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STADARDS OF PROOF IN CRIMINAL PROCEDURE (COMPARATIVE ANALYSIS)

Abstract. *In criminal process the main task of achieving result is forming of a verdict of guilty or acquittal on the basis of court decision. In this, every decision is grounded on independent evaluation of given evidences. Exactly these form the actuality of research – search for methodological and forming methods of evaluation of evidences. The author points out that evidences have different origin and application. That is why there is necessity that use of evidence in the framework of a judicial process has unified methodology. The author of the article provides such methodology on the basis of development of proof procedure. It has been determined that application of standards allows to use within criminal process differentiated sources thereby defining the boundaries of interaction between the subjects of the criminal process. The author of the article has found principles that form open standards of proof, that is, application of which is possible for all interested parties and which can be verified by controlling and supervisory bodies. The author in article provides not only the basis for development of methodological criteria, but also defines its practical application in all possible interpretations. Practical significance of research is defined by goals to increase transparency of criminal process and the possibilities of engaging relevant experts in the evaluation of evidence and general process of proof.*

Key words: *process of proof, standards, criminal proceeding, objectivity, hearing.*

Introduction

After renovation of criminal procedure legislation, law enforcement practice remained without strong scientific support in the field of evidence in criminal procedure [1]. The reason is certain attempts to stay in the paradigm of previ-

ous formally dogmatic doctrines including procedure proof [2]. The normativist way of thinking of a certain number of proceduralists is conditioned by the absolutist outlook of domestic jurisprudence, whose philosophical basis is dialectical materialism. New cognitive ap-

proaches to philosophical problems of evidence are perceived negatively that does not allow domestic scientists to refuse a number of concepts of inquisitorial-investigative ideology of pre-trial proceedings, which is inherent in the idea that study of evidence in court is a continuation of pre-trial investigation [3]. Accordingly, there is no significant procedural difference between trial and pre-trial evidence. That is why validity of protocols of investigation is presumed and is almost not questioned in trial [4].

However, according to the renewed national criminal procedure law a contradiction between a written secret investigative legal form of establishing evidence and a new legal ideology, which is based on priority of rights and freedoms of human embodied in the system of procedural means (presumptions), objectively grows. The investigator turned into a party of charge. Since a defence is limited in possibilities for gathering evidence and the main way to gather is investigation, which is carried out by a party of charge, in trial there are doubts about objectivity and impartiality of an investigator (presumption of the accusatory matter) [5]. According to judicial procedure a defence cannot and must not recognise as reliable information, which is collected by opponents of an accused. In addition, while maintaining the existing model of proof, the result of which is fixed in the written documents, in evaluating the evidence, the emphasis on the formal element (evaluation of details of procedural documents) will be

strengthened. Completion of parties in court will turn in discussion about admissibility of evidence and lower priority will be given to their affiliation, validity and sufficiency.

Materials and methods

The basis of the study is the method of comparative law. It applies for purposes of comparison of certain provisions of criminal procedural legislation. In particular, the basis to apply standards of proof is being disclosed. The structure of a legislative act for the purpose of integrating the methodological framework into the proof process is being determined.

Historical method defines the sources of appearance and application of evidence in general structure of criminal process. This method is used to correlate the application of proof standards to the evidence itself, which, in their turn, have been obtained applying certain standards of obtaining.

Method of modelling a legal decision is used not only as recommendation method, which allow expanding application of related complex standards of proof in the process of forming a court decision, but also let implement accompanying proof processes to correlate them with leading methods and techniques of proof procedure.

Method of analysis revealed that in countries if continental law the traditional approach is approach, according to which finding truth the purpose of court. Thus, the saying of K. I. Malyshchuk that truth is equally necessary for the trial as justice has truly become catching. Though, in practice finding

truth is not that simple, it is exactly truth has being keep stated as a purpose of trial. In fairness, it is worth noting that recently truth is perceived as pious wish without reference to specific means of its search and without answers to question what kind of truth is established in the process.

Standards of proof, on the contrary, sometimes are considered far from truth. In many ways, this perception is associated with the name of one of them – “balance of probabilities”. Probability is far from truth. Moreover, even criminal procedure standard “out of reasonable doubts” in the classical saying of Lord Denning is defined through a degree of probability. I. V. Reshetnikova also points out that standards of proof do not follow the goal to find truth. However, actually everything is different. Firstly, even Soviet doctrine allowed establishing knowledge based not on truth, but on probability. Thus, S. V. Kurylev notes that in the field of court proceeding jurisdiction of probability is wider. As an example he cites cases of fact establishment basing on presumptions or in the situation when there is no sufficient evidences of presence or absence of fact, which court is obliged to establish. A. T. Bonner also writes about probability. Secondly, standard of balance of probabilities is not boiled down only to the fact that position of one side is more probable than position of other. The probability of proving even should be possible and based on common sense.

Results and discussion

Reconsideration of views on the role of judicial bodies in system of managing

public processes is conditioned by division of state power into legislative, executive and judicial [6]. Reorganisation of state power necessitated a scientific understanding of the concept of judicial power, functions and forms of its implementation and naturally has led to recognition of judicial power as a main power providing rights and freedoms of human and citizen. Judicial protection of interests slowly, but consistently comes to the fore in the system of state guarantees of human rights and freedoms. In connection with this, reconsideration of the court role in criminal process in unavoidable: court becomes independent subject of special powers able to objectively and fairly hear and resolve a criminal case that is actuality of this research. The author demonstrates that new forming legal reality requires abandonment of dogmatic notions about main criminal procedure institutions hindering their effective implementation [7]. Research of many problems of criminal court proceeding appearing under new social and legal terms from the perspective of modern scientific views on judicial power and value of human personality, is one of the actual tasks of modern science. The most important among such problems are issues of organisation of proof process. It is noted that participants of proof process implement rights and duties provided by criminal procedure law; criminal procedure guarantees completely cover them. In proof process use of procedure forcing is also unavoidable. In connection with mentioned, evidence law also include norms by structure located in other sections of the Code of

Criminal Procedure, but regulating the process of proving.

New paradigm of knowledge, which is inherent to competitive procedure systems, is fixed in the new CPC and requires changes in technology of proof and establishing truth in criminal procedure [2]. Results of court criminal procedure demonstrate that judges determining affiliation, validity and sufficiency of proof information use provisions of modern doctrines of proof. That is why it can be stated that domestic procedure science has fallen behind in the development of such concepts as cross-questioning technique, art of formulation and articulation of questions, admissibility of leading questions, lingual-psychological power of court evidence, proof of guilty beyond reasonable, interpretation of all doubts concerning proof of guilt of an individual in his/her favour, etc. [6].

Speaking of proof standards two are usually mentioned: valid in civil process balance of probabilities or, as it is called in the USA “preponderance of the evidence”, and standard beyond reasonable doubt, which is valid in criminal court procedure. However, actually there are three standards of proof [8]. Yet only American lawyers accept it. In practice there may be other standards of proof (for example, comfortable satisfaction). However, all of them are no more than results of combination of three mentioned above.

The third standard of proof is standard of clear and convincing evidence. In literature there is position that it has not worked out in jurisprudence of Eng-

land. Instead of this, English courts speak about a higher degree of probability. Initially, American judges used different words to indicate requirements to provide higher degree of proving: “clear, sufficient and convincing evidence”, “clear, overwhelming and convincing evidence”, “explicit and obvious evidence”, etc. The saying “clear and convincing evidence” also has worked out.

In the current instruction to the jury in civil cases of the California, it is noted that clear and convincing evidence are required in cases where the most important individual rights and interests such as termination of parental rights, involuntary hospitalisation, deportation, are at stake. It also notes that the mere weight of the imposition of a private law sanction does not entail the application of a more stringent standard of proof. Such approach may be noticed also in practice of the Supreme Court of the USA.

Mentioned in instruction categories is not an accidental set of discussions. Necessity to prove basing on clear and convincing evidence in cases of such type is established by the Supreme Court of the USA. The necessity of a higher proof standard in American courts is explained by constitutional requirement of adequate legal protection. As it may be understood, such standard is aimed at alignment of procedural inequality and protection of personal interests when they confront public interest.

In this, it should be remembered that standard of clear and convincing

evidence (as well as other standards) may be directly mentioned in law or follow from it. For example, exactly this standard of proof, in the opinion of the Supreme Court of the USA, is proper in cases of invalidating patents. Most judges of the SC of the USA emphasised that application of the standard of clear and convincing proofs followed out of law.

Nevertheless, application of stricter proof standard may be based on other reasons too. For example, standard of clear and convincing evidence is applied in imposing punitive damages. The fact is that such damages are considered as “punishment”, i.e. aimed at achieving the goals that are inherent in criminal law. Although in such matters only monetary amounts are at stake, their value is quite substantial.

We also note that, despite the fact that the phrase “beyond reasonable doubt” has become familiar, it is not always used in modern literature and practice.

In foreign literature it is admitted that the phrase “beyond reasonable doubt” is fraught with confusion, especially, if try to explain it through the difference between terms “sure” and “certainty”.

In particular, the jury of the case *R. v. Majid* (2009) faced this difficulty. That is why now such standard is described as proof, which makes the jury sure. In such way, it is considered that prosecution manages to prove own rightness, if the jury after considering all evidence are sure that an accused is guilty.

The decision in case *Rhesa Shipping Co. SA v. Edmonds* (1985) was boiled down to this. That is why in case when “probabilities” (positions of a

claimant and respondent) are equal, respondent wins. In such case it is stated that a claimant did not fulfil his/her burden of proof [9].

Is there criterion of sufficiency in Russian court proceeding? It is obvious that the answer should be positive, because courts by virtue of direct indication of law evaluate also sufficiency of evidence. Evidences are evaluated by inner conviction, so the state of inner conviction itself can be a measure of sufficiency. A criterion seems to be quite subjective. However, considering the ideas of achieving truth, exactly truth can be called a criterion of sufficiency. Consequently, parties have to provide such sets of evidence proving its position, which allow to make all circumstances obvious, consistent, and knowledge of them can be considered true, in the framework of a competitive process with participation of private persons negative side of this criterion is quite obvious: parties have too heavy burden of proof.

Against the background of the Russian criterion of sufficiency, proofs standards appear to be very attractive and even objective criteria. But is it so?

To start, we focus on that the standard “beyond reasonable doubts” or the standard “certainty of guilt” is also very subjective, because certainty (as conviction) – is internal state that is difficult to manage. The standard of clear and convincing evidences is no less subjective.

It seems that the balance of probabilities is intuitively simpler and more understandable, because implies a simple advantage in favour of one of the parties. In addition, such standard is perceived

as subjective: it is about a probability, which is measurable. Often this standard is described through numerical expression “if a claimant fulfilled a burden of proof and could convince a judge in his/her rightness, then he won with a probability of at least 51 against 49”. However, numerical expression of this phrase is notional and has a descriptive purpose.

When making decision a judge (or jury) does not conduct mathematical calculation of probability [10]. Strict criteria of standards have not developed, as V.K. Puchinskiy underlined. Apparently, the situation has not changed and for now. In west literature reviewers note that it is impossible to formulate the exact meaning of civil and criminal proof standard.

In addition, in practice of English courts, the balance of probabilities is understood not so unequivocally and simply. A number of guiding principles in application of this standard is laid down in two decisions of the House of Lords: *Re H (minors) (Sexual Abuse: Standard of Proof)* and *SoS for the Home Department v. Rehman*. In particular, one of them is about flexibility of application of the balance of probability.

The flexibility of the standard is based on the fact that some events are more likely than others.

Thus, it is considered that a person committed negligence rather than misled, caused damage by chance rather than deliberately caused harm. To describe probability the words of Lord Hoffman, said in the decision on the

second case, became common: “To satisfy one that the creature seen walking in Regents Park in London was more likely than not to have been a lioness than to be satisfied to the same standard that it was a German Shepherd dog”.

Unlike American courts in English literature it is pointed out that there are no intermediate standards. Instead of this the practice suggests various fillings of the standard of the balance of probability. The more serious statements or its consequences, the more powerful evidences should be provided to court in order to prove this statement on the basis of the balance of probability. The flexibility is not in the probability, but in the power or quality of provided proof. Probability or improbability of an event themselves become a question, which should be taken into account when weighing the probability and deciding whether this event really has been.

The origins of the problem of flexibility of the proof standard are probably laid in the case of *Bater v. Bater* (1951).

The case was about the divorce, but lord Denning expressed general judgments concerning proof and other civil cases. In particular, he noted that in the standard of the balance of probability the probability could have different degrees, which depended on a subject of dispute [11]. For example, when hearing the case about fraud, lord Denning considered to be natural to require higher degree of certainty than in the case about negligence. Nevertheless, such strict standard should be weaker

than a legal criminal. However, further judges refused the existence of the intermediate (third) standard, having decided that it is more correct to speak about power and persuasiveness of proof.

Perhaps, this approach carries some uncertainties and intellectually such constructions are difficult to perceive. In addition it seems obvious that power and weight of proof directly affect a degree of certainty. Maybe continental approach to the evaluation of proof bothers to describe details? It is doubtful. Thus, the authors of the famous textbook "Murphy on Evidence" describing the standard of proof say that this is measurement of quality and persuasiveness of proof. Admitting that the probability remains the same, only requirements to proof change, English lawyers probably allow a certain degree of slowness. Under this approach difference between proof standard may be illusory.

In this, flexible is not only the standard of the balance of probability, but also the solution of question about what proof standard to apply. That is why in formally civil cases whether even the balance of probability cannot be applied or higher proof standard may be established. In practice, the latter, for clarity, is usually called the criminal standard.

For a long time divorce processes have been resolved on the basis of criminal standard. However, modern practice has chosen the way of applying the standard of the balance of probability. The analogical standard is applied in the situation when a person has been charged with criminal offence. For example, act of fraud, in particular fraudulent repre-

sentation when conducting a bargain (Hornal v. Neuberger Products Ltd.). Afterwards other judges referred to this decision justifying the flexibility of the civil proof standard. Also, there is number of specific situations-exceptions to the general rule about the proof standard in the civil process.

Among modern domestic scientific conceptions, which represents theory of criminal procedure proof, approach suggested by the scientists V.P. Gmyrko is worth of special attention. The scientific character of his approach is in overcoming the "gap" between "activity positioning of evidence and inactivity practice of his theoretical mastering (comprehension)". The practical value is consistent comprehension and application of procedural rules (standards) of proof in criminal procedure.

Domestic theory of proof should consider reasonable balance of development of the criminal process in two classical models: a) Due Process Model, which proclaims the main priority the protection of individual rights and freedoms, the provision of which is ensured by providing the maximum guarantees of their implementation to persons who have fallen into the criminal-procedural sphere; b) Crime Control Model, the basis of which is the protection of society and its member (potential or real victims) from offences; this basis allows a significant restriction of individual rights and freedoms for achieving maximal effectiveness (G. Parker).

In connection with this national criminal procedure, system should always pay attention to the improvement of the

system of evidence law in order to be consistent and able to respond to changes in social conditions and needs. The measure of such improvement is international standards (rules) and proof doctrines in criminal procedure. Among international proof standards there are proof rules, which are content elements of the presumption of innocence (“the right against self-incrimination”, “right of an accused to remain silent”, “proof beyond a reasonable doubt”, interpretation of reasonable doubt in *dubio pro reo*”).

The component of proof methodology is the provision concerning “proof of guilty beyond a reasonable doubt”. If this standard is not complied with, the fact cannot be regarded as established and be the basis of the indictment [12]. In the Ukrainian legal system this proof standard is new unlike English and American systems wherein it has existed for a long time. The burden of proof of all the circumstances of the case and the conviction of the jury in the defendant’s guilt beyond a reasonable doubt lies entirely on the prosecution side. Such proof according to the legal position of European Court states the absence of irrefutable, weighty, clear, consistent with each other presumptions and signs of guilt (the decision in cases “Kobez v. Ukraine”, “Avsar v. Turkey”). The modern vision of “a reasonable doubt” may be boiled down to two components: 1) proof beyond a reasonable doubt does not mean proof beyond all possible doubts; 2) proof beyond a reasonable doubt is defined as such a convincing proof be-

cause of which a person can act without hesitation. Its essential features are, firstly, certainty, steadfastness, absence of any hesitations; secondly, it is not equal to the definition “absolute certainty” [13].

The provision concerning proof of guilty beyond a reasonable doubt is a general ground not only for a judge, but also for parties of criminal procedure, that is why it changes not only approaches to the evidence evaluation, but also affect a model of competition in criminal procedure. The purpose of defence can be defined as both in the sense of “to prove the reverse” and in the sense of “refuting the allegations as doubtful” (the decision in the case “Allan v. the United Kingdom”); public recognition of a person’s innocence until a person will be convicted by a competent court; obligation of officials to refrain from revealing statements and assessments; impossibility for a state to use non-criminal procedures to obtain recognition of guilt in committing a crime and/or imposition of sanctions equal to a criminal penalty; the inadmissibility of the accusatory matter in the work of judges [12].

In practice of European court, human rights have been used to formulate “reasonable suspicion” as proof standard, as the standard for evaluation the validity of a prosecution when choosing a preventive measure, under which there is facts that indicate commitment of criminal offence by a person and also risks, which give reasonable grounds to believe that a suspect will impede criminal proceedings or commit criminal

offences. Besides, inadmissible methods of gathering evidence, which violate rights and freedoms of a person: 1) questioning the suspect as a witness (“Lutsenko v. Ukraine”); 2) right of a person not to testify against relatives and spouses (“Asch v. Austria” “Unterpertinger v. Austria”); 3) absolute inadmissibility of evidence obtained through torture or ill-treatment at their threat (“Gafgen v. Germany”, “Harutynyan v. Armenia”, “Gogmen v. Turkey”); 4) inadmissibility of evidence obtained under pressure from the accused or evidence obtained with a material violation of the right of a person to privacy, housing, correspondence, telephone conversations (“Magee v. the United Kingdom”, “Jalloh v. Germany”).

Updated doctrinal approaches to the rules of admissibility of evidence. The doctrine of asymmetry of the rules of admissibility of evidence establishes: 1) prosecutorial or other evidence, which worsen a position of a suspect, accused, obtained in violation of the criminal procedural law, in any way should be inadmissible; 2) illegally obtained exculpatory evidence, which commute sentence should be taken into consideration by the court at the petition of the party concerned. In Ukraine this theory has not gained its legislative consolidation and practical application.

The CPC of Ukraine recognises inadmissible evidences obtained due to information received as a result of a significant violation of human rights and freedoms (P.1 of Art. 87) [14]. That is why the doctrine of “fruit of the poisonous tree” has been mainstreamed; it claims that evidence obtained due to the

violation of the constitutional rights of persons loses its legal force (originated in US case law in the early 20th century). In American criminal procedure evidence can be brought before a court during trial if it has evidentiary weight to prove a certain fact (act. 402 of the USA Federal Rules of Evidence). Inappropriate evidence is inadmissible. They also may be inadmissible in the cases: 1) if their admission leads to an unjust prejudice or misleading jury; 2) unjustified delay, excessive use of court time or unnecessary representation of a large amount of evidence collected together; 3) if these are hearsay; 4) when they are obtained in violation of procedure or obtained in violation of benefits or witness’ immunity; 5) their recognition in court as unexpected for one party if they are filed by the other party after the completion of the pre-trial hearing. The Supreme Court of the USA does not rule out the examination of evidence if they were obtained illegally, but would still have been prosecuted, with greater effort (“Nix vs. Williams”) or evidence obtained through unintentional police mistakes (“The United States v. Leon”).

The doctrine of “fruit of the poisonous tree” is not characteristic for continental type of criminal process [15; 16]. In particular, the CPC of the Federal Republic of Germany does not imply normative determination of admissibility (inadmissibility) of evidence, but the issue of their proper evaluation is settled, therefore, the evidence obtained as a result of illegally obtained information is evaluated as admissible. The exceptions are the prohibition to use testimonies

obtained through physical influence, drugs, torture, hypnosis, etc.; violation of which automatically entails their inadmissibility (art. 136sa of the CPC) [14].

French system of proof is based on free proof evaluation by inner conviction of an investigative judge, prosecutor, judge, court. Any evidence is admissible regardless of whether it is indicated in law or not, but in the process of proof or conducting investigative actions, it is forbidden to violate the procedural law and to preserve decency, that is, to use means that are in accordance with the fundamental principles of the rule of law (art. 427 of the CPC).

The doctrine of “fruit of the poisonous tree” is being used in practice of European Court with its corresponding development. In solving the problem of evidence derived from an illegal, the Court estimates, how much an illegality of the initial investigative action poisons following evidence. If sentence was completely based on materials investigated in a court session, and none of the protocols of pre-trial investigation was taken into account, the right to a fair trial was not violated (“Allan vs. The United Kingdom”, “Gafgen v. Germany”). However, the Court find inadmissible evidence obtained as a result of illegally obtained information with significant violations of the right of a person to legal assistance based on the traditional approach of “fairness of the process as a whole” (Todorova v. Ukraine).

Domestic court practice demonstrates that quite often the component of grounding of acquittal sentences,

which constitute the content of the doctrine of “fruit of the poisonous tree “. In particular, court finds inadmissible evidence an expert’s conclusion that the subjects submitted to the investigation received as a result of an illegal search, since the decision of the investigating judge did not contain circumstances with reference to evidence and other materials, with which prosecutor substantiated the petition for the search, and in the resolution part of the decree did not indicate the objects to be searched (the case № 136/940/14-k. dated December 27, 2014). In the other case the court upheld the verdict of acquittal because it considered the expert’s opinion to be inadmissible since the evidence filed for an expert study was removed during an illegal review of the place of the event without the participation of the witnesses, although incorrect information regarding their participation had been recorded (the case № 490/12158/13-k dated May 5, 2014).

Conclusions

Mentioned examples of court decisions demonstrate that order of p. 1 of art. 87 of the CPC of Ukraine regarding the inadmissibility of factual data through information obtained as a result of a significant violation of human rights and freedoms, is used, as a rule, without exceptions. However, as it was showed above, this doctrine is not absolute even in the country of its origin and the practice of the European Court. That is why, in every specific example of court’s evaluation of the admissibility of any evidence the significance of

the alleged violations of the criminal procedural law and the importance of each evidence for establishing the circumstances of the criminal proceedings should be taken in account.

Rights of defence and prosecution in out ore-trial proceeding are not equal. Prosecution, which carries all difficulties due to the duty of proof, should also have such powers that allow effectively fulfill the duty. Defence as represented by an accused and defence counsel has fewer powers, but it is also relieved from the duty of proof. In such way, inequality of parties' rights in pre-trial proceeding compensates with unequal division of duties. It could be said that an accused is protected not by his/her rights, but by duties assigned on subjects of criminal prosecution.

Real competition of parties in full extend is possible only in judicial proceeding where there is an arbitrator independent of the parties who, by direct instruction, is not a body of criminal prosecution. Independent court makes decision exclusively by inner conviction, by law and conscience. Because the basis for inner conviction is totality of evidence of case, independence of court from preliminary conclusions of bodies

of criminal prosecution and, consequently, from their preliminary evaluation of evidence, is provided by examination of all evidence in court prosecution in the presence and with the participation of both parties. Independence of court is provided also by equality of parties' rights in court prosecution, which is aimed at neutralisation of benefits of prosecution conditioned by its rights at the stage of preliminary investigation.

At the same time, only independent judicial power is able to ensure true competitiveness of parties, i.e. to treat equally unbiased the arguments presented by the parties in support of their positions, to create really equal conditions for them including mechanism of compensation of their factual and processual inequality in pre-trial prosecution. Independence of court, as we may see, is a guarantee of competitiveness of all criminal proceeding.

In such way, competitiveness is a form of administration of justice in country where independent judicial power functions. One follows from the other and is provided by them. Recognising the independence of judiciary in practice, we are obliged to recognise and really ensure its competitive principles.

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