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Problems of the evidence exclusion from criminal proceedings

Abstract: In spite of the progressive in general content, the Criminal Procedure legislation of the Azerbaijan Republic contains some gaps and contradictions in terms of the evidence admissibility.

It is considered the problems; is suggested the ways to solve them.

The problems of the using physical and mental impact in the criminal process are investigated.

Keywords: evidence; admissibility; evaluation; criminal procedural activity; legal proceedings; subject of proving; criminal process.

Action of a new criminal procedural legislation of Azerbaijan Republic put the detailed analysis of the norms of adopted law as one of the priority tasks before the scientists – specialists in an area of the criminal process and other branches of the criminal circle. The goal of this analysis is as a development of the recommendations and comments, which are facilitated an application of the law to the employers of law enforcement bodies, so and further improvement of the legislative base of the criminal procedural activity. This improvement is a continuous process, which is not completed with adoption of the criminal procedural code. Constant and dynamic updating of the social relations dictates necessity of introduction of alternations and supplements into the criminal procedural legislation. This was confirmed by the eight years practice of application of the CPC of Azerbaijan Republic.

Improvement of the normative base of the criminal procedural activity is also caused with that a lawmaker, in principle, cannot adopt “ideal” law, which would be

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reflected to the full the needs and interests of a society and state [1, p. 21]. It is not exemption and the CPC, which, in spite of progressive content, lights and resolves the issues relating to the principle provisions of the criminal proceedings, and in a number of the cases, from our point of view, contradicts them.

Such, analysis of concept “evidence” allows asserting that in article 124 of the CPC talks about not the kinds of evidence, but about the kinds of the sources of evidence. Therefore, in our opinion, it should be changed the title of this article [9, p. 150].

Besides, from our point of view, the definitions of the evidence’s sources listing in the article 124.2 of the CPC are subject of changing. This is concerned also to the provisions, relating to their core, since they are contradictory and sometimes wrong.

So, according to article 124.2 of the CPC, as evidence in criminal process are accepted the testimonies of suspected, accused, victim and witness. According to article 126.1 of the CPC, the verbal and written information received from a suspected, accused, victim and witnesses in established by the CPC order are recognized as the testimonies with a body carrying out a criminal process [9, p. 153].

On the logics of a lawmaker, this information will be had an evidential significance if only it meets to the requirements of the article 124.1.2 of CPC. And opposite information, including an alibi will not be related to them since the evidence of the innocence, as such, are excluded from the process.

According to article 126.2 of the CPC, the evidence might be recognized only those testimonies, which are based on information and conclusions of an individual, directly perceiving an event, its reasons, nature, mechanism and development. It seems that such assertion comes proving up to the primitive level as excludes the process from its production: a search of the evidential information from one source to another one etc. [2, p. 17].

This is also related to the provisions of the article 126.3 of CPC, according to which information of someone transmitted to a body carrying out a criminal process cannot be used as evidence.

Exception is “information received from a dead person”, which is also to be seemed wrong as it contradicts to concept of evidence. From our point of view, in this case the main is reliability of information received with legal way, but not a source of the evidence. Particularly that the testimonies as such are not in the law.

In addition, it seems wrong a reference onto a body carrying out a criminal process, but not to the specific participants of criminal process, that means not the same [6, p. 109].

As it known, the testimonies are received with way of interrogations, which are produced by an investigator or other competent participant of a process. According to article 125.2.5 of CPC, an opposite of this relates the evidence to an admissible.

Definition of concept “material evidence” (article 128.1 of CPC) is not complete as it is absent a provision about subjects in it, which were instruments of a crime. Also, from our point of view, improper description, sealing and other, which did not have an influence on the features of a subject, cannot be grounds of inadmissibility of the evidence.

The records of investigative and judicial action including the records of inspection, search, interrogation, confrontation, examination of the testimonies of a place and others (article 134 of CPC) are listed in the law (article 124.2.4 of CPC) as a source of the evidence.

As I.A. Grudinin notes, according to logics of a lawmaker, the evidence are at the same time as the testimonies so and the records, in which they are written. This confirms our assertion about existence of the types’ evidence sources, but not the evidence [4, p. 26].

According to article 134.1 of CPC, the records of investigative action and court session are the documents, which are made up in compliance with CPC in written and confirmed direct perceiving the circumstances having significance for criminal persecution by a body carrying out a criminal process.

At the same time, article 135 of CPC is provided another type of the evidence sources – other documents, under which are recognized any notes on a paper,

electronic or other carrier, containing information in letter, figure, graphical or other signs, which might have significance on the criminal persecution.

It is presented that both of these sources of evidence are the same on essence if proceed from that each document (having significance for a case) should be examined with making up a record then the same information would be presented in three hypostases. In really we will have the three sources one evidence [8, p. 19].

Admissibility of evidence presupposes a compliance with procedural rules of their receiving: a lawmaker requires from a person, carrying out production on a case, to use only investigative actions (listed in the law) to obtain evidence and establishes an order to perform each investigative action.

Violation of these requirements is considered to be essential violation of a law and entails recognition of evidence as inadmissible, but the law also contains contradictions in this part.

So, according to articles 236, 237, 238, 241 and 247 of CPC, the records of survey, exhumation, examination, identification, search and seizure are made up on completion of these investigative actions and a note on clarification to the participants about their rights and obligations.

But, it is obvious that a participant of an investigative action should know his rights and obligation before its beginning and not its completion.

Importance of admissibility is that through its establishing are excluded from the system of criminal proceedings the evidence, reliability of which to determine is difficult or impossible. Consequently, admissibility has a role of barrier that does not allow penetration into the system of proving the information, which is not evidence in procedural meaning of this word.

It is presented that some provisions of the article 125 of CPC of Azerbaijan Republic are insurmountable barrier, which are artificially and, mainly unwarranted, complicated a proving process.

So, according to article 125.2.2 of CPC, acceptance of information, documents and items, which are received with application of violence, threat, deception, torture

and other brutal, inhuman or humiliating actions as evidence on criminal case are not admissible.

From our point of view, the law should clear determine concept of illegal psychic impact and its constituent parts, which are the following:

a) Threat of application in present or future a physical violence, destroying of property, distribution of disgracing and other confidential information, criminal, disciplinary or administrative persecution, prohibition of activity, violation of other rights, which are provided by the Constitution and other laws of Azerbaijan Republic.

Threats can be directed directly to a participant of the process or in respect of other individuals independently of relative ties level with participant of the process. The threats of application of physical violence can be verbal and demonstrative;

b) Execution of listed threats including a physical violence in respect of any persons who have attitude to a participant of the process.

In this instance an illegitimate physical violence and other illegal actions against some persons will be a way illegitimate psychic violence against a process' participant.

c) Intentional violation of the right of a process' participant as a man and citizen (except a physical impact). In this instance it is taken into account the constitutional rights and freedoms, which are provided in Chapter 3 of the Constitution of Azerbaijan Republic;

d) Intentional violence of procedural rights of an individual as a participant of criminal process [3, p. 75-76].

From our point of view, an issue on legal consequences of the rules' violence on admissibility of the evidence is remained problematic.

It is presented wrong a definition of the list of specific violations of criminal procedural law, under presence of which recognition of the evidential information as evidence is inadmissible. As it is believed by the authors of these lists, they are not in all instances concrete and are needed to be verified.

On this reason, it is not quite successful is established in new CPC the list (art. 125) according to which inadmissible evidence are information, documents and items received in the following way:

- With deprivation or restriction the rights of participants of criminal process, which are guaranteed by the law in violation of constitutional rights and freedoms of a man and citizen or other requirements of CPC that should or will be able to influence on reality of these evidence;

- With application of violence, threat, deception, torture and other brutal, inhuman or humiliating actions;

- With gross violations of the rules for production of the investigative or other procedural actions;

- From a person who unable to identify a document or other item, to confirm their reality, source, circumstances of receiving;

- From unknown individual in court session or non-established source in it;

- In result of application of the ways contradicting of the modern scientific views etc.

In connection with this, it is reasonable to consider an issue on differentiation between essential (gross) and non-essential violations of the criminal procedural law. It is believed that the main criterion for differentiation between essential or non-essential violations should be admitted their compliance or contradiction with the principles of criminal process.

The contradiction to fundamental, guiding principles of the criminal process should be in any instance assessed by a subject of proving as a base for exclusion evaluated evidential information from the evidential base.

One of the tasks of criminal proceedings (art. 8.0.3 of CPC) is thorough and complete determination all circumstances linked with criminal persecution. Considering that in various stages of criminal proceedings interlinked issues on the evidence's sufficiency and completeness of investigation are solved by different subjects of proving, then, accordingly, the assessment of this circumstance is various.

Very often, prosecutor or court, motivating their decisions with incompleteness of investigation, artificially retards its further course [10, p. 11].

It is possible objections that incompleteness and sufficiency of the evidence are the notions of different levels and categories, that sufficiency determines completeness etc. but one is obvious: this notion will always be an instrument of the subjective wishes and goals without exact orders of the law [7, p. 8].

It is not less important an issue on the subjects of the evidence assessment in criminal process. Article 145.2 of CPC is mentioned only an inquirer, investigator, prosecutor, judge and jurors, but it does not mean that other subjects of criminal process do not produce mentioned assessment. On opinion of L.D. Kokorev, that presented right, the subjects of evidence assessment might be any participants of a process, but their assessments have unequal significance for procedural proving [5, p. 223].

The procedural status of the certain subjects determines significance for proving of evidence's assessment of these subjects. With considering of procedural status a conditional division of the subjects of evidence's assessment into the two groups is presented possible. First group includes the subjects, which take procedural decisions on base of assessment of evidential information (evidence). Inquirers, investigators, prosecutors, judges and also jurors are included in this group.

Second group includes suspected and accused individuals, defenders of these persons, victims, expert witnesses, interpreters and other participants of criminal process, which do not take procedural decision of a case if the petitions not to consider as such.

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