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Inadmissibility of Evidence in Criminal Proceedings in Ukraine

Визнання доказів недопустимими в кримінальному процесі України

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Abstract

The aim of the article is to analyze the problematic aspects of finding evidence inadmissible in criminal proceedings, as well as to formulate, according to the Criminal Procedure Code of Ukraine (CCP of Ukraine) and the case law of the European Court of Human Rights (ECHR), proposals for elimination of existing shortcomings on the issue raised.

In the article used general scientific and special methods that enable to obtain scientifically sound conclusions and proposals. In particular, scientific methods, such as dialectical, comparative-legal, system-structural, modelling, abstraction, generalization and logical, are applied.

The problematic issues of the procedure for finding evidence inadmissible in the criminal proceedings of Ukraine are studied. The significant violations and shortcomings in collecting evidence by the pre-trial investigation bodies are under focus. The authors clarify grounds for the inadmissibility of evidence and the types of inadmissible evidence. The analysis of investigative practice and case-law enables to conclude that a violation in taking one piece of evidence in criminal proceedings may lead to finding a number of other pieces of evidence

Анотація

Метою статті є аналіз проблемних аспектів стосовно визнання доказів недопустимими в кримінальному провадженні, а також формулювання на основі правозастосування КПК України та практики Європейського суду з прав людини (ЄСПЛ) пропозицій з усунення існуючих недолік із піднятого питання.

Під час написання статті авторами використано загальнонаукові та спеціальні методи пізнання, що забезпечило отримання науково обґрунтованих висновків і пропозицій. Зокрема, застосовано такі методи наукового пізнання, як діалектичний, порівняльно-правовий, системно-структурний, моделювання, абстрагування, узагальнення та логічний.

Досліджено проблемні питання щодо порядку визнання доказів недопустимими в кримінальному процесі України. Акцентовано увагу на суттєвих порушеннях і недоліках, які допускають органи досудового розслідування під час збирання доказів. Констатовано, що є ймовірність визнання показань особи недопустимим доказом через їх зміну в судовому розгляді. З'ясовано підстави визнання доказів недопустимими та види доказів, які можуть бути визнанні

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inadmissible (the doctrine of the fruit of the poisonous tree). The authors argue that the court should be proactive in resolving the issue of inadmissibility of evidence either on its own motion or on the motion by parties to criminal proceedings. The utilization of the case law of the ECHR in national law application activities are analyzed from legal perspective. The study establishes that ratio decidendi of the ECHR with regard to finding evidence inadmissible is that the issue of its inadmissibility is subject to regulation at the level of national law. The assessment of inadmissibility of evidence is the responsibility of national courts, and the ECHR is obliged to ensure that the means of taking evidence are fair.

Key words: proving, collecting of evidence, inadmissible evidence, procedural form.

недопустимими. На підставі аналізу слідчої та судової практики зроблено висновок, що встановлення факту порушення отримання одного доказу в кримінальному провадженні може призвести до визнання недопустимими низки інших доказів (доктрина плоду отруйного дерева). Аргументовано, що суд повинен проявляти активність у вирішенні питання про недопустимість доказів як за власною ініціативою, так і за ініціативою сторін кримінального провадження, яка проявляється у формі клопотання. Проведено правовий аналіз застосування практики ЄСПЛ у національній правозастосовній діяльності. Встановлено, що правова позиція ЄСПЛ стосовно визнання доказів недопустимими полягає в тому, що питання про їх недопустимість є предметом регулювання на рівні національного законодавства. Оцінку недопустимості доказів уповноважені здійснювати національні суди, а ЄСПЛ має переконатися, що способи отримання доказів були справедливими.

Ключові слова: доказування, збирання доказів, недопустимі докази, процесуальна форма.

Introduction

One of the stages of domestic legislation adaptation to international and European standards was the updating of criminal procedure legislation of Ukraine in 2012, consequently the procedural form of pre-trial investigation bodies' activities have been changed, and functions of the court have expanded with regard to monitoring rights and freedoms of a person. Furthermore, approaches to the process of proving in criminal proceedings have changed noticeably, in particular, the criteria of adequacy and admissibility of evidence, the grounds and procedure for finding evidence inadmissible, guaranteeing the rights, freedoms and legitimate interests of participants of criminal proceedings provided by the Constitution of Ukraine.

The initiation of a range of new legal concepts and specific provisions related to proving is a testament to progressive public policy and awareness of national interests. At the same time, the application of the newest legislation usually causes some difficulties in practice, requiring better ways to solve these problems.

Therefore, the study of theoretical and practical issues relating to finding evidence inadmissible in criminal proceedings is, to date, relevant. This is because finding evidence inadmissible can change determination of a criminal offense, undermine the person's involvement in the crime in general, complicate the compensation of the harm caused to the victim, lead to the adoption of acquittal, etc. Therefore, the effective implementation of objectives of criminal proceedings requires improving the provisions of the CPC of Ukraine on the issue under study.

The aim of the study is a comprehensive study of theoretical and practical problems of legal regulation of inadmissibility of evidence in criminal proceedings, formulating, on this basis, appropriate proposals and recommendations for improving the current criminal procedural legislation of Ukraine. All this will contribute to the development of modern doctrine of criminal proceedings and other branches of legal science, in lawmaking, law enforcement and legal education.

Theoretical framework

Assigning a person a fair punishment for a criminal offense is impossible without a proper assessment of all the evidence collected by the parties to the criminal proceedings during the pre-trial investigation. Given this fact, it is generally accepted among lawyers and

practitioners that the knowledge of the theory of evidence and evidence constitutes the scope of the criminal process itself. Moreover, such a legal idea really should be recognized as fundamental, since knowledge of the process of collecting evidence and their assessment ensures the effective achievement of the objectives of criminal proceedings and compliance with the general principles of criminal proceedings. Indeed, not only the proper collection of evidence and the implementation of the process of evidence, but also the ensuring of the rights, freedoms and legitimate interests of participants in the process depends on the correct application of the legislative norms governing the admissibility of evidence.

The modern concept of facts admissible as evidence in criminal proceedings, as well as the grounds, procedural order and consequences of finding them inadmissible, is studied in the works of Cusveller J., Kleemans E. (Fair compensation for victims of human trafficking? A case study of the Dutch injured party claim, 2018), Drozd V. H., Ponomarenko A. V., Ablamskyi S. Ye. (Protection of rights, freedoms and legitimate interests of a person at the pre-trial stage, 2019; Organizational and legal principles of activity of investigative units of National Police of Ukraine, 2020), Honcharenko V. H., Nor V. T., Shumylo M. E. (Scientific and practical commentary to the Criminal Procedure Code of Ukraine, 2012), Lutsiuk P. S. Tsekhan D. M. (Inadmissibility of evidence in criminal proceedings (based on practice materials), 2018), Orlov Yu. Yu., Cherniavskyi S. S. (Application of electronic reflections as evidence in criminal proceedings, 2017), Osetrova O. S., Syzonenko A. S., Bryskovska O. M. (The system of grounds for finding evidence inadmissible in criminal proceedings, 2017), Panova A. V. (Finding evidence inadmissible in criminal proceedings, 2016), Pushkar P. V., Babanly R. Sh. (How to ensure the correct citation of the decisions of the European Court of Human Rights?, 2017), Shevchuk, M. I. (Finding evidence inadmissible: Right of the court or its duty?, 2017), Shytov A. Duff P. (Truth and procedural fairness in Chinese criminal procedure, 2019), Sirenko O. V. (Electronic evidence in criminal proceedings, 2019) and other.

In contrast to the considerable number of scientific works on the problems stated, this work is notable due to a comprehensive study of the issue of the inadmissibility of facts as evidence, the analysis of applying the provisions of the Criminal Procedure Code of Ukraine, the case-law and decisions of the European Court of Human Rights that enable to formulate reasonable conclusions.

Methodology

As it is known, in the methodological part of the work it is necessary to explain the choice of a specific set of research methods, in particular in accordance with the relevant generally accepted in methodological science, as well as provide information on where and why this or that was used in the work another scientific method. The names and essence of general scientific methods of cognition should coincide with the ideas about them in the general methodology. Application in legal research general scientific and interdisciplinary methods does not turn them into private scientific. In most cases, current methodological approaches have been sufficiently thoroughly researched and described in the legal literature.

The methodology of our research is grounded on the basic of study of judgments of the national courts of Ukraine, as well as the scientific positions of scientists regarding problematic issues inadmissibility of evidence in criminal proceedings in Ukraine.

The theoretical and methodological basis of the work is the general scientific methods of research and special methods based on modern scientific foundations of law and related sciences. We used the methods:

- *dialectical method* enables to consider finding of facts (evidence) inadmissible, in particular from the perspective of both the integrity of the phenomenon and the interconnectedness of the elements.
- *comparative-legal method* enables to compare the rules of national law with the ECHR's case law with regard to finding evidence inadmissible in criminal proceedings.
- *system-structural method* underlies the classification of grounds for finding evidence inadmissible.
- *methods of modelling, abstraction and generalization* enable to formulate proposals to improve the legal regulation of grounds and procedure for finding evidence inadmissible.
- *logical method* is the basis for the study of the procedure for finding evidence inadmissible in the criminal proceedings of Ukraine.

Results and discussion

Substantial changes in legislator's consideration of proving in criminal proceedings of Ukraine, reflected in the provisions of the CPC of Ukraine, led to the competitiveness of the parties to criminal proceedings and nonconformity in submitting their evidence to the court and in proving their preponderance before the court (para. 15, Part 1, Art. 7 of the CPC of Ukraine). This is manifested in the ability to collect evidence both by the prosecution and the defence. According to the CPC of Ukraine, proving in criminal proceedings can be carried out by the investigator, public prosecutor and, in cases specified by the CPC of Ukraine, by the victim, while proving that evidence, knowledge on the amount of procedural expenses and on circumstances that characterize the accused is adequate and admissible is placed upon the party submitting them. However, according to direct examination of evidence by the court in the decision on criminal proceedings, provided by Art. 23 of the CPC of Ukraine, if the collected evidence have not been directly examined by court during the pre-trial investigation, they cannot be a justification for the sentence in the criminal proceedings.

But despite direct examination of evidence by the court in criminal proceedings, the prosecution and defence party are obliged to take into account during evidence collection that the prosecution cannot be grounded on evidence obtained illegally, as well as on assumptions, since any doubt as to the proof of the guilt of an individual shall be interpreted in this person's favour (Part 2 of Article 62 of the CC). Therefore, inadmissible evidence cannot be used in making procedural decisions and, accordingly, cannot be referred to by a court in adopting a court judgment (Part 2 of Art. 86 of the CPC).

As noted above, the criminal procedure legislation of Ukraine provides for the possibility of collecting evidence both by the prosecution and the defence. However, the burden of proof is placed upon the investigator, who, as an official of the relevant law enforcement agency, is authorized, within the competence established by the CPC of Ukraine, to conduct pre-trial investigation of criminal offenses and is responsible for the legality and timeliness of procedural actions. It is the investigator who, based on the results of investigation, draws up an indictment, a petition in respect of application of compulsory educational measures, or in respect of application of compulsory medical or educational measures, and submits them to public prosecutor for approval (para. 7 of Part 2 of Art. 40 of the CPC). Accordingly, the efficient and lawful evidence collection by the investigators during the pre-trial investigation affects the further result of this evidence evaluation in court and the decision on criminal proceedings in total. After all, as a result of the evidence base incompletely formed by the parties to criminal proceedings, difficulties in compensation for harm to the victim occur (Cusveller, Kleemans, 2018).

At the same time, it should be noted that the law requires to open criminal proceedings first (open from the moment of entering information on criminal offence into the URPI), and then investigative actions should be taken to collect evidence. However, as a general rule, an examination of the site, premises, effects and documents may be carried out prior to entering the URPI in urgent cases. Accordingly, the investigator starts the process of proving, which involves identifying and recording information relating to the circumstances of a criminal offense that, in addition to conducting an appropriate examination, includes the seizure of things and documents that are relevant to criminal proceedings, measuring, photographing, sound or video recording, involving a specialist for this purpose, drawing up of plans and schemes before the pre-trial investigation. Moreover, it should be noted that in some categories of criminal offenses, for example, related to traffic accidents, illicit trafficking in narcotic drugs, psychotropic substances, their analogues or precursors, etc., the collection and recording of information regarding the criminal offense committed is of particular importance during an examination. Indeed, according to the case law, provided substantial violations of human rights and freedoms during the examination of the scene, search, investigative experiment or other measures or procedural actions are determined, the material evidence or documents seized in the course of their conduct shall be found inadmissible by the court. Furthermore, an expert examination of such physical evidence (documents) shall be found inadmissible.

For example, according to Decision of a Panel of Judges of the Criminal Cassation Court of the Supreme Court in Case No. 756/8425/17 of 21 January 2020, after examination of the inspection record of the scene as evidence (according to which psychotropic substance was voluntarily handed over), the Court of Appeal concluded that neither the said document is admissible source of evidence, nor the rest of the evidence of the

prosecution, derived from the mentioned record of the inspection of the scene, is admissible, namely, psychotropic substance as material evidence, and expert's opinion regarding it. Since the above evidence was grounds for the charges, then proving of the criminal offense under Part 2 of Art. 309 of the Criminal Code of Ukraine was not possible (Decision of the Panel of Judges, 2020).

It should be noted that the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention), the ECHR's case law and applicable international treaties to which the Verkhovna Rada of Ukraine consented to be bound are of special importance in the legal regulation of criminal proceedings, including the protection of human rights and freedoms. According to the provisions of Part 5 of Art. 9 of the CPC of Ukraine the criminal procedure legislation of Ukraine is applied in the light of ECHR case law, and "in considering cases the courts apply the Convention and the ECHR's case-law as a source of law" (Law of Ukraine, 2006).

Therefore, in the course of case consideration, the application of provisions of the Convention and the ECHR's case law as a source of law by courts in Ukraine contributes to the implementation of European human rights standards in the Ukrainian judiciary. This is because "first, by reasoning and taking decisions on the basis of such standards, public authorities and officials implement the constitutional provisions on the application of international treaties, which are part of national legislation. Second, the application of universal international standards for the protection of human rights and freedoms is a testament to the formation of a new legal system in which the rights and freedoms of each person and their guarantees determine the content and focus of the State's activities. Third, the formation of a judicial ratio decidenti on the basis of international legal standards for the protection of human rights and freedoms promotes confidence on the part of citizens who expect radical changes in this field" (Drozd, Ponomarenko, Ablamskyi, 2019, p. 230). Therefore, "the system of applicable international legal acts is an integral part of the legal regulation of investigation units' performance and a significant source of international positive experience of their activities…" (Drozd, Ponomarenko, Ablamskyi, Havryliuk, 2020, p. 141).
Thus, in the abovementioned decision, the Panel of Judges, in the course of consideration of the cassation appeal of the Prosecutor against the ruling of the Kyiv Court of Appeal of December 4, 2018 in criminal proceedings against PERSON_1, states that ratio decidenti of the Court of Appeal is consistent with the ECHR's case-law (decision of 30 June 2008, 21 April 2011, Gäfgen v. Germany and Nechiporuk and Yonkalo v. Ukraine). In particular, according to the doctrine of this Court, if the source of evidence is inadmissible, then all the other facts obtained by it will be the same (Decision of the Panel of Judges, 2020).

Therefore, the ground for the Panel's decision is the reference to the ECHR's case-law, in addition to summarizing the positions of all parties to the proceedings established by the courts of first instance and the court of appeal. Regarding the issue raised, V. H. Drozd (2018, p. 277-278) emphasizes that development and practical implementation of effective legal mechanisms for the protection of the rights, freedoms and legitimate interests of a person is impossible without taking into account generally recognized international legal standards and principles in this field. That is why, according to V. H. Drozd, further improvement of the criminal procedure legislation of Ukraine, the initiation of new concepts should be implemented in no other manner than taking into account the generally recognized European standards and principles of criminal proceedings. We advocate this perspective and consider it appropriate to focus on possibility of making mistakes, related to the human factor, by the prosecution during the pre-trial investigation, but in some cases, the shortcomings in collecting of evidence or conduct of criminal proceedings are due to gaps of law. Consequently, even the prosecution's efforts to collect effective evidence, some of the evidence obtained can further be considered by the court as a substantial violation of human rights and freedoms and lead to their inadmissibility.

An example of this is the testimony, which has been changed during the trial, and is significantly different from the pre-trial investigation. After all, even compliance with the current legislation provides possibility that such evidence will be found inadmissible due to the change of testimony by a person in court. Since, according to Art. 23 of the CPC of Ukraine, the court should examine the evidence directly at the court hearing, the testimony, which are given by the person directly in court, should be taken into account as evidence. If the person changed the testimony at the court hearing, those given during the pre-trial investigation will not be taken into account. Obviously, when it comes to the victim

or the witness, they are warned of criminal responsibility for giving deliberately false statements. However, it is not always possible to prove, since the testimony of a person may contain bona fide error, and a mandatory criterion of proving a criminal offense on the part of the witness or the victim is testimony given knowingly.

It should be noted that the ECHR's case-law provides for the set of actions to be taken by a court in adjudicating a criminal case, if one piece of evidence is explanations of a person (witness) who could not be questioned directly by the court, but such explanations are contained in the materials of the case as they have been obtained during the pre-trial investigation (Pushkar, Babanly, 2017). For example, in the ECHR's decision in «Sitnevskyi and Chaikovskyi v. Ukraine», the court decided that "there was a violation of sub-paras. d of para. 3 and para. 1 of Art. 6 of the Convention in relation to the applicants with regard to the admissibility of the unverified testimony by O. Va. and S. Va. as evidence and with regard to the second applicant in view of the admissibility of R.M.'s unverified testimony as evidence" (Decision of the ECHR, 2016). Therefore, the ECHR's decision is a prime example of the fact that, if the evidence collected during the pre-trial investigation was not verified by a court, it could not be a ground for an adjudication of criminal proceedings. The exception to this rule is the provision of Part 3 of Art. 349 of the CPC of Ukraine, which states that "the court has the right, if the participants in court proceedings do not object thereto, to find that examination of evidence in respect of indisputable circumstances is unnecessary".
However, it should be emphasized that difficulties occur if the evidential information is on electronic media, in particular, due to the absence of the clear procedure for collecting such evidence (Sirenko, 2019, p. 210). Considering that sometimes computerized technical expertise is required, the adherence of evidence, for experts to authenticate a digital record (video record), is still a problematic issue, which the investigator, public prosecutor, investigating judge, court cannot always answer (Orlov, Cherniavskyi, 2017, p. 18, 20). In case of doubt about assembling and distorting information, it shall not be taken into consideration and it is inadmissible as evidence in criminal proceedings. In order to solve this problem, we propose to complete Part 2 of Art. 84 of the CPC of Ukraine, after the phrase "expert findings," with the words "information recorded on technical media." In addition, we argue that Part 3 of Art. 107 of the CPC of Ukraine shall be supplemented with the sentence, as follows: "In case of the absence of the original of mediums with records of criminal proceedings, its copy shall be considered as the source of evidence."

Currently, despite the updating of the criminal procedure legislation of Ukraine, in the theory of criminal procedure and law-application practice issues with regard to the grounds and procedure for finding evidence inadmissible and their classification are debatable. This issue is relevant for criminal proceedings in other countries, according to the study by A. Shutov and P. Duff (2019). According to the criminal procedure legislation of Ukraine, inadmissible evidence is classified depending on the criteria, the nature of the procedural violation. We advocate the perspective of O. S. Osetrov, A. S. Sizonenko and O. M. Bryskovska (2017, p. 347-348), who classify the grounds for finding evidence inadmissible by the criteria, as follows: by subjects of proof:

a) provided by the prosecution;
b) provided by the defence;
c) provided by the victims, by the representative of the legal entity in relation to which proceedings are conducted;
d) obtained during the exercise of powers by the investigating judge, court.

According to the stages of criminal proceedings, inadmissible evidence may be obtained at the stage of pre-trial investigation and at the stage of trial. According to procedural sources, inadmissible evidence is obtained during the record of testimony, physical evidence, materials of criminal proceedings, documents, expert findings. According to the legal effects, the inadmissible evidence is grouped into ones that entail: closure of the criminal proceedings; change in the scope of a notice of suspicion or change in action determination; judgment of acquittal; change or annulment of sentence in cassation.

The study of issues of inadmissibility of evidence in criminal proceedings based on practice materials have enabled P. S. Lutsiuk and D. M. Tsekhan (2018, p. 397-398) to group inadmissible evidence into types, such as:

1. imperative inadmissible evidence, mandatory found as such by court because they are obtained as a result of a substantial violation of human rights and freedoms; evidence that characterizes the identity of the suspect (accused) but is not the target of criminal proceedings;

2. dispositive inadmissible evidence, possibly found as inadmissible by court, that is, this issue is evaluative, subjective and remains at its discretion. Parts 2, 3 of Art. 88 of the CPC of Ukraine provide for the list of such evidence.

Considering that the Law of Ukraine "On amendments to certain legislative acts of Ukraine concerning the confiscation of illegal assets of persons authorized to perform the functions of the State or local self-government, and the punishment for acquiring such assets" No. 263-IX of October 31, 2019 supplemented the CPC of Ukraine with Art. 88-1, which provides for another type of inadmissible evidence obtained in cases of assets found unjustified and their recovering in favour of state revenue (Law of Ukraine, 2015). The CPC of Ukraine currently provides for three types of evidence found inadmissible, namely:

1) evidence obtained as a result of a substantial violation of human rights and freedoms and evidence that characterizes the identity of the suspect (accused) but is not the target of criminal proceedings;
2) evidence relating to the criminal convictions of the suspect, accused or his/her committing other offenses which are not the target of this criminal proceeding;
3) evidence obtained in cases of assets found unjustified and their recovering in favour of state revenue.

Moreover, according to the analysis of the provisions of the CPC of Ukraine, Art. 89 of the CPC of Ukraine provides for two procedures for finding evidence inadmissible according to the criterion of evidence being manifestly and non-manifestly inadmissible, provided the manifestly inadmissible one – the court finds evidence inadmissible during the trial, which entails the impossibility to examine such evidence or termination of its examination in court if this examination has been initiated. If the evidence is not manifestly inadmissible, the court shall decide whether it is admissible by assessing in the Deliberative Room during adjudication of the final judgment.

At the same time, the CPC of Ukraine does not provide a definition of "manifestly inadmissible evidence," which results in no consensus among scholars and practitioners regarding the criteria to find evidence inadmissible. In this regard, we advocate A. V. Panova's (2016, p. 175) perspective that "manifestly inadmissible" is a qualitative characteristic of violations of the procedure for proving in criminal proceedings under the law. She argues that its essence is that these violations are unquestionable, indisputable and therefore do not require their examination and comparison with other evidence provided by the participants in the court proceedings. These violations of the procedural form can be associated not only with a substantial violation of human rights and freedoms, but also with any other non-compliance with the rules of evidence admissibility.

Nowadays, the CPC of Ukraine does not regulate directly the issue of whether the court can initiate finding records inadmissible. In legal doctrine, this issue is addressed differently. Thus, according to the scientific and practical commentary to the CPC of Ukraine, under the general editorship of V. H. Honcharenko, V. T. Nor and M. E. Shumylo (2012, p. 239), the parties and the victim initiate filing a motion for finding records inadmissible at the trial. However, M. I. Shevchuk (2017, p. 212-213) argues that the court can and should find evidence inadmissible on its own motion either in case of finding evidence manifestly inadmissible, or in cases of evidence obtained in violation of the procedure prescribed by criminal procedure law, which is not "manifestly inadmissible" by nature, however, this violation led to reasonable doubt about the accuracy of the facts obtained as a result of the procedural actions.

We advocate the procedural scientists' perspective that the court should be proactive in deciding the inadmissibility of evidence either on its own motion or on the motion of the parties to criminal proceedings. At the same time, M. I. Shevchuk (2017, p. 212) argues that if the violation of the requirements of the CPC of Ukraine are manifest, then the court is obliged to decide on the admissibility of the evidence immediately after the parties have filed a corresponding motion in the Deliberative Room by a reasoned ruling. In the case of a motion by a party to criminal proceedings with regard to finding evidence inadmissible, the inadmissibility of which is not manifest, the court may, either on its own motion or on the motion of the party to criminal proceedings, examine the admissibility of this evidence by carrying out additional procedural actions. If this examination results in the inadmissibility of the proof, the court is obliged to issue a ruling with regard to refusing to satisfy the motion in relation to finding records inadmissible.

Therefore, the CPC of Ukraine should be supplemented with Art. 89-1 which provides for the evidence inadmissible non-manifestly and identifies participants in criminal proceedings who have the right to appeal for finding evidence inadmissible to the court, the time limits for filing such a motion and the procedure and the time limits for deciding on a motion by the court.

It should be emphasized that Art. 55 of the Constitution of Ukraine guarantees the right of a person, after exhausting all domestic legal instruments, to appeal for the protection of his rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organizations of which Ukraine is a member or participant. According to Art. 32 of the Convention, the jurisdiction of the ECHR extends to all matters concerning the interpretation and application of the Convention and its Protocols and which are submitted to it for consideration in accordance with Articles 33, 34 and 47 of the Convention (Decisions of the ECHR, 2019, p. 3). Therefore, according to Art. 46 of the Convention, the ECHR judgment in the case against Ukraine is to be binding for Ukraine.

However, when appealing to the ECHR concerning the inadmissibility of evidence, the interested party should take into account that all procedural decisions are made in accordance with the rules of the CPC of Ukraine, accordingly the admissibility of evidence is determined by the provisions of the CPC of Ukraine in force at the time of their delivery (Part 2 of Art. 5 of the CPC). This aspect is under special focus of the Constitutional Court of Ukraine in interpreting Part 3 of Art. 62 of the Constitution of Ukraine, arguing that "In its decisions, the European Court of Human Rights has repeatedly stated that the admissibility of evidence is the prerogative of national law and, as a general rule, it is for national courts to assess the evidence given to them, and the procedure for collecting evidence provided for by national law, shall comply with the fundamental rights recognized by the Convention, namely: to freedom, personal integrity, to respect for private and family life, secrecy of correspondence, to privacy of home (Articles 5, 8 of the Convention), etc." (Decision of the Constitutional Court, 2011). This perspective of the ECHR is also substantiated in the Decision "Shabelnyk v. Ukraine" where the court states that "according to Art. 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting States. In particular, it is not its functions to deal with errors of fact or law allegedly committed by a national court, unless and as far as they may have infringed rights and freedoms protected by the Convention. Although Art. 6 guarantees the right to a fair trial, it does not provide any rules as to the admissibility of evidence as such, since it is first and foremost a matter governed by national law" (Decisions of the ECHR, 2009).

Therefore, the national courts are authorized to assess the evidence of criminal proceedings and to decide whether they are admissible or inadmissible, according to the criterion of being either manifestly or non-manifestly inadmissible, taking into account the importance of each particular evidence for establishing the circumstances of the case and the possible effects of considering evidence obtained not in the manner established by law and with significant violations of a person's rights and freedoms.

Conclusions

Therefore, the analysis of domestic law, international legal acts, court decisions and the ECHR's case-law enables to state that direct examination of evidence by a court and their finding inadmissible in the manner established by the CPC of Ukraine protects rights and freedoms of a person in criminal proceedings. However, the legal gaps in the concept of evidence indicate that it requires further improvement. It would be appropriate:

- *first, to supplement Part 2 of Art. 84 of the CPC of Ukraine, after the phrase "expert findings," with the words "information recorded on technical media";*
- *second, to supplement the CPC of Ukraine with Art. 89[1] which shall provide for the evidence inadmissible non-manifestly and identifies participants in criminal proceedings who have the right to appeal for finding evidence inadmissible to the court, the time limit for filing such a motion and the procedure and the time limit for deciding on a motion by the court;*
- *third, to supplement Part 3 of Art. 107 of the CPC of Ukraine with the sentence as follows: "In case of the absence of the original of mediums with records of criminal proceedings, its copy shall be considered as the source of evidence".*

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