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ЛОГІЧНА ПРИРОДА НЕПРЯМИХ ДОКАЗІВ У КРИМІНАЛЬНОМУ ПРОЦЕСІ

Анотація. *Необхідність реформування кримінального законодавства України зумовлена економічними, політичними та соціальними змінами в нашій державі. Робота має на меті дослідження логічної природи непрямих доказів, з'ясування особливостей їх структури та правил побудови, а також визначення типових логічних помилок, які можуть мати місце при доказуванні обставин вчиненого злочину. На підставі аналізу наукової літератури розкрито логічну структуру непрямого доказу, охарактеризовано їх види, виокремлено типові логічні помилки, що можуть мати місце при доказуванні фактів і обставин вчиненого злочину за допомогою непрямих доказів. Встановлено, що поняття доказу в системі наукових знань використовується як в широкому розумінні, так і у вузькому, стосовно конкретної галузі наукової діяльності. У логіці виділяють два види непрямих доказів: апагогічний і розділовий, які виступають єдиним засобом встановлення істинності певного твердження. При цьому слід враховувати, що логічне поняття непрямих доказів не збігається зі змістом поняття непрямого доказу у науці кримінального процесу. Цим пояснюється подвійна сутність процесуальних непрямих доказів: стосовно часткової тези вони є прямими доказами і самостійними засобами доведення її істинності або хибності; щодо до основної, або узагальнюючої тези – непрямими доказами, які лише у сукупності з іншими можуть доводити її істинність або хибність. З логічного боку непрямим доказом у кримінальному процесі є аргумент часткової тези, яка в подальшому виступає аргументом основної тези. Цим пояснюється подвійна сутність процесуальних непрямих доказів: стосовно часткової тези вони є прямими доказами і самостійними засобами доведення її істинності або хибності; щодо до основної, або узагальнюючої тези – непрямими доказами, які лише у сукупності з іншими можуть доводити її істинність або хибність. Доведення існування (неіснування) фактів і обставин, що мали місце в минулому, відбувається у формі умовиводу. Побудова умовиводу не виключає можливості логічних помилок, які мають місце і при доказуванні обставин вчиненого злочину за допомогою непрямих доказів.*

Ключові слова: доказування, непрямий доказ, умовивід, логічні помилки.

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THE LOGICAL NATURE OF INDIRECT EVIDENCE IN CRIMINAL PROCEDURE

Abstract. *The necessity of reforming the criminal legislation of Ukraine is caused by economic, political and social changes in our state. That is why the article is devoted to the research*

of the logical nature of indirect evidence in criminal procedure. Based on the analysis of scientific literature the logical structure of indirect evidence has been revealed, its types have been characterised, it has been determined the typical logical errors, which may be in facts proof and circumstances of committed crime using indirect evidence. It has been determined that the definition of evidence in the system of scientific knowledge is used both in the wide sense and in the narrow, in relation to a specific field of scientific activity. In logic two types of indirect evidences are highlighted: apagogical and assumption proof, which are the single method to discover the truth of certain statement.

Key words: proof, indirect evidence, reasoning, logical errors.

INTRODUCTION

Deep socio-political and economic transformations in Ukraine have affected the nature of criminality. It has become more professional and organised. Much of the crimes is being committed in abeyance. Opposition to the investigation and solution of crime is growing: its traces are suppressed and destroyed, documents and things, which may be evidences in criminal case [1;2]. This limits the possibility of using direct evidence to establish facts and circumstances of commission of a crime and necessitates the involvement of indirect evidence in the process. However, in the current criminal procedure legislation, there are no regulations regarding indirect evidences and conditions for their use in the process of proof [3]. That is why executors of law are guided by appropriate fragmentary knowledge of academic and scientific literature.

At different times L. E. Vladimirov, M. M. Vidrya, V. P. Gmyrko, Yu. M. Groshev, V. Ya. Dorokhov, P. S. Elkind, L. D. Kokoriev V. K. Lisychenko, Ye. D. Lukyanchikov, P. A. Lupinskaya, M. M. Mikheenko V. T. Nor, M. A. Pogoretsky, M. M. Rosin, V. D. Spasovich, M. S. Strogovich, V. T. Tertishnik, A. I. Trusov, F. N. Fatcullin, I. Ya. Foynitsky, M. O. Cheltsov-Bebutov, S. A. Sheifer, M. E. Shumilo and other researches devoted their works to the issue of evidence and proof in criminal proceeding. However, in the works of mentioned scientists, the issue of indirect evidence was researched mostly secondary, in connection with the coverage of other aspects of evidence law. A. I. Vinberg, M. M. Grodzinsky, O. O. Eysman, V. I. Kaminskaya, G. M. Minkovsky, R. D. Rahunov, M. P. Shalamov, O. O. Hmyrov devoted their works exclusively to the issue of indirect evidence. They formulated a number of important ideas that were used effectively in the course of criminal investigations for a long time. However, the mentioned works were created predominantly until the mid-80-ies of the last century, and later the theoretical development of this topic has slowed down [4]. The loss of scientific interest in the issue of indirect evidence is not justified, as in modern science of the criminal process, there remain a number of controversial and unexplored issues that need to be resolved for their proper understanding and unambiguous application in practice. Thus, the questions regarding the notion of indirect evidence and possibility and

expedience of their classification in criminal procedure are controversial; logical nature of indirect evidence is also underexplored [5]. Legislative gaps and controversy of above-mentioned questions in the theory of criminal procedure do not contribute to effective usage of indirect evidence in court and investigative practice and necessitates modern scientific development of the issue of indirect evidence in the domestic criminal procedure.

This work is aimed at researching the logical nature of indirect evidence in court and investigative practice, finding out the features of its structure and construction rules, as well as determining the typical logical errors, which may be in proof of the circumstances of the crime.

1. MATERIAL AND METHODS

The main goal of evidence theory is obtaining and deepening knowledge regarding improving evidence law and process of proof. Using analysis method it was revealed that evidence theory colligates system of knowledge and disclosers the notion and its content, content of truth and content of fact to be proven in criminal procedure; patterns of determination of criminal offence in objective reality and formulation of crime tracks and other proof information; notion and types of evidence; patterns of formation and storage of evidence; the essence of requirements of affiliation to a case, admissibility and reliability of evidence; features of material evidence, documents, testimonies, findings of expert and other evidence; features of process of prof, principle of evidence law; content, form and order of gathering, researching, check, evaluation and use of evidence; purpose and means to ensure documentation of proof activity; use an operative-investigative operations and their results in proof; guarantees of protection of human rights and freedoms and legal entities in the course of proof; guarantees of protection of human rights and freedoms and legal entities in the course of proof; features of handling evidences during public investigative and secret investigative (search) actions; legal positions and case law of the European Court of Human Rights on issues of proof in criminal proceedings; features of practical activity of the investigation authorities, prosecutor, counsel, court and other participants in the process of proof at various stages of criminal proceedings; features of proof in a jury and other special forms of the criminal procedure; features of evidence law of foreign countries; state of the main problems and tendencies in the development of evidence theory and ways to improve evidence.

While disclosing mentioned aspects of criminal process, evidence theory shows the ways to improve both the legislation and activity of investigative and judicial bodies, contributes to balanced application of effective means of proof and warns of possible legal errors. As in any scientific study, in evidence theory there is need for empirical knowledge – knowledge of certain empirical facts and their interrelations. An

object, which has an infinite set of properties and relations – external manifestations of its essence, is reflected in many facts that, after being discovered, are part of the empirical basis of science. Epistemologically, facts are valid knowledge, which is obtained by describing the individual fragments of reality in a particular spatial-temporal interval1.

The basis of evidence theory is evidence law. Evidence law includes norms that determine: a) purpose and fact to be proven; b) notion and types of evidence; c) requirements of admissibility of evidence; d) principles of evidence law; e) content and components of the process of proof; f) ways of proof, system of investigative and other cognitive and proof actions.

Analysis and comparison methods have revealed that in legislation and practical activity there is many unsolved problems, part of which will be analysed in this article.

2. RESULTS AND DISCUSSION

The notion "evidence" is one of the central in any sphere of scientific and practical activity. In the process of world cognition, clarifying the properties of individual objects, people form certain ideas about objects. During exchange of thought about an object, it is spread that formed ideas of one do not correspond to views of other, and there is need for defending own rightness, refuting the positions of the opponents, that is, in substantiating and proving the correspondence of own ideas and knowledge to objects and phenomena of reality. Ways of obtaining knowledge, which provide adequate representation of surrounding reality, are evidences.

To prove, i.e. to use evidence as means of grounding of the truth or falsity of a particular position, is necessary in all spheres of scientific activity. However, determining the notion of evidence in various fields of scientific knowledge has different content. In general scientific sense, evidence is certain mental process, when a truth of a certain statement is deduced from the statements already recognised as true. In such way evidence is explained in logic (Gk. logos – word, notion, mind) – the science about the rules and operations of correct thinking. In a similar way philosophy explains the notion of evidence. The analysis of scientific publications that generalise views on the notion of evidence indicates the coincidence of the concepts of proof (proving) and evidence. The latter is defined as logical form of establishing the truth of one or another though on the basis of knowledge, the truth of which is indisputable [6].

Unlike mentioned sciences, where mental process is evidence, aiming at grounding a certain statement, there is number of fields of scientific knowledge, which explain the notion differently. Thus, in mathematical sciences the evidence is the finite sequence of formulas, each of which is either an axiom (Gk. axioma – universally meaningful), that is condition adopted without proof, or derived from the previous formulas of sequence according to the rules of reasoning [7]. In the sciences, which research chronologically the human society and the patterns of its development (archeology, history, historiography), evidence is equated: firstly, with the way of obtaining new knowledge

about a new fact; secondly, with the way, by which it is confirmed or denied that gained knowledge corresponds to reality [8].

The notion of evidence is one of the central in jurisprudence, because "it is doubtful there is any other branch of human activity, in which knowledge and proof of truth would have been so acute in terms of the emotional tension of perception and the so immense in terms of significance of social consequences, as is the case with the justice" [9].

Learning facts, mental restoration and modeling of the picture of the event that took place in the past, are carried out with the help of evidence. As in historical sciences, in jurisprudence, evidences are certain facts (information about facts, factual data), by which presence or absence of a researched event and circumstances, that are interrelated with it, are established and substantiated. Thus, evidences are received in the established order factual data that contains information necessary for solution of a criminal, civil, economic, constitutional and other court cases. The process of obtaining evidences and using them with the purpose to reproduce the investigated event is called proof. In such way, the notion of evidence in the system of scientific knowledge is being used both in wide and narrow sense in relation to specific field of scientific activity. In the wide sense evidence is equated with a mental process, in course of which individual objects, existence of interrelations between events or phenomena is logically established or refuted. In more narrow sense it is about mathematical, historical, court evidences as about ways to establish or refute certain statement or condition. All of them have respective content differences, in which their specificity and individuality are reflected.

General doctrine about evidence, its structure and conditions of logical perfection is the subject of study of logic. It is characteristic that logic does not research content features of evidence in different fields of science, that is "researches only that is universal (general) regardless of specific features of their separate content" [10].

Modern formal logic highlights in evidence three main components: thesis, argument and demonstration. The thesis (Gk. thesis – statement) is a statement, truth of which is being grounded in evidence, that is statement, truth of which has to be substantiated (proven). The thesis is the main element of evidence, the whole process of proof is directed to its substantiating. Exactly "thesis takes the same place in the proof, which is given to the king in chess. No matter how proof was built, which facts and events would have been analyzed, which parallels and analogies would have been, in the focus of attention the task should always remain – the substantiating of the above thesis and the refutation of antithesis" [11].

There is the main and partial thesis. The *main thesis* is a statement that is subject to final substantiation by number of statements. The *partial thesi*s is a statement that becomes the thesis at the intermediate stage of proof building. Both the main and partial thesis has to meet specific requirements, violation of which may lead to inconsistency or incorrectness of the logical proof. These requirements include the following:

a) Only those statements, which really require substantiation under specific conditions, may be the thesis;
b) The thesis has to be clearly defined statement;
c) The thesis has to remain unchanged throughout proof;
d) There has not to be logical contradiction in the thesis [12].

The ways to confirm or refute thesis are *arguments* – statements (arguments), on the basis of which the truth (falsity) of the main or partial thesis is established. Arguments, or, as they are called, evidence grounds also have to meet clear requirements, namely:

a) To be true statement;
b) To be statement, truth of which is established regardless of the thesis;
c) To have enough grounds for proving the thesis.

When exploring the concept of evidence from the logical side, one more element of its characteristics should be identified – the way for conducting proof or *demonstration*, which is a method of illustrating the connection between the thesis and arguments. The existence of such connection is the precondition of the correctness of building each proof. In the literature, devoted to researching of issues of proof logic, it is highlighted: "not all two statements can be combined in the act of proof, because not from any "one" logically follows the "second". This is possible only when there is certain objective connection between statements. From the fact of threatening it is possible to deduce the existence of intent and make an indirect conclusion about crime commission by this person. But it is pointless to conclude about a motive for crime basing on the colour of the suspect's hair" [13].

Depending on the way for conducting or demonstration of proof in logic there is direct and indirect evidences. In *direct* evidence truth (falsity) of the thesis follows directly from the true arguments, without assumptions competing with the thesis; building of indirect evidence is based on conflicting statements that exclude each other.

In logical also there are two types of indirect evidence: apagogical and assumption. Apagogical (Gk. apagögos – to pull aside) indirect evidence is the evidence, in which truth of the thesis is proven through establishing falsity of antithesis. Evidence of such type has two stages. In the first stage – «reductio ad absurdum» (reduction to absurdity) – falsity of antithesis is being substantiated. Initially, instead of the arguments that directly confirm the truth of the thesis, the truth of the opposite judgment – antithesis – is temporarily admitted. Further, from this antithesis, conclusions are drawn that contradict reality. The result is a contradiction. In the second stage, on the basis of the law of the excluded middle – the logical law, according to which true is either statement or its denial, it is deducted that the antithesis is false and the thesis is the truth. For

example, suspect A states that in a day of crime commitment he took part in a scientific conference in another city, accordingly, he could not commit it. In such case, statement A is the thesis, the truth or falsity of which it is necessary to prove. In the first stage, it is argued that A was not at a conference in another city, so he had an opportunity to commit a crime. From this antithesis is deduced: A did not speak with a scientific report to a large number of audiences in another city; did not recorded in a book of hotel guests; did not indicate arrival in another city. Because of that these facts were established and they took place in reality, on the basis of the law of the excluded middle, person cannot be at the same time in two places – it is deducted: A really was at a scientific conference in another city. In the second stage, it is deducted that antithesis – suspect A was not at a scientific conference is false, therefore, his testimony about staying in other place corresponds to reality.

Apagogical indirect proof is often the way to achieve the truth of knowledge in scientific and practical activities of people. In many fields of science, it is called "proof from the contrary". However, the other type of indirect evidence – *assumption evidence* – is not less important. Unlike the apagogical, in this type of evidence, antithesis is not building, but several theses are put forward, a number of which completely exhausts all possible alternatives regarding a particular question. Accordingly, in the process of building evidence, all alternatives, except one that is a thesis, are refuted. The demonstration of assumption indirect evidence is as follows: it is known that occurrence of certain occasion may be caused only by one of the three reasons – A, B, C. It is determined that neither A, not B can cause this occasion. Therefore, the reason of occurrence is C.

In cognitive activity of people, both apagogical and assumption evidences play the important role and often are the one means to establish truth of certain statement. Most human discoveries – the unravelling of the mysteries of ancient civilisations, the knowledge of the depths of space, the discovery of new chemical elements – was often carried out because of the impossibility of using obvious arguments. In such cases, researchers, basing on the laws of logic, used indirect way of proof, with which provided the reasonableness and provenance of their discoveries.

The division of evidence into direct and indirect is a traditional also for the science of the criminal procedure. However, such division differs from analogical classification of logical evidence, only the terminology is the same. Such discrepancy is due, at least, two factors. Firstly, in criminal procedure evidence is not a process of selection or search for grounds in favour of a certain thought, but a means to achieve the final goal of such a process. In other words, evidences in criminal procedure are arguments of logical proof. Secondly, in the basis of the division of procedural evidences into direct and indirect is not the

relation of contradictory statements, as in logic, but the relation of proof (argument) to the desired position (thesis). Thus, the difference between direct and indirect evidences is in the ability of the argument to directly and independently establish a main or partial thesis. In such way, from the logical side, in criminal procedure direct evidence is an argument, which directly substantiates a main thesis. A content of such argument completely covers the thesis and directly substantiates its truth or falsity without partial theses. Accordingly, an argument, by which a partial thesis is directly substantiated that further is an argument of a main thesis, is called indirect evidence in criminal procedure.

Process of proof using indirect evidence is much more difficult and longer because it is a set of consequently built elementary acts of proof, and it is carried out, at least, in two stages. In the first stage, using true arguments partial thesis is being substantiated; in the second, a main thesis is being substantiated, and proven partial thesis is used as argument or one of the arguments of a main thesis. For example, testimony of a witness that a suspect left a scene in hurry will be an argument, which proves the fact of a suspect presence at a crime scene, that is, partial thesis. At the same time, proven fact of such presence will be one of the arguments of substantiation of the main thesis – committing a crime by a suspect.

Most scholars-processualists equate the main thesis with the so-called "principal fact" – a set of circumstances, the proof of which determine the fate of the criminal case and determines the adoption of two possible decisions in the case. A partial thesis is equated with interim fact, proof of which is not an ultimate goal, but its determination is a necessary condition for achieving such goal.

In the light of the foregoing, it can be stated that the characteristic features of procedural indirect evidence are following:

1) They are simultaneously direct and indirect evidence (arguments); regarding the interim fact (partial thesis) such evidences are direct, regarding the principal fact (main thesis) – indirect, because prove it in a roundabout way using intermediate link – partial thesis.

2) None of the indirect evidence (arguments) taken in isolation cannot independently confirm the main thesis, and the conclusion about the connection of a separate indirect evidence with the principal fact is always probabilistic.

In logic, categories of probability and reliability are used to determine the degree of substantiation of a certain thought, forms of logical thinking or system of knowledge. As noted in the scientific literature, "a statement, grounds of which can be used for other, including the statement opposite to the first, should be considered probable. On the contrary, a statement that precludes the possibility to build an opposite statement on the same grounds and, thus, refutes the first one can be considered reliable. In other words, reliability is a complete substantiation of knowledge, its complete proof" [14].

Therefore, when evaluating specific indirect evidence, possibility of gained knowledge indicates the possibility of another explanation of the connection between the interim fact and the principle fact and, accordingly, such conclusion has alternative nature. Reliability of knowledge, which verifies needed connection between the interim and principal facts, is provided by building reliable, consistent evidence system in a criminal case. Only together with other evidence indirect evidence can prove the main thesis.

Logical substantiation of the main thesis through indirect evidences is carried out in form of reasoning, which, closely interwoven with each other, form a chain of such deductions. Without contrasting deduction and evidence, it is worth noting that the main difference is deduction is logical form of thinking, in which new, previously unknown knowledge is being gained, in evidence, known knowledge is being substantiated, truth of which is assumed. Logic divides inferences into deductive and inductive. Deductive is inference, in course of which there is transition from the general to the particular. In this sense, the deductive inference is opposed to inductive, wherein logical transition is from knowledge about specific subjects and phenomena to general knowledge about certain range, set of researched objects.

Both deductive and inductive inferences are used in the process of proof of circumstances of criminal act. In this mentioned means of demonstration are in an inseparable unity and used for substantiation of both partial and main theses. At an early stage, when there is accumulation and statement of certain evidentiary facts (arguments) and their connection with interim fact (partial thesis) is being established, it is more common to use deductive inferences, in which there is connections of implication between prerequisites and conclusions. However, general inductive inferences are big reference to deductive inference, that is, statement, which is one of the arguments of logical proof. At the next stage, a subject of proof temporarily abstracts from the arguments of a partial thesis, and the inductive way of demonstration comes to the fore. Then again it should be noted that induction in this case is not in its pure form and statements, which are references of deduction, are conclusions of deductive inferences.

In the scientific literature on logical proof, it is stressed that in the process of "indirect knowledge law and rules of logic must be strictly enforced, because without this it is impossible to get true result consistently and on a reasonable basis" [15]. The above fully covers the process of proof of circumstances of offence with the use of indirect evidence. Compliance with logic's canons when using indirect evidence contributes to correct building of logical proof and protects it from logical errors. The most common among them are the error in thesis that is being proven; the error of false or unproven grounds; the error of too hasty conclusion; the error of equating an accidental feature with an essential feature.

The error the in thesis that is being proven is spread in logical proof. Its essence is he thesis, which is being substantiated in proof, accidentally or on purpose is replaced by other thesis. Logical fallacy of such actions is in violation of the law of

sameness, according to which different statements-theses are equated. In the process of proof by indirect evidences the error of thesis replacement may be when the main and the partial theses are being equated. Thus, fact of detecting fingerprints of a suspect at a crime scene, indicating his presence (partial thesis), can be erroneously equated with fact of crime commission by this suspect (main thesis); fact of detecting crime instrument in a person's dwelling, which indicates only the location of such an instrument (partial thesis), is identified with the fact of committing a crime by this person (main thesis). Therefore, the error of the replacement of thesis that is being proven most often occurs where there is prejudgment. This prejudgment contributes to the equating of different theses and weakens the attention to the differences between these theses [10].

The error of false or unproven grounds can take place in proving by both direct and indirect evidence. The essence of such an error is that when proving a certain thesis, false arguments are used. Fallacy may be in wrongness of factual data (for example, knowingly wrong testimony of a witness, as if he saw that the suspect was at a scene of crime), and in absence of proof of factual data (for example, fact about traces of a suspect at a crime scene has not been confirmed by an expert).

The error of equating an accidental feature with an essential feature is also one of the widespread logical errors in the process of proof with the help of indirect evidences. Its essence is in equating accidental and regular connections, which exist between interim and main facts. For instance, fact of detection of certain thing, which belongs to a victim, in an apartment of a suspect (interim fact) may erroneously be equated with a fact of committing a crime by a suspect. However, these facts may be related occasionally, that is, a thing could be presented to a suspect, he could buy it, find it, and so on. The specified error is closely linked to the error of the false conclusion about a cause, when a simple sequence of events in time is equated with a needed causal link between these events. Thus, a fact of hasty escape from a crime scene by a person immediately after crime has been committed a may be mistakenly perceived as a fact of involvement of this person in a criminal act. However, coincidence in time does not always mean causal link of events: a person might escape from a scene because of reluctance to communicate with law enforcement officers, fright, etc.

In the process of proof, there are also other logical errors: of false consequence, of increase of terms, of a transition from what was said in a certain sense to what was said irrelevantly, etc. All of them can take place in proof of circumstances of a committed crime using indirect evidence. That is why their recognising and overcoming, based on the laws and rules of formal logic, ensures not only the correct building of logically clear proofs, but also helps to avoid legal errors in investigative and judicial practice.

CONCLUSIONS

Determining of the nature of indirect evidence in criminal procedure should be based on the logic of the notion of evidence. In this, should be taken in account:

1. The logical notion of indirect evidence does not coincide with the content of the notion of indirect evidence in the science of criminal procedure. Such discrepancy is due, at least, two factors: 1) in criminal procedure evidence is not a process of selection or search for grounds in favour of a certain thesis, but a means to achieve the ultimate goal of such, that is, argument of logical evidence; 2) in the basis of the division of procedural evidence into direct and indirect is the ability of the argument to directly and independently establish a main or partial thesis, but not the relations of contradictory statements, as in logic.

2. On the logical side, the indirect evidence in criminal procedure is the argument of a partial thesis, which further is the argument of a main thesis. This explains dual essence of procedural indirect evidences: they are direct evidences and independent means to prove its truth of fallacy regarding partial thesis; indirect evidences, which only together with other can prove its truth or fallacy regarding main or generalising thesis.

3. Proof of existence (inexistence) of facts and circumstances that took place in the past is in form of inference. Building of inference does not preclude a possibility of logical errors which also take part in proof of circumstance of committed crime using indirect evidences.

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