

## Essence and basic properties of evidence, their sources in criminal proceedings



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**Abstract.** *Development of a new understanding of the basic properties of evidence and other provisions of the procedure for dealing with them and their sources in criminal proceedings*

*In the article new edition of the norm CPC of Ukraine on the understanding of the essence of evidence and their basic legal properties, sources, subjects, order and exhaustive list of actions for their receipt and forms of operating such information in criminal proceedings is proposed. The essence of the evidence and of each their primary and additional basic legal properties is disclosed. The variant of the decision of a problem of subjects of reception of proofs and participation of other persons in the given procedure is offered. Outlined an exhaustive list of those receiving investigative and judicial actions, as well as forms of submission, evaluation and use of evidence in criminal proceedings.*

**Keywords:** *the proofs in criminal proceedings; the primary and additional basic properties of proofs; the subjects of obtaining the proofs; the receiving investigative and judicial actions; the forms of presentation, evaluation and use of proofs.*

### Problem statement

Several generations of the scientists have worked for solving the problem and to gave the right definition of the evidence nature and their properties and sources, as well as subjects, order and actions in obtaining this kind of information in criminal proceedings, almost from the starting of this type of the legal proceedings [9; 10 and others.]. Thus, V. Spasovich noted in his lecture on the theory of judicial criminal evidence from October 4, 1860, according the art. 304 Part 2 of the XV Code of Laws of the Russian Empire that no one could be convicted for punishment without exact and indirect evidence, as established by perfect and imperfect evidence, emphasized that the presence of perfect (in our sense direct) evidence is equal to the probatity guilty, and imperfect, that is, indirect, evidence - only casts suspicion on the defendant, which gave grounds for the use of torture; further: confessed - executed, did not admit - died (not exclusively, crippled) in sharpening [10, p. 25]. The indicated position which was told by the scientist explains in the context of the varieties of evidence in the following way: a) the actual confession of guilt; b) another complete unconditional proof - the

testimony of a special witness; c) semi-proofs and other indirect evidence that could only lead to an accused suspect. The presence of any set of indirect evidence can not provide complete evidence and necessitates the use of the extreme judicial method of obtaining evidence - torture, the application of which, however, is not entirely understandable.

Three conditions were required when: a) the fact of the crime is obvious; b) there is powerful indirect evidence or half-evidence against the defendant; c) the defendant is not recognized in the commission of a crime [10, p. 21].

Despite the fact that the theory of evidence has more than a half-century development path, and still this issue can not be considered solved quite completely both at the legislative level and in the theoretical aspect. So, the part 1 of the art. 84 of the CPC of Ukraine evidence in criminal proceedings acknowledges the actual data received in the manner prescribed by this Code on the basis of which the investigator, prosecutor, investigating judge and court determine the presence or absence of facts and circumstances relevant for criminal proceedings and subject to proof, and in accordance with the part 2 of this article, the evidence, material evidence, documents and expert opinions are recognized as procedural sources of this kind of information [6]. However, S. Kirichenko, in the dissertation "The essence and classification of evidence and their sources in criminal proceedings: the genesis and possibilities for improvement," analyzed the similar list of procedural sources under the part 2 of the art. 65 of the CPC of Ukraine in 1960, where it was fixed that the evidence as actual data "is established by testimony of the witness, testimony of the victim, testimony of the suspect, testimony of the accused, expert opinion, material evidence, protocols of investigations and judicial actions, the protocols with the relevant annexes, compiled by the authorized bodies on the results of operational-search activities, and other documents "[4, p. 13; 5].

With regard to the foregoing, it is sufficiently substantiated to emphasize the fact that there is practically no evidence in the named objects, and only one part of them (material evidence and documents, as well as the victim itself, witness, prosecuted, expert, etc.) are essentially material in nature and personal sources of evidence; the second part (expert's report, reports of investigative and judicial actions, operational investigative activities with additional information, as well as

other carriers of information on these actions, etc.) is a procedural form for the submission of evidence; the third part (testimony of the witness, prosecuted, expert, etc.) - is a kind of way of transferring evidence as certain information from the memory of personal sources to the main subject [4, p. 13]. In addition, as in the above the part 1 of the art. 84 CPC Ukraine in 2012, and in the part 1 of the art. 65 of the CPC of Ukraine in 1960, the concept of evidence is practically confined to factual data, and the basic and additional basic legal features of evidence and their aggregates are not disclosed, and the procedure for working with the sources of evidence is sufficiently scattered out in a number of articles of these codes [5; 6].

#### **Analysis of latest research where the solution of the problem was initiated.**

The analysis of recent researches and publications, which initiated the solution of the problem and the allocation of previously unsolved parts of the general problem, which is devoted to the article.

Despite the fact that in this dissertation S. Kirichenko [4, p. 13, 168-185] not only clearly revealed the essence of evidence and their main or additional legal properties, but also their sources, the way of their transfer from a personal source to an investigator and the form of submission, evaluation and use of this kind of information were delimited among themselves and exhaustively solved all other problems regarding the procedure for working with evidence and their sources, D. Davydov in 2015 returned to the same topic again in his dissertation "Sources of Evidence in the Criminal Procedure Process of Ukraine" [1], put down the above-mentioned new approaches, declaring implicitly that " it is sufficient to determine the list of procedural sources of evidence in the norms of the current CPC of Ukraine of sources of evidence and features of evidence "[1, p. 178], and the procedural sources of evidence are all the same " testimony of the witness, prosecuted, expert, etc." [1, p. 179]. At the same time, it is appropriate to underline once more that evidence is not obtained from any direct or

indirect communication with a personal source or by means of personal or expert research of things or by studying documents, but only those which have an inseparable set of such basic legal features as significance, legality, admissibility and benignity [4, p. 169-170; 11, p. 170-171]. The existence of such an inextricable unity of the basic properties of each individual proof at first was originally established by Y. Lantsedova. She did this with the help of a comprehensive and detailed study of the existing 27 tasks of traditional assessment of evidence and 17 similar tasks of verification of evidence [7, p. 151-173], which was then assimilated by S. Kirichenko [4, p. 169-170] in the context of the wording of those editions in the context of the formulation of the version of those parts of the article CPC of Ukraine, which had covered the nature, sources and basic and advanced properties of the basic legal evidence. At this time, there is a need to join the legislative approach to reflecting such a basic legal characteristic of individual proof as authenticity, as well as to constructively develop other new approaches to highlighting the detailed procedure for working with proofs and their sources in a separate article of the CPC of Ukraine [2, with. 222-230; 3, p. 44-48, 81-84; 8 and others.].

Setting up tasks. Further international testing of this innovative approach in the joint edition of the article of the CPC of Ukraine the nature, properties and sources of evidence and all other essential provisions of the procedure for dealing with them in criminal proceedings, as well as the continuation of scientific discussion on the development of a generally recognized solution to this problem and constitute the main tasks of the actual publication.

**Presenting main material.** Innovative evidence and understanding of their basic legal basis and additional properties and sources and subjects, order and exhaustive list of actions from getting and forms a representation of this kind of information to all participants in criminal proceedings so and evaluation and use of this information in the present proceedings. Y. Lantsedova offers to present in the constructive development of the corresponding dissertational approaches S. Kirichenko [4, p. 169-170] and O. Tundulli [9, p. 169-173] in the form of the following comprehensive editorial of the article "Evidence, their properties, sources, subjects,

procedure and actions for obtaining and presentation, evaluation and use of this kind of information" (consolidated wording of the articles 84 and 93 of the CPC of Ukraine 2012, the articles 65 and 66 of the CPC of Ukraine in 1960) of the CPC of Ukraine (which in principle can be perceived by the relevant codes of any other (which in principle can be perceived by the relevant codes of any other countries, especially the post-Soviet space, Europe and the world as a whole):

1. The evidence in the criminal proceedings have any information about the fact (external or internal signs or expression properties of objects and documents, or a person or his actions or events as summative act or natural phenomena, including acts of predatory animals unregulated human terms) as a whole or its separate side, which were got from subjective and objective sources of information of this kind, if each has evidence of the unity of the main legal basis properties as relevance, legality, admissibility, purity and authenticity, as well as such additional the basic legal properties of the set of evidence, as its consistency and sufficiency for the adoption by the main subject of criminal proceedings (investigator, judge) of a certain interim or final decision.

2.1. Important is information according to which you can confirm or deny legal fact (circumstance) basic, special or partial subject of criminal evidence or evidentiary fact as an intermediate thesis the subject of proof.

2.2. Legitimate – information received in the order which fixed by this Code, and also without the use of deception, violence or threats or without other significant violations of the legal status of the person or entity or state.

2.3. Permissible – is true information obtained from a known and accessible source verification, when the evidence is inadmissible, the information is intended to justify:

- provisions of the legal act;
- a well-known or prejudicial fact, which, however, can be used directly in making decisions along with evidence;
- a paranormal phenomenon, that is contrary to the well-known laws of nature or can not be explained to them.

2.4. Qualitative – is information that doesn't have contradictions and give an opportunity to make a definite conclusion, as

well as obtained in the absence of significant violations of the recognized methodology or without the use of methods not recognized in the established procedure.

2.5. Trustworthy are any information that is adequate in the context of establishing the circumstances of the basic, special or partial subject of criminal evidence, and which:

2.5.1. Properly reflect the circumstances as preparation and/or commission of an act (event, phenomenon) of a criminal offense or the concealment of its anti-trace offenses, as well as any other acts (events, phenomena) or signs or properties of things and documents or a person.

2.5.2. Inappropriately reflect the circumstances of these legal facts as a result of remote, meteorological, educational, psychological, physiological and other features of their perception of a personal source and memorization, storage, reproduction and transmission of information about specified legal facts to the main subject of criminal proceedings.

2.5.3. Adequately explain the reasons for this inadequate reflection of legal facts.

2.5.4. There is adequate or inadequate, but obviously untrue and therefore acquire adequate reliability in the context of criminal proceedings for giving false testimony of such or such a knowingly false expert opinion.

2.6. Set of evidences is evidence in which one proof doesn't contradict another, and the existing contradiction can be eliminated by indicating the arguments of the reliability of one proof and the unreliability of another.

2.7. A sufficient set of evidence is a set of proofs that can form (without external factors of influence) in the main subject of criminal proceedings internal conviction of the possibility of making a certain interim or final procedural decision on a criminal case at the moment.

3. The investigator have the right to get evidence an (including the prosecutor, the head of the pre-trial investigation authorities) and a judge (panel of judges), and by the exclusion provided for in part 4 of this article, an expert and operational officer, by conducting subsequent investigators actions:

1) registration of appearance with a charge of committing an act (events, phenomena) of a criminal offense;

2) receipt of an oral statement or written notification of a criminal offense committed or its preparation;

3) the detention and interrogation of the persecuted;

4) interrogating a personal source;

5) personalized rates between personal sources;

6) presentation of the accusation and interrogation of the accused;

7) verification and / or clarification of the testimony of the persecuted, the victim or witness at the place of the act (event, phenomenon) of a criminal offense or in another significant place for a criminal case;

8) an experiment with the named personal sources and without them;

9) presentation for ordinary, counter or group identification of the persecuted, victim, witness, other personal source, thing, objective, subjective or mixed document;

10) examination (examination, personal investigation) of the place of the act (event, phenomenon) of a criminal offense, the area, premises, vehicle, human body, body of a living person, other things, including objective, a subjective or mixed document with signs of a real source of evidence;

11) Exhumation of a human body;

12) studying an objective, subjective or mixed document;

13) search of premises, terrain, vehicle, personal source;

14) snatching of a thing, an objective, subjective, or mixed document;

15) imposition of arrest on funds, other property and transfer to storage;

16) control of communications;

17) announcement of the prosecution of the accused, defendant;

18) obtaining samples for examination, as well as obtaining similar legal actions.

4. If the process of obtaining evidence requires the involvement of special knowledge, then for this purpose appointed by the main subject of criminal proceedings and conducted by an expert examination, and when it is necessary to hold the receiving secret actions - appointed by the main subject of criminal proceedings and executed by the operational officer promptly -finding task.

5. Survey (review, personal investigation) of the place of the act (event, phenomenon) of a criminal offense or other significant place for a criminal case (area, premises, vehicle), and with the sanction of the prosecutor and any other of the named procedural actions (investigators, judicial, expert) can be carried out before the notification of a real or probable act (event, phenomenon) of a criminal offense which is being prepared, continues or already committed, into the Uniform Register of Pre-trial Investigations, if without it it is impossible to obtain sufficient coherent set of evidence on the presence or absence of such an act (event, phenomenon) characteristics specific criminal offense or the circumstances excluding proceedings in a criminal case.

6. Things and / or objective and / or subjective and / or mixed documents, including the act of revision, the act of inspection, etc., may fall into the possession of the main subject of criminal proceedings and through their request or in the case of voluntary extradition and receipt of them from any natural or legal persons, but obtaining evidence is possible only through personal or expert investigation of things or / and studying these documents within the framework of obtaining procedural investigative or judicial actions.

7. The assistance of the main subject of criminal proceedings in obtaining evidence is to be granted to any natural or legal person, including representatives of the defense or prosecution, through:

7.1. Voluntary issuance of those important for criminal cases of things and / or objective and / or subjective and / or mixed documents in their possession.

7.2. Notice about the probable or real location of the material object or person who can act in this case, respectively, as an objective or subjective source.

7.3. If the individual and / or entity was the subject of criminal proceedings, it can provide such assistance and by asking questions or statements directly to a motion correction process to obtain this kind of information and / or the relevant procedure justice.

8 The investigator presents evidence (gives the subjects of criminal justice the opportunity to perceive the nature and features of this kind of information and to control the procedure for

their receipt) in the form of the protocol of the receiving investigative action, the judge or the panel of judges - the journal of the court session, the expert or the commission of experts - the conclusion of the examination, and provided by the code in cases or on the instruction of the initiator of the study - and the protocol of examination, and a summary assessment and use of evidence carried out by the subjects of criminal proceedings in cases provided by the code in the form of:

1) a resolution about instructions to execute a certain procedural act (a secret measure);

2) a resolution to instruct another entity to perform a certain procedural action (a secret measure);

3) the decision of the inquirer, investigator, prosecutor or judge (panel of judges) about sending a criminal case to the appropriate addressee;

4) resolutions on the elimination of violations of the law, the reasons and conditions that contributed to committing an act (events, phenomena) of a certain criminal offense;

5) the decision of an inquirer, investigator or prosecutor regarding the adoption of any procedural decision in the cases provided for by the Code, and the decision of the judge (panel of judges) - an interim procedural decision;

6) indictment, acquittal, or neutral (concerning a related person, that is, in relation to which a sufficient and consistent set of proofs, indicating the guilt or innocence of the prosecuted person, has not been obtained);

7) the decision of the judge (panel of judges) about the other final decision of the criminal case;

8) a petition of the person concerned about the acceptance by the investigator, investigator, prosecutor, judge of a certain procedural decision;

9) complaints of this person to the act, including decisions, the main subjects of criminal proceedings;

10) the decision of the prosecutor to review the court decision in the order of appeal;

11) appeals of other bodies authorized by the code;

12) the decision of the prosecutor to review the court decision in a cassation order;

13) the appeal of other bodies authorized by the code;

14) the decision of the prosecutor to review the court decision for newly discovered circumstances.

In connection with the edited article on the evidence of Y. Lantsedova, it is necessary to emphasize that any type of legal proceedings in criminal justice, should be carried out only by the professionals. The professionals who have experience, knowledge and skills of carrying out such acts and an appropriate level of analytical thinking, and who's obliged to provide direct, objective, comprehensive and complete study of all circumstances of the case, on this basis to establish objective truth and decide the right thing. In the context of this statement, the question of the adversarial nature of this legal process, which is not a sports competition, but the decision of the fate of the prosecuted person and the victim involved in this proceeding, whose right status should be secured on the basis of no assumptions, but only a coherent and sufficient set of evidence.

The participation of other persons in the immediate receiving of the proofs, accept investigator, prosecutor and court, and as an exception of an expert and operational officer, and people's assessors or jurors in criminal evidence with the status of judges violates the cornerstone of any and more criminal justice - the professionalism of obtaining evidence and the issue of the guilt or innocence of the persecuted person or other defendant [2, p. 213; 3, p. 51].

Providing a defender who, according to tradition and law, has a powerful motivation and the ability to "help" the client to avoid criminal responsibility, significant rights to directly obtain evidence without assigning to him the responsibilities for objective,

comprehensive and complete study of all circumstances of the case, establishing truth and the correct resolution of a criminal case violates another cornerstone of jurisprudence - about interconnection and proportionality, from one parties, rights, freedoms and interests of individuals or legal entities or state or interstate entities, and on the other hand - the duties of these persons as participants in the proceedings [2, p. 213-214; 3, p. 51].

Taking into account the above stated objective truth in a certain criminal case, it is necessary to understand the establishment of such information, which not only have the whole set of basic legal features (significance, legality, admissibility, benignity, authenticity), but also represent a sufficient and coherent aggregate in order to form an internal conviction ((it means the one that has developed without any external influence, such as telephone law, etc.)from the investigator or judge that some intermediate or even more definitive a procedural decision in a case can be taken [3, p. 53].

In this case, any subjective information, that is obtained from a personal source, are "objectified" by such conviction by an investigator or a judge who would be sure that, by subjective information in conjunction with other information set its own objective truth and only decided on the basis of a particular case. Otherwise, it is necessary to directly acknowledge the existence of situations for the resolution of certain criminal cases not on the evidence, but on assumptions that are inadmissible in relation to not only the indictment, as stated in the part 1 of the art. 62 of the Constitution of Ukraine, but also an acquittal, which can also be based only on a coherent and sufficient set of evidence [3, p. 53].

## Conclusion

It should be noted that the proposed new edition of the article of the CPC of Ukraine concerning the essence of evidence and their main and additional basic legal properties and sources, as well as subjects, actions and other procedures for obtaining and presenting such evidence in criminal proceedings does not claim to be a complete solution to this problem and is open to a broad and correct scientific discussion with the aim of developing a generally accepted option for solving these extremely important problems of counteraction as criminal, and all other types of offenses.

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