IRSTI 10.79.35

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THE PROBLEMS OF EVIDENCE ADMISSIBILITY IN THE CRIMINAL PROCEDURE OF THE REPUBLIC OF KAZAKHSTAN

The article is devoted to the study of theoretical and practical problems of admissibility of evidence in criminal cases in the light of the changes introduced by the criminal procedure legislation to this institution. In the article are analyzed the procedures for resolving questions about the inadmissibility of evidence as evidence in their legal and practical reality. Here we focus on analysis of the controversial practice of recognizing the inadmissibility of evidence in criminal cases. The material-genesis of the formation of objective criteria for the admissibility of evidence in the criminal process of the Republic of Kazakhstan is analyzed. Admissibility is considered as a mandatory feature of evidence in the criminal process of the Republic of Kazakhstan. It is concluded that the objective criterion for the admissibility of evidence in the criminal process of the Republic of Kazakhstan should be material truth. The article pays attention to the analysis of the concept of the discursiveness of the powers of law enforcement officials to establish the admissibility of evidence at the pretrial stages of criminal proceeding. It is proved that the extended use of the discursive capabilities of the inquiry officer and investigator to determine the admissibility of evidence leads to uncontrolled making of procedural decisions that do not meet the requirements of justice. Allowed at the stage of pre-investigation procedural violations of procedural legislation have a significant impact on the prospects for judicial consideration of the case.

Key words: criminal process, evidence, procedural evidence, criminal evidence process, criminal proof theory.

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Қазақстан Республикасының қылмыстық іс жүргізуде дәлелдемелердің жол берілуінің мәселелері

Мақала қылмыстық іс жүргізу заңнамасымен осы мекемеде енгізілген өзгерістердің негізінде қылмыстық істер бойынша дәлелдемелердің жол берілуінің теориялық және практикалық мәселелерін зерттеуге арналған. Дәлелдердің заңдық және практикалық тұрғыда дәлелдемелер ретінде қабылдануына қатысты мәселелерді шешу рәсімі талданды.

Қылмыстық істер бойынша дәлелдемелерге жол бермеуді танудың қарама-қайшылық тәжірибесін талдауға бағытталған. Қазақстан Республикасының қылмыстық процесіндегі дәлелдемелердің жол берілуіне объективті өлшемдердің қалыптасуының материалдық-генезисі талданды. Қазақстан Республикасының қылмыстық процесінде дәлелдемелердің міндетті сипаты болып табылады. Қазақстан Республикасының қылмыстық процесіндегі дәлелдемелердің жол берілуінің объективті критерийі маңызды шындық болуы керек деген қорытындыға келді. Мақалада қылмыстық сот ісін жүргізудің алдын ала сатыларында дәлелдемелердің жол берілуін анықтау үшін құқық қорғау органдарының лауазымды тұлғаларының өкілеттіктерінің

дискурстық тұжырымдамасын талдауына назар аударылады. Зерттеушінің және тергеушінің дәлелдемелердің жол берілуін анықтайтын дискурсивтік мүмкіндіктерін кеңінен қолдану сот төрелігінің талаптарын қанағаттандырмайтын рәсімдік шешімдердің бақыланбайтын түрде шығарылуына әкеліп соқтырады. Іс-шара алдындағы тергеу барысында процессуалдық заңнаманы бұзу жағдайында сот ісін қараудың перспективаларына айтарлықтай ықпал етіледі. Сот процедуралық бұзушылықтарды мұқият талдауға тиіс.

Түйін сөздер: қылмыстық процесс, дәлелдемелер, процедуралық дәлелдемелер, қылмыстық дәлелдемелер процесі, қылмыстық-дәлелдеу теориясы.

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Проблемы допустимости доказательств по уголовному процессу РК

Статья посвящена исследованию теоретических и практических проблем допустимости доказательств по уголовным делам в свете изменений, внесенных уголовно-процессуальным законодательством в этот институт. Анализируются процедуры решения вопросов о недопустимости фактических данных в качестве доказательств, в их правовой и практической реальности. Основное внимание уделено анализу противоречивой практики по признанию недопустимости доказательств по уголовным делам. Анализируется материально-правовой генезис формирования объективных критериев допустимости доказательств в уголовном процессе Республики Казахстан. Допустимость рассматривается как обязательный признак доказательств в уголовном процессе Республики Казахстан. Делается вывод, что объективным критерием допустимости доказательств в уголовном процессе Республики Казахстан должна выступать материальная истина. В статье уделено внимание анализу понятия дискурсивности полномочий должностных лиц правоохранительных органов по установлению допустимости доказательств на досудебных этапах производства по уголовному делу. Доказывается, что расширенное применение дискурсивных возможностей следователя (дознавателя), прокурора по определению допустимости доказательств создает условия для неконтролируемого принятия процессуальных решений, не соответствующих требованиям справедливости. Допускаемые на этапе доследственного производства нарушения процессуального законодательства оказывают существенное воздействие на перспективы судебного рассмотрения дела.

Ключевые слова: уголовный процесс, доказательства, процессуальное доказывание, процесс уголовного доказывания, теория уголовного доказывания.

Introduction

The Constitution of the Republic of Kazakhstan enshrines in law that the Supreme values are: the person, his life, rights and freedoms (Constitution of the Republic of Kazakhstan 1995: 4). The constitutional condition of stable existence and progressive development of society, creation of worthy conditions of the level and life of Kazakhstan citizens is the provision of public security. In the area of criminal law, a fundamentally new hierarchy of social values to be protected, based on the priority of natural, inalienable human rights and freedoms, has also been defined. At the same time, the policy documents of our state always indicate the need for further improvement of the criminal procedure legislation. Further consistent implementation of the fundamental principles of the criminal process aimed at the protection of human rights and freedoms in specific norms is noted as the main goal (The concept of legal policy of the Republic of Kazakhstan for the period from 2010 to 2020: Approved by the decree of the President of the Republic of Kazakhstan dated August 24, 2009 № 858: p. 10).

In the code of Criminal procedure of the Republic of Kazakhstan, a cross-cutting idea is enshrined in its new protective nature, which is expressed by the consolidation of new procedural institutions, including the institution of inadmissibility of factual data as evidence, in obtaining them in violation of the criminal procedure law.

However, the ongoing reforms of the criminal process do not lead to full-fledged positive results. There are still many reprimands about the achievement of a fair procedural decision in the criminal case. We see certain reasons in deformation of procedures of proof. Our view is also expressed in the conviction that some of the ideas for reform of

the criminal process relate to institutional changes, which is unjustified and wrong. It is inadmissible to resolve the institutional issues at the expense of the criminal process. An attempt to fix in the procedural rule all new legal powers of subjects of procedural activity quite seriously change the structure of the text of procedural legislation, making it verbose and difficult to perceive, which leads to the possibility of discrepancy and as a result of different application of rules and procedural regulations.

The main substantive purpose of the work is a comprehensive study of the legal and practical problems arising in addressing the issues of determining the inadmissibility of factual data as evidence in criminal cases, in the light of the changing social requirements for the quality of law enforcement agencies entitled to conduct criminal proceedings. To achieve this goal, the following tasks should be resolved:

1. Specify the legal nature of the factual data inadmissible as evidence in a criminal case;

2. Establish their mutually defining relationship with the system of established guarantees for the protection of individual rights and freedoms in criminal proceedings;

3. Identify the reasons for the formation of contradictory law enforcement practice in recognition of the inadmissibility of evidence in criminal cases;

4. Reveal the internal contradictions of the current procedural legislation in terms of fixing the powers of officials conducting criminal proceedings, according to the factual data inadmissible as evidence;

5. Develop proposals to improve the criminal procedure legislation.

The criminal procedural legal relations developing in the course of law enforcement activity in connection with the establishment of factual data inadmissible as evidence in a criminal case are analyzed. The previous experience of development of the designated problems by domestic and foreign researchers was also analyzed.

The subject of the research are: the material-legal, procedural and organizational features of the recognition of evidence in criminal cases are not admissible, theoretical developments on the general problems of admissibility of evidence (including foreign), the specific rules of the Republican criminal procedure legislation governing the inadmissibility of factual data as evidence in criminal cases, the study of the problems of ensuring the constitutional rights and freedoms of the individual involved in the sphere of criminal proceedings.

The study was conducted using general scientific methods: comparative legal, logical-legal, system-structural, statistical generalization method. The use of these methods allowed to consider the subject of research in its integrity and comprehensively.

Theoretical conclusions and suggestions formulated in the article can be used:

– in the improvement of the current criminal procedure legislation, in the theoretical studies of the problems of criminal procedure, as well as in the law enforcement activities of judicial and law enforcement agencies.

Main part

In the process of preliminary investigation of criminal cases carried out by the bodies of inquiry and investigators, as well as in the consideration of these cases in the courts, the tasks of criminal procedure established by article 8 of the code of criminal procedure must be fulfilled. In other words, in each case, the bodies of inquiry, the investigator, the prosecutor and the court are obliged to establish whether the event of a crime took place, who committed the crime, the guilt of persons, the degree of their responsibility, the amount of damage and other circumstances provided by law (articles 112, 390 of the CPC), the clarification of which will ensure the achievement of objective truth. The achievement of the truth in each case is a necessary condition for its correct resolution. The procedural means by which the circumstances relevant to any criminal case are established are the evidence. The concept of evidence is organically woven into the very procedural activity of establishing the truth in a criminal case, and by General recognition, all procedural activity is the activity of proving the truth in a criminal case. This was preceded by a process of long and difficult search for the optimal definition of the notion of proof.

The scientific literature presents a wide range of basic approaches to this issue (Pound 1982: 40). Particular attention is drawn to the reasoning of Elizabeth McDonald, who analyzed the development of the theory of proof in connection with the adoption of the new evidence Act in new Zealand in 2006, many of that arguments are in tune with our ideas (Elisabeth 2012).

It is obvious that the position of process specialists in understanding the significant influence on the legislative formulation of the concept of evidence. The existence of the dual notion of evidence led to the search for possibilities to formulate its new definition, which would

highlight only the characteristic features of the concept.

Conceptual changes in the criminal procedure legislation seriously affected the understanding of the essence of evidence in the criminal process, forced to turn again to the problems of determining the properties of evidence. As it turned out in practice, the problem of determining the admissibility of evidence comes to the fore. For example, it is necessary to address issues related to the determination of the admissibility of evidence, which establish, for example, the causes of contradictions between certain evidence, the presence or absence of certain relationships between suspects (accused) and victims, witnesses; change of evidence and the results of their incorrect fixation, etc. Many of these issues were previously in the area of addressing the relevance of evidence, and often their resolution depended on the discretion of law enforcement officials. For example when the question about the appropriateness of the use of evidence arises, even obtained with errors of procedural form, but testifying in favor of establishing the circumstances proving the event of a crime, a decision of an accusatory nature could be made.

In procedural theory it was believed that those factual data, the method of collection of which is directly defined in the law, should be recognized as relevant. This concerned the issue of obtaining the results of the mandatory appointment of the examination, but increasingly it has become relevant to the definition of another property of the proof – its admissibility.

The determination of the relevance of evidence is sometimes quite a long process, because there is not always the connection of evidence with the case with its subject matter or other circumstances relating to the case, it is immediately obvious, not always initially traced. Sometimes the relevance of evidence can be established not at the initial, but at the subsequent stages of the process, including next stages of the main trial, or appeal (cassation) and supervisory proceedings. Often, in such cases, have influence the subjective factor, including the level of qualification and experience of a law enforcement official, etc.

In the legal literature was expressed the opinion that the admissibility of evidence in contrast to the relevance of the pre-regulated by law, i.e. the actual data is considered valid and all others invalid (Zelikson 1969: 50-52). As was noted by foreign authors «the Main purpose of the trial is the rational establishment of facts» (Antony Duff, 2012). Analysis of the rules governing the concept of evidence (article 111 of the CPC), the subject of proof (article 113, 390 of the CPC) and the tasks of criminal procedure (article 8 of the CPC), shows that the law equally establishes the criteria relating to these properties of evidence, i.e. relevance and admissibility. In accordance with this, the criminal prosecution authorities and the courts are obliged to simultaneously establish the existence of the properties of relevance and admissibility in the actual data. For example, if there are testimonies of witnesses, the victim, the accused and the conclusion of the examination, which contain factual data on the event of the crime and its circumstances, the criminal prosecution authorities, the prosecutor and the court involved in the proceedings of this case are obliged, in accordance with the requirements of the CPC rules, to establish the relevance of the actual data obtained from these sources, which is specifically established in the case, as well as to determine the legality of the procedural sources obtained, legality of methods of obtaining and fixing in procedural documents of the specified factual data. If there is a violation of the rules, methods of obtaining and recording factual data from procedural sources, the possibility of using these data as evidence is excluded. Previously, the law clearly set out guidelines for the materiality of the violation of the procedural order of obtaining evidence, which led to the recognition of the impossibility of using factual data as evidence in a criminal case. Now this corresponding relationship is not always consistently enshrined in the law. For example, as the basis of the recognition of the inadmissibility of the use actual data as evidence in a criminal case in part 1 of article 112 of criminal procedure code indicates the violation of the CPC, and then in the system as would be qualifying grounds for the inadmissibility of the evidence in paragraph 5 of part 2 of this article clarifies the basis of the materiality of violation of the procedure for performance of procedural acts. This duality of signs of the inadmissibility of the evidence makes a greater focus on evaluation to clarify the presence of the "materiality" of the breach of the CCP (AAS Zuckerman, 2010). In the legal literature rules on the admissibility of evidence are derived on the basis of the requirements of the law, which help to distinguish factual data of importance of evidence from various types of data obtained without compliance with such rules. These include:

1) visibility and verifiability of the origin of the evidence;

2) awareness and competence of the persons from whom the evidence comes and who collect it;

3) compliance with the rules of evidence by means of factual data (in the process of their collection, recording, research, verification and evaluation);

4) compliance with the rules of collection of factual data of a certain type, guaranteeing protection from incompleteness and distortion;

5) compliance with the rules that guarantee the completeness and accuracy of the collected factual data;

6) refusal to include in the number of actual data assumptions, guesses, etc. (Belkin R. S., 2009: 180-182).

Compliance with these conditions in the practice of officials conducting criminal proceedings remains relevant today. And the main provisions derived by the theory of judicial evidence, influenced the legislative regulation of the definition of evidence in criminal cases. Thus, article 111 of the code of criminal procedure clearly states in part one that evidence in a criminal case is legally obtained factual data on the basis of which, in a certain procedure of the criminal procedure code, the investigator, the prosecutor, the court establishes the presence or absence of an act provided for by the criminal code of the Republic of Kazakhstan, the commission or non-commission of this act by the accused and the guilt or innocence of the accused, as well as other circumstances relevant to the proper resolution of the case. Part two of the same article contains an exhaustive list of legitimate sources of evidence.

The tasks of the criminal procedure can be fulfilled only when the preliminary investigation bodies and the court establish the truth in the criminal case. In order to properly resolve the case on the merits and in fairness, it is necessary first to establish the truth about the event that took place in the past, and then to give it a criminal law assessment.

The establishment of the truth in the process of preliminary investigation and trial of criminal cases is carried out by proving the circumstances, the totality of which is the subject of study in this case. Proof is the elucidation of the links between this phenomenon, the fact and other facts and phenomena justifying it. These connections are objective, they exist regardless of whether they are known or not. In the process of proving they are known and allow you to verify the truth of an assumption. Russian lawyers, in particular Spasovich V. D., argued: When we learn the known facts or phenomena, when from the contemplation of the relationship and relations between objects we come to a certain belief, we call the data that gave rise to this belief in us – the evidence. And our very belief in the existence of the studied fact – the truth (Spasovich 1861: 7-8). But proof is not a means of creating truth, but a means of knowing it. The success of proof is largely determined by the ability of the investigator and the court to find, establish evidence in the case and operate on them in order to establish the truth in the circumstances under study.

The truth is established as in all areas of cognitive human activity on the general laws of knowledge, which in the criminal process has a certain specificity, mediated by the specificity of the direction of this activity, and with the help of evidence, which in the criminal process also have a specific value and are called procedural evidence.

The question of establishing the objective truth in a criminal case about the guilt or innocence of those brought to criminal responsibility is the subject of research throughout the criminal process. But, as noted by foreign authors, only the court may in its sentence, decreed in the result of the trial, find the defendant guilty with attendant penal consequences (Paul 2010). From this provision, it seems that the assertion of the truth in a criminal case is the prerogative of the court alone. However, the interests of justice require that the truth within the scope of the subject of proof be established not only by the court, but also by the criminal prosecution authorities as a result of their pre-trial activities. The difference between the conclusions of the preliminary investigation and the court is not in the nature of the objective truth determined by them, but in the legal consequences caused by the establishment of the truth at each stage of the process (Bersugurova 2012: 239). Only the established truth serves as the basis for the prosecution, for bringing to criminal responsibility, and in court proceedings – the basis for sentencing (Graham 1993).

The theory of judicial evidence, based on the provisions of the theory of knowledge and the general provisions of materialistic dialectics, proceeds from the fact that the truth is knowable, that its knowledge is available to both the investigator, the prosecutor and the court. However, in the theory of procedural evidence there was another point of view, according to which the truth is not achievable in all criminal cases, because to some extent there are certain limitations of the means and methods of its establishment (Proof theory in the Soviet criminal trial, 1973: 13; Mahoney2010).

Thus, proof as the content of criminal procedure is aimed at establishing the circumstances of reality, as a result of which it will be possible to resolve a criminal case on justice.

Violation of the rules of evidence raises doubts as to the credibility of the findings, which entails quite certain legal consequences, including the application of sanctions of nullity.

The content of the collection of evidence as an element of the process of proof are committed by the subjects of proof within their powers of procedural actions aimed at the detection, reclamation, receipt and consolidation of evidence in accordance with the procedure established by law.

Detailed regulation by the law of the procedure for the collection, consolidation of evidence guarantees, on the one hand, the reliability of the transfer of extracted information, and on the other – ensures the safety of evidence and the possibility of their use and research in proving at subsequent stages of the criminal process. Violation of the requirements of the law in this part may lead to the loss of evidentiary value of the extracted data.

These basic provisions of the theory of forensic evidence and criminology have been recognized for a long time as the only correct and not questioned, but the modern paradigm of legality, in the figurative expression of Bakhtybayev I. Zh., leads to the need to rethink some seemingly unshakable provisions of the theory of evidence and the theory of truth in a criminal case (Bakhtybayev 2009: 37). Many aspects here are determined by the principles that are laid down as the foundation of the process of proof, consisting in the recognition of the freedom of evaluation of evidence and evaluation of evidence on internal conviction. The principle of evaluation of evidence is laid down in article 125 of the code of criminal procedure and is characterized by the following features:

The department conducting the proceedings is free to evaluate the evidence. No evidence has a predetermined force (article 25 of the code of criminal procedure). The criminal procedure law does not specify what evidence should be established certain circumstances, with the exception of mandatory provisions relating to the form of establishing the objectivity of a certain fact, such as the requirement of article 271 of the code of criminal procedure of the Republic of Kazakhstan about mandatory examination.

Free evaluation of evidence on the basis of internal conviction means that the person assessing the evidence is not bound by the findings of other persons and bodies. Evaluation of evidence on internal conviction should be based on the totality of the considered evidence (articles 25, 125 of the code of criminal procedure). This requirement of the law is intended to emphasize the basic rule: internal conviction is subjective, but should not be divorced from the objective properties of the assessed evidence, from the objective relationship that exists in reality between the available body of evidence.

To assess the presence or absence of a sufficient body of evidence, it is the internal conviction of the person who is obliged to make a decision on the case. The totality of the evidence admits sufficient for the resolution of the criminal case, if collected relevant admissible and credible evidence, conclusively establishes the truth of all and every circumstances, subject to proof (article 125, CPC).

The body of evidence always represents as a complex system in which the evidence is related to each other and to the proven provisions and conclusions.

When assessing evidence it is necessary to be guided by the criminal procedure law, the regulatory role of which in the evaluation of evidence is manifested by determining the objectives and principles of the criminal process; establishing rules on evidence; fixing the general conditions of production in certain stages of the process.

In some cases, the modern criminal procedure law expressly refers to the inadmissibility of evidence. For example, article 112 of the code of criminal procedure of Kazakhstan says, the actual data are obtained with the use of violence, threats, fraud; with the use of misconceptions of the person involved in the criminal process, regarding their rights and obligations arising from the lack of explanation; with a significant violation of the procedure, etc. (article 112 of the CPC).

Violation of the procedural order of collecting evidence casts doubt on the reliability of the received information, since the procedural form defined by the law is one of the guarantees of the reliability of these data. Therefore, if, for example, it is established that information about the circumstances of the case is obtained with the use of violence, threats, deception, as well as other illegal actions, they can not be used as evidence in the case.

It is often recommended to be guided by conscience when assessing evidence based on internal conviction. However, this concept is not defined as a category of criminal procedure in the criminal procedure legislation. Therefore, the correct assessment of evidence is often based not only on the need for the presence of an internal belief, but also on the management of legal consciousness. This situation leads to the correct understanding of the body that conducts the proceedings, goals and objectives of the criminal process and responsibilities for achieving them.

Internal belief in the evaluation of evidence acts as a method of evaluation of evidence and as a result of such evaluation. As a method of assessing evidence, internal persuasion ensures that the body conducting the criminal proceedings is not linked to the assessment of evidence given by any other body at any stage of the process, and that there is no advantage of one type of evidence over others. Internal conviction as a result of the evaluation of evidence means the confidence of the body conducting the proceedings in the admissibility, relevance, reliability of the evidence and the correctness of the conclusions to which he came in the process of proof.

The legal consciousness of the law enforcement officer should be professional, i.e. based on special legal education, professional experience in the application of law, its constant understanding and improvement, which is a necessary condition and prerequisite for the appropriate position in the law enforcement apparatus and the effectiveness of its functioning.

Foreign authors also emphasize that the connection of the nature of law with the phenomenon of legal consciousness, the starting point of which is legal understanding (Pound R, 1982: 41).

The modern code of criminal procedure performs more clearly protective functions and interprets the concept of factual circumstances inadmissible as evidence in a much broader and more specific way.

Factual data shall be deemed inadmissible as evidence if they are obtained in violation of the requirements of the code of criminal procedure, which, by depriving or restricting the rights of participants in the proceedings guaranteed by law or violating other rules of criminal procedure in the investigation or trial of the case, have affected or could affect the reliability of the factual data obtained. Further, the law contains a number of clarifying provisions specifying the basic concepts set out in part 1 of article 112 of the code of criminal procedure.

If we examine these provisions of the law more closely, we note the link between the need for strict observance of the procedural form of obtaining evidence and the results to which its violation may lead. Strictly speaking, the law clearly holds the position that due to violation of the procedural form the truth of the established factual data may suffer.

In the criminal procedure law there is no list of deprivations or tightness guaranteed by law rights of parties to the proceedings, meanwhile, the practice presents many such examples, which can be attributed to a simple increasing complexity of the criminal case, not the acceptance for review of allegations of crimes committed, frequent and wanton call for questioning, with subsequent production of this proceedings. A fairly common way to restrict the rights guaranteed by law to the participants in the process was the dissemination of investigative information in the media or its placement on Internet sites. It turns out that such information is distributed to an indefinite number of persons, and the sources of such information are unknown, although it can be assumed that it is distributed by such entities that have become its carriers.

In the corresponding connection with violations of the requirements of the criminal procedure law and its impact on the reliability of the evidence concretized the types of individual illegal actions.

Reasons for the recognition of factual data as inadmissible as evidence in a criminal case, such as the use of torture, violence, threats, fraud, Kogamov M. CH. refers to the qualifying reasons. But the General characteristic of such grounds (reasons) gives to a greater extent based on the experience of practical violations of criminal procedure legislation. For example, in his opinion, on illegal methods of investigation, the existence of signs of torture or other forms of ill-treatment of participants in the process, in addition to physical suffering caused to the tortured in a variety of forms, may also indicate the facts of non-compliance with procedural standards by the investigator. These include the lack of notification of detainees arrested of their rights; the use of informal pre-trial detention and interrogation facilities for investigation; and the deprivation of any communication with the outside world, with his family, defence counsel, interpreters or independent doctors. Special attention, in his opinion, should be paid to the observance of procedural safeguards for particularly vulnerable categories, in which he includes women, adolescents, persons with mental disabilities, the elderly, ethnic minorities, foreigners, persons without citizenship, the sick, persons with different sexual orientations (Kogamov 2008: 237).

On the basis of generally accepted concepts, transfering them in the area of procedural activities Kogamov M. CH. complements the concept of paragraph 1 of part 1 of article 111 with the following definitions: “factual data are inadmissible as evidence if they are obtained with the use of violence, which can be both physical and mental: beatings, bullying, investigative actions at night time, prolonged non-interrogation of a person in custody, the provision of physical or psychological pressure to compel compliance during official interrogation in the periods before, during and

after the interrogation procedure, the dissemination of information, which may harm the rights and interests of the participant and his relatives. Threats (intimidation) are also considered as illegal actions: bringing a person, his or her close relatives to criminal responsibility, use of detention, physical violence, etc. «Use of deception, in his opinion, is equivalent to misleading and " is expressed in the message to the person of false information, in concealment from the person of his real procedural status in the case, in the promise not to initiate or stop a criminal case, release from custody, not to disturb loved ones, not to report to the place of work, study about the crime, etc.". He also refers to other illegal actions as "bribery, blackmail, falsification of evidence, use of hypnosis, incitement and use of low feelings, national, racial, religious discord, etc.» (Kogamov 2008: 237). Such a broad interpretation of cases of illegality of actions of officials conducting criminal proceedings leads to the need not only to a more precise definition of them, but also to the solution of issues of a procedural nature, consisting in the conditions of establishing them as grounds for the recognition of circumstances as inadmissible as evidence (Jenny McEwan 2007).

In actions committed by bodies conducting criminal proceedings, persons involved in the case may also exercise their rights. All these actions are organically part of the structure of criminal procedure for the implementation of rights and duties. At the time, this was noted in foreign legal literature, for example, M. Johnson Search definitions: the quality of political life and the problem of corruption (Johnson 1997).

In practice, the application of these grounds is extremely rare. These include individual cases of procedural actions by the head of the investigation department in the criminal case, which is in the production of a subordinate investigator, or the conduct of procedural actions by the investigator outside the received instructions for the production of a separate procedural action.

Of considerable interest is the question of expanding the discursive capabilities of the investigator to determine the admissibility of evidence.

The determination of the discursive powers of the investigator to establish the admissibility of factual circumstances as evidence in a criminal case provide us with an opportunity to analyze this activity at the initial stage of its production. Discourse means (from lat. discursus-reasoning, argument) – rational, logical, the opposite intuitive, sensual. Discursive cognition as based on mind and reasoning is often opposed to intuitive cognition, which is based on direct contemplation and intuition. However, the distinction between discursive and intuitive is to some extent relative, since often new knowledge cannot be obtained by simple logical reasoning from existing knowledge, but requires the use of creativity. Discursive knowledge is the result of coherent, consistent, clear reasoning, in which each subsequent thought follows from the previous and determines the subsequent. Discursive is, for example, knowledge obtained as a result of a logical conclusion from some general principles of conclusion relating to a particular case, or knowledge arising by generalizing some set of facts. Any new idea, thought, representation arise on the basis of the previous knowledge, assume understanding and the formulation of a problem, tasks, demand conscious and purposeful reflection. After a new idea has arisen, it requires the development of its consequences, the establishment of its links with other ideas, its verification, etc. (Bersugurova 2012: 184).

Therefore, when discussing the powers of persons entitled to conduct pre-trial criminal proceedings, it is possible to use the term "discursive powers", since the activities of these persons are based on a number of logical mental operations, which are based on the need to assess the actual factual data, some of which are known to them, some of which they should establish, but logical reasoning about the existence of these factual circumstances already form the basis of a number of their decisions. For example, when establishing only the signs of a criminal offense, it is possible to make a decision on the beginning of pre-trial proceedings; at the initial stage of the proceedings, investigative versions are put forward, etc. The essence of the discursive powers of the investigator may be determined on the basis of two logical concepts "need" and "opportunity": the need to solve the problems of inquiry and preliminary investigation and the ability to determine the order of their resolution, based on the existing logical knowledge about the circumstances of the criminal case; the need to obtain evidence in a criminal case and the possibility of excluding some factual data from the amount of evidence, etc.

Recently, it has been noted that the increasing number of violations of the law by the criminal prosecution authorities acts as a negative trend. According to the results of 2017 year, 43 citizens were released from the temporary detention facilities of the criminal prosecution bodies, for non-confirmation of suspicion, 751 illegally detained citizens were released by prosecutors from

the premises of law enforcement agencies (Right 3 million Kazakhstanis defended the prosecutors). The investigator, as a body of criminal prosecution (article 60 of the criminal procedure code), has broad powers in activities related to the implementation of criminal prosecution, exposing the perpetrators of crimes, protection of citizens from unjustified prosecution. Admittedly, the criminal procedure activity of the investigator is expressed in two main elements: the knowledge of specific facts and the application of the law to them. According to legal scholars, in particular, Larin M.A., as a result of this work achieved a general, specific, next, perspective and other procedural goals (The term "evidence" was officially used in the normative decision of the Supreme Court of Kazakhstan in the decision № 15 of June 20, 1986. "On the practice of consideration of criminal cases by courts with a Protocol form of pre-trial preparation of materials" 2006: 50; Larin 1970: 50). Therefore, the art of the investigator, in his own opinion, "is to carefully, accurately decide what information, to what extent and at what point can become known to the alleged offender and related persons, in such a way that it not only does not hurt, but also helped to achieve the truth." Savitsky V. M. noted that " in hands of the investigator the powerful and terrible force ready to bring down on the head of the accused (suspect) the whole cascade of rather notable coercive measures is concentrated. This force is able to invade his home, under normal conditions, the revered untouchable, open someone else's eyes piously guarded the secret of postal items, to remove a person from the usual operation and dictate a lot of other severe limitations up to deprivation of the supreme good – freedom. And all of this can be used quickly, immediately, and sometimes with reprehensible haste" (Savitsky 1975: 193). In this regard, it is very important that, as rightly noted by Toleubekova B. H., "the activity of investigators was built on a deep principled basis, basically coinciding with the general procedural principles". However, she admits the existence of features in the principles of activities of the investigators, which include the speed of investigation, the procedural autonomy and the responsibility of the investigator (Toleubekova 1998: 263). Modern changes in the legislative regulations of the criminal investigation now allow us to assert that the preliminary investigation can be carried out both by the investigator, so the definition of "investigator – body of preliminary investigation", often used in the procedural literature is not quite accurate.

"The essence of the investigation is based on two basic principles: procedural independence of the investigator and personal responsibility for the course and results of the investigation," consider Sarsenbaev T. E. and Khan A. L. (Sarsenbaev 2008: 59).

The question of determining the admissibility of evidence in a criminal case depends on the personal discretion of the investigator, for example, when deciding on the beginning of pre-trial proceedings, because the law indicates that the reasons for the beginning of pre-trial investigation is the availability of sufficient data indicating the signs of a criminal offense, in the absence of circumstances precluding criminal proceedings. At the same time, the decision on the possibility (necessity) of starting a pre-trial investigation is sometimes decided quite arbitrarily. On the remote control of the duty of Almaty received a report of the perfect theft of money and valuables from the apartment of citizen N. When the duty team arrived at the scene it was found that citizen N was invited for the ad in the paper a team of three working to ensure that they dismantled room divider and took out the trash. When the workers finished the work and got the calculation, the hostess found the loss of money and some valuables from the next room. On a scene there were obvious traces of footwear of one of workers. The hostess with the help of neighbors detained workers and then arrived police officers escorted them to the duty of the police department. There at survey of things of workers the stolen money and other values were found. Instead of conducting an investigation into the theft, police officers offered the hostess to return the stolen money and valuables in exchange for not filing an application for theft. Since the call about the theft was taken to the remote control of the police department, the hostess (citizen N) at the request of the police department had to write a statement that she allegedly mixed up the place where she hid the money, and so she withdraws her statement (Materials of practice of Auezov and Bostandyk districts police departments of Almaty for 2016-2017).

The law defines the procedural order of each procedural action, which is aimed at obtaining evidence. However, the establishment of the possibility of investigative actions and the definition of the range of investigative actions of the law is entirely at the discretion of the investigator. Carrying out investigative actions is also possible at the request of the parties, but the resolution of petitions is also referred to the discretion of the investigator. This establishment of the law leads to the fact that it happens quite often groundless rejection by investigators of the petitions submitted

by the parties for the production of an investigative action in the interests of the requesting party. Thus the motivating reference of the investigator to procedural inexpediency of satisfaction of the declared petition is quite sufficient recognized.

The powers of the investigator to recognize persons as participants of the criminal process contain guarantees of observance of the rights and legitimate interests of the participants of the criminal process, since their knowledge of their powers gives them the opportunity to use the entire arsenal of procedural remedies and self-defense. However, the recognition of a person as a participant in the criminal process is also carried out through the prism of the discursive capabilities of the investigator and the person conducting the inquiry. Having a real task to protect the legitimate rights and interests of participants in the criminal process, investigators often consider these tasks by determining the prospects of disclosure of the criminal case and often, without determining them with sufficient confidence, delay the decision on the recognition of a person as a participant in the criminal case. An example is having the spread of the cases, when the subject is not explained adequately his right to a statement of a civil action, and thus exclude the possibility of protection of material rights within the framework of the investigated criminal case.

In this regard, the practice of recognizing a person as a victim and familiarizing him or her with procedural rights is of interest. Study 100 criminal cases in Bostandyk and Auezov districts police showed that the victims promptly examine belonging to them rights. In an oral interview, the staff of these police departments explained the reason by the fact that the victims themselves do not want to get acquainted with their procedural rights (Materials of practice of Auezov and Bostandyk districts police departments of Almaty for 2016-2017).

Due to the aggravation of the situation with the inviolability of the constitutional rights of the participants in the criminal process when deciding on the election of a measure of procedural coercion, the sanction of a preventive measure in the form of arrest was transferred to the courts at the legislative level. However, the initiative of raising the question of the application of such a measure of restraint is still mainly owned by investigators, and the decision on the application of other preventive measures remained under the jurisdiction of investigators.

Violations of procedural legislation by investigators have a significant impact on the prospects for judicial review of the case. However, only the prosecutor's supervision is able to fully assess the presence of violations of the criminal procedure legislation by the preliminary investigation bodies.

Conclusions

1. Conceptual changes in the criminal procedure legislation have affected the understanding of the essence of the evidence, forced to turn again to the problems of determining the properties of evidence. In practice, the problem of determining the admissibility of evidence comes to the front side.

2. The exacting attitude of the theory of criminal procedure law to the concept of evidence allowed to develop its definition, which included a sign of admissibility as an integral feature of it, characterizing the unity of the actual content and legal form. Criminal procedural form of evidence is essential, since the quality of evidence depends not only on the objective properties of the restored crime event, but also on many other objective and subjective factors affecting the formation and reproduction of evidence.

3. The legislative changes introduced in recent years to article 111 of the code of criminal procedure, the expansion of the list of factual data inadmissible as evidence in criminal cases, have created new procedural legal relations, which should be regarded as an element of the system of comprehensive development of guarantees of rights and freedoms of the individual in criminal proceedings.

4. Definitions of factual data that are inadmissible as evidence enshrined in article 111 of the code of criminal procedure and it can be seen as substantive law. They are fixed in the corresponding connection with violations of requirements of the criminal procedural legislation. The very same procedures for their establishment within the framework of the ongoing proceedings in the criminal procedure law does not contain, which creates serious disagreements in practice.

5. On the basis of the analysis of theoretical provisions and the emerging law enforcement practice, a provision is derived on the recognition of the discursive powers of persons conducting criminal proceedings to determine the admissibility of evidence in criminal cases in their proceedings, since the activities of these entities are based on the commission of a number of logical mental operations, which are based on the need to assess the actual facts, some of which are known to them, some of which they should establish, however, logical reasoning about the existence of these factual circumstances already underlies a number of their decisions.

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