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EVIDENCE IN CRIMINAL PROCEEDINGS: DEFINING THE NOTION

В статті досліджується питання щодо сутності доказу як фундаментальної категорії в кримінальному процесі. На основі аналізу наукових джерел розглянуто підходи щодо розуміння поняття доказу та їх процесуальних джерел в кримінальному процесі.

Ключові слова: *докази, кримінальний процес, факти, фактичні дані, джерело доказів, кримінальне провадження.*

В статье исследуется вопрос о сущности доказательства как фундаментальной категории в уголовном процессе. На основе анализа научных источников рассмотрены подходы к пониманию понятия доказательства и их процессуальных источников в уголовном процессе.

Ключевые слова: *доказательства, уголовный процесс, факты, фактические данные, источник доказательств, уголовное производство.*

The proof is a fundamental category of criminal proceeding as a science and practice of parties of criminal proceeding and the court of law. But until now there is no consensus in determining its concept that negatively affect the objectives of criminal justice and actualizes the issue of forming its definition, which would correspond to epistemological and legal principles of evidence.

Therefore, the problems concerning the definition of evidence in criminal proceeding have been the subject of investigation in research papers of such lawyers as V. Arsyeneva, A. Belkina, R. Belkina, Y. Grosheviy, V. Zazhytskiy, O. Eysman, L. Carneyeva, E. Kovalenko, V. Lazareva, P. Lupynska, G. Mynkovskiy, I. Mykhailovska, V. Nor, Y. Orlov, M. Pogoretskiy, D. Sergeeva, S. Stahivskiy, M. Strogovich, O. Trusov, L. Udalova, S. Sheifer, O. Shilo, M. Shumylo and others. However, the issue of the definition of evidence remains controversial today.

The purpose of this article is to study the question of the nature of proof as a fundamental category of the theory of criminal procedural proving. According to p. 1, art. 84 of the Criminal Procedure Code of Ukraine (hereinafter – CPC of Ukraine) evidence in criminal proceedings is the actual data obtained in the manner prescribed by the CPC of Ukraine on the basis of which the investigator, the

prosecutor, the investigating judge and the court determine the presence or absence of facts and circumstances relevant to the criminal proceedings and are subjected to be proved. Despite the fact that the legislator clearly defined the concept of evidence in criminal proceedings, there is no consensus in understanding this concept among practitioners.

Analysis of the results of practice shows that 28% of operatives, 32% of investigators, 33% of prosecutors, and 38% of judges believe that the evidence is the unity of actual data and their sources; 16% of operatives, 18% of investigators, 22.8% of prosecutors, and 16% of judges consider such only actual data (information about facts); 31.9% of operatives, 36% of investigators, 35% of prosecutors, and 31% of judges – the actual data and their sources; 10% of operatives, 2.8% of investigators, 3.9% of prosecutors and 2.7% of judges find any facts as evidence; 14.1% of operatives, 11.2% of investigators, 5.3% of prosecutors, and 12.3% of judges believe that the evidence is what is defined in p. 1, art. 84 of CPC of Ukraine.

Practitioners conditioned ambiguous understanding of the concept and content of evidence in criminal proceedings, including their ambiguous interpretation in scientific, academic literature, particularly in scientific-practical commentarie of criminal procedure law.

The correct definition of evidence in criminal proceedings is the guarantee of the objectives implementation of criminal justice, regulated by art. 2 of CPC of Ukraine, because the evidence is the primary means of proving with the help of which parties of criminal proceedings, the investigating judge and the court determine the circumstances to be proved in criminal proceedings (p. 1, art. 91 of CPC of Ukraine). Many prominent scientists spoke about the importance of evidence in criminal proceedings. For instance, M. Myheyenko said: «… in the end, in criminal proceedings as a science, an academic discipline, a branch of law and practice all comes down to practice and evidence, because they are the main content of the criminal process» [2, p. 115].

It should be noted that this problem has been the subject of research of scientists for more than a century. The analysis shows that the evolution of views on issues relating to the concept of evidence in a science of criminal process can be divided into three periods. The first period – the doctrine of proofs in a criminal proceeding of pre-revolutionary lawyers; the second stage – the doctrine of evidence during the Soviet Union; the third stage – modern points of view.

In pre-revolutionary period, to the definition of «evidence in criminal proceedings» were different approaches. For example, L. Vladimirov mentioned that the evidence is a collection of actual data that allow creating the conviction in a court of law about the existence or absence of certain circumstances that are the subject of a judicial investigation. [3, p. 115].

According to D. Thalberg, under evidence it is necessary to understand the jurisdiction facts or data, which are the basis of conviction of the accused to be guilty or innocent [4, p. 37]. A similar understanding of the evidence (as facts) is found in S. Poznyshev's statements. In particular, he points out that as criminal judicial evidence should be recognized only those facts, which are in compliance with statutory regulations, the introduction into the criminal process, which are the grounds for obtaining information about the properties of an event that is the subject of a judicial investigation [5, p. 51]. Noteworthy point of view is also expressed by V. Sluchevskiy. So, the scientist says that the judge is trying to establish the material truth in relation to the crime, and he can install it only after evaluation of factual circumstances that preceded, coincided or were caused by the committed criminal act. And those actual data that are received by the judge and on the basis of which he forms corresponding inner conviction about the circumstances of committing the crime and the guilt of the person are con-

sidered to be the evidence in the case [6, p. 41–42].

In contrast to the above expressed views, I. Foynytskiy believes that the concept of proof has two meanings. First, evidence is the data obtained from participants in the process by which we can draw the appropriate conclusions. For example, from the testimonies we can learn about the fact of death committed by the accused – it is the evidence (Factum Probans), with the help of which, the person has to find information about the circumstances of committing the crime (Factum Probandum). Second, the evidence is the mental activity itself of a certain subject, in the process of which the circumstance that is being established is correlated with the already known circumstances. (Demonstratio, Probatio) [7, p. 162].

The approaches to understanding the concept of evidence to some extent are reflected in subsequent writings of scholars of the Soviet era as well as in the era of the independent Ukraine. Some lawyers defend the position that the evidence in criminal proceedings are the facts (objectively existing facts of reality) with the help of which the circumstances of offense committing are established [8, p. 248]. In A. Vyshensky opinion, forensic evidence are simple facts, any phenomena that occur in everyday life, and they are called forensic evidence just because they are within the scope of the trial, and are means to establish the objective truth [9, c. 146].

Further, some experts have proposed to determine the evidence through the actual data, however, meaning by the latter the same facts of reality. For example, V. Arseniev wrote that the criminal evidence are the actual data (facts of the present and past) that are connected to properly set actual circumstances of committing a crime [10, p. 92]. A similar position is advocated by R. Dombrovskiy, who states that the evidence in a criminal case are just the facts, and they are the facts included in the scope of human cognitive, and, thus, they have become the thoughts about them, that is the actual data [11, p. 35].

Supporters of this view believe that the legislator deliberately highlights in this article two parts, emphasizing that the term «evidence» refers only to the first one. Mentioned in the second part the evidence of a witness, victim, suspect and the accused, expert opinion, material evidence, investigative (judicial) protocols and other documents – are a source of evidence, but not the evidence as they are [12, p. 10–11; 13, p. 76–77]. Another group of researchers under the evidence understand the actual data and their sources, or means of proof, as they are called in some cases. «The notion of proof has two meanings – writes M. Strogovich. – Proofs – firstly, are the facts on the ground of which the offense is established or not, guilt or innocence of the person in its committing and other factors that affect the degree of liability of the person. Secondly, the evidence are those sources required by law, from which the investigation and the court obtain information about the facts that are relevant to the case and with the help of which they establish the facts» [14, p. 188–189]. V. Arsenyev also follows the same opinion [10, p. 92].

Finally, there is the so-called single concept of proof, supporters of which claim that the actual data and their sources are combined in one concept as its two essential elements and the unity of the data and their sources which are in correlation of form and content should be considered a proof [15, p. 110; 16, p. 11–12].

O. Trusov in one of his last works also called for a single concept of proof. «The proof, as well as in any reflection – he said – one should distinguish its two main parties – the content of reflection, which is usually called a reflection or image of display and form, i.e. the mode of existence and reflection expression. The content of reflection in the proof is the information contained in it, i.e. the evidence and a source of evidence is the form, way of existence and expression of reflection» [17, p. 551].

The outlined approach to understanding the concept of «evidence» was produced

in response to a «double» understanding of the evidence about the nature of which the author mentioned above. Supporters of a «single» understanding of evidence state that in the evidence one must distinguish two main components – the content and form, including the impact of various processes in the formation of evidence. As the authors of one of the books in the criminal process noted, the content of display in the proof is the information that it contains, i.e. the evidence and a source of evidence is the form, way of existence and way of expressing reflection – [17, p. 551].

These approaches allow us to define evidence in criminal proceedings as a unity of actual data (information about the circumstances of the crime) and procedural forms (sources of evidence). The proof in criminal proceedings, according to I. Mykhailivska, is indissoluble unity of actual data (i.e. information about the circumstances to be proved) and procedural forms in which this evidence are embodied [18, p. 153].

Indeed, the actual data would not be recognized as a proof, although they are relevant to the case, but do not have the appropriate procedural form. Conversely, if properly prepared testimony of a witness, expert opinion will not contain information relating to the case, they can not serve as proofs, because they themselves do not prove anything. That's why the unity of content and form (actual data and their sources) gives the correct understanding of the nature of evidence.

M. Pogoretskiy mentioned that actual data as evidence (information) about the facts (circumstances of the crime) are the basis for obtaining proofs. However, they do not automatically become proofs, even if getting them from statutory sources, according to a specified criminal procedural law for each of the types of forms, but only after the recognition of the evidence by the person conducting the criminal investigation. From that moment, the totality of the actual data and their sources acquires the status of proof in a criminal case [19, p. 309].

Recently, there has been an attempt to rethink the concept of evidence. In the course of such actions the scientists focus on its form, and the content is considered to be an auxiliary property. In particular, according to S. Pashyn, proofs are procedurally recorded messages and documents or other items that can be legitimately used in legal proceedings to establish the facts, the adoption of procedural decisions and judgments adoption [20, p. 315]. However, it is believed that the mentioned definition is not more precise and deeper than that which was previously proposed. After all, there is no indication of substantial property of proof – its belonging, that is the connection of proof with the subject of proof (as we know, not all messages are evidence, but only those that indicate the circumstances to be proved). There is no clear indication on method of obtaining the evidence («procedurally recorded» message may be received in illegal way), and the most important is that the content and form of evidence are not separated (message, i.e. information, evidence, data are on a par with «documents or other.

Taking into account the mentioned above information, in our opinion, the position of M. Pogoretskiy is justified and deserves support. He defines evidence in criminal proceedings as a unity of actual data obtained and assigned in the appropriate procedural form, and their judicial sources, on the basis of which the parts of the criminal proceedings, the investigating judge and the court of law determine the presence or absence of facts and circumstances relevant to the criminal proceedings and are to be proved and that is recognized by the authorized subjects of proving, investigating judge and the court [22, p. 16].

Proofs have relevant content, i.e. the information about the facts that is being established, and secondly, procedural form which is referred to in the law as means of proving, and thirdly, a procedural order of obtaining and researching the evidence-based information and the means of proving. These three features characterize the legal nature of the evidence. The absence of any specified element destroys or signifi-

cantly distorts the concept of evidence in criminal proceedings.

Proof deprived of its cognitive content or procedural form, involved in the process of pre-trial or judicial knowledge with a violation of criminal procedural order, ceases to be an evidence, that's why the recognition in the theory of evidence received an idea that evidence, material evidence, reports and other documents – this is the procedural form, in which evidence obtained by the investigator or the court are stored and used. Considering such a belief as a true fact due to understanding of evidence as the dialectical unity of content and form, we can not but conclude that one can not differentiate «actual data», i.e. the content of the evidence from «sources», i.e. its form.

A source of evidence, in our opinion, is a procedural form, through which information about the facts, that are recognized as proofs, is involved in the sphere of proof, and a carrier of the information about the facts of the past in which parties of criminal proceedings, the investigating judge and the court are interested. The absence of a single concept of sources of evidence in the theory of criminal proceedings negatively affects the pre-trial and judicial practice. Thus, the sources of evidence include: a) objects of the material world, which have certain characteristics, qualities, attributes that can be used to establish the circumstances relevant for the case [20, p. 52]; b) witnesses, suspects, victims, experts, accused, documents [10, p. 118–120]; c) persons who give testimonies (witnesses, victims, suspects, accused, experts); investigators and witnesses that made up a protocol of an investigative action; authors of the document; carriers of material evidence (investigator and witnesses as well as individuals who provided the subject) [21, p. 190]; d) the court of law [23, p. 114]; e) testimony of the witness, the testimony of the victim, the suspect, accused, expert opinion, material evidence, records of investigative and judicial actions and other documents [24, p. 155–182]; f) procedural form by which actual data, recognized as evidence, are used in the procedure of proof and carriers of factual information [25, p. 133]; g) for protocols of investigative and judicial actions the source of evidence is recognized a procedural activity of officials leading the criminal process, and for other documents, evidence – both procedural activities of investigating authority, investigator or the court, or other activity that is outside the criminal justice [26, p. 52]; i) the offense itself is recognized as a source of material evidence and documents [13, c. 140].

According to S. Sheifer, the source is what gives rise to something, where anything starts with. The author notes that in order to serve as a source of proofs, evidence, conclusions, reports and material evidence must exist before the beginning of the process of proving, but in fact everything goes vice versa: these evidence arise as a result of evidence gathering, they are made up through the way of investigating by converting the obtained information into a form that ensures their safe storage and subsequent use [27, p. 28].

Having analyzed these statements we may realize that there are contradictions between epistemological and legal nature of the definition of sources of evidence. It is believed that the main reason of its existence is that particular scientists and experts mistakenly identified concepts such as «source of evidence» and «source of information» (information about the facts, actual data) [28, p. 29], which are close to each other on the epistemological nature, but different in legal nature. By a general rule, criminal event interacts with the environment, causing diverse changes of material objects, relations between them as well as the changes in the human psyche. As a result of that event, there is the formation of traces on material objects (material traces) and those formed in the psyche of people (ideal trace images). Taking into account these views, the sources of forensic evidence act as «repositories» that accumulate this information.

The immediate source of traces of crime (material and ideal) is socially dangerous influence of an offender, the behavior of whom is manifested in the form of action or inaction on the objective reality, the interaction of objects and states i.e. the offense itself.

Taking into consideration the fact that a crime may be known only by its traces, so the traces resulting from crime (material or ideal) are also sources of information. Therefore, the law enforcement agencies are mandated to seek additional sources of information, which under certain conditions can later become sources of evidence. In accordance with the demands of current CPC of Ukraine, the source of information can be a source of evidence only when it is involved in criminal proceeding in accordance with certain criminal procedural law for each source of evidence form. For example, testimony, as a source of evidence may be in criminal proceeding only if the person who knows certain circumstances of the crime, was questioned as a witness in accordance with the CPC of Ukraine (ch. 224, ch. 352). As to material objects as sources of information it is believed that they can be a source of material evidence only if the objects that were the instruments of committing the crime, retained traces of the crime or were directly the object of criminal acts, or they are money, valuables or other things acquired by a criminal way or objects that can be means to solve the crime and identify the guilty, or to refute the charges or mitigate liability. In addition, the material object as a source of information may become a source of material evidence only after a full and comprehensive inspection, a detailed description and attachment to a case by the investigator or by the court's decision. The material object as a source of information can also be a source of such evidence as a document if it contains set or certified circumstances relevant to the case, only if they have no material proof properties. So, as long as the evidence is not obtained from any source of information and are not fixed in procedural form determined by the law, until there are no evidence, and, therefore, there are no their sources. Summarizing everything, we should mention that the evidence in criminal proceedings is the unity of actual data obtained and assigned in the appropriate procedural form, and their procedural sources, on the basis of which the parties of the criminal proceedings, the investigating judge and the court determine the presence or absence of facts and circumstances significant for criminal proceedings and are to be proved and which is recognized by authorized subjects of proving, the investigating judge and the court of law.

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Maluga R. Evidence in criminal proceedings: defining the notion.

This article examines the questions about the nature of evidence as a fundamental category of records. Based on the analysis of scientific sources the approaches to the understanding of the concept of evidence and procedural sources of records. Evidence in criminal proceedings, according to the author, is the unity of the evidence obtained and assigned the appropriate procedural form, as well as their procedural sources for which parties to criminal proceedings, the investigating judge and the court determines whether or not the facts and circumstances relevant to criminal proceedings and to be proved and acknowledged by the authorized agents of evidence, investigating judge and the court.

Keywords: *evidence, criminal procedure, facts, actual data, source of evidence, criminal proceedings.*

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