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Problems of proof in providing legal assistance during the implementation of international cooperation in the field of criminal proceedings

Abstract: Collisions of the national criminal procedure legislation impede the implementation of the criminal process and international cooperation in the field of criminal justice.

A comparative analysis of the concepts "evidence" and "subject of proof" revealed significant contradictions, for the elimination of which proposals have been made to amend and supplement legislation.

Keywords: criminal procedure legislation; international cooperation; legal assistance; evidence; the subject of proof.

Legal assistance in criminal matters as a form of international cooperation in the field of criminal justice is carried out in accordance with the norms of national legislation based on the "Model Treaty on Mutual Assistance in Criminal Matters" adopted by UN General Assembly in resolution 45/117 of 14 December 1990.

Criminal legislation and criminal procedure legislation of the initiator and executor of the request must correspond to each other by main positions to implement cooperation in the form of legal assistance. It has particular importance in terms of evidence and proof. Thus, this kind of interaction is generally based on the data provided by the criminal procedure institutions.

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Meanwhile, the criminal procedure legislation of countries, even members of communities, commonwealths and other similar entities in terms of evidence and proof is not identical and contains significant contradictions complicating, and in some cases excluding full-fledged cooperation in the form of legal assistance in criminal matters. National criminal procedure legislation has a lot of collisions, which also negatively affect the processes of international cooperation.

Thus, according to Art. 124 of the Code of Criminal Procedure of the Republic of Azerbaijan, evidence of criminal prosecution are recognized as reliable data (messages, documents, items) received by the court or parties to the criminal proceedings and whether obtained in compliance with the requirements of the criminal procedure legislation and the mentioned whether the occurrence of an event is a crime, whether there are signs of a crime in the committed act, whether the act was committed by the accused, whether he is guilty of committing crime, as well as other circumstances that are important for the proper resolution of the charges [9, p. 143-144].

However, data is information, so documents and objects are not per se, but they can be carriers of it. In addition, since Art. 124 of the Code of Criminal Procedure is entitled "The concept of evidence and their types," then it should contain a definition that is uniform for all parties and participants in criminal proceedings. In the meantime, the emphasis on "evidence on criminal prosecution" gives grounds for assumptions about the existence of other types of evidence, which seems to be incorrect.

According to Art. 64 of the Code of Criminal Procedure of the Azerbaijan SSR, in 1960, evidence in the criminal case was recognized as any factual data which provide the grounds for the investigative bodies, the investigator, and the court to determine the presence or absence of a socially dangerous act, the guilt of the person who committed the act, and other circumstances that are important for the right adjudication of the case in accordance with the law [8, p. 43].

Thus, according to the Criminal Procedure Code in 1960 there was only evidence in a criminal case, and according to the new CCP of 2000 it is evidence of criminal prosecution, i.e. at the stages of pre-trial proceedings before initiation of criminal proceedings and beginning of the prosecution of evidence as factual and reliable data, received from the sources (testimony, expert opinions, protocols, physical evidence, etc.) specified in the law are absent due to the absence of these sources and the legal tools to identify them.

The German criminal procedure law does not contain the concept of evidence: in this regard, in some cases, it is understood as sources of information to which the accused, witness, expert, documents and inspection are related; in others - the evidence is considered evidence, the expert's opinion, physical evidence; in the third, the classification of evidence adopted in the German criminal process is based on the nature of the source of information: things (objects) and persons [1, p. 416].

The proof in the German criminal proceedings is understood as the practical activity of the court, which consists of the collection, investigation, and evaluation of evidence and is carried out in two forms: strict and free. Strict proving is carried out only in litigation on the basis of the principles of orality and directness, with strict observance of the norms of criminal procedure and consists in establishing the facts that are important for resolving the issue of guilt and determining the punishment.

The free proof is not regulated by law and is not connected with the procedural rules and in the course of its application proving certain facts are permitted at the discretion of the court and the prosecution authorities [1, 418].

The subject of proof is not clearly defined in the German CPC, and Part 2 of § 244 of the Code of Criminal Procedure stipulates that the court must investigate all the facts and evidence relevant to the resolution of the case [1, p. 419].

In English criminal procedure, there are also various definitions of judicial evidence, which is to some extent due to the ambiguous use of the concepts «evidence» and «proof». So, in some cases, the concept of evidence is the facts or means of establishing them; in others - it is noted that the evidence is all the facts, documents, and testimonies, other legal means that can be used to establish a contentious fact; third - the main types of judicial evidence are statements, information from derivative sources, documents, things, and facts which are received by the court to determine the main controversial circumstances in the case; fourth, it is recommended to consider evidence for practical purposes the material that the party of the process wishes to present to the court in support of its arguments-assertions [7].

There is a similar situation with the concept of "proof". In some cases, it means proof, in others - information, and third - what leads to a conclusion about the truthfulness or unreliability of statements about facts.

It is easy to see that the concept of "proof" has elements of proof and assessment of evidence adopted in the criminal process of the countries of the post-Soviet countries.

There are no separate sections devoted to evidence and proof in the CPC of France in 1958; the rules of evidence law are scattered throughout the text of the code, however, much work is being done to formulate a doctrine of evidence, consisting of problems of means of proof, evidentiary strength and the burden of proof in the scientific plan.

The French law of evidence is based on the principle of freedom of evidence, enshrined in Part 1 of Art. 427 of the Code of Criminal Procedure, where it is said that, with the exception of cases specifically defined by the law, the existence of criminal acts can be established with the help of any kind of evidence, and the judge decides on the basis of his internal conviction.

However, while allowing freedom in determining the types of evidence, the French CPC clearly and strictly regulates the procedure for their collection, prohibiting the transgression of the law [1, p. 320].

Taking into consideration the above-mentioned, we can only talk about the most typical types of evidence used in criminal proceedings with respect to French law of evidence. It is the prevalence of one or another type of evidence, as well as the fact, whether in the process of obtaining it the rights of the individual or not, serve as criteria for the fact that some types of evidence have received detailed regulation in the criminal procedure law. First of all, the testimony of the accused, testimony of the witness, the expert's conclusion, the protocols of police and investigative actions are related to such kinds of evidence. In addition to them, it is customary to single out evidence (indices) and material statements (constatations materielles) as separate types of evidence in the doctrine [1, p. 320].

The US criminal procedural law in the regulation of the process of proof differs significantly from the English interpretation. First of all, this is expressed in the fact that, unlike the unwritten rules of criminal procedure in England, the United States developed a single normative legal act of federal significance "Federal rules of evidence" regulating the purpose, types, and means of proof, as well as the procedure for collecting, verification and evaluation of evidence [3, p. 109-116].

Much attention is paid to the concept of evidence, its classification, and procedural significance in the theory of the criminal process of the United States. Classification of evidence in the theory of the criminal proceedings of the United States is characterized by the fact that along with the types of evidence (direct and derivative, direct and indirect, accusatory and exculpatory) recognized in many countries, the American criminal procedural doctrine distinguishes the following types of evidence: judicial and non-judicial, "evidence by ear", auxiliary,

additional, indisputable, confirming, refuting, presumptive, preliminary, probable, credible [3, p. 109-116].

K.B. Kalinovsky points out that "a characteristic feature of US criminal proceedings is that a court's conviction can be based only on admissible evidence, and therefore, all data obtained in violation of due legal procedure is excluded from the scope of the proceedings" [3, p. 109-116].

The normative basis of this rule is the amendments IV, V, VI, and XIV to the US Constitution. In this case, the legislator is guided by the principle of "the fruit of a poisoned tree," according to which all information obtained based on the evidence found to be inadmissible, is also excluded from consideration.

It is considered inadmissible questioning of the witness, whose identity was established as a result of forced confession of the accused. All seized objects, their inspection, expert examination, and other actions based on these data are recognized as having no legal value in case of illegal search [3, p. 109-116].

Moreover, according to the provisions of US law, "evidence by ear", that is, derivative evidence, cannot be recognized as permissible. However, this rule contains a number of exceptions: a police officer's testimony containing information about the recognition of the detainee at the time of arrest or after it, as well as data containing information on the results of eavesdropping or the search, may be considered admissible [3, p. 109-116].

At the same time, US legislation has some exceptions, in the presence of which even inadmissible evidence can be used during the trial if it has information that can have a significant impact on the resolution of the case on the merits. The above gives grounds to argue that the criminal procedure legislation of the USA is characterized by a formal and practical approach to the evaluation of evidence.

Italian Criminal Procedure Law distinguishes between the evidence that can be used to prove the guilt of a person in a crime and the evidence that can only be used to refute other evidence and show the unreliability (bad faith) of the witness.

The latter include the testimony of the accused and the testimony of witnesses, the data that was given on preliminary investigation to the prosecutor or the police and announced in the trial (CCP, 500) [6, p. 103-108].

The CPC of the post-Soviet states interprets the concept of evidence somewhat differently. Thus, according to Art. 72 of the Code of Criminal Procedure of the Republic of Tajikistan, evidence in the criminal case is de facto information on the basis of which, relevant procedure established by the Code of Criminal Procedure, the court, the prosecutor, the investigator, the inquirer determine the presence or absence of a socially dangerous act, the proof or lack of evidence of committing this act and other circumstances for the correct resolution of the case. Evidence can be considered: testimony of a witness, victim, suspect, accused, defendant; opinions and testimonies of an expert; opinions and testimonies of a specialist; physical evidence; protocols of investigative and judicial actions; hidden records; listening to and recording phone conversations; electronic, video and audio-visual surveillance; other documents [11, p. 25].

According to Art. 110 of the Code of Criminal Procedure of Georgia, evidence is obtained from the sources provided by law and with due observance of the information on the basis of which the parties assert their rights and legitimate interests, and the investigator, inquirer, prosecutor, and court prove the presence or absence of an event or act, legal proceedings, the commission or non-accomplishment of this act by a certain person, his guilt or innocence, as well as other circumstances that are important for the proper resolution of a case [10, p. 53-54].

According to Art. 84 of the Criminal Procedure Code of Ukraine, evidence in criminal proceedings is the factual data obtained in the procedure defined by the Criminal Procedure Code, on the basis of which the investigator, prosecutor, investigating judge and court establish the presence or absence of facts and circumstances that are relevant to criminal proceedings and are subject to proof.

The procedural sources of evidence are testimony, material evidence, documents, expert opinions [12, p. 60].

According to Art. 63 of the Code of Criminal Procedure of Estonia, evidence is the testimony of a suspect, accused, victim and witness, expert opinion, expert testimony explaining the examination report, material evidence, protocols of investigative actions, court session and operative investigation activities and other documents, as well as photographic images, films and other recording of information. Evidence not listed in Art. 63 of CCP can be used to prove the circumstances of the criminal process [13, p. 31-32].

Art. 124.1.2 of the Code of Criminal Procedure of the Republic of Azerbaijan refers to the circumstances to be proved in the case - the subject of proof. In the Criminal Procedure Code of the Republic of Azerbaijan, the subject of proof is also defined in Art. 139, however, it seems that it is not complete either. From our point of view, the subject of proof in the case must also include the circumstances of the nature and amount of damage caused by the crime, characterizing the identity of the accused, facilitating to commit a crime, excluding the crime of the act and its punishability, entailing exemption from criminal liability and punishment [2, p. 22-26].

Analysis of the concept of "evidence" allows us to assert that Article 124 of the Code of Criminal Procedure is not about the types of evidence, but the types of sources of evidence, and in this regard, we think, the title of this article should be changed. In addition, as to our opinion, the definitions in Art. 124.2 CPC on the sources of evidence, as well as provisions on their substance should be changed, as they are contradictory, and in some cases, incorrect.

Thus, according to Art. 124.2 of the Code of Criminal Procedure, the testimony of a suspect, accused, victim and witness, is accepted as evidence in the criminal proceedings. According to Art. 126.1 of the Code of Criminal Procedure, verbal and written information received from the suspect, accused, victim and

witnesses is recognized by the body conducting the criminal procedure relevant to the Criminal Procedure Code [9, p. 153].

According to the logic of the legislator, this information will have evidentiary value only if it meets the requirements of Art. 124.1.2 CCP, and the nasty information, including the alibi, will not be treated as evidence of innocence, as it is excluded from the process.

According to Art. 126.2 of the Code of Criminal Procedure, only those statements that are based on the messages and conclusions of the person who directly perceived the event, its causes, nature, mechanism, and development can be acknowledged as evidence. It seems that such a statement reduces the proof to a primitive level since it excludes the process of its production: Search for evidence from one source to another and beyond.

The same applies to the provisions of Art. 126.3 CCP, according to which as evidence cannot be used information transmitted to the body that carries out criminal proceedings from other people's words. The exception is "... information obtained from the words of the deceased person", which also appears to be incorrect, since it contradicts the concept of evidence. From our point of view, in this case, the main thing is the reliability of the received data obtained legally and not the source of evidence. Moreover, such testimonies appear in the law [2, p. 22-26].

The Code of Criminal Procedure of the Republic of Azerbaijan (Art. 141) reflected the provision that certain circumstances are recognized as proven without using materials of the criminal prosecution proceedings. These include well-known facts, the correctness of the universally accepted in modern science, technology, art and other fields of research methods, as well as the circumstances established by the decree, which is binding for the court in a pre-judicial order [9, p. 163].

Furthermore, according to Art. 141.3 CCP, the followings are defined without the use of materials of the criminal prosecution production: a) knowledge of the

law of persons; b) knowledge of the officials of their duties in the service and the professional rules and c) The absence of special training and education in the case of failure to submit to them documents confirming the contrary, or not informing him of the name of the enterprise or other organization that gave him special training and education [9, p. 156].

The foregoing seems to be incorrect. In the conditions of scientific and technological progress, the provisions generally accepted today may be criticized tomorrow; something that was approved by science yesterday can be refuted today. The notion of universally recognized and scientifically proven circumstances and facts is not static - it is dynamic. Accordingly, it is necessary to consider such circumstances and facts not in static but in dynamics, in an organic relationship with the latest achievements in the field of science and technology, especially since we are talking about methods of investigation [2, p. 22-26].

Concerning the "axioms" about knowledge of the law, Azerbaijani scientists rightly pointed out the following: "The assertion that everyone should know the laws is just, like the fact that ignorance of the law does not absolve from responsibility. At the same time, this does not mean that everyone knows the laws, and to decide whether the person knows the law or not. Ignorance of the law does not absolve from liability, but it affects the punishment, and this circumstance is an integral part of the subject of proof and should not be recognized as established without using materials of the criminal prosecution proceedings" [5, p. 47-48].

Indeed, it would be ideal if all persons knew their duties and professional rules, but the statistics of official and other crimes related to service and professional duties refute such a statement. Logically, it turns out that it is not necessary to investigate such crimes, since they, in spite of the presumption of innocence, are previously recognized as proven.

The situation is similar to the documents on the person's special training and education, as well as not informing him of the name of the enterprise or other

organization that gave him special training and education. If a person loses his education documents or forgets the name of the place of study, the investigator, inquirer, prosecutor, and, most importantly, the court, will have to consider that he has no education, and has not studied anywhere. This contradicts the logic, and therefore, is subject to exclusion from the law [2, p. 22-26].

As to the rules of proceedings, according to Art. 125 of the Code of Criminal Procedure of the Republic of Azerbaijan, deviations from the prescriptions of the law on their production will relate their results (evidence) to inadmissible. It turns out that when sending an application for legal assistance, it should be stipulated that, for instance, a search, seizure or inspection should be carried out according to the rules of the Criminal Procedure Code of Azerbaijan, which seems problematic if the legislation of the implementing state provides for other procedures.

As mentioned above, according to Art. 2.3 of the Law on Legal Assistance this will be provided to the initiator in accordance with the legislation of the Republic of Azerbaijan, and therefore, the value (admissibility) of the received materials and the information contained there will also be questionable.

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