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The axioms of new theory of forensic evidence

Abstract: It is proposed to discussion the kind of a faith symbol of post-post-modern doctrine of forensic evidence and proving which is developing by the Nizhny Novgorod school for critical legal research. There are twelve postulates in it which constitute the basis of this doctrine. Although a value of any postulate is relativity, presented axioms have been self-worth to author at the time of writing the work. In general, this is a preliminary outline of future research of Nizhegorod scientists on this issue, but at the same time this is a summing up of intermediate results of post-Soviet theory of forensic evidence.

Keywords: post-post-modernism, forensic evidence, Nizhegorod school for critical legal research, axioms, theory of forensic evidences.

Any religious, philosophy of life, and even just a school, intellectual flow, theory, paradigm, includes axioms, if you will, the dogmas which can not be questioned. It is not because they are true, but because an organized knowledge is needed in primary, indisputable canons. One can only believe them and share their, but not to be in doubt. Aristotle wrote: "The true and the first [provisions] are those that are reliable through themselves but not through others [provisions]. One does not need to ask "why" on the origins of knowledge as each of these origins should be reliable in itself"[1]. currently I need such postulates which are taken as true without evidence (assumptions); and they will be the basis for building further statements regarding the evidence and proving in a criminal trial.

Finishing protracted introduction, I will make one more explanation and some sort of self-justification. Nevertheless, I will use a usual way of post-modernism to take a classic text and try to "turn it inside out" interchanging of traditional opposition members. In this case, I used the 12-membered formula symbol of the

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[1] *Aristotle. Topeka / Works in four volumes.Vol*. 2. M., 1978. - p. 349.

Christian faith, which is accepted as the Catholics and so the Orthodox Christians (Muslims can not be offended; I imitated the writing style of SUR). This step will allow me using a shell of a canon and to build mine own "post-post-modern" Symbolum of "new theory of criminal procedural evidence"[2].

So, at what I believe. Sincerely and now.

1. I do not believe in one God, the Father Almighty.

I do not believe in his prophets – apostles.

I do not believe also in the Holy Scriptures, but on occasionally use them in a rhetorical argumentation - it is effective (e.g. a text of the Bible or the Koran is so good that it affords to substantiate any point of view; it is very convenient).

2. I believe that matter is objective and primary, the mind (the language) is secondary, weak and crafty; all "truths", which it achieves, are relatively.

"White lie" is a way of adapting, which each person uses daily, several times a day.

The same can be said about the human communities. A lie and truth are equally useful; the difference between them is only in efficiency.

Opposition lie / truth is relative ("truth is a lie inside out" G. Derrida).

This is especially relevant in the context of criminal proceedings. Measure of falsehood and truth of "plausible" assertion of any party in a criminal process is proportional to its credibility. It is important to keep the proportion.

This does not mean that the "truth" is not to be fought. It is quite opposite: pathos of assertion must resist to pathos of negation. No "truth" can not be exempted from criticism.

To doubt in the "truth" is a way of thinking. "Anyone who is aware that he is in doubts, thereby he aware his doubt as some kind of the truth" (Aurelius Augustine (Blessed).

Therefore the standard of "reasonable doubts" is universal standard for definition of forensic truth.

3. I believe in the primary of chaos. Chaos is eternal, the order is random. Structure is the secondary, and "knowledge" is a structure.

4. I believe in the universality of the second principle of thermodynamics and entropy.

All ordered tends to the destruction, chaos.[3]

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[2] Ah, after so many years of exercises in unbelief is not easy to collect a hand (at least temporarily) a beam of "truths".

[3] Entropy (from ancient Greek .ἐντροπία is a turning, transformation) in the natural sciences is a measure of disorder of a system consisting of many components. In legal science, in my opinion, the entropy characterizes measure of uncertainty of a meaning of any statute, and therefore a possibility of different interpretations and applications of it.

I understand the essence of entropy such way. The entropy is a measure of disorder and chaos in any system: physical, informational, biological, psychological, and social.

I share a synergistic approach to resolving problems of the struggle against entropy. Biological as social organisms, being complex and ordered systems can fight to the entropy various ways (although in the end it always wins).

Democracy, open society is the most viable organization of the social system as it redistributes entropy around itself that is it gives its entropy to all, to which it can.

Adversarial justice is an effective redistribution of entropy in a democratic open society.

The entropy in information science is a level of incompleteness and uncertainty of knowledge.

Thus the legal system can never be complete, and at the forensic system any knowledge will be incomplete. Therefore the forensic truth can not be perfect knowledge: the objective, and moreover of the absolute truth.

5. I believe in Freudianism. I believe in universality of the law about the lack and compensation[4].

The problem of desire and its dissatisfaction is a center of psychic activity. However, for the issues that we discuss it will be sufficient to state the following.

A human psyche is split and acts as a sphere of controversial interaction of the three components (ego - superego - id); biological and social, egoism and altruism are struggling in a man. Egoistic motives prevail in his behavior: lust, greed, etc. As person is angry, prone to sin, therefore a community is needed in prohibitions and the institutions that support these prohibitions: a church, morality, law, justice, a state, etc.

Through a symbolic the right is institutionalized in a human psyche, and in a collective unconscious. But the causes of unlawfulness have the same roots ("split" of human personality).

Justice is a game. Mission of the criminal process is manifested in playing of a court drama; in other words, mission is manifested in actualization of the prohibitions on subconscious level of individual, the collective unconscious of society.

6. A value of a man is absolutely. Man is a measure of all things; existing, that they exist and non-existing, that they do not exist.

But the transcendental "subject of cognition" does not exist (this is a bad fiction).

Further. A care of law and order can not be placed above the ideal of individual liberty. The first truth for criminal justice is that an individual, his rights and

[4] In my view, the essence of this law clearly expressed B.Grebenshchikov: "How many rooms full of people / clear rooms full of people ... But there is not yet your love / I will always want something else" ("Eyes").

freedoms are the supreme value. Truth and justice is only that court proceeding, which guarantees the rights of individual.

Although a man is not perfect, a man can be only judged by a man, and no one and nothing else. Therefore jury trial is an optimal form of justice.

7. Language is created by people in process of evolution; it is the alpha and omega of knowledge. The Reason is a language; consciousness has a linguistic device.

The reality is given to man in a language picture. Symbols refer to the signs, and then - to real things. There is no other reality in criminal proceedings besides of that which is given in case materials.

Agree with linguistic approach to the analysis of legal, procedural events (forensic linguistics). Legal means linguistic. Language is taken by me as existential image of "rights". The right is a text a meaning of law text multiplied on its interpretation in a certain context. Therefore instance of law – in meaning; and a way of being of the right is a constant compensation of the shortage of law sense (what Iering called "a struggle for the right"). An interpretation of the law is "a legal argumentation", which should be understood as an organic part of the real right. A legal argumentation includes a struggle of interpretations for "correct meaning" of the law in the context of power relations. It is not a neutral and it aims on substation of certain ideology by the rhetorical means.

A fool violates the law, an intelligent man stupidly follows the law, and a wise man interprets it.

Criminal process is one of the genres of public judicial speech. The main thing in it is the establishment of basis for using of punishment of a criminal. Revealing the truth of a crime / punishment, i.e. proving (argumentation) is a kernel of the criminal proceedings. Therefore of problems of proof / argumentation is the essence of problems of science in criminal proceedings.

It is important to clarify the following. The argumentation begins where violence ends. Argumentation is temptation of mind. As it is known, the conviction replaces force. To argue it means to proselytize. That is why a convinced man the best argues and infects by his faith.

To argue it means to communicate. Argumentation is possible mainly through speech. Differences in speech and writing are cause of differences in the ways of argumentation. Public speech is an environment of argumentation; in private speech is possible only "conviction".

A dialogue, but not a monologue is a way of organizing of argumentation. A manipulation of the voting rights and the various techniques "pinching mouth" lead to a breakdown of communication and consequently make it impossible for

argumentation (with which we are concerned in some scientific events and in general in the country that winning a simulation of democracy).

A despot needs no to argue his actions and decisions. Democratic form of public state system is a necessary condition for argument, and the judicial argumentation is impossible without competition. Otherwise, the argumentation becomes a vulgar talk (simulacrum). Word-action replaced talking.

Dialectics is the best way of reasoning, and rhetoric is of judicial reasoning, as it has an oral language at the heart. Competitive, transparent, direct court proceedings are the best field for the development of the legal and judicial reasoning. The trial jury is an ideal situation for the argument.

Therefore, the theory of criminal process is the most advanced form of knowledge of a legal argumentation. The so-called "legal argumentation" is an integral part of the theory of evidence, cultivated in the science of criminal process. Theory of forensic evidence and proving is richer than the "pure theory" because it is adapted as a spoken language so writing one. It aims to be as profane (intended for philistine) and professional (facing the judge, lawyer) and, therefore, more flexible, combining both low-and high-style appeal. Rachitic of "legal argumentation" as a marginal part of the "theory of right" explained by a lack of the real competitive environment (ignoring of the factor of democracy) and not understanding some basic things: the specificity of humanitarian cognition, oral language, the nature of convictions in court (trial jury), argumentation of investigative actions etc.

Only in a criminal proceeding has a jury trial, where the rhetorical argumentation includes all elements of argument situation of proof (including the notorious legal arguments) is exhaustive: pathos, ethos and logos.

"New sophistry", an era which occurred in connection with the introduction of the internet technologies in court proceedings, means a dialectic return to the art "as a strong evidence to do a weak, and a weak one to do strong".

The forensic truth is a result of judicial pleadings (legal argumentation). It is in the mind of a judge, this is a condition of his inner conviction. Forensic truth is the legal truth, its reality in the law; it reasonability is in the absence of reasonable doubts.

Forensic truth must be plausible, and the most plausible is that closest to the familiar, ordinary, everyday. That is why in sphere of forensic reasoning standards of truth are a sound sense and public opinion (doxa).

"Objectivity" of the forensic truth is in verifiability; at first, it is on a level of higher court, then to the universal audience (which is associated more with public opinion and not "absolute mind").

Legal evidence of the facts is an art, and this art is mainly connected with organization of justice and not establishing of the "objective truth"; but rather the

search for truth is dependent on the rules of court procedure. The main rules of legal proof there is reasonable agreements on the solution of the problem of power in society.

Adversarial and equal of the parties is the only way to a fair justice. Everybody is equal before the law and a court. The parties must be equal in rights to proof, including during pre-trial proceedings.

The human factor, which carries a contradictory, introduces an element of uncertainty in litigation, transforming a process of proof from objective cognition to a game or a war which being waged in words.

8. Believe in the cognitive program of a new theory of forensic evidence. Cognitive structures (symbolic, sign) make an empirical experience by knowledge (sense).

It is not denied that reality actually exists: the subject of cognition deals with reality. However, the knowing subject is "cut" from the reality on the specific model only what is comparable with his activities aimed at adapting to this reality. Knowledge is not acquired passively through the sense organs or means of communication; it is actively built by a subject interacting with objectivity, through improving of cognitive structures. A subject of cognition and an object of his cognition constitute a single system, mutually determines each other. There is no knowledge of objects that would be independent of the subject. The classical scheme of the "subject-object" becomes "subject- structure- object".

Knowledge is a product of conceptual structures and patterns of perception and action. All our knowledge about the world are approximate, and its worth is measured by its ability to give us better adapt to the conditions of existence. The distortion of information during the interaction of a subject with reality has an objective character. Already in a process of preceding realization a part of information *is inevitably lost*, it eliminated by our cognitive apparatus as excessive. This is due to the filters of perception: neurophysiologic, social, individual.

Operation of perceptual filters, generalization, omission and distortion of information during the formation of cognitive structures leads to unavoidable discrepancies between the "raw" reality and reality-to-subject, which only makes sense for each of us, as a life of a man in all its manifestations is going it is in it. Knowledge about the phenomena of reality is not its reflection in consciousness, but rather a reconstruction, "understanding" it adequately survival. All this is true in relation to the criminal justice process, as one of the segments of the cognitive activity of people.

I do not accept circulated metaphor of "reflection", which serves as the methodological basis for the theory of objective truth[5]. Cognition is the acquisition and mastering (recycling) by a man through a certain schemes, models of the information from both the external and internal environment in order to adapt to the reality[6].

A thinking man is a system of feedback loops, which is included as an element in the large external system. Survival and adequate human behavior is ensured by his constant "adjusting" of his systems in response to changing environmental parameters (both external and internal). For adequate interaction with reality, it is important for a man to remove from the environment rather than exhaustively complete information as meaningful in appropriate context. Cognition of reality is not reflected by significant objects, connections and relationships between them, and through constructing of useful models of reality, fixing its contextually relevant elements and structures.

Knowledge should be considered not in terms of the dichotomy of "right and wrong", and as a useful or harmful for social and biological organism, connected to a system of feedback loops with an environment. As the value of knowledge is determined by his ability to adapt to environment, so and criminal procedure is valuable for its ability to allow of society the best way to adapt to the reality.

Replace a term "truth" of a concept of "sustainability" is crucial. The purpose of knowledge is not an objective, but the adaptation. "Useful" is the knowledge that supports a viability of the system. Such is the "forensic truth" which is a mechanism for adaptation of an individual and society to the environment. It should speak not about the truth of a court decision. It should be spoken about its ability to fulfill a function of settlement of legal conflict, stabilization of a system. And if the verdict destroys solidarity of society, splits it, opposes power to the people, and then a knowledge contained in it is wrong. Court should seek to know not "the objective truth", but find the best solution in the given circumstances, a solution that unites a

[5] Concept of the objective truth attaches a special importance only in the classical philosophy of cognition; non-classical epistemology uses instead of it "solidarity", "universality", etc. Cognition does not reflect the world, and designs it. Designing is a process that gives a reality an external appearance of indissoluble and coherent whole. Designing generates coherent, relative world. Constructed reality is coherent because it is designed as intrinsically adjoin, connected, in which an isolated does not exist and cannot exist. Designing is a process generating continuous and cyclic causality. Knowledge and cognition are highly self-relatively, self-referential events. We interpret the truth as internal consistency, consistency of knowledge.

[6] Adaptation is an ability of living organisms to actively search (or create) favorable conditions for life, using information about surrounding reality and own organism. Cognitive mechanisms can be considered as one of the most important factors of adaptation of organisms to their living environment.

nation on a sense of community, solidarity and strengthen the social structure[7].

9. Power is a force that supports the social structure in equilibrium. This is something that is opposed entropy of social structure.

I believe in freedom. Freedom is better than non-freedom. But I understand that to live in society and be free from society is impossible. It is a necessary evil. It is an attempt to resolve the contradictions between a libido and a herd instinct.

Foucault wrote: "Ii is necessary to see in the power a network the same voltage, active relationships, but not a privilege, by which can be possessed. It should be considered as a model of rather perpetual battle than a treaty on the rights and property, or the conquest of territory. By word, it is rather this power administers than belongs; it is not "a privilege", acquired or retained by the ruling class, but a cumulative influence of its strategic positions, it is an influence that shows up, and sometimes it extends owning to a position of those over whom they dominate. In addition, this power does not administer as a common obligation or prohibition imposed on those who "possess it"; it captivates the last and it is transmitted through them; it puts pressure on them, similarly they fighting against it, resisting its grip. Hence, the attitude of power penetrates into the very heart of society; they are not localized in the relationship between state and citizen or on the border between classes and not simply reproduce (at the level of individuals, bodies, gestures and deeds) a common form of a law or rule; and the existing continuity (they are conjugate with this form through a number of complex mechanisms) is not provided nor analogy or homology. They are provided by the specificity of the mechanism and modalities. Finally, relations of power are ambiguous, and they are expressed in countless points of collision and pockets of instability, each of which carries a risk of conflict, struggle, and at least a temporary changing the ratio of forces[8].

Justice is a way to legitimize of the power (of course, it is better that it would be implemented by people (the jury, the national accusation, public defense, etc.). This reproduction of relations of power - knowledge in society; it creates the right and in it turn lives in the mind of people.

A will to power and a will to the truth have one nature, i.e. the desire for total domination up to biology. Power can temporarily make the truth an absolute, and not just its one (when this is necessary).

Production of the truth in a criminal case, i.e. a cover its by a flesh, objectification in a force field of power with using a variety of verbal techniques –

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[7] This theme is developed more detailed in the following works: *Alexandrov A.S.* A language of the criminal proceedings. N. Novgorod, Nizhny Novgorod Law Academy, 2001; *Alexandrov A.S., Alexandrova I.A., Kruglov I.V.* Purpose of criminal legal proceedings. N. Novgorod, Nizhny Novgorod Law Academy, 2006.

[8] *Foucault M.* Discipline and Punish: The Birth of the Prison. – M., 1999. – p. 41–42.

the techniques of proof (of knowledge) of legal knowledge, including “event of crime”, “guilt”, “criminal” (this is also called knowledge "juridical corpus delicti”, “the main evidential fact”); sticking it to the body of a specific subject by a court sentence. So, this is a constituting of crime in a discourse of criminal trial.

Hence, an expression of power forces in criminal proceedings is related to establishing of the system of legitimate knowledge about crime and criminal. This can be called “dispositive of evidence”, which is built in the criminal proceedings, in relations of power-knowledge of discursive formations.

Not only legal character, but a real human body and its soul are immersed directly in the area of legal, text. The individual, who find himself trapped in the criminal process, acquires a symbolic, i.e. legal (criminal procedure) hypostasis, on one hand and, on the other hand, his body following his legal personality finds himself in real relationship of power. An individual “splitting” should be considered as a form of involvement his into one of the speech practices - judicial.

A man goes to meet the desires. But, he is surrounded in a society by simulacra. He is doomed to deal with the symbols. He embroiled in production of signs and he produces it himself. In various ways the power pulls him into its relationships, forced to participate in its strategy. “The relations of power keep his with mortal grip. They grasp him brand, drill, torture, subject to forced labor, force to participate in the ceremonies, to make a signs”[9].

Jean Baudrillard wrote, “Every structure is violent, any violent causes fear ... it threatens to undermine a correlation of the individual to the society”[10]. Strength of the social influence on a body is equal to a force of resistance. Every minute, every second the order is undermined, is being eroded or destructive impacts of the illegality. As stated above, a mess is an inalienable quality of the system. Along with a relatively stable norm, the system of ordered relations in society is always present decomposition processes, subjects whose behavior are asocial. In a society it always has been, is and will be energy of destruction. A sublimation of this energy is a problem of the survival of society. That is why a strategy of power is always associated with the transformation of this destructive energy - here and now, in every individual, everywhere: in a family, education system, religion, in a factory, in prison. There are dissection and dispersal of the delinquency, description, account, domestication, control and disposal of delinquents for the needs of society. This is what explains a selectivity of the mechanism of criminal justice system.

Criminal proceedings must be considered as mechanism aimed differentially to manage by illegalities, but not to destroy them. After all, where there is power, there is resistance. That is why the resistance never is in the internal position in relation to

[9] *Foucault M.* Idem. – p. 40–41.
[10] *Baudrillard J.* The System of Objects. – M., 1995. – p. 140.

a power. Power relations can only exist as a function of the set of points of resistance. These points of resistance are present everywhere in the power network[11]. Consequently, a criminal proceeding is one of the psycho-linguistic mechanisms of power. This is a libido apparatus, device of power. We can not say certainly that it is used by someone against someone. It simply acts like a power acts - anonymously omnipresent, as a defensive reaction of a social body on centrifugal forces which are tearing it.

Criminal proceedings means (evinces) the presence or activities of the power in this particular form as formation of a special category of people, a special kind of outcasts - criminals. And it always makes the job even when "does not work". This is (i.e. failure) also included in the tactics of power. The strategic aim of the criminal process is not in solving a crime, identify culprits, the application of criminal law, but in administration of criminal justice as such, the production of judicial discourse, ceaseless actualization of the relation of power-knowledge, eventually- counteraction entropy.

The purpose of the criminal proceedings is the adoption by a court a legally significant decisions. Which decision is? It does not matter, it is important to put a point in the matter, but for justice it will be an ellipsis; the game should continue and give energy to recharge the system.

A Court decision will always be "wrong" in the sense of achieving "referential" (correspondence) truth. While for a particular individual (whose interests are affected in the case) is important success, winning a procedural fight, then for society it is more important a formal certainty - the rule of law. Court decision – presumed by the true – precisely because, an orderliness of relations and faith of members of societies in the justice of the existing order of things is considered in any society as a primary value.

Only under these conditions the legal system will meet the requirement of efficiency, i.e. ability of a system to adapt well to the environmental conditions, to extract from it the resources necessary for the existence of development.[12] The "lawful state" limits a power by a set of means through which it can exercise the measures of social protection. A power is limited not only by law, but also by those resources which a society gives it to fight crime. In these circumstances, it inevitably arises a problem of choice: how to ensure the protection of society in terms of a shortage of forces and means of a law enforcement system. This deficit is willfully

[11] See: *Foucault M.* The will to truth: beyond the knowledge, power and sexuality. Works of different the years.– M., 1996. – p. 196.

[12] *Petrukhin I.L.,Baturov G.P., Morcshakova T.G.* Theoretical basis of effective legal proceedings. – M., 1979. – p. 165.

laid into the prosecutorial jurisdiction: a system of checks, restrictions is a guarantee not so much even against arbitrariness, but most likely against of inadequate consumption of public resources there, where possible to do without these expenses - by private funds. Power is compelled calculate an economic, political and, if anything, the psychological consequences of its decisions in the area of crime policy.[13]

10. A Law and a state are transitional forms of social organization, the manifestations of power / knowledge that will eventually wither away.

Any state and legal structures, and all the more bourgeois one are imperfect. Anarchy is an ideal form of social organization; social progress will lead to it. It is a mother of order and altruism is its father.

But if choose between the available options, a state of law is better than unlawful, democracy is better than autocracy. Bourgeois democracy has many flaws, but meanwhile this is the best form of society. The same can be said of the adversarial justice.

11. I believe in the deconstruction as a general approach to the analysis of contemporary legal (text) reality.

In the sphere of legal there is nothing except text and deconstruct the text of the law mean to create right, open new (adaptive) features in it.

But end up a sequence of acts of deconstructions are dystrophy of meaning of the text - a denial of the law. That is why I count myself among the supporters of the CLR (school of critical legal research), an intellectual direction in the philosophy of law, the main feature of which is skepticism towards a legal reality.

12. I believe in the difference between the natural sciences and the humanities.

In the sphere of human knowledge a man is criterion of truth; in the hard sciences an experiment, repeatability, precise calculus are the.

Jurisprudence (theory of proofs) is more an art, rather than a "real" science. Like other human sciences (sociology, political economy, history) jurisprudence does not provide any rational reason to culture, does not reveal the true "laws", but it is a subculture of other subcultures, there is no difference between literary fiction and scientific knowledge.

An ideal of legal science is not in the truth – but in criticism of the real (which is always imperfect), which constitute a moral imperative of every free reflection. Apologetics of reality is slavish (piggish) ideology and that is why pathos of denying

[13] See: *Alexandrov A.S., Alexandrova I.A., Kruglov I.V.* Purpose of criminal legal proceedings. N. Novgorod, Nizhny Novgorod Law Academy, 2006. – p. 112.

of “reasonable” and “real” is the best guarantee for the existence and development of the world.

Finally, the Internet brought a new reality in the argumentation situation; “everything goes” for the argumentation there. There is a hypertext and universal audience (crowd) here. That is why the internet is place where occurs argumentation directly in front of the “people” but not in front of the lawyers, philosophers, or sovereign.

Long live the new (real) democracy and a new type of forming of power relations, new science, new (well forgotten sophistical) strategy of argument! Amen.

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