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The Burden of Criminal Procedural Proof

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Abstract:

The urgency of the article stated in the article is due to the need to revise traditional scientific views on certain peculiarities of criminal procedural evidence in connection with the expansion of the adversarial nature of domestic criminal proceedings. The purpose of the paper is to determine the essence of the category 'burden of proof' and justify the necessity of introducing it into scientific and law enforcement circulation. The main approach to the study of this problem was to carry out a critical analysis of the norms of the current criminal procedural legislation that regulates the requirements regarding the burden of proof and the views expressed on their proper understanding and application. The publication expresses the view that the distinction between such legal categories as 'burden of proof' and 'burden of proof' is proposed, the definition of the concept of 'burden of proof' is proposed and the rules for burden sharing between parties of criminal proceedings are analyzed. The material of the article represents both theoretical and practical value. They can be used for further research into the essence of the concept of 'burden of proof', as well as for proper understanding and enforcement of criminal procedural law enforcement activities.

Keywords: the burden of proof; the burden of proof; responsibility; legal position; proof of facts.

JEL Classification: K10; K14; K38.

Introduction

The development of the science of the domestic criminal process prompts the need for research and revision of traditional scientific views on the particular features of criminal procedural evidence in general and the peculiarities of the exercise of evidence by its subjects in particular. Particularly relevant was the decision of this issue in connection with the entry into force of the CPC of Ukraine in 2012, which proposes the extension of the use of the principle of adversarial criminal proceedings, some other new approaches to understanding the essence and procedure for the implementation of criminal procedural evidences. The study of the same understanding of the essence of the burden of proof is decisive for the proper use of a competitive procedure in conducting evidence of criminal procedural activities. It is these circumstances that explain the necessity of writing this article, its logic and content. Attention to the study of the burden of proof in the criminal process of Ukraine was almost not paid. On this occasion, it is possible to mention only certain works of such domestic scientists as Vapnarychuk 2014; Loboyko and Banchuk 2014; Lukashkina 2017; Glovuk 2013).

According to Art. 92 CPC is obliged to prove the circumstances envisaged in Art. 91 CPC, as a general rule, relies on the investigator, the prosecutor and, in the cases established by the CCP, on the victim. The burden of proof of the affiliation and admissibility of evidence, the amount of procedural expenses and the circumstances characterizing the accused lies with the party submitting them. In our opinion, in the article cited, in spite of its name, two separate categories of criminal procedural law are fixed - the burden of proof and the burden of proof.

The obligation to prove is to be understood as the legal obligation of certain subjects of criminal proceedings. In the general theory of law, legal duty is defined as the norm of law the measure of proper conduct. The main feature of a legal obligation is the need to be responsible for its non-fulfilment. In the criminal proceedings, such liability for failure to fulfil the burden of proof may be, in particular, disciplinary (for example, reprimand or dismissal from work for failure or improper performance of his professional duties) or procedural (for example, removal of the investigator from conducting pre-trial investigation by the head of the pre-trial investigation on the initiative of the prosecutor or on his own initiative, cancellation by the prosecutor, which carries out procedural guidance, or the investigating judge or court decision of the investigator, etc.). Any legal obligation corresponds to the right to demand its execution. The criminal procedural law gives the subjects of the process a fairly wide range of such rights, in particular, to file a petition, make statements, file complaints, make trials, etc. The authors believe that the provisions of Part 1 of Art. 92 CPC, which in the imperative form provides for a range of subjects of duty to prove the circumstances specified in law, regulates the duty of proof as a kind of legal obligation.

1. Materials and Methods

In order to obtain objective and reliable results in the conduct of scientific research, both general and special research methods were used. In particular, the following methods were used:

- historical and legal – to analyze the development of ideas about the ‘burden of proof’;
- comparative legal to establish the relation between the concepts of ‘burden of proof’ and ‘burden of proof’, comparing the provisions of the current and previous criminal procedural law;
- formally-legal – for making suggestions aimed at improving the current and developing new legislation to improve the legal regulation of obligations to carry out criminal procedural evidence by its subjects.

The main basis of scientific research was the norms of the legislative acts and the provisions of the judicial practice of Ukraine, the European Court of Human Rights, which found their consolidation of the rules for the distribution of the burden of criminal procedural evidences, as well as publications on this issue as domestic scientists of the past and present, as well as other countries.

2. Results and Discussion

2.1. The Essence of the Concept of ‘Burden of Proof’

As for the burden of proof (from the Latin – *onus probandi*), before proposing an understanding of its essence and the peculiarities of normative regulation, we note that this category was actively investigated by pre-revolutionary proceduralists (Vladimirov 1910; Foinitsky 1996). In Soviet times, the possibility and necessity of its existence, as a rule, was denied, since this concept, in essence, was identified with the legal obligation of a comprehensive, complete and objective study of all circumstances of the case. According to the scientists of that age, the burden of proof is the result of following the dogmas and practice of the criminal process of the bourgeois countries, a characteristic manifestation of their class orientation, as well as the consequence of the reactionary nature of the person's cult in the field of law. It is characteristic of the prosecution process, which is distributed between the parties, and the failure to provide evidence to support the claims leads to negative consequences, that is, to the

unfavorable outcome of the case (Zhogin 1973). The rejection of this phenomenon – the burden of proof – can be found in domestic editions of the criminal process as in previous years (in them traditionally it was only about the duty of proof, which according to Article 22 of the CPC of Ukraine in 1960 relied on actors who lead the criminal process is a body of inquiry, an investigator, a prosecutor, a judge, and in our time (the burden of proof is again identified with the obligation of its implementation, and both terms are used synonymously).

Why do you need to allocate the category of 'burden of proof' as an independent in the science of the criminal process and what is its distinction from the category of 'burden of proof'? The expediency of introducing a 'burden of proof' into the category of scientific research is explained, first of all, by the expansion of competition in domestic criminal proceedings (in particular, at the stage of pre-trial investigation). After all, in the current CPC, the defense has been given sufficiently wide powers to protect its interests in criminal proceedings (and not only by questioning the suspicion or accusation raised, but also by forming the evidence base of its own legal position and its active advocacy). In addition, this also prompts the legislative regulation of the distribution of the need for evidence between actors of different parties (Part 2 of Article 92 of the CPC). However, since such a necessity is not always (or more correct, not with respect to all subjects of proof) guaranteed by a certain type of legal liability, we believe that it is necessary to speak about the burden of proof, and not on its duty.

In support of the above considerations regarding the conditionality of the study of the burden of proving these legislative stories, we can quote Vladimirov more than a century ago, who believed that the burden of proof ... involves the separation of powers of the prosecution from the court. That is why the burden of proof as a special duty cannot be the language in the investigative process (Vladimirov 1910). In the legal literature, the view has already been expressed that the legal obligation and the burden of proof are different legal phenomena. In this regard, the positions expressed by researchers of this issue in the civil process are interesting. Thus, in the opinion of Baulin (2004), in connection with the absence of the burden of proof of the main feature of any legal obligation (namely: responsibility for its failure (clarification of the author - VV), it is quite right to consider it as a special legal phenomenon, which does not fit into the traditional classification of the rights and obligations of the parties. Almost the same opinion was expressed by one of the few supporters of the position regarding the need to highlight the 'burden of proof' in the Soviet criminal process by Polyansky (1960) (although, it should be remembered that, in connection with the lack of real competition in the Soviet criminal process, the study this concept was unthinkable and unpromising at that time). In his view, the concept of 'burden of proof' and 'burden of proof' are not unambiguous: the burden on the party in the process of proof only means: if a party cannot prove its claim to a particular circumstance, it has the consequences that it remains unproved and only the burden of proving means that it is opposed to the right to enforce it.

The difference in the concepts of 'burden of proof' and 'burden of proof' was also seen by the authors of Theory of Evidence in the Soviet Criminal Procedure, which indicated that the burden of proof (literally, heavy burden) was not equivalent to a legal obligation; in the Soviet criminal process, the burden of proof does not exist in any of the indicated meanings; if we accept the notion of 'burden of proof', it would have to be extended to the accused, who would risk the risk that, if he does not prove the justification, the investigator and the court will not establish them (Zhogin 1973). With regard to such an understanding, in our opinion, the decisive difference between the concepts of 'burden of proof' and 'burden of proof' is still not the circumstance of which the first or second applies, but its essence, which is the possible consequences of its non-fulfilment. In addition, we would point out that the legislator, instructing the investigator, the prosecutor and, in the cases established by the CCP, the victim, to prove that it applies to all circumstances envisaged in Art. 91 CPC (see: Part 1 of Article 92 of the CPC).

In the domestic criminal procedural literature, attempts to differentiate these concepts also take place. Yes, in particular Loboyko and Bunchuk (2014) distinguishes between these concepts that the burden of proving is to bring the prosecution to the court of guilty in a criminal offense, the burden of proof refers to other circumstances (which constitute a criminal procedural (affiliation and admissibility of evidence), civil law (the size procedural expenses) elements of the subject of evidence and a criminal element in the part that does not concern the guilty person in committing a criminal offense (for example, the circumstances that x nomics accused extenuating circumstances)).

Thus, we believe that the legal obligation and the burden of proof are independent legal phenomena. The difference between them is that the burden of proof is ensured not by measures of legal liability, but rather by the interest which is being pursued by the parties in the criminal proceedings. Interest, and not coercion, is a driving force in realizing the burden of proof. It is believed that it is precisely in this sense (that is, in the sense of the burden of proof) that the law in force provides that the burden of proof of the affiliation and admissibility of evidence, the amount of procedural expenses and circumstances characterizing the accused lies with the party submitting them

(part 2 Article 92 of the CCP⁶). In addition, it is in this sense that the prosecution and rejection of the arguments put forward in defense of a suspect or accused is on the part of the prosecution (Part 2 of Article 17 of the CPC). In this regard, it becomes clear that the duty to prove the guilt of the person lying on the prosecution side is not unconditional. In cases where the prosecution is not confirmed by the circumstances of the criminal proceedings, the parties to the prosecution may refuse to do so. Consequently, if we consider the possible consequences of non-fulfilment of a legal obligation not from the point of view of the application of a certain type of legal liability, and from the point of view of possible dissatisfaction with the interests of certain subjects, then it should not be about the burden of proof, but about the burden of its implementation.

In addition, we believe that it is possible to agree with Lukashkina, who sees the need to delimit the concepts that are considered, depending on their relationship to various aspects, the meanings (content components) of the procedural proof of evidence: evidence-cognition (proof as a cognitive activity) and proof-justification (proof as a project-realization activity). In her opinion, 'when it comes to proof in the first sense (activity aimed at establishing factual circumstances), it is worthwhile to speak about the duty to prove and the right to participate in the proof (in particular, the right to collect and verify evidence); proof in the second meaning (the activity consisting in the nomination of a certain thesis, a certain requirement that is addressed to the subject, which is authorized to make the desired decision, and the arguments presented in support of this requirement are presented in order to persuade the authorized entity to make such a decision) needs the use of the concept of 'burden of proof' and the solution of the problem, relies on (or does not rely on) the burden of proof of certain participants in the criminal proceedings that undertake such proof in specific situations' (Lukashkina 2017). Based on this understanding, we believe that if in Part 1 of Art. 92 The CPC refers specifically to the obligation to prove (by collecting and verifying evidence) the circumstances of the subject of evidence, which relies on the investigator, the prosecutor and, in cases established by the CCP, on the victim; then in Part 2 of Art. 92 CPC - about the burden of proof (by assessing evidence of the formation and implementation (justification) of its own legal position), which relies on either side.

We would also like to express another opinion, which affects the understanding of the essence of the burden of proof in criminal proceedings and the definition of its concept. In order for one side (for example, the prosecution side) to be able to challenge the arguments of the other party (the defense side), the latter must not simply object, disagree or doubt, but must substantiate its claim, that is, it should be positive. In other words, if the parties to the defense take a passive position consisting solely in making objections, disagreement or doubt regarding the materials provided by the prosecution party or due to deficiencies in the procedural form for their receipt, then there is nothing to reject, deny, except for these objections or doubts. The prosecution party in this case submits additional evidence, arguments to confirm the compliance of procedural law or the validity of the information obtained in the course of this action.

Let's emphasize also that the statement, which is proved, should be not only positive, but also objectively achievable. This means that it must be fully defined both in time and in space, and whenever possible, be established or verified using available means and means of proof in a particular party. Based on the foregoing, we can state that the burden of proof in the criminal process is a legal phenomenon, the essence of which is the due to the interest of the procedural necessity of a certain subject of proof to defend his legal position with positive and objectively achievable allegations.

2.2. Rules for Burden Sharing

More simple understanding of the essence of the burden of proof can be formulated as a set of rules of distribution between participants in the process of their need to justify the presence of certain circumstances. In the domestic criminal procedure, the following rules of distribution can be distinguished:

- (1) The basic (general) rule is based on the logic of the course of any dispute. Its meaning is that 'one who defends a certain judgment must give him reasons'. As for proof, this means that one who put forward this or that evidence must prove it. Thus, in logic, the duty to prove is understood not to be a legal obligation in the general theoretical understanding of this term (as a measure of proper, necessary behavior), and the burden of its implementation.

⁶ Based on this understanding and the delimitation of the concepts of 'burden of proof' and 'burden of proof' it is appropriate to draw attention to the mismatch of the title of art. 92 CPC of its contents. In addition, Part 2 of Art. 92 CPC does not provide for the burden of proof of belonging and admissibility of evidence to the victim and the representative of the legal entity in respect of which the proceedings are conducted, although part 1 of Art. 93 CPC provides for the possibility of their collection and submission by these entities. In this regard, it would be advisable to make appropriate changes to this article.

Confirmation of this idea is also the teachings of the English scientist U.M. Best who believed that any dispute ultimately comes to the fact that one side claims something and the other denies or at least does not recognize. It is clear that where there is no reason to assume that the statements of one side are more likely than the oppositions of the other, and where the means of proof are equally accessible to those who argue, there is the asserting party and must prove their statements (that is, exactly on it is the burden of proof). The opposing party should not give any evidence to the contrary, as long as the party claiming does not provide more or less convincing evidence in support of its provisions (Best 1875). It is on this basis that the burden of proving the charge lies with the prosecutor (that is, whoever claims it). It is he who has to prove all his essential points in order not to have any reasonable doubts as to the guilty person in committing a criminal offense.

The lawfulness of the rules for proving the charge, in addition to the aforementioned logical principle, can also be explained by the fact that it basically contains an artificial assumption created for the protection of a person in a criminal proceeding, namely the presumption of innocence (the accused's innocence is presumed until the opposite is proved). In accordance with the content of this provision, the burden of proof of facts having a criminal law significance lies with the parties to the proceedings of the prosecution. All doubts concerning the proof of the fault of the person are interpreted in favor of such person (Article 17 of the CPC). The presumption of innocence in this case protects a party that objectively is in a weak position, guarantees a public competitive equality of the parties. She either frees the weaker party from the necessity of proving an important situation to her, or makes this task more accessible, which is to cast doubt on the legal position of the opposing party as to guilty.

On the basis of an analysis of the current criminal procedural law and practice of its application, other examples, which confirm the general rule, can be cited. Yes, in particular: - The burden of proving the application on the application of measures to ensure criminal proceedings (in view of the presumption of unjustified suspicion of a criminal offense of a certain degree of gravity, as well as the possibility of achieving the objective of the effectiveness of criminal proceedings - without the application of these measures), lies with the party he made it (parts 3 and 4 of Article 132 of the CPC) (see for more on this presumption and the burden of its refutation: (Glovuk 2013)); - the burden of proof of the affiliation and admissibility of evidence (taking into account the presumption of their inadequacy or inadmissibility), data on the amount of procedural expenses (based on the presumption of their minimal or absent), is borne by the party submitting them (Part 2 of Article 92 of the CPC); - the burden of proving circumstances that exclude participation in a criminal proceeding of a judge (given the presumption of integrity and impartiality of the judge) relates to the subjects who have filed an appeal (Article 5, Article 80 of the CPC), etc.

- (2) The burden of proof can sometimes be transferred to other subjects of criminal proceedings, including the parties to the defense. Such a move may relate to facts that have both substantive and procedural significance.
- (A) With regard to the possible shift of the burden of proof of substantive facts, it was almost not investigated in the national scientific literature. As a rule, in our opinion, a rather simplistic approach to the impossibility of such a move was expressed, that is, the absence of any reasonable exceptions to the provisions of the presumption of innocence. We believe this approach is somewhat conservative (ossified), and that does not correspond to the type of modern domestic (publicly-competitive) criminal process. On the basis of the analysis of pre-revolutionary scientific researches on this issue, the scientific works of modern processualists (mainly in the field of civil procedure) and the current criminal procedural legislation of Ukraine and the practice of its application, we believe that it is possible to assume such cases of the possible shift of the burden of proving material facts in criminal proceedings:
 - (a) when the evidence base is formed by one or the other, it is possible to put forward a strong factual assumption. In this case, the burden of proof (refuting this assumption) is shifted to the other side. An example of such a case may be: (a) establishing the fact that a stolen thing is owned by the prosecutor, which leads to a shift in the burden of proof on the suspect, accused, who must prove the lawfulness of such possession, for example, the legality of the acquisition of this thing; (b) establishing the prosecutor in a criminal proceeding on poisoning the fact of the purchase of the accused poison; in this case, the burden on the latter to prove the legitimacy of the purpose of his purchase is shifted to the latter; (c) the party's protection of evidence to confirm the allegation of the accused necessitates its refutation by the prosecution party;
 - (b) when an appropriate evidence base has not yet been formed as one and the other party, however, there may be a certain legal presumption in favor of one of the parties regarding the existence of certain facts. In this case, the burden of rebutting this presumption may shift to the opposite side. Yes, in particular: (a) if the presumption is in favor of the party opposing certain facts, this is an additional reason for imposing the burden of proof on the assertion (for example, the prosecutor claims that the

- accused has committed an offense; however, according to Art. 62 of the Constitution and Article 17 of the CCP, he is presumed innocent until proved guilty (we have a situation where the legal presumption acts in favor of the accused, which confirms the necessity of imposing the burden of proof on the prosecutor ('confirms' that the burden of proof is on the prosecutor and so relied on him in accordance with the basic rule of his distribution - 'proves the one who claims'); (b) if the opposite situation arises, the presumption is in favor of the party who claims something, the objectionable party must accept the burden of proof (for example, the prosecutor asserts that, having regard to the actions of the accused and on the basis of the normal course of human cases, he committed a criminal offense intentionally (that is, the presumption of intent, until proved to the contrary, is against the accused, which means that the burden of proof of the unintentional form of guilt lies with the accused) - such a situation may occur, in particular, in the case where the prosecutor asserts that, as the accused inflicted numerous blows on the vital organs of the victim, he intended to commit a murder - in this case, as mentioned above, we consider it quite legitimate to lay the burden of refuting such a statement on the accused);
- (c) when the other party is in an objectively stronger position (on this possible case of moving the burden of proof of the expressed thoughts in modern scientific criminal procedural literature, see, in particular: (Kalinovsky 2010)), has better opportunities to prove a particular fact. Such cases are possible to ensure procedural equality of the parties. Thus, the presumption of innocence protects the accused, placing the burden on the prosecutor, since in his capacity the defense side is, as a rule, actually weaker than the prosecution, which has at its disposal all the organizational and material power of the state. However, the situation is radically changing in special cases where the defense side objectively is in a better position than the prosecution. Usually, this happens when the prosecutor has to reject the so-called denied fact referred to by the defense party, especially if this fact is at the same time the main fact in the criminal proceedings. As already noted above, objectionable facts must not be unfounded, but must be confirmed by positive and objectively feasible facts. In turn, the rejection of such objectionable facts (proof of their untrustworthiness) is also possible only if they are refuted by positive facts (for example, the rejection of the fact of the storage of narcotic substances (a denied fact) with the reference to the fact that they do not belong to him or that they were thrown to him by him (positive facts) -the fact of their illegal purchase from another person (a positive fact) .If such positive facts are not established, the guilt of the person who refers to the objectionable main fact usually remains inadequate Azan.

With regard to the condition of reach, this means that such positive facts must be sufficiently defined, have the necessary localization in time and space. Thus, in a judgment of the European Court of Human Rights (ECHR) in the case of *Fam Hoang v. France* (1992), the suspect was detained at the border when heroin was imported into France. French law stipulates that the import of prohibited goods (including heroin) is illegal if the person importing it does not prove the reverse: by providing, for example, sufficient justifying documents or proving that the action was committed in a situation of extreme necessity or was a consequence of the error, which was impossible to avoid. In the case under consideration, no such justifying evidence (positive objectionable facts) was provided, and the accused refused to give any explanation. Having examined the case on the applicant's complaint, the ECHR found that there was nothing inadmissible in the assumption that a person holding possession has something to do with the general prohibition is to explain this fact, otherwise it will be found guilty.

In essence, the European Court of Justice has confirmed the possibility of laying the burden of proving its innocence on the accused, given that he has more opportunities for this. However, positive facts that could hypothetically contradict the version of the accidental or lawful presence of suspected narcotic substances were not given by them, and even if they were, then they would probably have been considered beyond the reach of the French authorities - they would have to look for a large foreign territory and in an indefinable time retrospective. When positive facts that can be denied to be objectionable are achievable, this allows the prosecution to retain the main burden of proof.

Another example of this case of moving the burden of proof, in our opinion, is the situation when a person who is authorized to perform functions of the state or local government has found a large sum of money, other values that clearly do not correspond to her legal income, but whose origin (time, place, source of purchase) there is no information. In such cases, the burden of proof of the lawfulness of the origin of the property can / should be translated into such a person, since it is objectively in a better position than the evidence of the prosecution, and it is easier for it to provide information about the concluded acts and prove their legitimacy if the property acquired legally. Moreover, the case of the possible shifting of the burden of proof in the case of such a person may be

expressed by a strong presumption that he has obtained such property illegally, using his position, is taking place here.

Such a possible shifting of the burden of proof in Ukrainian legislation at one time found the legislative consolidation in Part 1 of Art. 3682 of the Criminal Code of Ukraine. However, we note that on February 26, 2019, the Constitutional Court of Ukraine, by its decision, declared this article unconstitutional (Decision of the Constitutional Court of Ukraine 2019), citing the fact that it contravened the principles of the rule of law in its part as a legal definition, a presumption of innocence and freedom from self-disclosure. From our point of view, this decision is rather dubious. In this regard, it is worth paying attention to the separate (divergent) opinions of seven judges of the Constitutional Court of Ukraine, which both supported and did not support the said decision (Separate opinion of judge V.P. Kolesnik 2019; The dissident opinion of the judge Sergey Holovaty 2018; Separate opinion of judge O.O. Pervomaisky 2019; Separate opinion of judge V.V. Lemak 2019; Separate opinion of judge V.V. Gorodovenko 2019; Separate opinion of the judge S.V. Shevchuk 2019; Separate opinion of judge I.D. Slidenko 2019).

Without going into a detailed analysis and quoting as provisions of the decision of the CCU, as well as separate (divergent) opinions, we consider it possible to express an opinion on the relation of Part 1 of Art. 3682 CC with the principle of presumption of innocence. From our point of view, the assumption of the presumption of innocence applies also to proceedings concerning illegal enrichment, since the need for confirmation of evidence is a substantial part of the disposition of the norm enshrined in Part 1 of Art. 3682 CC. This means that a person suspected or accused of unlawful enrichment is innocent until it finds assets in a significant amount or does not reveal any transfer of such assets to any other person, provided that he cannot prove the legality of the evidence their acquisition. That is, the impossibility of confirming the evidence of the legality of acquiring assets is part of the objective part of this crime. If she confirms the evidence of the legality of acquiring assets, then according to the presumption of innocence she is deemed to have not committed a crime until the prosecution party refutes the evidence and does not prove the contrary. Such a legislative shift of the burden of proof to the defense side, in our opinion, is quite reasonable and corresponds to the above-mentioned opinions about the essence of this concept and will ensure compliance with the principle of equality of criminal proceedings. For other possible examples of moving the burden of proof in this case, see also (Vapniarychuk 2014; Vapniarychuk 2018).

- (B) With regard to the possible shifting of the burden of proving facts of procedural importance, in order to reveal its features, it is first of all advisable to point out that the grounds of any kind of legal liability, given the general notion of 'composition of the offense', are the fault if, in the law itself, and unequivocally not set another. In the area of criminal liability, the Constitution establishes the presumption of innocence, that is, it imposes an obligation to prove the guilty person in committing a criminal offense to the parties to the prosecution. In the course of the same legal regulation of other types of legal liability, the legislator has the right to decide on the distribution of the burden of proof of guilt in another way, taking into account the peculiarities of the respective relations and their subjects, as well as the requirements of inevitability of responsibility and interests of protection of private and public interests.

The current CPC of Ukraine, regulating the use of procedural sanctions for violating its norms, does not directly indicate the possibility of their application without fault. However, based on an analysis of the current criminal procedural law, it can be argued that, in some cases, the guilt may be forgiven. Yes, according to the provisions of Art. 139 CCP, if the suspect, accused, witness, victim, civilian defendant who was summoned in a prescribed CCP did not appear without good reason or did not report the reasons for his non-arrival, he would be fined, and the suspect, the accused, a witness may also be used as a witness. As we see, in this norm, the absence of valid reasons, and hence the guilt of a person who did not appear on the challenge, is foretold, and the burden of proof of innocence (a valid reason for not being received) relies on the person being summoned.

The authors believe that the examples of legislative regulation of the burden of proof of certain procedural facts by the parties are not only the parties to the charge, but also the parties to the defense, and sometimes even the subjects contributing to the evidence, testify to the wisdom and admissibility of such an approach, first of all in terms of principle competition, since the prosecution party, in violation of the requirements of equal rights of the parties, would not be able to establish all these facts without difficulty.

Conclusions

Based on the analysis of various scientific positions, the existing criminal procedural law and practice of its application, it has been established that 'burden of proof' and 'burden of proof' are independent legal phenomena, the difference between which is: - firstly, that the burden of proof is ensured not by measures of legal liability, but

by the interests of the parties of criminal proceedings; - secondly, the fact that the burden of proof (and the right to participate in it) relates to such a substantial component (aspect) of criminal procedural proof as evidence-cognition, but the burden is to prove as a project-realization activity. The cases of possible translation of the burden of proof (both substantive and procedural-legal facts) into the opposite direction are considered.

The materials of this article may be useful for scholars who are investigating the theoretical and practical problems of criminal procedural proof, as well as for those involved in criminal proceedings. In the course of research, questions that require further development and resolution are raised. It is necessary to continue the scientific study of such a legal category as a 'burden of proof', with a view to improving its legislative regulation and law enforcement.

References

- [1] Baulin, O.V. 2004. *The burden of proof in civil proceedings*. Gorodets.
- [2] Best, W.M. 1875. *The principles of the law of evidence: with elementary rules for conducting the examination and cross-examination of witnesses*. Wentworth Press.
- [3] Decision of the Constitutional Court of Ukraine No. 1-p/2019 of February 26, 2019 http://www.ccu.gov.ua/sites/default/files/docs/1_p_2019.pdf.
- [4] ECHR judgment in the case of Fam Hoang v. France of September 25, 1992. <http://www.hrighs.ru/text/inter/b2/Chapter8.htm>.
- [5] Foinitsky, I.Ya. 1996. *The course of criminal proceedings*: in 2 volumes. Vol. 2. Alfa.
- [6] Glovuk, I.V. 2013. Presumption and the burden of proof in the consideration by the investigating judge of petitions on the application of measures to ensure criminal proceedings. *Legal Journal of the National Academy of Internal Affairs* 2: 84-89.
- [7] Kalinovskiy, K.B. 2010. Distribution of the burden of proof in criminal proceedings: is it always in favor of the accused? *International scientific conference 'Criminal justice: the link of times', October 6-8, Saint Petersburg, Russian Federation*.
- [8] Loboyko, L.M., Banchuk, O.A. 2014. *Criminal proceedings*. Vaite.
- [9] Lukashkina, T.V. 2017. Participation of the defense in proving a pre-trial investigation in the criminal proceedings of Ukraine. *Comparative-Analytic Right*, 2: 189-195.
- [10] Polyansky, N.N. 1960. *Essay on the development of science of the Soviet criminal process*. Publishing House of the Academy of Sciences of the USSR.
- [11] Separate opinion of judge I.D. Slidenko in relation to the Decision of the Constitutional Court No. 1-p/2019. http://www.ccu.gov.ua/sites/default/files/docs/1_p_2019_8.pdf.
- [12] Separate opinion of judge O.O. Pervomaisky in relation to the Decision of the Constitutional Court No. 1-p/2019. http://www.ccu.gov.ua/sites/default/files/docs/1_p_2019_4.pdf.
- [13] Separate opinion of judge V.P. Kolesnik in relation to the Decision of the Constitutional Court No. 1-p/2019. http://www.ccu.gov.ua/sites/default/files/docs/1_p_2019_2.pdf.
- [14] Separate opinion of judge V.V. Gorodovenko in relation to the Decision of the Constitutional Court No. 1-p/2019. http://www.ccu.gov.ua/sites/default/files/docs/1_p_2019_6.pdf.
- [15] Separate opinion of judge V.V. Lemak in relation to the Decision of the Constitutional Court No. 1-p/2019. http://www.ccu.gov.ua/sites/default/files/docs/1_p_2019_5.pdf.
- [16] Separate opinion of the judge S.V. Shevchuk in relation to the Decision of the Constitutional Court No. 1-p/2019. http://www.ccu.gov.ua/sites/default/files/docs/1_p_2019_7.pdf.
- [17] The dissident opinion of the judge Sergey Holovaty in the case No. 1-135/2018 (Decision of the Constitutional Court No. 1-p/2019 (updated and supplemented on 11.03.2019)). http://www.ccu.gov.ua/sites/default/files/docs/1_p_2019_3.pdf.
- [18] Vapniarychuk, V.V. 2014. The essence of the category of 'burden of proof' in the criminal proceedings of Ukraine. *Journal of the National Academy of Legal Sciences of Ukraine* 2(77): 145-155.

- [19] Vapniarychuk, V.V. 2018. Theoretical basis of criminal procedural proof. Doctoral diss., Yaroslav Mudryi National Law University.
- [20] Vladimirov, L.E. 1910. The doctrine of criminal evidence. Parts of the general and special. Publishing house of book shop 'Zakonovediniye'.
- [21] Zhogin, N.V. 1973. *Theory of evidence in the Soviet criminal process*. Legal Literature.

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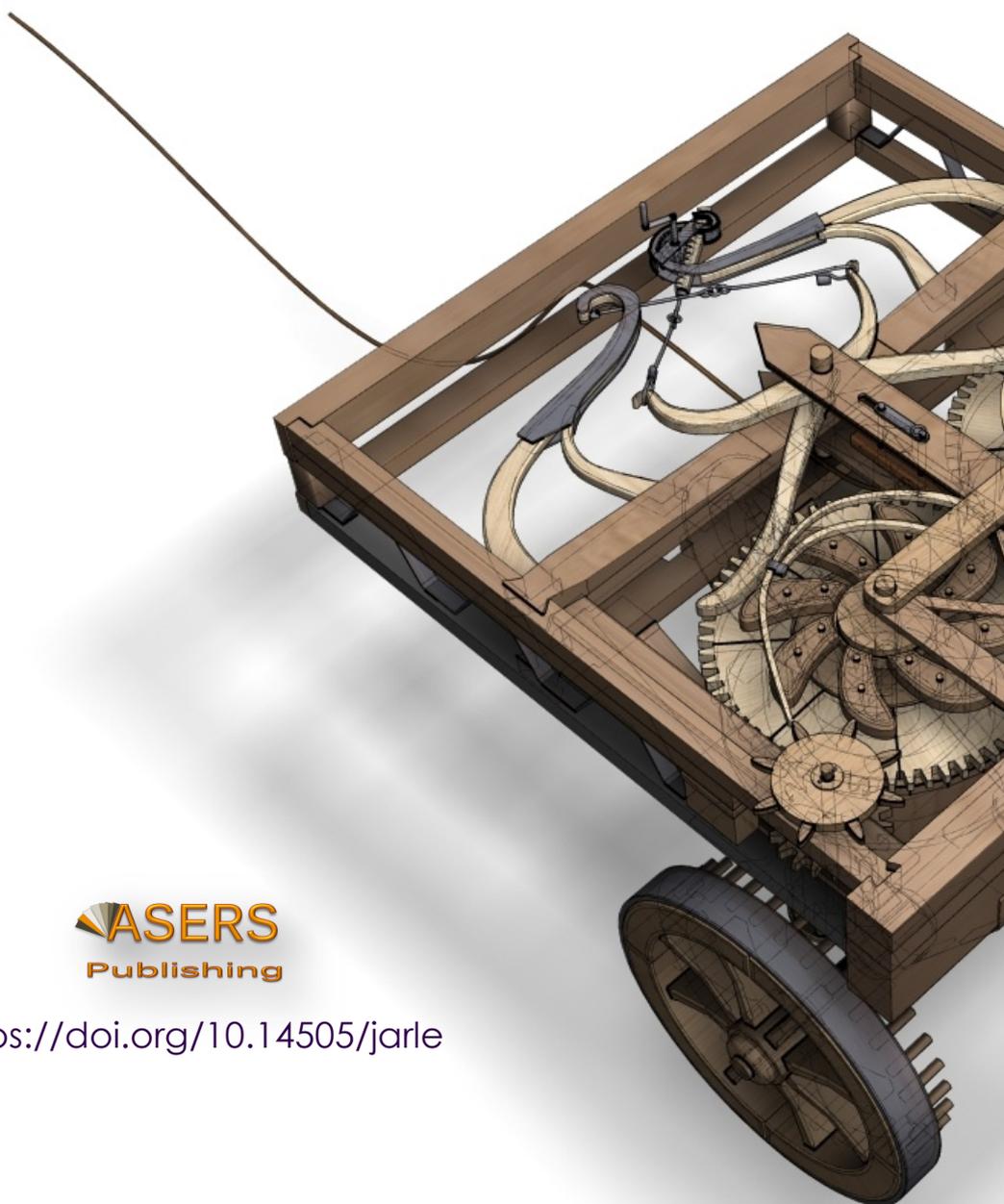
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