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ВАГОМІСТЬ КРИМІНАЛЬНИХ СУДОВИХ ДОКАЗІВ

Анотація. *Статтю присвячено актуальній темі вагомості кримінальних судових доказів, яку в доктрині кримінального процесу України практично не досліджено. Законодавець, запровадивши 2012 р. це оцінне поняття (п. п. 1, 11 ч. 1 ст. 178КПК), не дав його нормативного тлумачення. У результаті виникла ситуація понятійної невизначеності, яка недоречна з огляду на вимоги засади верховенства права (ст. 8 Конституції України, ст. 8 КПК). Відтак метою розвідки є спроба сформулювати визначення поняття «вагомість доказів», а також запропонувати схему роботи юриста з визначення ознак цього діяльнісного феномену в ситуаціях ухвалення відповідних процесуальних рішень. Роботу написано на основі положень діяльнісної методології з використанням низки спеціальних методів: пошуково-бібліографічного; семантичного; формально-логічного; герменевтичного; історико-правового; порівняльно-правового (компаративістичного); функціонального аналізу; узагальнення. У статті сформульовано визначення поняття «вагомість доказів» як діяльнісної характеристики. Остання є результатом прагматичного логіко-юридичного оцінювання доказу ad hoc в рамках їхньої сукупності. Таким чином певний доказ виділяється завдяки приписуваній йому юристом більшої придатності слугувати переконливою доказовою основою процесуального рішення ніж інші наявні докази. Відтак обґрунтовується висновок, що поняття «вагомість наявних доказів» як їхня діяльнісна характеристика в заголовку цієї статті є «п'ятим елементом» структури поняття «кримінальні процесуальні докази» поряд з таким характеристиками, як «належність», «допустимість», «достовірність» та «достатність». Наводиться обґрунтування висновку, що запровадження законодавцем 2012 р. поняття «вагомість наявних доказів» відповідає вимогам доказової практики сучасного змагального процесу, а також ЄСПЛ*

Ключові слова: *кримінальні судові докази, вагомі докази, судове доведення, оцінювання доказів, вагомість судових доказів*

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THE WEIGHT OF CRIMINAL JUDICIAL EVIDENCE

Abstract. *The study is devoted to the current issue of the weight of criminal judicial evidence, which is understudied in the national doctrine. The legislator, having introduced this evaluative concept in 2012 (Paragraph 1, Part 11, Article 1 of 178 CCP), did not provide its normative definition. As a result, there is a conceptual uncertainty, which is inappropriate given the requirements of the rule of law (Article 8 of the Constitution of Ukraine, Article 8 of the CCP). Therefore, the purpose of study is to attempt to formulate a definition of the "weight of evidence", to propose a scheme of work of a lawyer to determine the signs of this activity phenomenon in situations of making appropriate procedural decisions. The study is based on the activity methodology using a number of special methods – search and bibliographic; semantic; Aristotelian; hermeneutic; historical-legal; comparative-legal; functional analysis; generalisation. The study formulated the definition of the "weight of evidence" as an activity characteristic. The latter is the result of a pragmatic logical and legal evaluation of ad hoc evidence within its totality. Thus, certain evidence is prioritised due to the greater suitability attributed to it by the lawyer to serve as a convincing evidence base of the procedural decision. Therefore, the conclusion is substantiated that the "weight of available evidence" as its activity characteristic is "the fifth element" of the structure of "criminal judicial evidence" along with such characteristics as "credibility", "admissibility", "reliability", and "sufficiency". The study includes conclusion that the introduction by the legislator in 2012 of the "weight of available evidence" meets the requirements of the evidentiary practice of the modern national adversarial process and the ECHR*

Keywords: *criminal judicial evidence, weighty evidence, court proof, evidence evaluation, weight of judicial evidence*

INTRODUCTION

The Criminal Procedure Code of Ukraine of 2012 (hereinafter referred to as the CCP), among many others, introduced such a new evaluative approach for national doctrine and practice as the "weight" of available evidence (Paragraphs 1.11 of Part 1 of Article 178 of the CCP). However, the legislator, having taken this further step in terms of constructing the concept of "criminal judicial evidence" [1], did not define their position on it. Thus, if the text of the law defines such concepts as "evidence" (Article 84), "credibility of evidence" (Article 85), "admissibility of evidence" (Article 86), the definition of "weight of evidence" was ignored by the legislator. It is clear that such a decision caused a conceptual uncertainty, which is inappropriate given the requirements of the rule of law (Article 8 of the Constitution of Ukraine, Article 8 of the CCP), and especially given the practical context of using this concept – the situation of choosing preventive measures by the accusatory authorities.

Despite the fact that law enforcement practice requires clear and understandable normative definitions of this concept and reasonable scientific recommendations, this issue has not been purposefully studied in the literature on the subject of this study. The only relevant studies are the ones by D. Sergeieva [2, p. 109], T. Lukashkina [3 p. 684-685], V. Rozhnova [4 p. 340-341], T. Fomina [5 p. 96], the authors of which *ad marginem* concern the issue of the weight of criminal judicial evidence. Notably, the attitude of national proceduralists to this legislative *novum* remains quite restrained. For example, D. Sergeieva, presenting a scientific position on the concept and essence of the reliability of evidence as its property, rightly notes: the investigating judge, the court, deciding on the choice of a preventive measure, is obliged to evaluate all the circumstances, including the weight of the available evidence about the commission of a criminal offence

by a person (Paragraph 1 of Part 1 of Article 178 of the CCP). The author, without objecting to the presence in the text of the law of such terminological formulations as "weight of evidence", "sufficiency of evidence", at the same time emphasises that they need to be clarified [2, p.109]. In turn, T. Lukashkina, upon analysing the conditions and grounds for applying preventive measures, notes that the legislator among the circumstances that are considered in deciding on the choice of a preventive measure indicated "the weight of the available evidence about the commission of a criminal offence" and "the weight of the available evidence to substantiate the relevant circumstances". However, in her opinion, it is impossible to agree with the attribution of these data to the above circumstances, because, firstly, the conditions, grounds, and circumstances that are considered when choosing a preventive measure constitute a local subject of proof, that is, these are certain circumstances, and, secondly, the "weight" of evidence is a concept that concerns the process of proof, more precisely, the availability of evidence and its evaluation. Therefore, the author argues that evidence is necessary to establish all the circumstances that constitute the local subject of proof; in addition, T. Lukashkina emphasises that it is impractical to introduce the concept of "weight" of evidence, because the CCP applies the concept of credibility, admissibility, and reliability of evidence, the sufficiency of the evidence to make a certain decision (Article 94 of the CCP) [3, p. 684-685].

Another researcher, V. Rozhnova, considering the issue of the weight of available evidence when choosing preventive measures in the aspect of compliance of national legislation with international standards, interprets the weight of evidence as an element of its sufficiency, characterised by the relative importance that should be given to each evidence when deciding whether a certain statement was proved with its help or not. The author states that this is a qualitative evaluation of evidence; weight is a rather subjective criterion, depending on the actual quality and characteristics of particular evidence, and on the quantity and quality of other available evidence of the same fact. Thus, she concludes, the weight of the available evidence characterises its sufficient totality and, according to its qualitative indicators, creates the conviction of the investigating judge and court of the possibility and necessity of making an appropriate procedural decision. The investigating judge, the court in this case should ascertain that the quantity and quality of available evidence are sufficient to ensure that there is no doubt about the possibility and necessity of making a decision, in particular on the application of a certain type of preventive measure [4, p. 340-341]. Sharing the scientific positions of T. Lukashkina and V. Rozhnova, T. Fomina, in the framework of analysing the circumstances that are considered when choosing preventive measures, draws the following conclusions. First, it is clear that the investigator, prosecutor, when filing a petition to the investigating judge, court for the application of a preventive measure, must justify it with certain evidence; secondly, use the wording "note the weight of the available evidence, which justifies the relevant circumstances" considering the theory of proof is unacceptable; third, it is necessary to replace the word "weight" with "sufficiency" in Paragraph 11 of Part 1 of Article 178 of the CCP [5, p. 96].

To summarise the data on the content of the scientific positions presented above, it is possible to outline the existing discrepancy among researchers regarding the "weight of evidence", and, – more importantly, – lack of scientific recommendations for working with it. The authors, considering the relevance and absolute importance of this scientific issue, selected an attempt to formulate a definition of this evaluation concept and model the scheme of work of a lawyer to determine the signs of the weight of evidence as the *purpose of the study*.

1. MATERIALS AND METHODS

According to the pattern of the basic research programme on the weight of criminal procedural evidence, the authors of the study chose the activity methodology of H. Shchedrovytskyi (1929-1994). The authors' choice of this version of the activity approach among others (philosophical, praxeological, and psychological) is conditioned by the following factors. First, in the national doctrine, the phenomena of criminal procedure and proof are conventionally considered as specific types of human purpose-oriented activity. Secondly, the activity methodology, (or system-thought-activity methodology (STA) methodology) in the post-Soviet scientific space is qualified by specialists as the most developed platform for effective work with social mass-like (population) objects. Therefore, the main characteristic feature of the activity-based approach and activity-based methodology is its consistent and sharp opposition to the naturalistic approach, which still reigns in modern science. The science of criminal procedure in this regard, admittedly, is no exception. The essence of the naturalistic approach is that everything in the world is declared natural, therefore it can be studied by scientific methods that correspond to nature, that is, by natural scientific methods. However, in the activity methodology, everything is stated exactly the opposite: for a person, not nature, but the activity itself is the only reality in which one lives, therefore, everything related to the activity is its "traces" ("organisations"); moreover, even "nature" itself is a kind of construction of activity and can be "material" for activity. It has

a substantive (speech) character, therefore, being an independent entity, phenomenon, exists independently of a person who can "come" to the activity either as a "variable material" (for example, someone comes to the judicial activity, works as a judge, and then leaves, while the place comes to another person; the activity exists further) or "source material" (for example, a person, after completing studies at the Faculty of Law, "turns" from a student to a specialist in the field of law). Activity methodology also rejects archaic the positivist idea of the possibility of the independent existence of the object and subject "from themselves". The latter, as stated by methodologists, can only exist within the framework of specific activities. This means that such objects as "offences" or "evidence" are not entities that exist outside of activity, as stated in the national substantive and procedural criminal law. From the standpoint of activity methodology, they are products, "organisations" of the activities of the court and the parties in adversarial criminal proceedings, the result of attributing certain legal characteristics to them. The chosen methodology rejects the so-called "reflection theory" and does not address the question of truth, offering in return other – activity criteria for achieving results – practicality, implementation capability, and efficiency.

Within the framework of the chosen basic research programme, special methods were used: search and bibliographic, which allowed conducting a systematic search of national and foreign sources of literature on the subject of research; semantic – to clarify the meaning of the term "weighty" and its place among its synonyms; Aristotelian was used to determine the state of national procedural thought regarding the issue under study, analysis of the provisions of the current CCP; hermeneutical, necessary to establish the legal content of the provisions of evidentiary law in solving the question of the place of the characteristic "weighty" in the structure of "criminal judicial evidence"; historical-legal – to identify trends in understanding the content and purpose of the modern model of criminal procedure and to distinguish the concepts of "evidence" and "proof"; comparative-legal was used to clarify the state of research on the activity of judicial evidence in Ukraine and in other countries. It was also necessary to compare the case-law of the ECHR and the practice of national courts in terms of using such a characteristic of criminal judicial evidence as its "weight"; functional analysis – allowed determining the place and role of the prosecution and judicial authorities in preparing evidentiary materials by the police and establishing criminal judicial evidence in an adversarial trial; generalisation allowed bringing the obtained scientific data and evaluations into a systematic whole and formulating reasonable conclusions and suggestions.

The main stages of the study of the weight of criminal judicial evidence were: (1) *putting forward* the scientific hypothesis that the "weight" of evidence (along with "admissibility", "belonging", "reliability", and "sufficiency") is their "fifth element", the fifth characteristic of "criminal judicial evidence"; (2) *verification* of hypotheses: (2.1.) linguistic analysis of "weight" in the context of Ukrainian and English languages; (2.2) comparative-legal analysis of "weighty evidence" in the doctrine of *common law* countries and the case-law of the European Court of Human Rights; (2.3) analysis of the practice of using the "weighty evidence" in national judicial practice; (2.4) clarification of the place and function of "weighty evidence" in the system of provisions of national evidentiary law; (2.5) research of the scientific positions of Ukrainian processalists regarding the interpretation of "weighty evidence"; (2.6) synthesis of the obtained scientific results; (2.7) development of scientific position; (2.8) making arguments in support of it; (2.9) reflexive criticism of the obtained scientific results from the position of interested parties opponents; (2.10) final formulation of conclusions and proposals in terms of further research on "weighty evidence in national criminal proceedings".

2. RESULTS AND DISCUSSION

The evaluative concept of "weight" of criminal judicial evidence introduced by the legislator is proposed to be *prima facie* defined as its activity characteristics (the general scientific concept of "characteristic" in this narrative is considered a *distinguishing feature* of something [6, p. 629]), according to which a certain proof as a result of a pragmatic logical and legal evaluation *ad hoc* is outlined from its totality due to the suitability attributed to it by a lawyer to serve as a more convincing, stronger evidentiary basis for a procedural decision in comparison with other available evidence.

Therefore, in the post-Soviet theory of proof, "criminal procedural evidence" (Article 84 of the CCP) is further considered using a natural-scientific method, that is, as a natural object, Kant's "thing-in-itself", having immanent "properties" that the lawyer can only identify; however, from the standpoint of activity approach, it can be considered completely differently – the result of the evidentiary activity of authorised participants in criminal proceedings. Such participants are the ones who can *attribute* the characteristics defined in the law to the evidence (Articles 85-86 of the CCP). As S. Pashyn convincingly emphasises in this regard, in a process where decisions are made based on internal conviction, the only purely *legal* characteristic of the evidence is its *admissibility* [7, p. 16]. In the current CCP of Ukraine, it is interpreted as compliance of evidentiary materials (factual data together with procedural sources of their origin) with the requirements of the established

standard of admissibility (Article 86 of the CCP) and the rules of the standard of inadmissibility of evidence (Articles 87-88 of the CCP). Legal *permits* and *prohibitions* enshrined in these two standards (positive and negative) are procedural *rules* of proof, following which allows deciding on the admissibility (inadmissibility) of materials as criminal court evidence. As J. Skorupka rightly notes in this regard, the standards of admissibility of evidence determine the scope of permitted procedural activities for the authorities, and, consequently, establish the limits of permissible interference with the rights and freedoms of participants in criminal proceedings [8, p. 97].

In addition to admissibility, the procedural law also mentions *other* legally unregulated logical and cognitive characteristics of evidence – its *credibility* (Article 85 of the CCP), *reliability* (Part 1 of Article 94 of the CCP), and for the totality of the evidence – *sufficiency* and *relationship* for making a relevant procedural decision (Part 1 of Article 94 of the CCP). The need and opportunity to attribute the mentioned characteristics to the materials (objects specified in Part 2 of Article 84) arises during the work of authorised participants in criminal proceedings with acceptable materials as part of solving problems caused by their procedural positions (prosecution – defence – arbitration). Therefore, according to the authors of the study, the above-mentioned characteristics of evidence can be called *activity-based* characteristics. Thus, the positive conclusion of the investigator, inquirer, prosecutor, and the court as an arbitrator-evaluator on the admissibility of evidence is a *conditio sine qua non* of their further use as procedural evidence in general. The decision on the possibility of attributing to materials the activity characteristics required by law allows using procedural evidence to solve specific practical problems of evidence activity in the conditions of *place* and *time*, a specific situation of criminal proceedings, for example, the choice of a certain preventive measure. Notably, the above refers to evidentiary materials (and not judicial evidence) provided by judicial charges, based on the following grounds. *Firstly,* the concept of "criminal procedure" covers only the activities of the court and the parties to consider a criminal legal claim (*sensu largo*), therefore, no evidence in out-of-court police detective activities is out of the question in general. Police detectives monopolistically perform an informative historical reconstruction of a right-wing event of the past in closed mode, and its products – facts as knowledge with a claim to reliability are used by the prosecutor to form a reasonable suspicion and accusation, which will be defended as part of the judicial proof procedure. *Secondly*, the possibility of the latter implies the presence of such indispensable *attributes* as a presence of *an arbitrator*(court) and equal *parties-players* (prosecution and defence) as procedural *proponents* and *opponents*, respectively. Proof also provides for the presence of *theses* – a legal position that one party defends (prosecutor-proponent), and the other – refutes (defender-opponent). While *in merito* issue is decided by the court. Evidently, all this in the pre-trial proceedings, guided by the principles of the *Inquisition*, do not exist. Accordingly, *thirdly*: procedural criminal judicial evidence as a *product* of the interpretive efforts of the parties and the court arise in court as part of the proper procedure of judicial proof of legal "raw materials", which is the evidence of the prosecution; approval of their use is given by the court, positively resolving the issue of their admissibility as evidence. It is unnecessary to prove that raw materials and products are different concepts. *Fourthly,* the analysis of the content of Part 2 of Article 23, and the related Part 4 of Article 95 of the CCP, leaves no room for rational doubts about the validity of the given position on "evidence materials". This statement does not detract from their weight and value: it is simply the task of the prosecutor to be able to show one's evidence in court.

In other words, if in the first case the lawyer decides on the fundamental possibility of *using* the collected materials in evidence as procedura*l evidence*, the second is the possibility of the most *efficient* use of the latter for evidentiary purposes in various procedural situations "*here and now"*. That is, the procurator (prosecutor) in the perspective of defending their legal position in court in pre-trial proceedings should be concerned about how *best* – from the standpoint of *evidence-based praxeology* – to justify the available evidence (*à propos*, the volume and quality of which in practice do not always correspond to the theoretical (ideal) ideas about it). In this situation, there is the need to attempt to attribute to the existing evidence material *other*, activity characteristics that are not covered by the normative template (Articles 85-86 of the CCP), but which are necessary for solving their evidence-based tasks. *Vice versa* the prosecutor must give an answer to the pragmatic question of how they should manage to properly use the evidentiary potential of both each individual piece of evidence and their available totality. Therefore, in this regard, it should be noted that in western doctrines, especially in *common law* countries (Great Britain, USA, Canada, Australia, New Zealand, Israel, India, Japan, South Korea, etc.) and – to a lesser extent – in the case-law of the European Court of Human Rights (ECHR), where, in contrast to national legislation, there is no legal (normative) *definition* of "procedural evidence", more attention is paid to work with performance *characteristics* (activity grounds) of evidence, the catalogue of which is much more meaningful than the current national CCP. Lawyers of these countries, remembering that *argumenta non numeranda, sed ponderanda sunt*, work with such concepts as "the best evidence"; "supporting evidence"; "irrefutable evidence"; "contradictory evidence"; "negative evidence";

"positive evidence"; "prima facie evidence"; "probable evidence"; "rebuttal evidence"; "side evidence", "credible evidence"; "weighty, strong, valuable evidence" etc. [9; 10, p. 1-4; 11, p. 1661; 12, p. 81-82]. The mentioned and other characteristics of procedural evidence are not a reflection of their objectively inherent *properties*, as is conventionally stated in the post-Soviet theory of proof but are *the result* of logical and cognitive operations and the reasons for their choice, because they are *derivative* from the evidentiary activity of authorized participants in criminal proceedings.

For example, an investigator finding a passport with traces of blood at the scene should not only decide on the criminal procedural *qualification* of the case, i.e., its classification in a certain type of evidence (evidence matrix specified in Part 2 of Article 84 of the CCP) – a document or physical evidence with the simultaneous determination of its affiliation and admissibility, but also – more importantly – properly *work* with this evidence (which, unfortunately, in the special and educational literature is not paid attention to). The above refers to the fact that within the framework of a specific evidentiary situation, the investigator (prosecutor) must decide what the evidence obtained in criminal proceedings is suitable for: for example, the same evidence can be used to prove some circumstances of criminal proceedings, but cannot be used to establish others; evidence can be evaluated for one situation as *prima facie evidence* or as "supporting evidence" in another, etc. This requires a lawyer to be very professional and creative because the law in this case, in contrast to situations of deciding on the admissibility of the use of materials as procedural evidence *does not contain* any substantive instructions on specific means and methods of their use to address these issues.

Notably, paragraphs 1.11 of Part 1 of Article 178 of the current CCP "Circumstances considered when choosing a preventive measure" mention another unconditional *activity* characteristic – "*weight*" of available evidence of a suspect, accused criminal offence, as and "weight" of available evidence justifying the amount of damage or amount suspected income. The European Court of Human Rights (hereinafter referred to as the ECHR) draws attention to this characterisation of procedural evidence both in its decisions on specific cases and in the context of doctrinal positions regarding the standard of proof "beyond a reasonable doubt" (Part 2 of Article 17 of the CCP). For example, the ECHR decision in Prade v. Germany of 03 March 2016 stated that "40… [drugs] found in the applicant's home constituted *weighty* evidence" [13], and in the case of Buid v. Belgium of 28 September 2015, the ECHR, in particular, noted: "82. Allegations of ill-treatment contrary to Article 3 must be supported by relevant evidence. To evaluate this evidence, the Court applies the standard of proof "beyond reasonable doubt" but adds that such evidence may result from a set of fairly clear, *weighty*, and consistent conclusions or similar compelling presumptions of fact" [14], which logically presupposes the existence of a body of *weighty*, clear, and consistent procedural *evidence*.

Based on this, there are grounds to assert that the "weight" of evidence in the practice of the ECHR is considered an important activity characteristic of procedural evidence in general, which is used not only to justify procedural decisions on choosing a preventive measure but also other decisions in criminal proceedings. This position is shared by individual Ukrainian courts. For example, the Kyiv Court of Appeal, in its ruling of 8 June 2015 in case № 757/16862/15-k, stated: "...with regard to a person, if the question of the application of an exceptionally strict measure of restraint arises, the investigating judge should pay special attention to evaluating the *weight* of evidence of the crime. Evidence that does not have signs of weight cannot justify a suspicion that was sufficient for the application of a preventive measure in the form of detention but is only the basis for further pre-trial investigation in a criminal proceeding" [15].

The procedural law does not provide a legal definition of the evaluative concept "weighty evidence", which creates the above-mentioned situation of conceptual uncertainty. Therefore, to clarify its content to a certain extent, it is advisable to turn to the linguistic characteristics of the *correlative* adjectives "weighty" and "strong", and then to the interpretation in the doctrine of Anglo-American evidentiary law of the *same root noun* – the concept of "*weight of evidence*" (weight, strength, value of evidence). Thus, according to linguists, the adjective "weighty" means one that has *weight*, is *meaningful, authoritative*, *convincing*, and the adjective "strong" is interpreted as *reasonable*, *sufficient* to convince someone of something, *convincing* [16, p. 72]. Thus, it logically follows that "strong evidence" is one of them that has the necessary *weight* for a lawyer, is *meaningful*, *authoritative*, *convincing, sufficient* to convince its addressee.

American and British jurists, in turn, associate the *weight of evidence* with the *weight*, *strength*, *value*, and *plausibility* of evidence provided by one party *compared* to the evidence provided by the other party. If, in accordance with Rule 401 of the Federal Rules of Evidence of the United States of America, "appropriate evidence" is evidence that *makes* any fact more or less *relevant* to the case more likely than it would be without it, [17] the "weight of evidence" is a tool for evaluating the *extent to which* the *degree of probability* of a fact may change in the case of the use of certain evidence. Thus, American lawyers, for whom working by plausible standards is a cultural norm (habit), believe that the *weight* of procedural evidence is *what* can cause the desired *evidentiary* or *rebuttal* (damaging) *competitive effect* in proving the circumstances of a criminal case in an

adversarial trial. In this context, it is worth mentioning that logic treats the strength of evidence – "*nervus probandi*", "*vis argumentationis*" – as a *strength* that consists in a strictly logical connection of the thesis with arguments, as a result of which the confessor of the truth of *arguments* must recognise the truth of the *thesis*, which logically follows from these arguments [18, p. 528].

The procedural law, as mentioned above, does not establish any formal rules for *determining* the weight (strength) of procedural evidence, except that for the proponent no evidence must have a *predetermined* strength (Part 2 of Article 94 of the CCP), including expert opinion (Part 10 of Article 102 of the CCP). In the plan under consideration, this means, firstly, a legal *prohibition* for the court to give *preference* to certain types of evidence over others (for example, direct over indirect or material over personal) and to *determine* the weight (strength) of evidence according to depending on the party *which* received it.

In this context, it should be noted that the rapid development of information technologies creates the possibility of new ideas about the procedures for obtaining criminal procedural evidence. Therefore, J. Du, L. Ding, G. Chen reasonably identify electronic evidence as a new type of evidence in the criminal procedure legislation of the PRC [19, p. 111-112]. According to Y.V. Francifirov, A.P. Popov, P.P. Muraev, Y.V. Komissarova, the development of the information society has led to the intensive introduction of telecommunications technologies in the field of criminal proceedings. This requires solving the actual issue of switching from paper documents to electronic ones [20, p. 674-675].

Lawyers, deciding in their practice on the presence (lack) of signs of the weight of procedural evidence may, in the opinion of the authors of the study, consider the following provisions.

1. The need to *evaluate* the weight of evidence is directly related to the legal *obligation* of the prosecution to comply with the *standards of proof* of the circumstances of criminal proceedings in the course of establishing the factual grounds for issuing important procedural decisions. For example, the "reasonable suspicion" and "beyond reasonable doubt" standards require the law enforcement officer to establish, on an *ad hoc* basis, *facts* sought in a particular criminal proceeding. This is due to the fact that the first standard of proof guides the establishment of grounds for *lawful* restriction of the human right to freedom and personal inviolability provided for in Article 29 of the Constitution, and the second – compliance with the requirement specified in Article 62 and Paragraph 3 of Part 3 of Article 129 of the Constitution to ensure the *guilt* of the defendant, i.e., in both situations, it is a question of the *validity* of the attempt to encroach on the accusatory power on the social *values* of fundamental importance. Therefore, Part 2 of Article 177 of the CCP establishes a direct *prohibition* for an investigator or prosecutor to initiate the application of a preventive measure without the existence of legal *grounds* for this, and in accordance with Part 1 of Article 290 and Article 291 of the CCP, an indictment cannot be sent to the prosecutor without *sufficient evidence* in criminal proceedings, while the performance of these tasks requires authorised persons primarily to form and rely on a reliable *body of strong evidence*.

2. The issue of determining the weight of available evidence is also directly related to the need for a well-thought-out, activity-based meaningful definition of *subject of proof* in specific criminal proceedings. This step should ensure that the evidence is *grouped* according to the circumstances of the case to *convince* the court of: (a) the existence of a criminal offence; (b) the existence of a criminal *offence* in the act; (c) the *commission* of this offence by the *suspect* (accused); (d) the *guilt* of the accused in committing the incriminated offence in accordance with the requirements of a particular *standard of proof* (for example, "reasonable suspicion" in deciding whether to choose a measure of restraint (Article 178 CCP) or "beyond reasonable doubt") in the case of a conviction (Part 2 of Article 17, Part 1 of Article 368, Part 1 of Article 373 of the CCP)

Such an approach allows the prosecution to form a *systematically* organised body of *evidence*, thus avoiding its submission to the court by a chaotic, disordered *mass* [21, p. 13]. Therewith, the procedure of grouping evidence allows identifying *links* and *interdependencies* both between evidence within a certain group and between individual groups of evidence, which, on the one hand, will help determine the degree (index) of the *real* weight of each "isolated" evidence, second, will "add" to it the weight of evidence within a specific body of evidence. Comparing individual separate evidence with the circumstances to be established helps to determine the weight of *specific* proof.

3. Simultaneously with the development of a *body of evidence* in criminal proceedings, the selection and examination of *certain* available procedural evidence (Paragraph 1 of Part 1 of Article 178 of the CCP) as its *components* should take place. This logical operation is of *paramount* importance because from the *activity* standpoint, *every* procedural evidence – no matter how "weak" – always has a certain *weight*, *somehow justifies itself*, independently of others [22, p. 13]. For example, failure to identify the valuables in the suspect's safe undoubtedly establishes the fact of their apparent *absence* at the time of the search, the interpretation of which allows the defence to insist that it is *exculpatory evidence* and the prosecution to claim that this is *strong*

evidence of criminal "qualification" of the offender, so the mentioned valuables should be sought elsewhere [23, p. 9-13].

Therefore, the selected evidence can and should be worked on in the *context* of its place in the existing *body* of evidence to form judgments about: (a) the *degree* of its potential *reliability* (*certainty*), (b) the *degree of sufficiency* of the evidence to prove a *particular* thesis (*factum probandum*), (c) its *inconsistency* (*harmony*) with other evidence, and (d) the possible *purpose* of using that evidence within a particular body of evidence; nevertheless, in the body of evidence, as in a special evidence structure, each of them is called to perform a certain *function*, for example, be "decisive" evidence, laxative, or reinforcing, etc.

In this regard, it should be emphasised that the *reliability* of evidence (as, indeed, its other characteristics) must be proved *independently*, regardless of the justified *theses*, since the latter, by its logic, is always a *plausible* judgment. Therefore, it is necessary to *separate* the evidence from the *fact* proved by it, from the *conclusion* about it, while the evaluator must be guided by the rule of *independence of arguments from the proved thesis* to avoid logical errors. For example, in the criminal proceedings on the death of a motorcyclist as a result of a collision at an unregulated intersection with a truck, the testimony of two identified witnesses suggested a probable logical thesis (version) that the motorcyclist, leaving the yard of the house on the main road, turned left, where the collision took place immediately. The truck driver categorically denied his guilt, explaining that he, turning left at the intersection, as a person with many years of experience, could not help but notice and miss a motorcyclist who was moving in the opposite area to him. The new investigator, who was assigned an investigation a year and a half later, decided to carefully check the arguments (witness statements) without seeming to be tied to the obvious reliability of the thesis. As a result, it was established that both witnesses were mistaken in stating on repeated interrogations not *what* they *actually* saw, but their own *judgments* about the critical day they perceived. As a result, very strong evidence on some facts of criminal proceedings immediately turned into no less *weighty* evidence on other circumstances. In turn, the degree of *sufficiency* of the evidence is determined by evaluating the probability of its real "contribution" to ensuring the *quality* and *quantity* of evidence taken in their entirety, if they logically followed the required *reliability* of the *proven* judgment and not some other thesis. Therefore, when deciding on the degree of the weight of evidence, firstly, it is necessary to strive to use only *those* evidence that within a specific *situation* and *purpose* to the *maximum* extent indicate the *reliability* of the proven thesis.

4. In the practice of proof, it is standard practice to attribute – with equal reliability – *more* weight to *direct* evidence than *indirect*. In *one* way, the situation is evaluated, for example, the detention of a person *at the time* of commission or attempt to commit a criminal offence or immediately after the commission of a criminal offence or during its direct prosecution (Paragraphs 1-2 part 2 of Article 207 CCP), and in *another* – the situation of finding stolen valuables in one's home. In the case of *direct* evidence, the rules of probabilistic logic must be taken into account, according to which the weight of this evidence is *greater the* more they *increase* the probability of the existence of a substantiated thesis. Therefore, for example, the expert's opinion on the individual *identification* of a person by fingerprint will always be more important than the *diagnostic* opinion on the sex and age of the alleged offender.

5. The procedural law (Part 2 of Article 242 of the CCP), without formally establishing a list of *pre*-established evidence, determines the grounds *for the mandatory* appointment of expertise in certain criminal proceedings. In addition, investigative and judicial practice establishes the grounds for the appointment of mandatory examinations in certain types of offences (e.g., automotive, drugs, economic, fire and technical, etc.), or mandatory in certain situations of criminal proceedings (eg, car science, ballistics, dactyloscopic, psychological, etc.). Therefore, the presence of evidence obtained as a result of the examination in the materials of the criminal proceedings is *mandatory*, and their *weight* to establish certain circumstances of the case is in fact presumed *a priori greater* than other evidence.

6. The weight of procedural evidence in criminal proceedings is always determined only "*here and now*", strictly *individually* within the *available* body of evidence, by examining each of them and correlating with the circumstances of the evidence, given their credibility, admissibility, reliability, and other performance characteristics; notably, in the totality of evidence each individual evidence has its function (purpose): for example, to be "weighty" evidence, to be "decisive" evidence, to be "reinforcing" evidence, to be "convincing" evidence, *etc*.

CONCLUSIONS

1. The authors of the study state that the introduction by the legislator in 2012 of the evaluative concept "weight of available evidence" is quite reasonable, meeting the requirements of the evidentiary practice of modern national adversarial proceedings, and the ECHR. Introducing this concept, the legislator thus required the judicial authorities to decide on the choice of precautionary measures, relying primarily on "weighty" evidence as the basis of a sufficient body of evidence, around which *other* evidence "gathers", which has other functions

in this body. This decision of the legislator can be interpreted in the sense of a procedural guarantee for the protection of two fundamental values – the good name of a person and the protection of one's property rights.

2. Upon evaluating *in merito* scientific positions analysed in the introductory part of this study, it can be assumed that they are a consequence, firstly, of the fundamental non-distinction between the "weight" and "sufficiency" of evidence (the first is a characteristic of an individual proof, and the second is their totality), secondly, the non-distinction between normative and activity characteristics of the evidence.

3. The "weight of available evidence" as its activity characteristic is the mentioned in the title of this study "fifth element" of the structure of "criminal procedural evidence" along with such characteristics as "credibility", "admissibility", "reliability", and "sufficiency"; the study of activity characteristics of criminal judicial evidence belongs to the field of the doctrine of evidentiary law and lays down the need for a deep examination of the practice of forming evidentiary aggregates in criminal proceedings based on the achievements of logic (the logic of evaluations), psychology, praxeology, pragmatism, theory of activity, axiology, theory of decision-making, rhetoric, etc.

3. The prospect of further research on the weight of evidence is the construction of the "weight of evidence" concept in the doctrine and the development of technology for issuing decisions on the weight of evidence within a specific evidentiary situation in criminal proceedings.

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