

SOME ISSUES CONCERNING THE CONCEPT OF A “REASONABLE DOUBT” IN CRIMINAL PROCESS

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The article is devoted to the research of standards of proof, especially beyond reasonable doubt. Based on the analysis of the scientific literature and legislation United Kingdom, the United States and the European Court of Human Rights had found the basic standards of evidence that are used by the courts in the administration of justice. The author, also, highlighted some problems determining the standard of proof “beyond a reasonable doubt”. The main areas of application of the standard were outlined in the cases studied as well as in the criminal process of Ukraine. The author revealed particular issues of defining standard of proof “beyond reasonable doubt” and emphasized guidelines of its application in concerned cases and in criminal procedure of Ukraine as well.

Keywords: proving, burden of proof, standards of proof, beyond a reasonable doubt.

The Criminal Procedural Code of Ukraine in 2012 (CPC), in contrast to the Criminal Procedural Code of Ukraine 1960 in the Art. 17 enshrined the presumption of innocence and conclusive proof of guilt, thus duplicating the content of the Art. 62 of the Constitution of Ukraine and somewhat legislatively expanded its meaning by including the provisions concerning the proof of guilt beyond a reasonable doubt, which are not typical for the domestic legal system. The legislator by including in the Art. 17 of the Criminal Procedural Code of Ukraine the requirement for proof of guilt of a person by the prosecution to a certain level, or possibly at “reasonable doubt” does not define the term, and none of the article refers to it. However, the presence or absence of reasonable doubt in the mind of a judge or a jury is a decisive factor when deciding on the guilt of a person. Give the above, it seems reasonable to attract attention to the analysis of this issue.

The term “beyond a reasonable doubt” is a component of the broader scope of the concept - “standard of proof”. This phenomenon is reflected in the legal systems of England, the U.S., Canada and the European Court of Human Rights (Court). The Court and the European Commission on Human Rights (Commission) has repeatedly noted the absence of sufficient evidence that would be “beyond reasonable doubt” confirmed the circumstances specified in the applicant's complaint as one of the grounds of absence of violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3) by the Ukraine [4].

The formula of proof “beyond reasonable doubt” can be traced back to The Greek Case. There, the Commission pointed out that “it must [...] maintain a certain standard of proof, which is that in each case the allegations of torture and ill-treatment, as breaches of Article 3 of the Convention, must be proved beyond reasonable doubt. A reasonable doubt means not a doubt based on a merely theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be given drawn from the facts presented” [5].

The Commission reiterated this standard in its report in Ireland v. United Kingdom. When that case went on to the Court: “the Court agreed with

the Commission's approach regarding the evidence on which to base the decision whether there has been violation of Article 3 To assess this evidence, the Court adopted the standard of proof “beyond reasonable doubt” but added that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar rebutted presumptions of fact” [6].

Moreover, the Court adopts the standard of proof “beyond reasonable doubt” as the standard of proof in the consideration of complaints. However, this approach to the assessment of evidence and the proof of guilt is not an invention of the Court, as it states in his decisions. The Court has never aimed to borrow an approach to this criterion, which is used by domestic judicial system – this criterion, when used by the court, has independent value [7].

The origins of the concept of “beyond reasonable doubt” is the common law of England, where it began to be used by the courts in the administration of justice, since the end of the XVIII century. James Q. Whitman suggests in his research that Medieval church lawyers were especially fascinated by the dangers of judging, to which they devoted considerable attention. As they saw it, any sinful misstep committed by a judge in the course of judging “built him a mansion in Hell,” and rules had to be developed to shield judges from the consequences of their own official acts. This was especially true any time a judge imposed “blood punishments” – that is, execution and mutilation, the standard criminal punishments of pre-nineteenth-century law.

And when it came to inflicting blood punishments, premodern Christian theology turned in particular on the problem of “doubt.” Doubt about the facts presented a real danger to the soul of the individual judge. Doubt was the voice of an uncertain conscience, and in principle it had to be obeyed. Such was the rule laid down in particular by the standard “safer way” school of Christian moral theology, which grew up during the central Middle Ages: “In cases of doubt,” as the safer way formula ran, “the safer way is not to act at all.” For Christians living in an age of fear and trembling, any “doubtful” act was full of danger, and this applied to judging just as it did to all other acts

involving the individual conscience. As a typical French “dictionary of conscience” explained the standard Christian law in the eighteenth century, “In every case of doubt, where one’s salvation is in peril, one must always take the safer way. ... A judge who is in doubt must refuse to judge.” A judge who sentenced an accused person to a blood punishment while experiencing “doubt” about guilt committed a mortal sin, and thus put his own salvation in peril.

The story of the reasonable doubt rule is simply an English chapter in this long history of safer way theology, a history in which Christian theologians worried for centuries over the nature of judging, over the problems of doubt, and over the dangers of what a famous seventeenth-century English pamphlet called “the Guilt of Blood” [12].

Contemporary British lawyers, by referring to the “standard of proof”, understand it as a degree of certainty that must be reached by the side which bears the burden of proof [13, p. 448]. British lawyers link the standard of proof to the procedural institution of the “burden of proof”. Party shall provide judges with an evidence in support of its position, and such evidence must convince the court of its reliability for a given standard (degrees), which is set depending on the form of legal proceedings [9, p. 53-54].

It is established that for the prosecution (in criminal cases) the standard of proof is “beyond reasonable doubt”, and in civil cases – “balance of probability”, which is treated in judicial decisions, as “more likely than not”. This provision was first ruled in *Woolmington v DPP* in 1935, where court found that: 1) the burden of proving the guilt of the accused lies with the prosecution, calling it “the golden thread running through all of the criminal proceedings in England” and, 2) the defendant is entitled to acquittal if there was a reasonable question from the evidence submitted either by the prosecution or the defense [14].

Common law of England had huge impact on the U.S. law system, thus there are also provisions regarding the standards of proof. However, unlike England the U.S. law the third standard, “clear and convincing evidence”, which occupies an intermediate position between the relatively “weak” standard – “preponderance of evidence” and “high” – “beyond a reasonable doubt” and is used in several types of civil claims, including administrative hearings, habeas corpus, and some fraud claims. In these cases, the plaintiff must prove not merely that his version of events is “more likely than not” true. Rather, plaintiffs who face a “clear and convincing evidence” standard must prove that it is “substantially more likely than not” their claims are true. However, the “golden grail” of these standards is the standard of “beyond reasonable doubt”.

In accordance with the requirements of the criminal procedural legislation of the U.S., the prosecution should bear the burden of proving the charge, namely the prosecutor must provide evidence of the guilt of each of the charges, and then convince a jury beyond a reasonable doubt that the accused is guilty on each count. The defense/defendant may be either an active party in the proceedings – summon “their own” witnesses to

testify, provide the court with the evidence and documents, or to take a passive role and just to cross-examine the witnesses.

The U.S. Supreme Court in 1970 in the case of *In re Winship* pointed out that the use of the practice of the standard of proof “beyond reasonable doubt” reflects the long history of justice and is one of the components of a fair trial. The U.S. Supreme Court ruled that due process requires both federal and state prosecutors to prove every element of a crime beyond a reasonable doubt. According to the Court, “The reasonable doubt standard is bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free” [8].

However, the meaning of this standard and, more importantly, the question whether the standard needs to be clarified to the jury by the judges is still open. There is no consensus among US courts, either at the federal level or at the state level. Many appellate courts insist that trial judges should not define “beyond reasonable doubt” standard for jurors in their instructions. At least ten states now hold this view. In some (such as Oklahoma), if a judge offers a jury any explanation of what reasonable doubt is, this is automatic grounds for reversing a conviction [10]. By contrast, another fifteen states require judges to define “beyond reasonable doubt” standard for jurors. We see the same confusion at the federal level. Four of the eleven U.S. circuit courts require a definition; failure to give one being grounds for reversal. Most of the rest hold that judges needn’t define rational doubt [11, p. 47-48].

Nonetheless, the courts give such explanations to the jury. Courts of First Instance interpreted “reasonable doubt” in different ways:

- 1) a doubt that would cause prudent people to hesitate before acting in a matter of importance to themselves;
- 2) a doubt based on reason and common sense;
- 3) a doubt that’s neither frivolous nor fanciful and that can’t be explained away easily;
- 4) substantial doubt;
- 5) persuasion to a reasonable or moral certainty;
- 6) doubt beyond that which is reasonable; about “7S on a scale of 10” (rejected by the appellate court);
- 7) when the “scales of justice are substantially out of equipoise” (rejected by the appellate court) [15, p. 457].

Given the above, it can be concluded that the American and British system of justice consider the standard of proof as the level of evidence which must be reached by the sides during allegations. Depending on the form of legal proceedings (whether criminal, civil or administrative) the party is the subject to different requirements of proving statements upon Court and the burden of proof lies differently with the parties.

It should be noted that there is no consensus on the definition of “proving” among scientists. One group of authors [16, p. 21-22; 17, p. 18] distinguishes the collection of evidence (cognitive and practical activities) and evidence (as justification, as rational and practical activity), another group of authors [2, p. 237; 18, p. 247-248; 19, p. 298;

20, p. 156-158] justifies the dual understanding of proving: 1) as collection, verification and evaluation of evidence, and 2) as an argumentation. In this connection authors distinguish the burden of proof (Art. 92 of the Criminal Procedure Code of Ukraine), and the burden of proving of circumstances of the criminal proceedings.

In criminal proceedings the burden of proof lies solely with the prosecution, to prove of the case and convince jury of the defendant's guilt "beyond reasonable doubt" and is one of the guarantees of justice, which proclaims "it is worse to condemn an innocent man than to allow the guilty to escape punishment".

To sum up, it can be noted that the standard of proof "beyond reasonable doubt" firstly, has an ambiguous meaning and contains some objective criterion for judgment but assumes inherently subjective component of "reasonable doubt" which is based on the prudence of the judge or the jury and their common sense and life experience.

Secondly, establishes a direct requirement to acquit a defendant if there is a "reasonable doubt". This requirement specifies the Art. 17 Code of Criminal Procedure, that the only "reasonable" doubts as to the proof of guilt shall be interpreted in favor of a person and such doubts that can arise only on the basis of the analysis of the evidence, or the lack of it. Thirdly, the standard of proof "beyond reasonable doubt" sets the required level of sufficiency of the evidence for the courts and jury's decision-making. Fourth, it establishes an additional requirement for making a court acquittal and/or a conviction, and, fifthly, it's one of the manifestations of the competitive nature of the criminal process in Ukraine, where the prosecution must prove its position and leave the court with no reasonable doubt, and the defense is trying to refute prosecutor's claims by either 1) producing evidence that can raise such doubts, or 2) producing evidence discrediting charges.

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ОКРЕМІ ПРОБЛЕМИ, ПОВ'ЯЗАНІ З КОНЦЕПЦІЄЮ “РОЗУМНИЙ СУМНІВ” В КРИМІНАЛЬНОМУ ПРОЦЕСІ

Анотація

Стаття присвячена дослідженню стандарту доказування “поза розумним сумнівом”. На основі аналізу наукової літератури та законодавства Великобританії, США, а також рішень Європейського суду з прав людини було виявлено основні стандарти доказування, які використовуються судами при відправленні правосуддя. Було виділено окремі проблеми визначення стандарту доказування “поза розумним сумнівом”. Окреслено основні напрями застосування стандарту, як у досліджуваних випадках, так і у в кримінальному процесі України.

Ключові слова: доказування, тягар доказування, стандарти доказування, поза розумним сумнівом.

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ОТДЕЛЬНЫЕ ПРОБЛЕМЫ, КАСАЮЩИЕСЯ КОНЦЕПЦИИ “РАЗУМНОЕ СОМНЕНИЕ” В УГОЛОВНОМ ПРОЦЕССЕ

Аннотация

Статья посвящена исследованию стандарта доказывания “вне/за пределами разумных сомнений”. На основе анализа научной литературы и законодательства Великобритании, США, а также решений Европейского суда по правам человека было выявлено основные стандарты доказывания, которые используются судами при отправлении правосудия. Автором, также, были выделены отдельные проблемы определения стандарта доказывания “вне/за пределами разумных сомнений”. Очерчены основные направления применения стандарта, как в исследуемых случаях, так и в уголовном процессе Украины.

Ключевые слова: доказывание, бремя доказывания, стандарты доказывания, вне/за пределами разумных сомнений.

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ANALYSIS OF THE POWERS OF THE PROSECUTOR IN ARTICLE 291 OF THE CCP

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This article analyzes the powers of the prosecutor in the criminal production verification and confirmation of the indictment on the pre-trial investigation. Assessment about the importance of changing the name of the indictment was made. Comparison of similar articles of the CCP in 1960 and 2012 was conducted. Necessity of the extensive interpretation of the Article 291 of the CCP was established. Conclusion about key role of the prosecutor was made.

Keywords: prosecutor, investigator, indictment, materials of criminal proceedings, approval of indictment, closing criminal proceeding.

Formulation of the problem. Constitution of Ukraine proclaims that a human being, his life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value. For criminal procedural law this means that Ukrainian law must be focused on ensuring the procedural possibilities of participants in criminal proceedings. Consistent and strict compliance of all requirements of criminal procedure law is one of the important conditions of implementation of the right of citizens to judicial protection against unlawful infringement.

New Criminal Procedure Code of Ukraine made a lot of changes in the process of pre-trial investigation and the trial to create more opportunities for participants to protect their rights. At the same time some changes require detailed study and analysis to improve enforcement activities of authorities. One of this changes is about powers of the prosecutor in the final phase of pre-trial investigation.

Analysis of recent research and publications. A lot of scientists developed the problem of the powers of the prosecutor during pre-trial investi-