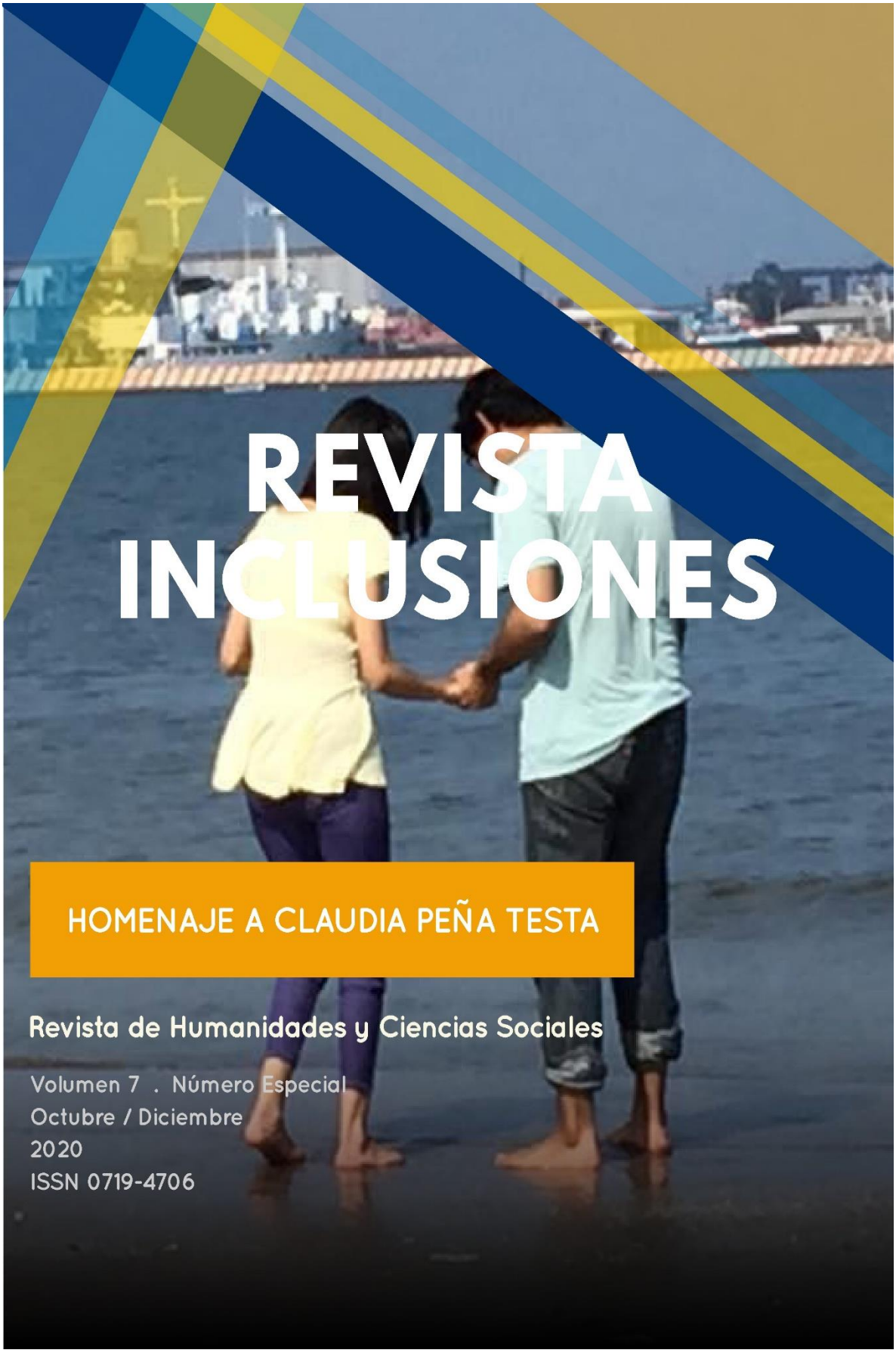

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ADMISSIBILITY OF EVIDENCE IN CRIMINAL PROCEEDINGS AND CRIMINAL LIABILITY FOR ITS VIOLATION

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Abstract

The article deals with the problems of criteria-based admissibility of evidence in criminal proceedings, which are considered through the prism of bringing a person to criminal responsibility for falsifying evidence. The paper draws several conclusions. Firstly, not every violation of the criteria for admissibility of evidence leads to criminal liability, but that committed with direct intent and associated with the falsification of evidence by subjects of criminal responsibility. Secondly, there is a difference in the subject composition between subjects of admissibility of evidence and subjects of criminal liability for falsification of evidence. Thirdly, when falsifying evidence, the subject forms the state of the proper source of evidence, the proper method of collecting evidence, and the proper procedure for conducting a procedural action, which should not be in reality. The article has a scientific value, representing a comprehensive analysis of interrelated and mutually dependent criminal procedure problems of admissibility of evidence and criminal liability for its violation.

Keywords

Proof – Admissibility of evidence – Criminal law – Crimes against justice – Falsification of evidence

Para Citar este Artículo:

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Introduction

Even though many works have been devoted to the institute of admissibility of evidence in criminal proceedings, many issues in this area remain debatable in the literature to this day[1]. This is naturally not only because key elements of the admissibility of evidence are reflected in Part 2 of Art. 50 of the Constitution, when "in administering justice it shall not be allowed to use evidence received by violating the federal law", but also because it protects the rights and legitimate interests of the person. It allows ensuring the accuracy of the evidence used when deciding on such a basic issue of a criminal case as the issue of whether or not a person is guilty of a crime, and is ultimately aimed at achieving the purpose of criminal proceedings.

Such a high significance of the admissibility of evidence in criminal proceedings allowed the legislator to establish criminal liability in Art. 303 of the Criminal Code of the Russian Federation for falsification of evidence and results of operational-search activities[2] , in which the falsification of evidence in a criminal case is referred to in Part 2 and Part 3.

As a consequence of the foregoing, falsification of evidence in a criminal proceeding in the cases provided for in Part 2 and Part 3 of Art. 303 of the Criminal Code of the Russian Federation is not only a criminally punishable act but also entails the recognition of evidence inadmissible[3].

Methods

The methods used were analysis and synthesis, induction and deduction, the ascent from the abstract to the concrete, as well as formal legal methods.

Results and Discussion

The position established by Part 2 of Art. 50 of the Constitution of the Russian Federation, that "in administering justice it shall not be allowed to use evidence received by violating the federal law" corresponds to Part 3 of Art. 7 of the Criminal Procedure Code of the Russian Federation and Art. 75 of the Code of Criminal Procedure of the Russian Federation.

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[1] S. A. Solovev, Blagopriyatstvovanie zashchite kak protsessualnyi mekhanizm obespecheniya ravenstva storon v ugolovnom sudoproizvodstve Rossii: Diss. … kand. yurid. nauk (Moscow, 2019) y S. A. Sushchenko, Nedopustimost dokazatelstv v ugolovnom protsesse Rossiiskoi Federatsii i zarubezhnykh gosudarstv anglo-amerikanskoi i kontinentalnoi pravovykh semei: sravnitelno-pravovoe issledovanie: Diss. … kand. yurid. nauk (Moscow, 2020).

[2] V. L. Kudryavtsev, Falsifikatsiya dokazatelstv i operativno-razysknoi deyatelnosti, in: Prestupleniya, sovershaemymi litsami, osushchestvlyayushchimi pravosudie, predvaritelnoe sledstvie ili doznanie, a takzhe storonami po grazhdanskomu delu. Entsiklopediya ugolovnogo prava Vol: 28. Prestupleniya protiv pravosudiya (St. Petersburg: MIEP pri MPA EvrAZES, 2017) y G. G. Radionov, Ugolovnaya otvetstvennost za falsifikatsiyu dokazatelstv i rezultatov i operativno-razysknoi deyatelnosti: Diss. … kand. yurid. nauk (Moscow, 2015).

[3] O. Ya. Baev, Zashchita dokazatelstv v ugolovnom sudoproizvodstve: monografiya (Moscow: Prospect, 2016) y M. A. Fomin, Praktika vyyavleniya falsifikatsii dokazatelstv po ugolovnym delam (Moscow: Yurlitinform, 2019).

Explaining Part 2 of Art. 50 of the Constitution of the Russian Federation and Art. 75 of the Code of Criminal Procedure of the Russian Federation, the Plenum of the Supreme Court of the Russian Federation in paragraph 16 of its resolution of October 31, 1995 No. 8 "On some issues of application the Constitution of the Russian Federation by courts when administrating justice: resolution of the Plenum of the Supreme Court of the Russian Federation" (hereinafter the resolution of the Plenum of the RF Armed Forces of October 31, 1995 No. 8), points out that "Evidence must be recognized as obtained in violation of the law, if, during their collection and consolidation, human and civil rights guaranteed by the Constitution of the Russian Federation or the procedure for their collection and consolidation established by the criminal procedure legislation have been violated and also if the collection and consolidation of evidence were carried out by an inappropriate person or body or as a result of actions not provided for by procedural norms".

Despite the above-mentioned provisions of the law and the explanations of the Plenum, the question remains in the literature: do all violations of the criminal procedure law entail the inadmissibility of evidence?

A different number of criteria for the admissibility of evidence is distinguished in the science of criminal procedure[4]. Some name three criteria[5], others – four[6] or five[7], but they all have the same criteria, including the proper subject of evidence, source of evidence, and method of collecting evidence.

These three criteria correspond to the above explanation of clause 16 of the Resolution of the Plenum of the RF Armed Forces of October 31, 1995 No. 8 on cases in which evidence should be considered inadmissible.

It is believed in the literature that the basis for the admissibility of evidence is a procedural form that serves two closely related, but not completely merging tasks: a) to protect the rights and legitimate interests of citizens in criminal proceedings; b) to ensure the reliability of evidence[8].

Violation of such criteria for the admissibility of evidence as the proper subject of proof, source of evidence, and method of collecting evidence always leads to the fact that

[4] V. V. Pushkarev; A. Gaevoy; A. V. Skachko; A. Kolchurin y D. N. Lozovsky, “Criminal Prosecution and Qualification of Cybercrime in the Digital Economy”, Journal of Advanced Research in Dynamical and Control Systems Vol: 11 num 8 (2019): 2563-2566 y V. V. Pushkarev; P. V. Fadeev; S. A. Khmelev; N. Van Tien; E. A. Trishkina y A. A. Tsviliy-Buklanova, “Crimes in the Military-Industrial Complex (MIC)”, International Journal of Recent Technology and Engineering Vol: 8 num 3 (2019): 7950 7952.

[5] S. A. Sushchenko, Nedopustimost dokazatelstv v ugolovnom protsesse… 171.

[6] N. M. Kipnis, Dopustimost dokazatelstv v ugolovnom su¬doproizvodstve (Moscow: Yurist, 1995); V. L. Kudryavtsev, Realizatsiya konstitutsionno-pravovogo instituta kvalifitsirovannoi yuridicheskoi pomoshchi v deyatelnosti advokata (zashchitnika) v ugolovnom sudoproizvodstve (Moscow: Yurlitinform, 2008) y G. G. Radionov, Ugolovnaya otvetstvennost za falsifikatsiyu dokazatelstv… 53-54.

[7] V. Z. Lukashevich, Ugolovnyi protsess Rossii: Obshchaya chast: Ucheb.dlya studentrv yuridicheskikh vuzov i fakultetov (Saint Petersburg: Publishing house of St. Petersburg State University, 2004), 196.

[8] N. M. Kipnis, Dopustimost dokazatelstv v ugolovnom su¬doproizvodstve (Moscow: Yurist, 1995) y G. M. Reznik, Vnutrennee ubezhdenie pri otsenke dokazatelstv (Moscow: Yuridicheskaya Literatura, 1977).

both the rights and legitimate interests of citizens in the criminal process are violated and the reliability of the evidence is not ensured. Accordingly, this should refer to the inevitability of doubts in the reliability of the evidence obtained in violation of any of the three criteria, that is, the irrefutable presumption of inadmissibility of evidence.

Such a criterion for the admissibility of evidence as to the proper procedure for conducting a procedural action also follows from paragraph 16 of the Resolution of the Plenum of the RF Armed Forces of October 31, 1995 No 8. This criterion is drawn to the attention of representatives of the second point of view, writing about the four criteria of admissibility[9]. In this case, it all depends on the nature of the violation and the possibility of carrying out investigative (judicial) actions aimed at obtaining factual data and eliminating the arisen doubt about the reliability. For example, if there is no signature of one of the attesting witnesses in the on-site inspection report, then such a violation can be eliminated by interrogating him/her in court and if it is established that he/she simply forgot to sign the protocol. In cases where it is impossible to interrogate an attesting witness (for example, he/she died) or during interrogation it is established that he/she did not participate in the investigative action, then such a violation always entails an irreparable doubt about the reliability of the evidence and, therefore, the evidence should be recognized as inadmissible.

Thus, the criteria for the admissibility of evidence in criminal proceedings should include: the proper subject of proof; the proper source of evidence; the proper method of collecting evidence; the proper procedure for conducting a procedural action.

In case of violation of which criteria of admissibility of evidence, can a person be prosecuted for falsification of evidence?

A comparative analysis of the criteria for the admissibility of evidence in criminal proceedings and the main and qualified elements of falsification of evidence in a criminal case allows coming to the following conclusions.

Firstly, not every violation of the criteria for the admissibility of evidence leads to criminal liability, but only that committed with direct intent and associated with the falsification of evidence subject to criminal liability and, in some cases, criminal liability under Part 2 or Part 3 of Art. 303 of the Criminal Code of the Russian Federation does not occur.

Secondly, there is a difference in the subject composition between the subjects of admissibility of evidence and the subjects of criminal liability for falsification of evidence. If the proper subject of admissibility of evidence can only be an official authorized to collect evidence in a criminal case, then the subject of criminal liability for falsification of evidence can be not only an official authorized to collect evidence (for example, an investigator, inquirer), but also such a participant in criminal proceedings as a defender.

In this regard, it is appropriate to bring the point of view about the existence of "asymmetry of the rules of admissibility of evidence" in the criminal process of Russia.

[9] V. L. Kudryavtsev, Realizatsiya konstitutsionno-pravovogo instituta kvalifitsirovannoi yuridicheskoi pomoshchi v deyatelnosti advokata (zashchitnika) v ugolovnom sudoproizvodstve (Moscow: Yurlitinform, 2008) y V. L. Kudryavtsev, “Nekotorye teoretiko-metodologicheskie problemy obektivnoi storony falsifikatsii dokazatelstv i rezultatov operativno-rozysknoi deyatelnosti (st. 303 UK RF)”, Evraziiskaya advokatura Vol: 4 num 35 (2018): 59-64.

According to it, the rules on the inadmissibility of evidence refer only to incriminating evidence, while exculpatory evidence obtained in violation of the law can be used by the defense[10].

This rule is proposed to be legalized by including the corresponding norm in the criminal procedure law[11].

In the literature, not everyone shares the position of the existence of "asymmetry of the rules of admissibility of evidence", and there are those who disagree with this rule due to contradiction to the criminal procedure law.[12]

Part 2 of Art. 50 of the Constitution of the Russian Federation, Part 3 of Art. 7 of the Criminal Procedure Code of the Russian Federation, and Part 1 of Art. 75 of the Code of Criminal Procedure of the Russian Federation refer to recognizing as inadmissible evidence, both incriminating and exculpatory, obtained in violation of the Code of Criminal Procedure of the Russian Federation and any advantages to someone, including the defense or defender concerning exculpatory evidence obtained in violation of the law.

Moreover, as follows from the system analysis of Part 3 of Art. 7 of the Criminal Procedure Code of the Russian Federation and Part 1 and Part 3 of Art. 86 of the Code of Criminal Procedure of the Russian Federation, the defender is not endowed with the authority to collect evidence. This leads, on the one hand, to the fact that he/she is not listed among the subjects whose activities entail the recognition of evidence obtained in violation of the law inadmissible (Part 3 of Art. 7 of the Code of Criminal Procedure of the Russian Federation). On the other hand, under collecting evidence, the law understands his/her activity aimed at collecting factual material with the property of relevance, which he/she then presents to the person conducting the proceedings to obtain the property of admissibility.

If the evidence is falsified by the defense lawyer, he/she is subject to criminal liability (Part 2 and Part 3 of Art. 303 of the Criminal Code of the Russian Federation).

Thirdly, when falsifying evidence, the subject forms the state of the proper source of evidence, the proper method of collecting evidence, and the proper procedure for conducting a procedural action, which does not exist and should not exist in reality and he/she knows about it.

Evidence can be falsified based on the etymology of the word "falsification", as well as unity and differentiation of the content and form of the proof by a) making untrue changes in the content proof at the constant shape; b) substitution of one proof for another, similar to

[10] A. V. Pobedkin y V. A. Gavrikov, “O nekotorykh problemakh opredeleniya dopustimosti dokazatelstv v ugolovnom protsesse” Gosudarstvo i parvo num 7 (1999): 53-56; G. M. Reznik, “O dopustimosti dokazatelstv, taktike zashchity i obvineniya”, Rossiiskaya yustitsiya num 4 (1996) y V. M. Savitskii, Poslednie izmeneniya v UPK: prodolzhenie demokratizatsii sudoproizvodstva (vstupitelnaya statya k UPK) (Moscow: Antares, 1994).

[11] S.A. Solovev, Blagopriyatstvovanie zashchite kak protsessualnyi mekhanizm obespecheniya ravenstva storon v ugolovnom sudoproizvodstve Rossii: Diss. … kand. yurid. nauk (Moscow, 2019), 16

[12] V. L. Kudryavtsev, “Nekotorye voprosy dopustimosti dokazatelstv v kontekste naznacheniya ugolovnogo sudoproizvodstva v Rossiiskoi Federatsii”, Rossiiskii sledovatel num 24 (2012) y L.V. Golovko, Kurs ugolovnogo protsessa (Moscow: Statut, 2016).

it, but with a changed content that does not correspond to reality; c) creation of new evidence that did not previously exist with content that does not correspond to reality.

Thus, falsification of evidence cannot be carried out by destroying or hiding evidence, however, the admissibility of evidence in this way is impossible.

Conclusion

Based on all the above, it can be concluded that a comprehensive cross-sectoral study can identify the general and the particular between the admissibility of evidence as an institution of criminal procedure law and falsification of evidence as a crime, as well as establish a relationship and interdependence between them, thereby improving the quality of scientific research.

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