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Recognition of evidence inadmissibility in criminal process: The main scientific and theoretical concepts

Streszczenie

Uznanie dowodów za niedopuszczalne w postępowaniu karnym: podstawowe koncepcje naukowo-teoretyczne

Zróżnicowane podejście do uznania dowodów za niedopuszczalne jest jednym z podstawowych problemów procesu karnego, dlatego też rozwiązanie go ma znaczenie zarówno teoretyczne, jak i praktyczne. W artykule dokonano analizy różnych koncepcji uznania dowodów za niedopuszczalne, do których należą koncepcje: „owoc zatrutego drzewa", „uczciwe błędy", „srebrny talerz", „herbata i atrament", „rozbite lusterko" oraz „bezwzględne wykluczenie dowodów". Głównym zadaniem autora tego artykułu jest przedstawienie najlepszych przykładów wykorzystania tych koncepcji w różnych sytuacjach, które występują w postępowaniu karnym.

Słowa kluczowe: dowód, postępowanie karne, koncepcja uznania dowodów za niedopuszczalne

Анотація

Визнання доказів недопустимими у кримінальному процесі: основні науково-теоретичні концепції

Проблема диференційованих підходів до визнання доказів недопустимими є однією з центральних проблем кримінального процесу, при цьому вирішення даної проблеми

має як теоретичне, так і практичне значення. В статті проведено аналіз різноманітних концепцій визнання доказів недопустимими, серед яких концепція «плодів отруєного дерева», «добросовісної помилки», «срібне блюдце», «чаю і чорнил», «розбитого дзеркала» та «нещадного виключення доказів». Ціллю цієї статті є представлення наочних прикладів найкращого використання даних концепцій у різних ситуаціях, котрі виступають у кримінальному процесі.

Ключові слова: доказ, кримінальний процес, концепція визнання доказів недопустимими

In the theory of criminal process and criminal processual legislation the problem of recognition of evidence inadmissibility is being solved ambiguously. It should be emphasized that such an ambiguity refers not only to the criminal process, but generally to various kinds of legal procedures. The existence of complex and multifaceted approaches to clarifying the nature of evidence admissibility, recognition of their unacceptability in a legal process contributed to the emergence in national legal science of a considerable, one can say great number of relevant concepts studied in relation to these issues. In this case in order to conduct an objective and critical analysis and improve certain elements of data concepts, there is a need to explore their significance for the criminal procedural law and their impact on domestic criminal procedural legislation of Ukraine.

In pre-revolutionary Russian and Austrian criminal procedure law there was inherent the concept of positive admissibility of evidence, the essence of which is that certain circumstances should be proved only by certain evidence, as well as the concept of negative admissibility of evidence, the essence of which is that the ability of installation (confirmation) of any circumstances to be proven is possible only on the basis of the evidence referred to in the law and the use of which is not prohibited by law directly. In turn, the second concept was mainly formed on two fundamental provisions of the Anglo-American concept of evidence — rules of providing "better evidence" and rules of exclusion of "evidence at the hearing."[1]

[1] Гордейчик А.В. *Исследование допустимости доказательств в гражданском и арбитражном процессах* / А.В. Гордейчик. — Хабаровск: РИОТИП, 2007. — 238 с., pp. 65–121; Кипнис Н.М. *Допустимость* доказательств в уголовном судопроизводстве / Н.М. Кипнис. – М.: Юристъ, 1995. — 128 с., pp. 14–15; Є.Г. Коваленко, *Теорія доказів у кримінальному процесі України: Підручник* / Є.Г. Коваленко. — К.: Юрінком Інтер, 2006. — 632 с., pp. 33–34; Ларина Е.В. *Признание доказательств недопустимыми в российском уголовном судопроизводстве (в стадии предварительного расследования): Дис. … канд. юрид. наук: 12.00.09* / Е.В. Ларина. — М., 2005. — 220 с., p. 46; Розин Н.Н. *Уголовное судопроизводство. Пособіе къ лекціям: Второе изданіе, измъненное и дополненное* / Н.Н. Розин. — С.-Пб.: Издание Юридического книжнаго склада «Право», 1914. — 547 с., p. 21.

At the same time, based on the philosophical categories of justice and morality, A.F. Koni substantiates the concept of psychological admissibility of evidence where an evaluative notion is the criterion of morality, regardless of regulations or prohibitions of the law.[2]

Thus, in our opinion, such categories as: reforms of the criminal procedural law in the 1860s, rapid development of legal science and the adoption of certain rules of recognition of inadmissible evidence from the appropriate law of the UK and the USA contributed to the emergence of data concepts in domestic criminal procedural law. Furthermore, other scientific and theoretical concepts of recognition of evidence inadmissibility in a criminal process emerged due to the appearance of the above concepts. In fact, the scientific and theoretical research in the criminal process of pre-revolutionary as well as of Soviet scientists who investigated the procedural relationship were considered to be the basis for the creation of new scientific concepts concerning recognition of evidence inadmissibility. In particular, these include: the concept of asymmetry of evidence admissibility rules, the rule of "equilateral asymmetry in the evaluation of evidence validity," the concept of "fruits of the poisonous tree," the concept of "tea and ink," the concept of "broken mirror," the concept of "ruthless exclusion of evidence," the concept of "silver saucer," the concept of "good faith mistakes" and others.

In highlighting the issue of differentiating criminal procedure violations and legal consequences for the possibility of using information about the facts of the case in the process of proof, we cannot neglect the concept of "the asymmetry of evidence admissibility rules." Its content is that for the prosecution and for the defense there are different legal consequences of violations made when obtaining evidence.[3]

In jurisprudence, scientists perceive the scientific and theoretical concept of recognition of evidence inadmissibility ambiguously. Indeed, in procedural literature there is a discussion between the supporters and opponents of this concept, the essence of which is reduced to answering the question whether there are the same legal consequences of non-compliance to the rules of evidence admissibility for the prosecution and the defense.

Supporters of the concept of "asymmetry of admissibility evidence rules" base their position on the following arguments: only evidence obtained through violation of the law, which may be the basis for the prosecution,[4] should be recognized as unacceptable; the defense may use evidence that is inadmissible in the hands of the prosecution and the accused cannot be held responsible for errors of investigator

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[2] Стоянов М.М. *Властивості доказів у кримінальному процесі України: Дис. … канд. юрид. наук: 12.00.09* / Микола Михайлович Стоянов. — Одеса, 2010. — 246 с., p. 95.

[3] Стоянов М.М. *Властивості доказів у кримінальному процесі України: Дис. … канд. юрид. наук: 12.00.09* / Микола Михайлович Стоянов. — Одеса, 2010. — 246 с., p. 116.

[4] Савицкий В.М. *Уголовный процесс России на новом витке демократизации* / В.М. Савицкий // Государство и право. — 1994. — № 6. — С. 96–107., pp. 105–106.

who has lost exculpatory evidence;[5] evidence obtained with violation of the rights of the accused can be considered valid on request for the protection of the fact that these violations have reached their goal;[6] if the evidence is submitted or acquired by the defense, the question of admissibility should be decided in full compliance with the rules of evidence admissibility without any restrictions.[7]

Accordingly, opponents of the concept of "asymmetry of evidence admissibility rules" in deciding whether the evidence is admissible support a position that it is impossible to set a different legal regime or create different "weight categories" for the presentation and use of evidence in a criminal process by the prosecution and by the defense.[8] In addition, scientists adduce the following arguments: firstly, "asymmetry of evidence admissibility rules" is illegal, and therefore its use in a criminal process is unacceptable, and secondly, in terms of the law there does not exist the problem of double standard in determining evidence admissibility.[9] In turn, someone points out that the trend towards asymmetry of evidence admissibility rules is irrelevant, since it allows the use in the process of proving of information obtained contrary to the constitutional status of an individual as well as evidence obtained with flagrant violations of procedures.[10]

It should be noted that at the moment there is a synthesis, a so-called combination of the viewpoints described above. The substance of it is that some scholars, while recognizing the possibility of "asymmetry of evidence admissibility rules"

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[5] Орлов Ю.К. *Проблемы теории доказательств в уголовном процессе* / Ю.К. Орлов. — М.: Юристъ, 2009. — 175 с., pp.77–78; Пашин С.А. *Доказательства в российском уголовном процессе* / С.А. Пашин // Состязательное правосудие. — М.: Тр. научно-практ. лаборат., 1996. — Ч. 2. — 424 с.; pp. 371–372.

[6] Іщенко В. *Принцип допустимості і достатності засобів кримінально-процесуального доказування* / В. Іщенко // Право України. — 2003. — № 7. — С. 90–93., pp. 90–91; Стецовский Ю.И. *Конституционный принцип обеспечения обвиняемому права на защиту* / Ю.П. Стецовский, А.М. Ларин. — М.: Наука, 1988. — 320 с., pp.75–76.

[7] Абросимов И.В. *Актуальные вопросы обеспечения допустимости и достоверности доказательств в уголовном судопроизводстве: Автореф. дисс. … канд. юрид. наук: 12.00.09* /. — М., 2007. — 26 с., p. 16; Іщенко В. *Принцип допустимості і достатності засобів кримінально-процесуального доказування* / В. Іщенко // Право України. — 2003. — № 7., pp. 115–116.

[8] Кипнис Н.М. *Допустимость доказательств в уголовном судопроизводстве* / Н.М. Кипнис. — М.: Юристъ, 1995. — 128 с., p. 95–105; Ларина Е.В. *Признание доказательств недопустимыми в российском уголовном судопроизводстве (в стадии предварительного расследования): Дис. … канд. юрид. наук: 12.00.09* / Е.В. Ларина. — М., 2005. — 220 с., pp. 146–147; Соркин В.С. *Особенности процессуального доказывания в уголовном судопроизводстве: Монография* / В.С. Соркин. — Гродно: ГрГУ, 2002. — 95 с., p. 35.

[9] Кудрявцев В.Л. *Проблемы двойного стандарта при определении допустимости доказательств в российской уголовно-процессуальной науке* / В.Л. Кудрявцев // Актуальные проблемы уголовно-процессуального права и практика его применения: Материалы международной дистанционной научно-практической конференции. — Караганда: КЮИ МВД РК им. Б. Бейсенова, 2009. — С. 7–13, p. 13.

[10] Верещагина М.А. *Асимметрия правил о допустимости доказательств* / М.А. Верещагина // Вестник Южноуральского государственного университета. Серия «Право». — 2007. — № 28., pp. 23–24.

point out that it is possible to consider inadmissible only the evidence obtained by investigators. However, when evidence is put forward by the defense, the question of admissibility of such evidence must be resolved in accordance with the rules of evidence admissibility without any restrictions.[11]

It seems that in this matter we must proceed taking into account the epistemological aspects and rules of interpreting doubts in favor of the accused.[12] Evidence cannot be used in favor of the accused only in cases where there exist against him obstacles of an epistemological nature that cannot be eliminated. In this case, when procedure violations related to guarantees of reliability of evidence exist, you should try to neutralize them to the greatest possible extent or replace the unsuitable evidence with other. And only when this cannot be done, it should be decided on the basis of the rule of doubt: the fact that the evidence works in favor of the accused, if it is neither truly confirmed nor refuted.[13] In other cases, when procedure violations are not related to the reliability of evidence, the evidence should not be related to the accused, because he does not have to suffer for reasons of incompetence or bad faith of the prosecution or of unfair conviction of subjects who bear the burden of proof. Thus, in the absence of obstacles of epistemological nature, such evidence must be conferred with legal force in the case when it is interpreted in favor of the accused.

At the same time, we can agree with the statement that a rule saying that "the prosecution should not be based on evidence obtained by illegal means" is fundamental in this discussion and, in our opinion, it serves as another argument for the possibility of using "asymmetry of evidence admissibility rules."[14] In accordance with Part 3 Art. 62 of the Constitution of Ukraine, all doubts concerning the proof of guilt of the accused which cannot be removed in the manner stipulated in the Criminal Procedural Code shall be interpreted in favor of the accused.[15] Besides giving an official interpretation of the provisions of Part 3 Art. 62 of the Constitution of Ukraine, the Constitutional Court of Ukraine proceeds from the fact that a person's charge of committing a crime cannot be based on evidence obtained as a result of a violation

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[11] Дмитриева А.А. *Оценка допустимости доказательств стороной защиты* / А.А. Дмитриева, А.А. Коряжкин // Вестник Южноуральского государственного университета. Серия «Право». — 2005. – № 8. — С. 186–188, p. 187.

[12] Стоянов М. *Концепції допустимості доказів: проблеми теорії, нормативної регламентації та правозастосовчої практики* / М. Стоянов // Часопис Академії адвокатури України. — 2009. — № 4. — С. 1–10, p. 2.

[13] Орлов Ю.К. *Проблемы теории доказательств в уголовном процессе* / Ю.К. Орлов. — М.: Юристъ, 2009. — 175 с., pp. 77–78.

[14] Стоянов М. *Концепції допустимості доказів: проблеми теорії, нормативної регламентації та правозастосовчої практики* / М. Стоянов // Часопис Академії адвокатури України. — 2009. — № 4. — С. 1–10, p. 2.

[15] Конституція України [Електронний ресурс]. — Режим доступу до документа:http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.

or restriction of his constitutional rights and freedoms, except in cases where the Constitution of Ukraine allows such restrictions.[16]

Thus, we should agree with the view of scientists who research procedural relations that when evidence is presented by the defense, general rules of admissibility apply.[17] Therefore, it is necessary to make a clarification that "asymmetry of evidence admissibility rules" cannot be applied to cases when evidence is obtained from improper sources.[18]

At the same time, while describing the concept of "asymmetry of evidence admissibility rules," it is wrong, in terms of terminology, to talk about violations committed during the collection of evidence only by the prosecution. Moreover, it is noted that the doubts concerning the fact whether the guilt was proved, which are interpreted in favor of the accused (defense), through violations of the law cannot be allowed; the breach of law, in the absence of signs of emergency, admitted by the defense has the effect of unconditional acceptance of inadmissible evidence.[19]

It should be added that one of the important problems, which are to be solved by public prosecutor during the trial, is the protection of the evidence of guilt with regard to which the court also has or may have some doubts concerning its admissibility. Of course, not in every case the public prosecutor has at his disposal legal arguments and actions necessary for the protection of such evidence. Often those mistakes and violations that were admitted at some stage of prosecuting or at the stage of pre-trial investigation are so substantial that they preclude the effectiveness of any attempt to save them from inadmissibility. At the same time, if the prosecution identified and presented to the court a reasonable proof of a mistake being unessential or essential or of a breach of law, the public prosecutor has a chance to achieve recognition of such admissible evidence.[20]

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[16] Рішення Конституційного Суду України у справі за конституційним поданням Служби безпеки України щодо офіційного тлумачення положення частини 3 статті 62 Конституції України від 20.10.2011 р. № 12-рп/2011 (№ 1-31/2011) [Електронний ресурс]. — Режим доступу до документа: http://zakon2.rada.gov.ua/laws/show/v012p710-11.

[17] Крупницкая В.И. *Гарантии использования при разбирательстве уголовных дел допустимых доказательств: Дис. … канд. юрид. наук: 12.00.09* / В.И. Крупницкая. — Ростов-на-Дону, 2005. — 214 с., pp. 158–159; Кожевникова Ю.А. *Исключение недопустимых доказательств из разбирательства уголовного дела: Дисс. … канд. юрид. наук: 12.00.09* / Ю.А. Кожевникова. — Воронеж, 2005. — 244 с., p. 42.

[18] Стоянов М.М. *Властивості доказів у кримінальному процесі України: Дис. … канд. юрид. наук: 12.00.09* / М.М. Стоянов. — Одеса, 2010. — 246 с., pp. 117–118.

[19] Некрасов С.В. *Допустимость доказательств: вопросы и решения* / С.В. Некрасов // Российская юстиция. — 1998. — № 1. — С. 12–14., p. 12; Стоянов М.М. *Властивості доказів у кримінальному процесі України: Дис. … канд. юрид. наук: 12.00.09* / М.М. Стоянов. — Одеса, 2010. — 246 с., p. 118.

[20] Гармаев Ю.П. *Устранение сомнений в допустимости доказательств* / Ю.П. Гармаев // Законность. — 2011. — № 5. — С. 29–33., p. 33.

Thus, the concept of "asymmetry of evidence admissibility" is entirely justified and reasonable, since the results of presenting proof should apply to the party by whose fault they occurred.

Another important scientific and theoretical concept that originated on the basis of "asymmetry of evidence admissibility" and received rave proposal for an introduction in the scientific revolution is usually "equilateral asymmetry in the evaluation of evidence validity."[21] In general terms, this entails: on the one hand — the right of the prosecution to restore validity of inadmissible evidence in pre-trial proceedings. On the other hand — the right of the defense to use evidence in obtaining legal requirements which have been affected by the fault of the subjects engaged in the proceedings.[22]

Another scientific and theoretical concept of recognition of inadmissible evidence, which proved its relevance and importance in the science of criminal process, is the concept of "fruits of the poisonous tree" (fruit of the poisonous tree doctrine). We agree with M.M. Stoyanov that in characterizing the mentioned concept one should emphasize its unequivocal interpretation in the scientific literature, which also leads to an incorrect solution of similar scientific problems in the theory of evidence. Statements about the nature of the doctrine of "fruit of the poisonous tree" can provide a broad and a narrow understanding.[23]

This doctrine originated on the basis of precedent decisions of the Supreme Court of the United States in the 1920s. In broad terms it is possible to express its essence by quoting one of the decisions of the Supreme Court of the United States, according to which "the content of provision that prohibit receiving proof by one way or another, is that the evidence obtained by illegal means, not only cannot be used in our Court but is excluded in total."[24] In addition, a broad understanding of the doctrine of "fruit of the poisonous tree" means that any violation of constitutional rights by the police, which has only an indirect relationship with the very process of identifying, extracting and fixing the evidence, also involves the loss of its legal force.[25] In this case, "poisonous tree" generates "poisonous fruit;" presenting

[21] Стоянов М. *Концепції допустимості доказів: проблеми теорії, нормативної регламентації та правозастосовчої практики* / М. Стоянов // Часопис Академії адвокатури України. — 2009. — № 4., p. 3.

[22] Терехин В.В. *Недопустимые доказательства в уголовном процессе России: теоретические и прикладные аспекты: Автореф. дисс. … канд. юрид. наук: 12.00.09* / В.В. Терехин. — Нижний Новгород, 2006. — 27 с., p. 11.

[23] Стоянов М.М. *Властивості доказів у кримінальному процесі України: Дис. … канд. юрид. наук: 12.00.09* / М.М. Стоянов. — Одеса, 2010. — 246 с., p. 119.

[24] Золотых В.В. *Проверка допустимости доказательств в уголовном процессе* / В.В. Золотых. — Ростов-на-Дону: Феникс, 1999. — 288 с., p.2 17; Сутягин К.И. *Применение доктрины «плодов отравленного дерева» при оценке допустимости доказательств требует корректировки* / К.И. Сутягин // Вестник Оренбургского государственного университета. — 2008. — № 83. — С. 56–59, p. 56.

[25] Стоянов М.М. *Властивості доказів у кримінальному процесі України: Дис. … канд. юрид. наук: 12.00.09* / М.М. Стоянов. — Одеса, 2010. — 246 с., p. 119; Шестакова С.Д. *Допустимость*

evidence based on the information received from inadmissible evidence involves its absolute inadmissibility. Besides, the inadmissibility of evidence, as noted by A. Lobanov and A. Chuvylev, does not depend on the nature and extent of a violation of criminal procedural law.[26]

In particular, as an example of judicial practice of the United States it can be mentioned that in November 2010 judge of the Federal District Court in Manhattan did not allow the testimony of a star witness for the prosecution in case *Dzhailani*. The reason for this non-admission was the fact that the prosecution knew about this important witness as a result of the use of force against the accused. The importance of this witness is confirmed by the fact that due to the unacceptability of his testimony the defendant was acquitted of 279 out of 280 charges pressed by the prosecution. However, the judge rejected the defense motion to dismiss the case because of the use of force against the accused. In fact, in that case, the court applied the doctrine of "fruit of the poisonous tree."[27]

In the narrow sense of this doctrine it is reduced to a ban on the use of data obtained from or with the use of evidence deemed inadmissible. Namely, the second meaning of the doctrine is associated with a problem of the use of evidence, although legal in form, but with relevant disabilities in their very sense.[28] A somewhat similar view was expressed by J.K. Orlov, who noted that essentiality or inessentiality of procedure breaches can be spoken about only in respect to two components of admissibility — a method of obtaining evidence and the procedure of its formulation.[29] In this case, in the narrow sense, the concept of "fruit of the poisonous tree" must be understood in terms of a method of obtaining evidence, its procedural formulation and differentiation between essential and non-essential procedure breaches.

The concept of "fruit of the poisonous tree" attracted attention in the Soviet science of criminal procedural law. In particular, researchers pointed out that the information derived from improper source, therefore considered inadmissible, may in some cases be used (as operational information) as "instructions" for the direction

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доказательств в уголовном процессе России и США / С.Д. Шестакова // Уголовное право. — 2004. — № 3. — С. 100–102, p. 101.

[26] Чувилев А. *«Плоды отравленного дерева»* / А. Чувилев, А. Лобанов // Российская юстиция. — 1996. — № 11.— С. 47–49, p. 47.

[27] Проект УПК Украины 2011: недопустимость протоколов допросов как панацея от пыток? [Електронний ресурс]. — Режим доступу до документа: http://interjustice.blogspot.com/2011/08/2011.html.

[28] Стоянов М. *Концепції допустимості доказів: проблеми теорії, нормативної регламентації та правозастосовчої практики* / М. Стоянов // Часопис Академії адвокатури України. — 2009. — № 4. — С. 1–10, p. 3.

[29] Орлов Ю.К. *Проблемы теории доказательств в уголовном процессе* / Ю.К. Орлов. — М.: Юристъ, 2009. — 175 с., p. 73.

of the investigation and location of evidence.[30] In fact, scientists actually allowed using the concept of "fruit of the poisonous tree" in this case.

However, a number of scholars in the field of criminal procedure take a different stance in comparison to the above researchers, advocating a different approach to solving this problem and dividing procedure violations into essential and non-essential.[31] Thus, it is mentioned that the violations which did not affect and could not affect the reliability of the obtained evidence are considered to be non-essential. In turn, essential violations call into question the reliability of data acquisition. The violations that can be eliminated or neutralized are considered to be subject to correction. The defect of a procedural design of documents (lack of signature) refers to such violations. Nevertheless, evidence obtained with the substantial breach of law can be recovered as a result of replacement by a different one, obtained using inadmissible evidence as a primary epistemological aspect. That is why we support the position of those scholars who believe that this approach is fully justified in terms of scientific relevance and feasibility of application in practice.

It is in this sense that the doctrine of "fruit of the poisonous tree" is widely used in practice.[32] In particular, T. was sentenced under Part 4 of Art. 296 of the Criminal Code of Ukraine to four years in prison and under Part 2 of Art. 121 of the Criminal Code of Ukraine — for up to seven years of imprisonment by Korolevo District Court in Zhitomir in the judgment of 20 October 2008. As seen in the case, on 13 October 2007, after the arrest and delivery of T. to the police station, he was questioned as a witness and the reconstructions of the events of a crime were conducted with him in this status. Thus, the criminal investigation body deprived T. of the opportunity to exercise the rights of a suspect provided in Art. 43-1 of the Code of Criminal Procedure of Ukraine. As a consequence, this evidence is inadmissible which is why the decisions of courts of the first instance and appellate courts with reference to it in the reasoning part to confirm the guilt of the accused are illegal and subject to the exclusion of both the judgment of the local court and the ruling of the appellate court. However, the aforementioned violation of criminal procedural law did not affect the correctness of establishing T's guilt, qualification of his actions and imposing punishment. That is why the panel of judges of the Chamber of Criminal Cases of the Supreme Court of Ukraine decided to exclude from the reasoning parts of the local court's verdict and from the ruling of the court of appeal references to the testimony of T. as a witness and a record of reconstructions of the

[30] *Теория доказательств в советском уголовном процессе* / [Отв. ред. Н.В. Жогин]. — Изд. 2-е, исправл. и дополн. — М.: Юридическая литература, 1973. — 736 с., p. 234.

[31] Боруленков Ю. *О допустимости доказательств* / Ю. Боруленков // Уголовное право. — 2004. — № 1. — С. 55–57., p.32; Гришина Е.П. *Актуальные вопросы допустимости доказательств в уголовном процессе* / Е.П. Гришина // Российский следователь. — 2001. — № 7. — С. 36–37., p. 37; Іщенко В. *Принцип допустимості і достатності засобів кримінально-процесуального доказування* / В. Іщенко // Право України. — 2003. — № 7. — С. 90–93, p. 92.

[32] Стоянов М.М. *Властивості доказів у кримінальному процесі України: Дис. … канд. юрид. наук: 12.00.09* / М.М. Стоянов. — Одеса, 2010. — 246 с., p. 121.

events of crime with his participation on 13 October 2007 as evidence because of its inadmissibility.[33]

Of course, the concept of "fruit of the poisonous tree" in legal science has its opponents, sometimes categorical. From the perspective of opponents of this concept — it is not justified either theoretically or practically, because there exists a procedural form of legal proceedings, which despite all its importance is not an end in itself. The procedural form is endowed with a deep meaning and purpose, it is designed to provide two important objectives: first, to guarantee maximum reliability of evidence and, secondly, to protect the rights and lawful interests of individuals.[34] A rather original point of view is expressed by I.V. Abrosymov, who points out that the concept of "fruit of the poisonous tree" is close in meaning to "asymmetric rules of admissibility" with one difference — evidence is considered inadmissible if it is obtained on the basis of evidence previously declared inadmissible. In his opinion, more acceptable from a conceptual, legal and practical point of view is a theory that interprets the request to admit the evidence in terms of essential or non-essential violation of criminal procedural law. A list of circumstances that do not involve automatic exclusion of evidence on grounds of inadmissibility is provided by the author to support his theory.[35]

Without going into details, it should be noted that the concept under discussion is not to be regarded as a theoretical model, as far as it is actually recognized in jurisprudence and should be applied in all criminal cases. Moreover, the concept of "fruit of the poisonous tree" is incorporated in the 2012 Code of Criminal Procedure of Ukraine. Thus, in accordance with Part 1 of Art. 87 of 2012 Code of Criminal Procedure of Ukraine, evidence is inadmissible if obtained as a result of an essential violation of the rights and freedoms guaranteed by the Constitution and laws of Ukraine, international treaties ratified by the Supreme Council of Ukraine, as well as any other evidence obtained through information acquired as a result of an essential violation of human rights and freedoms.[36] Of course, the adoption and consolidation of the concept of "fruit of the poisonous tree" in the 2012 Code of Criminal Procedure of Ukraine requires a detailed study and thorough approach to the formulation of appropriate criminal procedure rules. However, it is a matter of time and jurisprudence.

The concept of "good faith mistake" that follows the rule of ruthless exclusion of evidence has become of a significant theoretical and practical value. As noted in legal

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[33] Ухвала Верховного Суду України від 28.01.2010 р. // Вісник Верховного Суду України. — 2011. — № 3 [Електронний ресурс]. — Режим доступу до документа: http://www.scourt.gov.ua/clients/vs.nsf.

[34] Орлов Ю.К. *Проблемы теории доказательств в уголовном процессе* / Ю.К. Орлов. — М.: Юристъ, 2009. — 175 с., p. 72.

[35] Абросимов И.В. *Актуальные вопросы обеспечения допустимости и достоверности доказательств в уголовном судопроизводстве: Автореф. дисс. … канд. юрид. наук: 12.00.09* /. — М., 2007. — 26 с., pp. 16–17.

[36] Кримінальний процесуальний кодекс України від 13.04.2012 р. [Електронний ресурс]. — Режим доступу до документа: http://zakon3.rada.gov.ua/laws/show/4651a-17.

science, the Supreme Court of the United States pursued a course in which this rule is generally maintained but its scope is narrowed.[37] An example of such limitation of the rules of admissibility in general can serve as one of the last decisions of the US Supreme Court on this issue. The court noted that the rule of excluding evidence acts as a court created remedy adopted in order to prevent violations of IV Amendment to the US Constitution in the future by the general prevention of illegal actions of the police. As with any other mechanism of legal protection, the general application of the rule of excluding evidence is limited to cases where it is obvious that it effectively achieves its goals of human rights.[38]

According to some American lawyers, the rule of exclusion shall act only in cases where it effectively achieves its human rights goals. Many scholars believe that this limitation is reasonable, but with some observations, since the consolidation of some evaluation categories in the law, including such as "efficiency" does not contribute to the same law enforcement.[39]

This problem can be solved in practice by applying the concept of "good faith mistakes." The essence of this concept is that in some cases evidence obtained with violation of procedure rules may be accepted by the court if the judge determines that enforcement bodies acted "with a good faith mistake" on the legality of their actions while obtaining the evidence.[40]

We believe that the above scientific-theoretical concept of "good faith mistakes" emerged in the legal science under the rule of exclusion. The essence of this concept is that when enforcement body did not know, or with a reasonable assumption could not have known that its actions are of an illegal nature, the evidence obtained as a result of these actions does not lose its admissibility. Moreover, in the domestic criminal procedure science the issue of reasoning the normative consolidation of this concept is actually not considered.

One of the attempts to investigate the above-mentioned concept was made by S.D. Shestakova, who provided a number of precedents that led to the emergence of such a ruthless exclusion of evidence concerning only search and arrest. S.D. Shestakova justifies the need to add some flexibility to the rule of "a ruthless exclusion of evidence." Based on that, she proposes to give discretionary powers to the court for the recognition of evidence obtained with violation of the criminal procedural law. They are to be considered admissible if the officials involved in the process for the

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[37] Бернам У. *Правовая система США* / У. Бернам. — 3-й выпуск. — М.: Новая юстиция, 2006. — 1216 с., p. 500.

[38] Сутягин К.И. *Оценка допустимости доказательств с учетом концепции «добросовестного заблуждения» субъектов доказывания* / К.И. Сутягин // Вестник Омского университета. Серия «Право». — 2008. — № 1 (14). — С. 180–182, p. 181.

[39] Сутягин К.И. *Оценка допустимости доказательств с учетом концепции «добросовестного заблуждения» субъектов доказывания* / К.И. Сутягин // Вестник Омского университета. Серия «Право». — 2008. — № 1 (14). — С. 180–182, p. 181.

[40] Николайчик В.М. *Уголовное правосудие в США: научное издание* / В.М. Николайчик. — М.: Ин-т США и Канады РАН РФ, 1995. — 108 с., p. 45.

prosecution prove that violating criminal procedural rules, they did not know and could not have known about their violation.[41]

Thus, the scientific and theoretical concept of "good faith mistake" can be normatively consolidated by the division of responsibilities to prove. It is indirectly indicated under Part 2 of Art. 92 of 2012 the Code of Criminal Procedure of Ukraine 2012: "The burden of proof that evidence, knowledge on the amount of procedural expenses and on circumstances that characterize the accused, is adequate and admissible is placed upon the presenting party."[42] However, in our view, this provision of the concept of "good faith mistake" is to be included in those norms of the Code of Criminal Procedure of Ukraine that concern the very procedure of the recognition of evidence as inadmissible.

A very interesting concept with almost fabulous name "silver saucer" is provided by O.V. Smirnov.[43] He defends the assertion that the collection of evidence provided by the subjects of proof in violation of federal law makes the evidence inadmissible. However, if the information relevant to the case is obtained by a person who is not a party to the case and the law is violated, this information can be introduced by the subject of proof and can be used as evidence in the process.[44]

Special attention should be given to the concept of "tea and ink" and "broken mirror" that is formed on the basis of the development of the "asymmetry of admissibility rules" and "fruit of the poisonous tree" theories.

It is worth mentioning that various concepts under the so-called codenames were provided by the scholars in the sphere of criminal process. Thus, the scholars introduced two conflicting theories — "tea and ink" and "broken mirror." In particular, they gave a reasonable reference to the existence of two competing conceptions of inadmissibility of evidence "tea and ink" ("fruit of the poisonous tree" analogy), whereby a spoon of ink spoils a cup of tea, and "broken mirror" — if you break a mirror, you can see what can be seen in each of its particles.[45] According to the first theory, any violation of the admissibility of evidence entails the impossibility of its use in criminal proceedings. The second theory is suitable to assess the evidence in greater depth and evaluates it not in terms of a unified array of information contained in a source provided by law, but in terms of relatively independent units, each

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[41] Шестакова С.Д. *Допустимость доказательств в уголовном процессе России и США* / С.Д. Шестакова // Уголовное право. — 2004. — № 3. — С. 100–102., p. 102.

[42] Кримінальний процесуальний кодекс України від 13.04.2012 р. [Електронний ресурс]. — Режим доступу до документа: http://zakon3.rada.gov.ua/laws/show/4651a-17.

[43] Стоянов М.М. *Властивості доказів у кримінальному процесі України: Дис. … канд. юрид. наук: 12.00.09* / М.М. Стоянов. — Одеса, 2010. — 246 с., p. 110.

[44] Терехин В.В. *Недопустимые доказательства в уголовном процессе России: теоретические и прикладные аспекты: Автореф. дисс. … канд. юрид. наук: 12.00.09* / В.В. Терехин. — Нижний Новгород, 2006. — 27 с., pp. 23–26.

[45] Золотых В.В. *Проверка допустимости доказательств в уголовном процессе* / В.В. Золотых. — Ростов-на-Дону: Феникс, 1999. — 288 с., p. 55; Филин Д. *Дифференциация доказательственной информации* / Д. Филин // Законность. — 2002. — № 2. — С. 45–46., pp. 45–46.

of which is connected by a single meaning and confirms or refutes one or more of the circumstances that are to be proved in a criminal case. That is, using the rules of differentiation, evidence is valid only in cases where the violation of its admissibility does not concern the proof, but only a single unit.[46]

Moreover, supporters of the second approach provide convincing arguments in favor of the concept of differentiation of evidence. In particular, the aforementioned scientists believe that the citizens are exempt from the obligation to testify or explain anything about themselves, their family members or their close relatives defined by law (Part 1 of Art. 63 of the Constitution of Ukraine), but not from the obligation to give such evidence and explanations about other people. Thus, the testimony of a witness, not warned about the appropriate constitutional provision can combine, firstly, the data on close relatives that may become discovered because of the ignorance of a person of his or her rights, and secondly, other information that is required to be submittted to the law enforcement bodies anyway. The supporters of the first approach recognize testimony as an admissible proof in general, and the supporters of the second one — only the information in part relating to themselves, their family members or close relatives.[47]

Of course, such a position of the aforementioned scholars is worth our attention. However, understanding the thrust of adherence to procedural form, we realize that it essentially allows one to track every stage of obtaining evidence, to identify both the significant and insignificant violations of the law, some attempts of falsification of evidence-based information. Undoubtedly, in practice there are cases where, due to violation of criminal procedural law, it is impossible to assess the evidence. Thus, we should not deny the admissibility of evidence in cases where the omission or violation in obtaining evidence hinders the objectivity of evidence-based evaluation of information through appropriate verification. On the other hand, the position that indicates inadmissibility of any evidence is equally unreasonable. Indeed, the formation of evidence, its verification and evaluation is a creative and cognitive activity in a broad sense, with appropriate limits or standards, but it is almost impossible to standardize all the creative and cognitive activities of the subjects bearing the burden of proof.

The concept of "the ruthless exclusion of evidence" that emerged and was formed on the basis of the concept of "perfect evidence" developed considerably in the theory and practice of the criminal procedural law.[48] Its content coincides with the

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[46] Костенко Р. *Доказательства в уголовном процессе* / Р. Костенко // Уголовно-процессуальное право. — 2003. — № 3., p. 3.

[47] Золотых В.В. *Проверка допустимости доказательств в уголовном процессе* / В.В. Золотых. — Ростов-на-Дону: Феникс, 1999. — 288 с. p.55; Филин Д. *Дифференциация доказательственной информации* / Д. Филин // Законность. — 2002. — № 2., pp. 45–46.

[48] Абросимов И.В. *Актуальные вопросы обеспечения допустимости и достоверности доказательств в уголовном судопроизводстве: Автореф. дисс. … канд. юрид. наук: 12.00.09* /. — М., 2007. — 26 с., p. 17.

broad understanding of the doctrine of "fruit of the poisonous tree." The basic tenet of the theory of "the ruthless exclusion of evidence" is to recognize the evidence as inadmissible regardless of the nature of law violations.[49]

With American roots, this concept has been widely accepted among the scholars in the field of domestic criminal procedural law, it has both opponents and supporters.[50] However, in our view, current rules of Ukrainian criminal procedure legislation governing admissibility of evidence and procedure for recognizing evidence as inadmissible, allow some controversy which greatly complicates interpretation by the law enforcement bodies and its applicability in practice. On the one hand, the rule that defines the notion of admissibility of evidence reflects the constitutional idea that the prosecution cannot be based on evidence obtained through the violation of law, as well as on assumptions that all doubts concerning the proof of guilt of a person are to be interpreted in his or her favor (Part 3 of Art. 62 of the Constitution of Ukraine).[51] Based on the understanding of the content of Part 3 of Art. 62 of the Constitution of Ukraine, the actual data obtained through violations of the law, regardless of the degree of significance of the violations in the collection, evaluation and review of evidence, are to be considered inadmissible evidence. On the other hand, criminal procedure rules governing the procedure of recognizing evidence as inadmissible (Part 1, 2 of Art. 87 of the 2012 Code of Criminal Procedure of Ukraine), reinforce the established rules that emerged in the jurisprudence, which result in the respective legal positions of law enforcement bodies and provide for a mandatory assessment of violations of the law and make a grounded decision of an appropriate recognition of such evidence as inadmissible.[52] Such a decision, not the fact of violation of the law in the collection of evidence is the reason for their exclusion from the trial.

To sum up, it should be mentioned that the problem of different approaches to recognizing evidence as inadmissible is one of the central problems of a criminal process and solving it is both of theoretical and practical importance. In this case, we join a group of scientists who justify their points of view on the appropriateness

[49] Стоянов М.М. *Властивості доказів у кримінальному процесі України: Дис. … канд. юрид. наук: 12.00.09* / М.М. Стоянов. — Одеса, 2010. — 246 с., p. 120.

[50] Абросимов И.В. *Актуальные вопросы обеспечения допустимости и достоверности доказательств в уголовном судопроизводстве: Автореф. дисс. … канд. юрид. наук: 12.00.09* /. — М., 2007. — 26 с., p. 17; Кожевникова Ю.А. *Исключение недопустимых доказательств из разбирательства уголовного дела: Дисс. … канд. юрид. наук: 12.00.09* / Юлия Александровна Кожевникова. — Воронеж, 2005. — 244 с., p. 97; Крупницкая В.И. *Гарантии использования при разбирательстве уголовных дел допустимых доказательств: Дис. … канд. юрид. наук: 12.00.09* / В.И. Крупницкая. — Ростов-на-Дону, 2005. — 214 с., p. 9; Ларина Е.В. *Признание доказательств недопустимыми в российском уголовном судопроизводстве (в стадии предварительного расследования): Дис. … канд. юрид. наук: 12.00.09* / Е.В. Ларина. — М., 2005. — 220 с., p. 132.

[51] Конституція України [Електронний ресурс]. — Режим доступу до документа: http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.

[52] Кримінальний процесуальний кодекс України від 13.04.2012 р. [Електронний ресурс]. — Режим доступу до документа: http://zakon3.rada.gov.ua/laws/show/4651a-17.

of regulatory consolidation on the basis of different (classification) approach to the consequences of violation of criminal procedure law in the collection of evidence by dividing them into essential (absolute inadmissibility of evidence) and non-essential (the ability to restore the admissibility of evidence).[53]

Moreover, this point of view of scholars is in general conformity with provisions of Part 2 of Art. 87 of the 2012 Code of Criminal Procedure of Ukraine, which says that the court must counter essential violations of human rights and fundamental freedoms, including the following actions: 1) implementation of the procedures which require prior approval of the court, without permit or in violation of its essential conditions; 2) obtaining evidence as a result of torture, cruel, inhuman or degrading individual treatment or threats of such behavior; 3) violation of the right to protection; 4) testimony or explanation from a person who was not notified of their right to refuse to testify and did not answer questions or received them in violation of the law; 5) violation of the right to cross-examine; 6) testimony of a witness who will be considered suspect or the accused in this criminal proceeding.[54]

Thus, solving the problem of the legal concepts regulating admissibility of evidence is a necessary factor for improving the efficiency of a criminal process, the tasks of criminal justice bodies, and therefore it should be subject to further analysis and improvement.

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[53] Абросимов И.В. *Актуальные вопросы обеспечения допустимости и достоверности доказательств в уголовном судопроизводстве: Автореф. дисс. … канд. юрид. наук:* 12.00.09 / — М., 2007. — 26 с., р. 8–9; Ільченко О.О. *Проблеми застосування доказів, отриманих з порушенням процесуальної форми* / О.О. Ільченко // Вісник Запорізького юридичного інституту Дніпропетровського державного університету внутрішніх справ. — 2009. — № 1. — С. 202–209, р. 208–209; Кожевникова Ю.А. *Исключение недопустимых доказательств из разбирательства уголовного дела: Дисс. … канд. юрид. наук: 12.00.09* / Ю.А. Кожевникова. — Воронеж, 2005. — 244 с., р. 9; Крупницкая В.И. *Гарантии использования при разбирательстве уголовных дел допустимых доказательств: Дис.… канд. юрид. наук: 12.00.09* / В.И. Крупницкая. — Ростов-на-Дону, 2005. — 214 с., р. 9; Ларина Е.В. *Признание доказательств недопустимыми в российском уголовном судопроизводстве (в стадии предварительного расследования): Дис. … канд. юрид. наук:* 12.00.09 / Е.В. Ларина. — М., 2005. — 220 с., р. 130; Орлов Ю.К. *Проблемы теории доказательств в уголовном процессе* / Ю.К. Орлов. — М.: Юристъ, 2009. — 175 с., р. 70–71; Стоянов М.М. *Властивості доказів у кримінальному процесі України: Дис. … канд. юрид. наук: 12.00.09* / Микола Михайлович Стоянов. — Одеса, 2010. — 246 с., р. 125–126; Терехин В.В. *Недопустимые доказательства в уголовном процессе России: теоретические и прикладные аспекты: Автореф. дисс. … канд. юрид. наук: 12.00.09* / В.В. Терехин. — Нижний Новгород, 2006. — 27, с. р.10–11; Дмитриева А.А. *Оценка допустимости доказательств стороной защиты* / А.А. Дмитриева, А.А. Коряжкин // Вестник Южноуральского государственного университета. Серия «Право». — 2005. — № 8. — С. 186–188, р. 186–187.

[54] Кримінальний процесуальний кодекс України від 13.04.2012 р. [Електронний ресурс]. — Режим доступу до документа: http://zakon3.rada.gov.ua/laws/show/4651a-17