domestic scientists –specialists in procedures).

The notion of evidence in criminal process is clearly determined in p. 1 of Art. 74 of the CCP of RF. As for p. 2 of the Article, containing the list of sources of evidential information, in our view, here it is required either exclusion if from the Code or coming back to the concept of previous CCP of RSFSR. It is completely obvious that the second variant is more preferable for domestic criminal procedural legislation. In this case part 2 of Article 74 might be stipulated in the following edition: "procedural sources of evidence are testimonies of suspected, accused, victim, witness, conclusions and testimonies of an expert and specialist, material evidence, records of investigative and court actions, documents".

I would like to note that presented list has comprehensive and universal nature. It allows determining the legal nature of any carrier of information or doing opposite conclusion whether the object possesses with features of procedural source of evidence or not. Therefore, suggestions about supplementing of this list with other objects (materials, received in course of operation searching activity or in result of application of technical criminalistic means [3, p. 400]) are presented to be groundless.

We, actually, believe that three words that compose the beginning of offered by us norm enable to return to proper routine the scientific ideas about basic concepts of evidential law.

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