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Material Evidence and Samples for Comparative Study: Criminalistic and Procedural Problems of Seizure and Storage

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Abstract: The study deals with the questions concerning procedural guarantees of ensuring of the rights of individuals and companies at seizure of material evidence, money and values, samples for comparative survey. One studies the separate cases connected with seizure and storage of certain real evidences and also samples for comparative analyses: gene-biological materials, cash resources and others. One may indicate that there is an absence of clear legal regulation of procedural mechanism of seizure, arrest, storage of material evidences and samples for comparative analysis in spite of the amendments introduced to the legislation for specifics of procedures of destruction, realization and return of the seized articles and documents to legal owners. Under democratization of society of our country the seizure of separate objects during the conduct of investigative actions and, in particular, of seizure, requires reconsideration and the very procedure of investigative actions development and improvement. Not to a lesser extent it relates to the storage of material evidences and samples for comparative study. It seems possible to solve many considered above problems only by co-operative efforts of procedural scientists and criminalists and also practitioners.

Key words: Material evidences, samples for comparative study, seizure, storage, compulsory seizure, tactical techniques

INTRODUCTION

For the last years of criminal procedure legislation enforcement there arose certain problems related to seizure and storage of some material evidences and also the samples for comparative study:

- Gene-biological material (first of all, it goes about the problem of procedural form of obtaining of biological material and work with genomic information) (Semenov, 2009)
- Money resources (Ruzanova, 2011)
- Large-size materials (Kostylev, 2008)

Legal consequences of deficiencies in legal regulation of material evidences may lead to investigative mistakes, discharge and change of final court orders and other negative effects related to property, violation of rights of legal owner and holders of seized articles and documents. Especially, it has become actual for the last several years when a number of decisions of the Constitutional court of the RF was adopted: legal views on a right of innocent purchaser (The Decree of the Constitutional Court of the RF of 21.04.2003 No. 6), on effective control to seizure of property (The Decree of the Constitutional Court of the RF of 16.07.2008 No. 9), on third persons protection to seizure of property (The Decree of the Constitutional Court of the RF of 21.10.2014 No. 25).

First of all, the process of seizure of material evidences and other objects, their further fate and liability for pretrial precautions must be clearly formulated by law of criminal procedure and not only by numerous departmental normative legal acts which do not always conform to current legislation. The introduced to legislation amendments concerning the specifics of the procedures of destruction, realization and return to the legal owners of the seized articles and documents, the valuables cannot have substantial influence on the solution of the existing problems in this sphere (Anonymous, 2013a).

MATERIALS AND METHODS

On the whole, one may talk about that the subject of research in jurisprudence becomes an efficient legal regulation of the procedural mechanism of seizure, sequestration, storage of material evidences and samples for comparative study. Efficiency of the solution of these problems is associated to a large extent with improvement of research criminalistic recommendations in the indicated directions.

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The CCP of the RF provides for a number of procedural guarantees of ensuring of the right of individuals and legal entities to seizure of material evidences and other documents, money and valuables (Chapter 9 Chapter 2 Article 29, Provision 5-1 Part 2 Article 29, Provision 5 Part 2 Article 29 CCP of the RF, h. 5 Article 165 of the CCP of the RF). From the viewpoint of functional thing the most important is judicial review that is indispensable at seizing articles and documents containing state secret or other secret protected by Federal Law, information about citizens' deposits and accounts in banks and other lending agencies, in institutions of communication; at seizing in the house and pawnshop.

However, what to do in cases when it is required to seize human biological material (of hair, blood, sperm, saliva, particles of tissues and organs, bones, sweat, scent trail and so on), certain personal articles that are on a dead body or in a dead body and also in the body of a certain person if he refuses to have something seized? As it is a question of protection of citizens' most important constitutional rights (Articles 2, 21, 22, 23 of the RF Constitution).

The study of information sources has shown that in practice different life and health threatening substances from the stomach and other organs of a living man, the suspected person are withdrawn (Torbin, 2003). So, for the last years the cases of transportation of jewels and particularly narcotic drugs in the stomach of a man became more frequent. The use of the Roentgen rays makes it possible to detect the hiding place with Foreign "enclosures" by means of having the man's stomach X-rayed. It is supposed that the finding of such material evidences to be possible in process of examination (Article 179 of the CCP of the RF). However, this requires more detailed study of both procedural and tactical grounds of such actions. It should be remembered that the use of the X-ray equipment can affect adversely the human organism. Therefore, one should have health certificate requested preliminarily from a corresponding medical institution know whether the person to be X-ray examined. It is reasonable a physician to use the X-ray equipment.

For comparative study the samples can be seized as human biological samples. Depending on the source and procedural method of acquisition, the samples for expert investigation are divided into two principal groups:

- The subject samples, the objects for comparative study obtained from living persons concrete participants of the process, that is, the suspected, the accused, the injured party or the witness
- The object samples, the sources of which are the material evidences, documents or objects that have not a definite procedural status (corpses, a site of occurrence, animals)

In the first case, the samples are withdrawn in concordance with Article 202 of the CCP, that is, in the course of independent investigative action called "Obtaining samples for comparative analysis" in the second in the course of the other procedural actions (examination, search, judicial expert investigation and others). Provided by the CCP of the RF a special method of obtaining sample from participants of the process is conditioned by the necessity of ensuring of their legal interests, rights and liberties. Besides, on receipt of samples from the living men the investigator shall pass a separate resolution. At that, obtaining samples of the injured person and witness is allowed on compulsory basis only if it is needed to check whether the indicated persons have left leave traces at the scene of an accident or the material evidences (Article 202 of the CCP of the RF).

Another restriction was placed by the Federal Law on May 31 2001 No. 73-FZ "On state expert activity" in Article 35 upon receipt of the samples for comparative analysis from living persons in whose relation forensic inquiry is examined. Collection of samples from living persons is carried by a doctor or other specialist at the medical establishment in the presence of two medical workers of the medical institution. Compulsory obtaining samples of the persons aimed at forensic examination on a voluntary basis is not permitted. Consent of a person to his providing comparative samples should be contained in the order of the investigator.

Traces of blood and other biological discharges that is the objects of biological origin become the physical evidences in a criminal case after them to have been discovered, fixed in appropriate documents, correctly seized, remitted to be examined and properly analyzed. It is carried out by the investigator per se or under his supervision. The more complicated are the cases on seizing human biological material, when it is removed from the body or the corpse or the body of a living person. Certainly, in this case in process of investigation at seizing the categories of effectiveness and lawfulness come into conflict. As, if the investigator needs to obtain a permission from controlling or supervising unit for seizing then such essential condition of prompt ascertainment of all circumstances of the criminal case as unexpectedness.

It is supposed that both the suspects and the investigators themselves will suffer from an unsolved

question in this field. Besides, the lawyers often point to human rights violation of execution of seizure not groundlessly: performing seizure of linen from the human body (James, 2009), sample seizure genotyposcopic expertise from bureaus of forensic medical examination (Anonymous, 2010). Does a man agree to his blood being a subject of new type of expert examination?

If the compulsory seizure of the articles and documents is provided by the law (Part 5 Article 183 of the CCP of the RF), then the seizure of human biological material is questioned. One should not forget about existence of juridical position of the Decision of the Constitutional Court of April 25, 2001 No. 6 on the person can refuse not only to evidence but to provide the organs with the preliminary investigation and the investigators with other evidences testifying against himself (Shevyakov, 2001).

RESULTS AND DISCUSSION

How do the practitioners answer the model questions? The question: "Is it necessary to have the decision of the public prosecutor of the execution of seizure of human material provided in the law"? has been given the following answers to. The investigators "No" 91% of the investigators, the prosecutors "yes" 62%. The answers of the judges: 50% think that the prosecutor must give his consent, 50% the judges. The model question: "Do you think, it is necessary to introduce to the law the notion "personal seizure"? "no" has been answered by 93% of the investigators, "yes" has been answered by 43% of the judges" (Muratov, 2013b).

It is thought that the procedural guarantees by way of procurator's supervision or judicial review only enhance the investigators' responsibility not only for seizure execution of human biological material but also for the quality of its execution. On the other hand, indubitably, it will promote more active use of tactics of seizing the human biological material. In particular, the investigator can use the methods of forensic forecasting, as he must predict various possible situations since the present-day seizure even with abidance by all the rules of procedure may have unforeseeable consequences. So, the head of the Federal Penitentiary Service for Khabarovsk District shot himself on August 2, 2011 during seizing by the investigators of the documents in his office (Anonymous, 2011). It is not difficult to model a typical situation when the owner of property or the other person refuses to point the location of sought-for object which is subjected to be seized. There is no doubt that such situations are possible as a result of compulsory measures to seizing human biological material as well.

The problem of prevention of transnational crime convinces of necessity to formulate the notion "execution of seizure as legal aiding" (Muratov, 2013a). Here, it is important to determine whether the procedure of seizure on Russian legislation would agree with the legislation of a Foreign State.

The problems of storage of material evidences are not less actual either. The noteworthy is the following example. The first and serious signal of storage procedure of the seized organs and (or) tissues from the corpse resounded in 2013 in Kazan, when IC for RT filed criminal charges in connection with the staff of SAHE "The Republican bureau of forensic medical examination of Ministry of Health of the Republic of Tatarstan". They were suspected in the crime stipulated by Article 286 of CC of the RF "Abuse of office". The heel bone fragment and knee-caps were cut, the brain tunic was taken from the corpses to be examined. Despite the fact that the actions of medical workers did not run contradict to Article 8 of the FL "On transplantation of organs and (or) human tissue", the community was thunderstruck by the circumstance that the relatives of the dead persons had not been notified about the removal of the parts of their bodies. At present time, the criminal proceeding has been ceased in connection with actual repentance of the single case figurant but this case stirred up the juridical community as well (Minnegulov, 2013).

Now a days, along with legality of seizure of the human biological materials from the corpses in process of investigation there arise the problems of the material evidence storing. Owing to the example to be given above the investigators executed the seizure of the biological material such as the organs and tissue taken by the workers of medical institutions before from the corpses, the medical workers, in their turn, showed concern about safekeeping of the seized by the investigators human biological material. Where will they have been kept to the end of the investigation or who will be responsible for in case of spoiling or destruction of unique and valuable biomaterials (the cost of some of them is assessed at 10 thousand dollars)?

One more practical example is noteworthy. According to the materials of the criminal case on developments of October 13, 2005 in Nalchik, Murat Akhmedovich Kardanov, born on May 14, 1975, was killed by the militiamen during the attack of the fighters on the building of MHA of KBR. Genetic examination, conducted on February 8, 2006, revealed the coincidence of genotypes of the killed and the mother of the living L.Kh. Kardanova on May 15, 2006 the leader of the investigation group of the Chief Committee of Prosecutor General's Office of the RF ruled on the question of burial

of the bodies of the killed fighters. On June 22, 2006, the bodies of the fighters, including M.A. Kardanov's were cremated. But in 2009 Kardanov was detained by the workers of militia in his Native Village and in relation to him it was revived the criminal proceeding on the criminal case under investigation.

Certainly, one can understand the wish of the criminals to evade responsibility but the serious errors were made by law-enforcement agencies either. In particular, the illegality of the adopted decision on cremating bodies was recognized by the Constitutional Court of the Russian Federation: before the entry of the decision of the court into force the bodies (remains) of the killed persons cannot be buried; burial must be preceded by keeping all requirements concerning identification of a person of the killed (in case of impossibility provision of identification information), time and place of death, cause of death (Guziev and Karmovaya, 2007).

Violation of the constitutional rights of the residents leads to the other violations. The body was cremated, the biological human materials being for comparative analysis were destroyed. Who was cremated under surname Kardanov? Therefore, investigation of the truth in this case is not an easy task.

At the same time, more effective use of criminal records would contribute to the solution of such problems. So, in FC of the MHA of Russia, it is kept record of data of DNA (DNA-profiles) of biological objects that is meant for identifying persons who left biological tracks on the scene of an accident, facts of belongings of biological tracks seized on several crimes to the same unknown person and also establishing of an identity of unidentified corpses. As it is noted in special literature, this crime recording is according to Article 105, 111 and Chapter 18 CC of the RF and also recording of corpses the persons of which are not identified (Kulikov, 2011). In this case, there no tracks of cremated corpse remained. In all cases of cremating the bodies of the persons involved in committing serious crimes, it is necessary to place the material of postmortem examination of the corpse for obtaining DNA-profile for further registration.

Special importance in the CCP of the RF is attached to the storage of money and valuables as material evidences on criminal case. The required and correct storage of the material evidences (Article 82 of the CCP of the RF) is the earnest of effectiveness of correct assessment of evidences. First of all, the earnest of successful investigation is the observance of the juridical culture and the culture of business correspondence. The money and valuables storage as material evidences is regulated by certain procedural juridical rules (Article 115 CCP of the RF, Clause 3.1 Part 2 Article 82, Part 1 Article 82 of the CCP of the RF (clause a Part 4 Part 2 Article 82 of the CCP of the RF, clause "a" Part 4 Part 2 Article 82 of the CCP of the RF). The following examples from practice are worth noting.

The chief specialist of the department of work planning, financing, accounting and reporting of Investigative Department of Investigative Committee of the RF for RT M. was responsible for storing material evidences, valuables and other property on criminal cases given to her for storage. In the years 2009-2010, she repeatedly opened fabric bags and stole the entrusted money means being the material evidences on various crime cases and, thus, she had stolen >580 thousand roubles.

Acting as the chief of operative part V is returned guilty according to Part 1Article 285 of the CC of the RF. It is seen from facts of the case that at the request of the persons concerned, V. refused to suppress the criminal intentions and actions on stealing of material evidences in the form of 5 containers with nonferrous metal of 105 tonnes and secreted this serious crime for fee.

It is important to specify the conditions of storing the material evidences in the form of the articles mentioned in Clause 1 Part 2 Article 82 of the CCP of the RF. There exist a special subordinate regulatory act establishing this procedure (Anonymous, 2013b). The interesting is the example from the resolutions of the Constitutional Court of the RF (Golovkin, 2005).

The officials of the investigative department for the West department of home affaires on the transport of the MHA of the Russian Federation on the basis of articles 81 and 82 recognized as material evidences, attached to the criminal case and then as seized from illegal circulation, sent for technological processing to JSC "Tsentrspirt-prompererabotka" 62 containers of alcohol production (>1.16 mL), arrived to branch office OOO "Union" from Belgium and Germany. On citizen's complaint Golovkin (2005) the Constitutional Court of the RF noted that Clause 3 Part 2 Article 82 of the CCP of the RF does not provide for possibility of transfer for technological processing or destruction of the seized production indicated or filed as material evidence without judicial decision.

Thus, the existing legal regulation of seizure and storage of money and valuables during execution on Criminal Law requires more efficient legal scheme. For example, where to store money and valuables and who is the holder of bank interests on them? Should the procedure of seizure, arrest, storage and realization of cash means be uniform and who I responsible for it? Hence, it is a matter of improvement of regulating the fate of material evidences.

CONCLUSION

Everything mentioned above indicates that in conditions of democratization of our society, the seizure of separate objects during the conduct of investigative actions and seizure, in particular, requires reconsideration and the procedure itself of investigative actions the development and improvement. It also concerns the storage of material evidences and samples for comparative study not to a lesser extent. Therefore, the significance and role of preparation, conduction and consolidation of the results of seizure in modern conditions is considerably enhances. It is believed that the criminalists must make the work more active on development and improvement of:

- Tactics on execution of seizure on basis of rendering international juridical aid (in short, international seizure)
- Tactics on removal of the articles from the body out of the human body (personal seizure)
- Tactics on seizure of biological human objects (seizure of biological objects)
- Tactics on seizure of constitutive, financial and economic documents which belong to a juridical person
- Tactics to combination of processes of investigating actions (search-seizure, obtaining samples for comparative analysis-seizure and so on)

This study touches upon the problems of regulating of procedural mechanism of seizure, arrest, storage only of certain material evidences and samples for comparative study. Efficiency of solution of these problems is connected in many ways with improvement of forensic developments in the indicated directions. The jurists of procedural law and criminalists are "doomed" to joint work: many procedural rules have been created in the depth of forensic science called before as tactics and the forensic science has developed new tactics, on the basis of the needs of criminal procedure practice. It is believed that certain considered problems here will arouse the interest of the representatives of juridical science for more thorough study.

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