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DEFECTS OF LEGAL TECHNIQUE AND POSSIBLE WAYS OF THEIR OVERCOMING IN THE REGULATION OF THE FORMATION OF PHYSICAL EVIDENCE AND SOLVING THE ISSUE ABOUT THEM IN THE CRIMINAL PROCESS OF UKRAINE

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INTRODUCTION

An indispensable attribute of the legal culture of society is the level of development of law. First of all, it is about the culture of legal texts – the proper degree of law-making. It is inextricably linked to the level of progressiveness and adequacy of law enforcement activities.

An exceptional place in ensuring the proper level of law-making and enforcement activities is given to legal technique, as it is intended to solve the problems of construction of legal structures, issues of legal terminology, rules for the development, presentation and systematization of regulations. Certainly, any normative act must be perfect both in terms of its content, that is, in conformity with the notions of justice, equality and freedom, and in terms of its form. Therefore, the law, including criminal procedural law, should be consistent, optimal in scope, clear, logical and understandable to the population. Obviously, such a negative phenomenon, as the imperfection of legal technique in the regulation of certain issues of criminal proceedings, calls into question the high level of legal culture and impedes its potential and necessary improvement.

Against this background, the identification of gaps and conflicts in the normative regulations of certain aspects of criminal proceedings and finding out ways of their possible overcoming are of permanent relevance. At the same time, given the reasonable boundaries of our work, fully aware of the inability to cover the variety of defects in criminal procedural law, the subject of our study is identified in such a direction as the formation of material evidence and the resolution of the issue about them in criminal proceedings. In our view, this direction is relevant, since it is inextricably linked to the issue of balancing the task of criminal proceedings, such as ensuring prompt, complete and impartial investigation and trial, along with the inadmissibility of any unjustified procedural coercion against any person. At the same time, the formation of material evidence and the resolution of the question about them is always closely intertwined with the restriction and deprivation of the property right of a person which is central to the system of socio-economic

rights and freedoms of citizens and enshrined in Art. 41 of the Constitution of Ukraine along with such fundamental human rights as the right to life, liberty, privacy and the like.

1. Defects of legal technique in the regulation of the formation of physical evidence

The starting point in assessing the adherence to the proper procedure for the formation of material evidence in criminal proceedings, apparently, is the steady adherence to the procedural form, which, in particular, is manifested in the drafting of the necessary procedural documents that would certify the lawfulness of the entry of the relevant material object in the criminal proceedings. However, unlike the CPC of 1960, as well as the codes of some other states (for example, the Republic of Kazakhstan[1], the Republic of Moldova[2], etc.), the Ukrainian CPC does not explicitly require that a material object be recognized the physical evidence by the adopting a decision. Said lack of regulation led to the appearance of plurality of views on this issue among researchers and practitioners.

A systematic analysis of the case law shows that the authorized entities usually not only draw up the protocol of inspection of the subject, but also issue a corresponding decree recognizing his material evidence. However, this practice raises many questions for some scholars. For example, L.M. Loboyko, while giving a negative assessment of such a law enforcement practice and emphasizing its residual nature, indicates that drawing up of such decision by the prosecution puts the defense party in a clearly disadvantageous situation and testifies to the existence in the criminal proceedings of unjustified superiority of the prosecution party[3]. Close to the above approach is the stance of M.Ye. Shumilo, who emphasizes that during the pre-trial investigation, the parties collect materials about sources of future evidence – data carriers of facts and circumstances to be proved. The materials collected by the parties can be admitted as evidence by the results of their interpretation only by the judicial authority, that is, before that neither

[1]Ugolovno-processual'nyj kodeks Respubliki Kazahstan ot 04.06.2014 № 231-V. [The Code of Criminal Procedure of the Republic of Kazakhstan dated 04.06.2014 No. 231-V]. Retrieved from: http://online.zakon.kz/Document/?doc_id=31575852#sub_id=2210400 (accessed 25.01.2020)

[2] Ugolovno-processual'nyj kodeks Respubliki Moldova ot 14.03.2003 g. № 122-XV. [The Code of Criminal Procedure of the Republic of Moldova dated March 14, 2003 No. 122-XV]. Retrieved from: http://online.zakon.kz/Document/?doc_id=30397729&doc_id2=30397729#pos=30;-15&sub_id2=1020000&sel_link=1001129174 (accessed 25.01.2020)

[3] Loboiko L. M. (2014) Spivvidnoshennia danykh dosudovoho rozsliduvannia i dokaziv [Ratio of data of pre-trial investigation and evidence]. *Pravo Ukrainy*, no.10, p. 86.

the investigator nor any other entity, except the court, can decide that certain factual data should acquire the value of evidence in criminal proceedings[4].

Legal interpretation of the provisions of Part 3 of Art. 110 of the CPC certifies the formal admissibility of the investigator's or prosecutor's decision to recognize the material object as physical evidence, since the said rule allows the investigator, the prosecutor to make the decision not only in cases directly provided for by the CPC, but also when they consider it necessary. Moreover, O.G. Shilo reasonably points out that the drafting of a separate decree on the involvement in criminal proceedings of objects as material evidence provides certainty in this matter and, taking into account Part 2 of Art. 100 CPC, it seems appropriate[5]. In addition, S. O. Kovalchuk draws attention to the problem of ambiguity of the case-law formed today to resolve the issue of the fate of material evidence and gives examples where domestic courts often refuse to resolve this issue, citing that material objects are not confessed to the decision of the investigator material evidence and did not join the materials of criminal proceedings, as a result of which the court was deprived of the opportunity to make a decision on them in the order of p. 4 Art. 374 or § 14 p. 1 Art. 537 CPC[6].

In expressing our own view of this issue, it should be noted, first of all, that the investigator's or prosecutor's decision to admit a material object the physical evidence does not mean that these participants decide in advance instead of the court the issue of the relevance, admissibility and authenticity of certain evidence. All of them are independent subjects of the evaluation of the evidence, which they carry out at certain stages of criminal proceedings, taking appropriate procedural decisions.

In addition, the presence or absence of a decision, in our view, plays an important role in resolving the question of the lawfulness of the restriction of ownership of property that has been temporarily removed and seized. Thus, given that the request of the investigator, the prosecutor for the arrest of the temporarily seized property must be filed not later than the next working day after the seizure of the property, and in the case of temporary seizure of the property during the search, examination, carried out on the basis of the

[4] Shumylo M. Ye. (2013) Poniattia "dokazy" u kryminalnomu protsesualnomu kodeksi Ukrainy: sproba krytychnoho pereosmyslennia ideolohii normatyvnoi modeli [The notion of "evidence" in the criminal procedural code of Ukraine: an attempt to critically rethink the ideology of the normative model]. *Visnyk Verkhovnoho Sudu Ukrainy*, no. 2 (150), p. 41

[5] Shylo O. H. (2013) Rechovi dokazy yak protsesualne dzherelo dokaziv [Physical evidence as a procedural source of evidence]. *Visnyk prokuratury*, no. 6 (144), p.81.

[6] Kovalchuk S. O. (2016) Protsesualna forma rechovykh dokaziv u kryminalnomu provadzhenni [The procedural form of material evidence in criminal proceedings]. *Pravo.ua*, no. 3, p. 161. Retrieved from: http://pravo.unesco-socio.in.ua/wp-content/uploads/2016/11/Pravo_ua_2016_3-1.pdf (accessed 25.01.2020)

decision of the investigating judge, provided for in Art. 235 of the CPC, the request for the seizure of such property should be filed by the investigator, the prosecutor within 48 hours after the seizure of the property, in fact, the seizure may be imposed on the property which is not relevant for the criminal proceedings. However, the investigator, the prosecutor cannot establish this without, for example, the involvement of an expert and an examination, which obviously requires more time than one day.

In view of the foregoing, it seems appropriate to provide in the CPC with the need for the investigator, the prosecutor to issue a decree recognizing the material object as physical evidence no later than five days from the moment of its removal. The investigator, the prosecutor must state the reasons for the decision. However, if the admission of such objects as the physical evidence requires the appointment of an examination, the decision to admit their physical evidence must be made no later than the next working day after receiving the expert's expert opinion. The absence of a decree recognizing a material object as physical evidence should be considered as a ground for canceling the seizure of the property and returning it to its owner.

Some drawbacks of law-making technique are also evident in the aspect of drafting other procedural documents that constitute the procedural form of material evidence. In particular, Part 3 of Art. 168 of the CPC establishes that the investigator, the prosecutor, another authorized officer, during the detention or search and temporary seizure of property, or immediately after their execution, is obliged to draw up an appropriate protocol, a copy of which is provided to the person whose property has been seized or his representative. However, as N. S. Morgun rightly points out, it is unclear why this provision does not provide for the obligation to draw up such a protocol when conducting the review, based on the logic of Part 1 of Art. 168 and Part 2 of Art. 168 CPC. In addition, indeed, the formulation of Part 3 of Art. 168 of the CPC, which uses the phrase "relevant protocol"implies its ambiguous interpretation, since it is not clear what protocol the legislator meant – a procedural action during which a temporary seizure was carried out, or a separate protocol of temporary seizure of property[7].

We support the view that a separate protocol of temporary seizure during a search, examination or detention is not included in the list of documents to be drawn up in this case[8], especially since, in accordance with Part 9 of Art. 236

[7] Morhun N. S. (2014) Tymchasove vyluchennia maina yak zakhid zabezpechennia kryminalnoho provadzhennia, shcho obmezhuie pravo vlasnosti [Temporary seizure of property as a measure to ensure the criminal proceedings, which restricts ownership]. *Mytna sprava*, no. № 3(2), pp. 321-322.

[8] Shylo O. H. (2013) Rechovi dokazy yak protsesualne dzherelo dokaziv [Physical evidence as a procedural source of evidence]. *Visnyk prokuratury*, no. 6 (144), pp. 79-80.

of the CCP, the second copy of the search protocol, together with the description of the seized documents and temporarily seized items, if any, shall be handed over to the person who has been searched, and in case of absence – an adult member of his (her) family or his (her) representative. So no need to double duplicate the same information. Therefore, it seems to us that the provisions of Part 3 of Art. 168 CCP does not have any meaning and should be excluded in order to provide legal certainty.

Manifestation of legal uncertainty are also some issues of regulating the need for seizure of items that are excluded by law from circulation. Yes, we have to ascertain the existence of a conflict between the provisions of Part 2 of Art. 167 CPC on the one hand and Part 7 of Art. 236, part 7 of Art. 237 CPC on the other. In particular, paragraph 3 of Part 2 of Art. 167 of the CPC provides that temporarily seized property may be seized in the form of things, documents, money, etc. for which there are sufficient grounds to believe that they are the subject of a criminal offense, including those related to their illicit trafficking. At the same time, the analysis of Part 7 of Art. 236, as well as Part 7 of Art. 237 of the CCP, on the contrary, indicates that only seized items and documents that do not relate to items that have been seized by the law are considered temporarily seized property.

In the light of the above, we will cite the thesis of S. Smokov and D. Lisnichenko, according to which if if during the search were found objects and items which withdrawal from circulation can only confirm the findings of relevant examinations, in which case these things are considered temporarily seized property and require the investigator to resolve the issue of their arrest[9]. Indeed, the examination may show that the item removed does not belong to objects that are prohibited for circulation. And in this case, if the object was not previously seized by a court decision, a situation arises when the property right of the person is restricted without due legal basis. Considering the above, in our opinion, practice to arrest all seized during the search and review for housing or other property items, including those that were listed in the order the investigating judge for permission to conduct an appropriate investigation (search) action is correct. And so it seems appropriate to lay down the provisions of Part 7 of Art. 237 CPC read as follows: "... objects that are excluded by law from circulation, be withdrawn, regardless of their relationship to criminal proceedings. Seized items and documents are considered temporarily seized property". Similarly, we propose to amend to Part 7 of Art. 236 of the CPC: "... Items removed and documents not included

[9] Smokov S., Lisnichenko D. (2015) Tymchasove vyluchennia ta aresht maina: dokaz chy zakhid zabezpechennia kryminalnoho provadzhennia [Temporary removal and seizure: evidence or a measure ensuring criminal proceedings]. *Pravo Ukrainy, no.* 5, p. 165.

in the list for which a search permit was explicitly granted in the search permit shall be considered temporarily seized property."

Also relevant in our study is the issue of regulating the proper procedure for generating such a kind of material evidence as digital sources of evidence. Unfortunately, Ukrainian criminal procedural legislation does not take into account the rapid development of scientific and technological progress. Therefore, there are no provisions in the CPC that would govern the review of such a storage medium. It is quite obvious that an inspection of an object in its traditional sense only provides a visual observation of the features of the relevant material object (mobile phone, tablet, flash drive, etc.). Therefore, as R.I. Okonenko points out, it is more appropriate to use the concept of "digital device search", which will correspond to the nature of the investigative action, which is carried out in this case[10]. At the same time, in our view, it is more appropriate to apply in this case a procedure for temporarily accessing such information by reading and copying it, which can be done to overcome the system of logical protection and to obtain the specified access using specialized knowledge.

Continuing consideration of the issues raised, it should be noted that digital (electronic) information has certain characteristics, which, in our opinion, can testify to its special procedural status, namely: the absence of a firm bond with the material carrier; broadcastability, ie the ability to be transferred from one carrier to another; multiplicity – the possibility of simultaneous existence on different media; the need for compulsory interpretation and transcoding by means of specialized hardware and software; variability, which is manifested in the possibility of remote modification of electronic information and its destruction.

Therefore, de lege ferenda (from the point of view of the law which is desirable), in our view, seems to be a more successful approach, aimed at isolating electronic information as an independent procedural source of evidence, as, for example, in Latvia's Criminal Procedure Code (Art. 136 "Electronic Evidence"), as well as in the Code of Administrative Procedure of Ukraine (Article 99), Civil Procedure (Art. 100) and Economic Procedural (Art. 96) Codes of Ukraine.

[10] *Okonenko R.I. (2016) Elektronnye dokazatel'stva i problemy obespecheniya prav grazhdan na zashchitu tajny lichnoj zhizni v ugolovnom processe: sravnitel'nyj analiz zakonodatel'stva Soedinennyh S. Htatov Ameriki i Rossijskoj Federacii* [Electronic evidence "and the problems of ensuring the rights of citizens to protect the secrets of their personal lives in criminal proceedings: a comparative analysis of the laws of the United States of America and the Russian Federation] *(PhD Thesis), Moskva: Moskovskij gosudarstvennyj yuridicheskij universitet imeni O.E. Kutafina, pp.* 120-121.

Note also appears that the actual is a problem with the possible complete or partial destruction (and depletion) a material object aimed at examination during its conduct.. It should be noted in the context that the method of carrying out some examinations does not always allow to preserve a complete material object, which can be recognized as material evidence in criminal proceedings, and the amount of the test substance may not be sufficient for possible further examination by the defense party. However, this issue remains unresolved at the regulatory level. At the same time, there are some developments in the science of criminal procedural law in this area. Thus, for such situations, both Ukrainian and foreign scientists propose to provide a procedure for depositing material evidence at a pre-trial investigation by an investigating judge in the presence of the parties[11]. We consider the stated scientific positions to be worthy of support, since the application of the depositing allows to move the process of examination of physical evidence to the stage of pre-trial investigation with the participation of the investigating judge and parties before the start of the examination and possible destruction or complete expenditure of the material object, which, in particular, facilitates ensuring the implementation of the principle of competitiveness in criminal proceedings.

Based on the above, we consider it advisable to propose to establish in the CPC a special procedure for expert examination of material objects in case of their possible destruction or complete expenditure during the examination. Such a mechanism should include the following requirements: (1) if necessary to order an expert examination during the pre-trial investigation, which results in a material object, due to its own characteristics, a small number, peculiarities of the study, etc., may be destroyed or completely used, the investigator, the prosecutor must petition the investigating judge deposit of this object; (2) application of the depositing should be considered within three days of its filing in court with the obligatory call parties to criminal proceedings. However, the non-arrival of the defense party duly notified of the place and time of the court hearing to participate in the investigation of the material object and the appointment of the relevant expert examination at the request of the prosecution party does not prevent such actions in the court hearing; (3) during the court hearing, the material object and its outwardly

[11] Gambaryan A.S. Sudebnoe i notarial'noe deponirovanie pokazanij po iniciative advokata kak sredstvo garantirovaniya nezavisimosti advokata [Judicial and notarized deposition of evidence at the initiative of a lawyer as a means of guaranteeing the independence of a lawyer] (unpublished). Retrieved from: http://www.iuaj.net/node/1745 (accessed 25.01.2020); Aleksandrov A.S., Kovtun N.N. Grachev S.A i drugie. Doktrinal'naya model' ugolovno-processual'nogo dokazatel'stvennogo prava Rossijskoj Federacii [Doctrinal model of criminal procedural evidence of the Russian Federation] (unpublished). Retrieved from: http://www.iuaj.net/node/1766(accessed 25.01.2020)

accessible external features are examined by the investigating judge and the parties to the criminal proceedings. An investigating judge, either on the initiative of the parties or on his own initiative, may involve a specialist to assist in the study of the properties of the material object; (4) the process of investigating the material object by the investigating judge and the parties must be fully recorded in the court journal and the technical record of the trial; (5) after investigating the object, the investigating judge shall appoint a commission examination by his decision. The commission must consist of at least three persons, and the parties are entitled to recommend one expert to participate in the examination of a number of persons who, according to the Law of Ukraine "On Forensic Expertise", may be a judicial expert. Another expert is selected by the investigating judge; (6) the decision of the investigating judge on the involvement of the expert and the appointment of the examination must be accompanied by written permissions of the parties to the prosecution and defense to the possible destruction or complete expenditure of the object of investigation during the examination; (7) the presence of a criminal procedural sanction in the event of a party's violation of such an order, namely, the remnants of a material object and the expert's opinion obtained must be recognized as clearly inadmissible evidence.

2. Defects of legal technique in the regulation of the solving the issue about physical evidence

Particular attention is required to analyze the activity, which is also inextricably linked to the production and use of material evidence in criminal proceedings. It is about resolving the issue of material evidence. In particular, within the scope of our research, it seems appropriate to dwell on the particular problems that arise in resolving the issue of material evidence in criminal proceedings, in order to identify legislative conflicts and gaps in this area and formulate proposals aimed at overcoming them.

First of all, we note not very successful, in our opinion, the formulation of Part 9 of Art. 100 CPC. According to this rule, in the case of criminal proceedings being closed by the investigator or prosecutor, the issue of special confiscation and the fate of material evidence and documents shall be resolved by a court order on the basis of a corresponding request, which is considered in accordance with Articles 171–174 of the CPC. Based on the content of the said provision, it is not clear when it is for the investigator or the prosecutor must petition to resolve the issue of material evidence – either before the decision to close the criminal proceedings or after. Such legal uncertainty leads to the appearance of relevant misunderstandings in law enforcement practice. Thus, by the decision of the Kyiv District Court of Kharkiv dated March 24, 2017, the request of the investigator for special confiscation and

the fate of material evidence was denied on the grounds that "in accordance with paragraph 5 of Part 1 of Article 3 of the CPC of Ukraine, the pre-trial investigation – the stage of criminal proceedings, which begins from the moment of entering information about a criminal offense in the Unified register of pre-trial investigations and ends with the closure of criminal proceedings or the referral to court of indictment, the application for coercion s measures of medical or educational nature, an application for exemption from criminal liability. Considering that the pre-trial investigation in criminal proceedings, within the framework of which the measure of securing criminal proceedings in the form of seizure of property was applied, has now been completed by the decision of the investigator to close the criminal proceedings, according to the provisions of Part 9 of Article 100, Part 1 Art. 170, Part 1 Art. 174 CPC investigating judge is not entitled to decide the fate of material evidence. Moreover, since the decision of the investigator to close the criminal proceedings, the investigator has lost the procedural opportunity to appeal to the investigating judge with a request for special confiscation and fate of material evidence"[12].

This reasoning seems quite logical, since after the closure of criminal proceedings the issue of special confiscation and the fate of material evidence should be resolved in the framework of some separate proceedings, but the CPC does not envisage such a procedure. In our opinion, it is considered correct to address the investigator or the prosecutor to the investigating judge with a request to resolve the issue of material evidence prior to the decision to close the criminal proceedings.

At the same time, there is another problem with the possible loss of material evidence in the case of unjustified closure of criminal proceedings. According to Part 6 of Art. 284 of the CPC within twenty days from the receipt of a copy of the investigator's decision to close the criminal proceedings, the prosecutor has the right to cancel it due to illegality or groundlessness. The investigator's decision to close the criminal proceedings may also be quashed by the prosecutor on the complaint of the applicant, the victim, if such a complaint is lodged within ten days of the receipt by the applicant, the victim, of a copy of the decision. In addition, the CPC also provides for the possibility of challenging the decision of the investigator or prosecutor to close the criminal proceedings to the investigating judge within ten days from the day the person receives a copy of the decision.

[12] Ukhvala Kyivskoho raionnoho sudu m. Kharkova vid 24 bereznia 2017 r., sudova sprava № 640/4053/17. Retrieved from: http://reyestr.court.gov.ua/Review/%2065609636 (accessed 25.01.2020)

Given this, it seems appropriate to clarify the provisions of Part 9 of Art. 100 of the CPC, stating that if an investigator or prosecutor concludes that there are grounds for closing a criminal proceeding, they should apply to the investigating judge for special confiscation and to resolve the issue of material evidence and documents prior to the decision to close the criminal proceedings. At the same time, the appeal of the decision of the investigator or the prosecutor to close the criminal proceedings in accordance with the procedure provided by the CPC, shall suspend the entry into force of the decision of the investigating judge, delivered after the consideration of such request, and its execution.

In addition, in accordance with the prescription established by Part 5 of Art. 284 of the CPC, namely that the decision of the prosecutor to close the criminal proceedings against the suspect is not an obstacle to the continuation of the pre-trial investigation into the relevant criminal offense, we offer provide in Part 9 of Art. 100 CPC in such cases should be resolved only the question for the restitution of property of the person against whom ordered the closure of criminal proceedings.

As the case law shows, certain difficulties arise in cases where material evidence containing no traces of a criminal offense, in the form of objects, large consignments of goods whose storage due to cumbersome or other reasons is impossible without unnecessary difficulty or the expense of securing special conditions of storage which are commensurate with their value, as well as material evidence in the form of goods or products that are perishable can be transferred for sale, if possible without prejudice to criminal process or the destruction if such goods or products are subject to perishable deterioration.

The most illustrative example is the decision of the investigating judge of the Mlynivsky district court of Rivne region, who refused to satisfy the request of the investigator to grant permission for the sale of physical evidence, since the criminal proceedings lack information about the request of the investigator to the owner of the timber upon his / her consent to the realization of physical evidence, or information that would indicate the absence of such consent[13]. That is, in the opinion of the investigating judge, granting the court permission to present material evidence is possible only if such permission of the property owner is refused. At the same time, the analysis of paragraphs 2-3 of Part 6 of Art. 100 of the CPC does not warrant such an unambiguous conclusion, since the wording "… with the written consent of the owner, and in the absence of the decision of the investigating judge, court…" may indicate that the realization and destruction

[13] Ukhvala Mlynivskoho raionnoho sudu Rivnenskoi oblasti vid 10 kvitnia 2017 r., sudova sprava № 566/154/17. Retrieved from: http://reyestr.court.gov.ua/Review/65866021(accessed 25.01.2020)

of certain types of material evidence are possible on the basis of or alternatively, the consent of the owner, or the decision of the investigating judge, court. Therefore, to ensure legal certainty, we propose to adjust the provisions of paragraphs 2-3 of Part 6 of Art. 100 of the CPC as follows: "… with the written consent of the owner or upon the decision of the investigating judge, court…".

In light of the problem raised, it is appropriate to pay attention to Part 8 of Art. 100 of the CPC, according to which the realization, technological processing or destruction of physical evidence in the cases provided for in this Article shall be carried out in accordance with the procedure established by the CMU. In particular, according to Sec. 2 paragraph 28 of the Procedure of storage of physical evidence, realization of objects is carried out in compliance with the requirements of the Procedure of accounting, storage, valuation of confiscated and other property that passes into state ownership, and its disposal, approved by the Cabinet of Ministers Resolution of August 25, 1998 No. 1340. In this case, the proceeds from the sale of property confiscated by a court decision shall be credited to the state budget, less the amount of commission paid to the enterprise, institution, organization charged with managing the property under the concluded agreement. However, it is obvious that the procedure for transferring funds obtained from the sale of material evidence at the stage of pre-trial investigation may not be identical to the procedure for transferring funds received from the sale of confiscated property, since at the time of the decision on the sale of material evidence, in the order provided for in paragraph 2 Part 6 Article 100 of the CPC, the person's guilt of committing a criminal offense has not been definitively and authentically established. Therefore, in our opinion, the enrollment of the funds received from the realization of material evidence to the state budget, seems not quite correct.

Instead, based on the content of the decision of the investigating judge Kovel City Court of Volyn region of 22.09.2015, the investigator was granted permission to sell 93 logs of pine timber in the procedure established by the CMU, which were recognized as material evidence in the criminal proceedings, and stated that from the sale of 93 logs of pine wood, the money is sent to the state revenue[14].

To solve this conflict, in our opinion, it is advisable to provide an algorithm of action similar to that established by Art. 182 CPC on deposit of money in the form of collateral. According to Part 1 of this Article, the pledge is to deposit funds in the currency of Ukraine into a special account, determined in the manner established by the CMU. Pursuant to Item 2 of the

[14] Ukhvala Kovelskoho raionnoho sudu Volynskoi oblasti vid 22 veresnia 2015 r., sudova sprava № 159/5016/15-k. URL: Retrieved from: http://reyestr.court.gov.ua/Review/50960608 (accessed 25.01.2020)

Procedure for depositing funds into a special account in case of application of the pledge as a precautionary measure approved by the Cabinet of Ministers Resolution No. 15 of January 11, 2012, the pledge shall be deposited in the national currency into a special account of the territorial administration of the State Judicial Administration, which performs organizational and financial support of the court. A similar approach is found in the criminal procedural legislation of some foreign states (in particular, for example, part 3 of Article 161 of the CPC of Moldova[15] establishes that when the material evidence is transferred to the tax authorities for their sale, the resulting funds are transferred to the deposit account of the respective prosecutor's office or court). In view of the above, we propose to supplement Part 8 of Art. 100 CPC in a sentence, stating it in the following wording: "The funds received from the sale of physical evidence are credited to the special deposit account of the court that made the decision on such realization."

In the light of the analysis of the shortcomings of the legal technique regarding the resolution of the issue of material evidence, let us also consider the situation when, in the judgment of the court of first instance, contrary to the imperative instructions enshrined in Part 9 of Art. 100, Part 4 of Art. 374 of the CPC, regarding the need to resolve the issue of material evidence in a court decision terminating criminal proceedings, this issue was not resolved. The above problem can be caused by several factors: 1) certain legal conflicts – in particular, in cases where the CCP provides for differentiation of criminal procedural form (for example, the so-called reduced court proceedings provided for in Article 349, part 3 of the CPC, as well as criminal proceedings on the basis of agreements), since in this case the law there is no obligation on the parties to provide material evidence to the court. At the same time, based on the content of Part 9 of Art. 100 of the CPC, the question of the fate of material evidence and documents *provided to the court* is decided by the court when adopting the court decision, which ends the criminal proceedings[16]; 2) shortcomings of law enforcement practice. In particular, the common are cases where courts do not consciously decide the fate of certain material objects, because they were not considered material evidence separate

[15] Ugolovno-processual'nyj kodeks Respubliki Moldova ot 14.03.2003 g. № 122-XV. [The Code of Criminal Procedure of the Republic of Moldova dated March 14, 2003 No. 122-XV]. Retrieved from: http://online.zakon.kz/Document/?doc_id=30397729&doc_id2=30397729#pos=30;-15&sub_id2=1020000&sel_link=1001129174 (accessed 25.01.2020)

[16] Uzahalnennia Vyshchoho spetsializovanoho sudu Ukrainy sudovoi praktyky zdiisnennia kryminalnoho provadzhennia na pidstavi uhod vid 22.01.2014 [Generalization of the High Specialized Court of Ukraine of judicial practice of criminal proceedings on the basis of agreements dated 22.01.2014]. Retrieved from: http://zib.com.ua/ua/print/92557-uzagalnennya_vssu_sudovoi_praktiki_zdiysnennya_kriminalnogo_.html (accessed 25.01.2020)

decision of the investigator or prosecutor. In addition, such a situation may also occur when the judges leave the issue unconsciously, contrary to the requirements of paragraph 1 of Part 4 of Art. 374 CPC on the content of the resolution part of the sentence. Let us analyze the directions of solving the problem de facto, de jure and de lege ferenda.

De facto. The analysis of the case law on the outlined issue gives the grounds to distinguish three main ways that are most common among judges: (1) "correction of records" with reference to Art. 379 CPC; (2) in order to resolve issues arising during the execution of sentences, in accordance with Art. 537 and Art. 539 CPC; (3) in the order of appeal, on the basis of which the courts of appeal, guided by Art. 409 CPC, change the court decisions of the first instance regarding the determination of the fate of material evidence.

De jure. It should be noted that the law does not explicitly establish an algorithm of action if the issue of material evidence was not resolved by the court at the time of adopting the court decision, which ends the criminal proceedings. Therefore, in this section, we analyze each of the above paths in terms of their relevance to address the issue.

With regard to the first of the options we have identified, it should be noted that according to Part 1 of Art. 379 The CPC has the right, at its own initiative or at the request of a participant in a criminal proceeding or other interested person, to rectify the entries made in the court decision of this court, obvious arithmetical errors, whether or not the judgment entered into force. In view of the foregoing, it seems appropriate to agree that "in resolving the issue of rectification of clerical or arithmetical errors made in a judicial decision, the court does not have the right to change the substance of the judgment, it merely eliminates inaccuracies in the established factual circumstances of the case (for example, the date of the event, numbers and dates of the document, name of the party, surnames of the person, etc.)"[17]. It is obvious that the question of the fate of material evidence cannot be regarded as a mistake by the court of first instance in the operative part of the sentence. Even in cases where the courts have motivated his decision by saying that "…sudom been a typo, but it is not true indicates that the physical evidence in the case has not. However, on the basis of the case file, the court sees a receipt for the preservation of physical evidence seized (received) by the prosecution during criminal proceedings. In view of the foregoing, the court concludes that these errors should be corrected, as they do not affect the substance of the

[17] Blazhivskyi Ye.M., Hroshevyi Yu.M., Domin Yu.M. ta in. (2012) *Kryminalnyi protsesualnyi kodeks Ukrainy. Naukovo-praktychnyi komentar: u 2 t. T. 2* [The Criminal Procedure Code of Ukraine. Scientific and practical commentary: in 2 volumes. Vol. 2]. Kharkiv: Pravo, p. 161. (in Ukrainian)

sentence and are obvious, the evidence of these mistakes is indicated by the materials of criminal proceedings"[18], in our opinion, to speak about the existence of the record and the possibility of its correction. In this way, it seems wrong and inappropriate. In view of the above, it should be recognized that such jurisprudence does not correspond to the literal content of Art. 379 of the CPC, and the design enshrined in this norm is not suitable for solving the problem we are considering.

Another possible way of resolving the issue of material evidence, which was not reflected in the final decision, is to appeal to the courts in accordance with the procedure laid down in Art. 537, 539 of the CPC, that is, through the mechanism provided by law for matters to be resolved by the court during the execution of the sentence. Analysis of the normative content of Art. 537 of the CPC, which defines the range of issues that can be resolved by the court in the execution of sentences, indicates that the said rule does not directly provide for the possibility of resolving the issue of material evidence. However, the list enshrined in Part 1 of Art. 537 of the CCP is not exhaustive, since paragraph 14 of this article allows other issues to be resolved on all sorts of doubts and contradictions that arise during the execution of the sentence. Contextually note that one of the lexical meanings of the word "doubt" is "complications, misunderstandings that arise when solving any issue, a particular problem"[19]. In view of this, the courts often state their decision that "the question of any doubt and controversy arising in the execution of a sentence to be resolved by the sentencing court includes the question of the fate of the material evidence and documents, if not resolved by a court judgment"[20]. In our view, such a path is the least objectionable, but to ensure legal certainty requires the introduction of appropriate regulatory adjustments to Art. 537 CPC that will be offered below.

The last of the existing ways of solving the problem identified by us is based on the provisions enshrined in Art. Art. 407, 409 and 412 of the CCP, which determine the order of appeal, whereby the courts of appeal change the decisions of the courts of first instance in determining the fate of the material evidence. In the context of the above, it is necessary to support S. Kovalchuk's position regarding the wrongness of this practice. In particular, the scientist quite rightly

[18] Ukhvala Kyivskoho raionnoho sudu m. Kharkova vid 9 kvitnia 2015 r., sudova sprava № 640/6229/15-k. Retrieved from: http://reyestr.court.gov.ua/Review/43556545 (accessed 25.01.2020)

[19] Slovnyk ukrainskoi movy (1978): v 11 tomakh. T. 9, [Dictionary of the Ukrainian language: in 11 volumes. Vol. 9] Retrieved from: http://sum.in.ua/s/sumniv (accessed 25.01.2020)

[20] Ukhvala Kyivskoho raionnoho sudu m. Kharkova vid 25 liutoho 2016 r., sudova sprava № 640/14342/15-k. Retrieved from: http://reyestr.court.gov.ua/Review/56107677 (accessed 25.01.2020)

states that the issue of the fate of material evidence, provided that it was not decided by the court of first instance at the time of the court decision, cannot be resolved by the court of appeal, since the rules of the cited articles of criminal procedural law do not provide such an opportunity[21]. Indeed, according to Art. 412 CPC failure to resolve the issue of material evidence does not belong to the list of material violations of the requirements of the criminal procedural law, which are the basis for changing the court decision by the court of appeal. Therefore, in our opinion, it is impossible that the court of appeal can change of a court decision of the court of first instance by supplementing it or clarifying it in order to resolve the issue of material evidence.

De lege ferenda. "In view of the law in need," we consider it appropriate to propose a number of regulatory adjustments that would allow us to avoid legal uncertainty in solving the problem we have stated: (1) to the development of the idea formulated by A.R. Tumanyants and V.V. Kolodchin[22] it seems appropriate to supplement Art. 349 and Art. 474 of the CPC with statutory provisions that would establish the duty of the prosecutor, even in cases where the CPC provides for differentiation of criminal procedural form, still provide the court with material evidence and documents to resolve the issue in the sentence; (2) in view of the widespread improper practices of judges who do not decide on the fate of material evidence not recognized by such a separate order of the investigator or prosecutor, even though the law does not provide for the obligation to admit it, we propose to further clarify the provisions of Part 9 Art. 100 CPC, pointing out the need to resolve the issue of material evidence regardless of the presence in the criminal proceedings of the decision on recognition of certain material objects; (3) in our opinion, it seems appropriate to supplement the list of issues enshrined in Part 1 of Art. 537 of the CCP, as a separate item that would relate to cases where the issue of material evidence was not resolved at the time of the court decision ending the criminal proceedings.

CONCLUSIONS

The section has highlighted some of the defects of the legal technique in the regulation of the formation of physical evidence and the resolution of the issue of them in the criminal process of Ukraine and suggested ways to overcome them. In particular, in order to ensure the control of the legality and

[21] Kovalchuk S.O. (2017) *Vchennia pro rechovi dokazy u kryminalnomu protsesi: teoretyko-pravovi ta praktychni osnovy* [The doctrine of physical evidence in criminal proceedings: theoretical, legal and practical basis]. Ivano-Frankivsk : Suprun V.P., p. 511. (in Ukrainian)

[22] Kolodchyn V.V., Tumaniants A. R. (2016) *Povnovazhennia prokurora v sudovomu provadzhenni u pershii instantsii* [Powers of the prosecutor in court proceedings at first instance]. Kharkiv, TOV "Oberih", p. 113. (in Ukrainian)

validity of the restriction of ownership of property that has been temporarily confiscated and seized, proposed that to predict in the CPC necessity of passing the investigator, prosecutor resolution on recognition of the object material evidence.

In addition, it was noted that the actions taken to investigate the information that may be contained in a digital device are inappropriate tothe legal content of such investigative (search) action as the review of the subject. In this regard, it is considered appropriate to apply in this case a procedure for temporarily accessing such information by reading and copying it, which can be done to overcome the system of logical protection and to obtain the said access using specialized knowledge.

To solve the existing problem of possible destruction or complete waste of a material object during the examination, which creates obstacles in the implementation of the principles of parties' competitiveness and freedom in presenting their evidence to the court and in bringing to court their persuasiveness and direct examination of testimony, things and documents, it seems appropriate to predict the deposition of material evidence in case of potential impossibility of their submission in court proceedings due to their possible destruction or complete expenditure during pre-trial investigation.

In order to prevent loss of material evidence in the case of unlawful closure of criminal proceedings, it seems appropriate to clarify the provisions of Part 9 of Art. 100 of the CPC, stating that if an investigator or prosecutor concludes that there are grounds for closing a criminal proceeding, they should apply to the investigating judge for special confiscation and to resolve the issue of material evidence and documents before the ruling on the closure of criminal proceedings. At the same time, the appeal of the decision of the investigator or the prosecutor to close the criminal proceedings in accordance with the procedure provided by the CPC, shall suspend the entry into force of the decision of the investigating judge, delivered after the consideration of such request, and its execution.

Other defects of the Ukrainian criminal procedural legislation concerning the formation and resolution of physical evidence were also considered, and possible directions of regulatory adjustment were considered.

SUMMARY

The article analyzes some defects of legislative regulation in the aspect of the formation of material evidence in criminal proceedings. The discrepancy between the actions taken to investigate the information that may be contained in the digital device, with the legal content of such investigative (wanted) action as a search of the thing has been established. In view of this, it is appropriate to apply in this case the order of temporary access to such information by means of getting acknowledged with it and its copying that can be carried out to overcome the

system of logical protection and obtain the specified access with the use of special knowledge. Also the author consider analyzes certain issues arising during the examination of material objects related to their possible destruction or complete consumption, as well as the study of court practice in this area. The author proposes to regulate the mechanism of expert examination of material objects in the case of a possible destruction in the examination process, and the procedure for handling of samples for comparative investigation after the examination. On the basis of the system analysis of the norms of the Ukrainian criminal procedural law, a comprehensive study is carried out on the procedure for deciding on the question of material evidences in pre-trial and judicial proceedings. Based on the normative provisions and the results of the generalization of judicial practice, conflicts and gaps in normative regulation were identified in the work and proposals were made on improving the criminal procedural legislation of Ukraine in this direction. This question is investigated under three points of view: de jure (formally, by law), de facto (in fact, as is the case in practice) and de lege ferenda (from the point of view of the law, the adoption of which is desirable).

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