EVIDENTIARY PROCESS IN UKRAINIAN AND SLOVAKIAN CRIMINAL PROCEEDINGS: A COMPARATIVE ANALYSIS AND IMPLICATIONS ON CRIMINAL PROCEEDINGS

Serhii Ablamskyi, Kharkiv National University of Internal Affairs
Adrian Vasko, Matej Bel University Banska Bystrica

ABSTRACT

Issues of evidence are an important concept and component in every criminal proceeding where there is the need in establishing the very essence of criminal proceedings. In every criminal trial, for there to be proper administration of justice in its proceedings, the process of evidence in the trial must be clearly stated in ensuring effective criminal applicability's. This article articulates that when it comes to issues relating to the proof of evidence or the supposed evidentiary process in Ukraine and Slovak Republic has established the evidence process during criminal proceedings in their various criminal laws and procedural descriptions. This State's Criminal Procedure Code has really contributed enormously in conformity to international prescription when issues of evidentiary process are concerned. Even though with all the explanations given by the Countries Criminal Procedure Codes as to matters of evidence, its applicability's has been greatly flawed with some deficiency rendering it questionable. Some of the gaps and procedures when aspects of evidence are concerned becomes a great worry.

Keywords: Criminal Procedural, Proof, Subject of Proof, Evidence, Comparative Analysis.

INTRODUCTION

Nowadays, procedural law of evidence is based on "*healthy criticism*" as a system for evaluating the evidence. However, procedural law of evidence has not developed the elements of healthy criticism, or the standards of proof to be applied, which are empty norms that need to be filled in through doctrine and jurisprudence (Francisco & Rojas-Quinay, 2019).

The theory of evidence, despite its century-old history of formation and development, leaves open a number of issues resulted from the introduction of adversarial criminal proceedings as a category that literally occupies one of the central places in legal doctrine. Further study of the law of evidence is due to the fact that criminal procedural activity, as one of the types of social activity, has a cognitive nature, and with the increased subjects of evidence, this area has received a new development, formed as a result of the enforcement of criminal procedural legislation. Given that, the key aspect of our study is a comparative analysis of the theoretical and practical foundations of the evidentiary process under the legislation of the Slovak Republic and Ukraine.

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14

First of all, the relevance and importance of this issue is due to the fact that in order to make a lawful and reasonable decision, the participants in the criminal process seek to restore a reliable picture of the past event, to clarify all the circumstances of a criminal offense by establishing facts significance for criminal proceedings. Achieving this goal is performed by criminal procedural evidence, which occurs at all stages and levels of the criminal process. The largest number of mistakes made by law enforcement officers in criminal proceedings is related to violations during the collection and verification of evidence, which caused either violations of human rights and freedoms, or the adoption of unreasonable decisions, or revocation of these decisions by higher courts (Tiutiunnyk, 2016).

There is no doubt that this area of research should be carried out taking into account the views of procedural scientists, which will allow to form our own vision in order to understand the evidence and its significance.

LITERATURE REVIEW

Scientific Views on the Concept of Evidence in Criminal Proceedings

The investigation of any criminal offense (misconduct or crime) is inextricably linked with the formation by law enforcement agencies of all the facts and circumstances of its commission. Such activity is carried out by criminal procedural evidence, during which evidence is collected, verified, evaluated, on the basis of which procedural decisions are substantiated. In this context, evidence has the largest share in all activities of bodies and persons conducting investigations, as well as persons involved in these activities. That is why the normative regulation and theoretical study of the problems of evidence occupies a prominent place in criminal procedural law, the most important component of which is the law of evidence, and in the science of criminal procedure, where the leading role is played by the theory of evidence (Mladsheva & Tataryn, 2018). Indeed, the criminal procedural activity carried out during the evidence has an important and, perhaps, without exaggeration, the leading role in the adoption by the investigator, prosecutor, court of procedural decisions, as well as the issuance of a lawful and reasoned court decision based on the results of the consideration of the case on the merits.

The concept of evidence is not new to the law of Ukraine: in particular, it is used in Art. 62 of the Constitution of Ukraine adopted in 1996. Literally, this article of the Constitution contains the following - *"the guilt will not be proven", "is not obliged to prove", "doubts about proof"*. It can be understood that there is an articulation of various derivatives of the basic concept of evidence (Tiaglo, 2020).

Based on doctrinal developments, it is possible to trace a clear distinction between the two meanings of evidence, namely as:

1. Activities for the collection, verification and assessment of evidence.
2. Substantiation of a certain statement, a certain thesis (Lytvyn, 2016).

In addition, analysis of the scientific literature makes it possible to claim that there are two main positions regarding the understanding of the concept of evidence among scientists. Such a peculiar division is due to the inclusion in the interpretation of the evidence of processes

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14

that are not regulated by the rules of criminal procedure legislation. In this case, the processes are understood as the cognition, analysis and formation of the relevant conclusions of the authorized subjects of evidence. That is, the second scientific position is broader because it includes the above two meanings of evidence.

The first group of scholars is confined exclusively to the processes that are regulated by criminal procedure legislation. For example, V. G. Lukashevich notes that evidence should be considered as the duty of certain subjects to collect, verify and evaluate evidence in order to establish the truth in the case, and, on the other hand, as the duty of the subjects of evidence to substantiate their conclusions with the help of evidence (Lukashevich, 2009). A similar interpretation of the concept of evidence is found in the works of M. Dyeyev, who believes that the process of criminal procedural evidence is the activity of the investigation and court bodies carried out in procedural forms, as well as other empowered participants in the process to collect, verify and evaluate the factual data necessary for establishing the circumstances that are important for criminal proceedings and solving the tasks of criminal proceedings (Dyeyev, 2015).

The second group of scientists in a slightly different perspective reveals the concept of evidence, including in this term cognitive activity as a direct element. Thus, V.T. Nor points out that proving is a kind of human cognitive activity, which is carried out according to the general regularities inherent in the process of cognition in all branches of science and practice, although it has a number of features since it is carried out in procedural forms defined by law and aimed at collection, consolidation, verification and evaluation of factual data (evidence), final to establish the truth in a criminal case (Nor, 1978). Within the cognitive approach V.V. Vapniarchuk believes that evidence in criminal proceedings is to understand it as a cognitive activity that has lots of similarities and differences compared to other types of cognition. In this regard, the researcher considers it possible to note the prevalence at one stage or another of the historical development of certain accents that determined the essence of such cognitive evidentiary activity (Vapniarchuk, 2018). A similar vision was expressed by R.V. Maliuha, who emphasizes that criminal procedural evidence should be defined as cognitive activity that takes place in the statutory procedural form, and is aimed at identifying the circumstances of the crime that took place in the past, and establishing the truth in criminal proceedings (Maliuha, 2013).

According to Yu. A. Komissarchuk, evidence is nothing but knowing the truth in criminal proceedings, namely the establishment (in full accordance with reality) of the criminal act, guilt or innocence of a person, circumstances that affect the extent and nature of responsibility, etc. In this case, cognition is a complex process during which evidence is collected and verified, by which individual facts are established, on the basis of these facts, others are established, and thus all the circumstances of the case are clarified. At the same time, we cannot fully agree with the author's point of view on the possibility of establishing certain facts through non-procedural ways or sources, in particular within operational and investigative activities, even in the context of a supporting role without the need for its evidentiary weight (Komissarchuk, 2011). It is worth noting that under the current CPC of Ukraine of 2012, during the investigation of a criminal offense, the investigator should get permission to conduct certain investigative (search) actions from the prosecutor (the relevant resolution) or the investigating judge (ruling). In this regard, the motivating part of the investigator's motion should be described only on the basis of

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14

information got in the manner prescribed by the CPC of Ukraine. In this context, it should be noted that operational and investigative activities are not possible in criminal proceedings, and covert investigative (search) actions should be carried out.

Carrying out a scientific analysis of the cognitive approach to understanding the essence of evidence in criminal proceedings, V.G. Honcharenko models four variants for considering cognition in terms of evidence (Honcharenko, 2014):

1. Cognition and evidence are different processes in their content: the first is carried out by forensic methods, and the second – by means of criminal proceedings;
2. Cognition and evidence in criminal proceedings are identical concepts;
3. Cognition and evidence in criminal proceedings form one activity, as two parties, its two aspects;
4. Cognition, in comparison with procedural evidence, is a broader concept in content.

This point should be supported, as we also believe that cognition cannot be considered outside the scope of criminal procedural evidence. This is due to the fact that evidence, as a type of activity, includes an intellectual orientation, which is to form logical constructions between facts and evidence, pointing to the possibility of a certain event in the past, including the event of a criminal offense. At the same time, it cannot be said that cognition within criminal proceedings is identical to the concept of evidence, because evidence is always aimed at establishing circumstances relevant to criminal proceedings and involves further work with evidence, in particular after cognition. That is, cognition, having a retrospective orientation, can be considered a "reference" point of the evidentiary process. At the same time, evidence in criminal proceedings, first of all from the standpoint of intellectual activity (cognition and logic of substantiation), is considered in the science of criminal procedural law in a broad and narrow sense. In the first sense, the evidentiary process is understood as the implementation of all cognitive activities of the subjects involved in the criminal process, which includes not only the assessment but also the collection and verification of evidence. In the second - evidence is only a logical activity with the justification of the thesis (Kirmach, 2003).

We also believe it is advisable to pay attention to the fact that the participants of the criminal process (first of all the investigator and the prosecutor) perceive the event of a criminal offense not directly, if of course they were not participants, but indirectly, in particular through the testimony of the victim, witnesses or the suspect by reproducing circumstances of a certain event, etc. That is, by conducting an appropriate set of procedural actions, the investigator, the prosecutor tries to reproduce as much as possible those events and circumstances that took place in the past, and which are relevant to criminal proceedings. However, direct perception also takes place, for example, on the impact of committing a criminal offense, in particular when the investigator finds and withdraws traces of blood, fingers, clothing, biological micro-objects, etc. during the inspection of the scene. Of course, this also takes place during the commission of crimes against journalists.

On the researched question in scientific sources there is a position that cognition in criminal procedural evidence is possible both indirectly, and directly. In this scientific controversy, we believe that the issue of indirectness or directness of cognition as an aspect of criminal procedural evidence, in particular at the stage of pre-trial investigation, is ambiguous, i. e. one that has the properties of indirectness and directness. Meanwhile, if the object of cognition

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14

is directly the event of a criminal offense, then such a process is always indirect, because the investigator, prosecutor, judge can directly perceive only the consequences (primarily in the form of detected traces) of the crime, trying to reproduce events that have already took place. Therefore, the cognitive activity that takes place during the evidence of the circumstances of the crime is retrospective.

M. Pogoretskyi also sees in the evidence logical direction, which consists in the activities of authorized persons to receive and use evidence to substantiate decisions in criminal proceedings in the manner prescribed by law (Pogoretskyi, 2013). Of course, without the laws of logic it is impossible or difficult to justify the relevant procedural decision, because human thinking should not be chaotic, but subject to a certain sequence, which helps the investigator, prosecutor, investigating judge, court to structure motivating part of the decision more constructively. This, in turn, should indicate that the procedural decision is motivated and justified. In criminal proceedings on crimes of the research category, this is of great importance, because evidence has its own specifics and features, which requires the investigator, the prosecutor to organize a constructive investigation process. The point is that during motivating procedural decisions, they must use the necessary conceptual apparatus, know the legislative framework, etc.

Recent Criminal Proceedings Pattern and evidentiary process: An Appraisal of the Ukraine 2012 Criminal Procedure Code

In accordance with Part 2 of Art. 91 of the CPC of Ukraine, evidence consists in collecting, examining and evaluating evidence in order to establish circumstances that are important for criminal proceedings. It should be noted that the CPC of Ukraine of 1960 did not explain at all what exactly should be understood by evidence, and the process of proving consisted of collecting and submitting of evidence and their evaluation. Under the CPC of Ukraine of 2012, proving consists of three elements - collection, verification and evaluation of evidence. At the same time, the legislator explained only two elements of evidence - collection (Art. 93 of the CPC of Ukraine) and evaluation (Art. 94 of the CPC of Ukraine). It should be noted that in the provision of Art. 94 of the CPC of Ukraine the legislator provided that «investigator, public prosecutor, investigating judge, court evaluates evidence based on his own moral certainty grounded in comprehensive, complete, and impartial examination of all circumstances in criminal proceedings being guided by law, evaluates any evidence from the point of view of adequacy, admissibility, and in respect of the aggregate of collected evidence, sufficiency and correlation, in order to take a proper procedural decision». As for the verification of evidence, we can talk about it only on the basis of a systematic analysis of the CPC of Ukraine, for example, Part 5 of Art. 225 of the CPC of Ukraine provides that

> *"In order to verify the veracity of testimonies of a witness, victim, and establish discrepancy with the testimonies given under this Article, they may be read out during his interrogation during court trial"*

Part 1 of Art. 240 of the CPC of Ukraine provides that "*in order to check and clarify details of importance for establishing circumstances of criminal offence, investigator, and public prosecutor may conduct an investigative experiment by way of reconstructing behaviour,*

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14

situation, circumstances of a certain event, and conducting required experiments or tests" Thus, we come to the conclusion that the legislator should have explained more precisely what exactly is the verification of evidence. In the context of the study it should be noted that in accordance with Part 3 of Art. 93 of the CPC of Ukraine, the defense party is also an entity authorized to collect evidence that in the context of the development of adversarial criminal proceedings become particularly relevant. Meanwhile, despite the long-term application of the CPC of Ukraine of 2012, the issue of collecting evidence by a defense counsel remains controversial today, since not all provisions of the law provide clear regulations for this criminal procedure. For example, in Part 3 of Art. 93 of the CPC of Ukraine it is established that; "*the defense party collects evidence by way of demanding and obtaining copies of documents*…"

However, Part 3 of Art. 99 of the CPC of Ukraine stipulate that a party to criminal proceedings is obliged to provide the court with the original document, i. e. the document itself. Thus, when the court evaluates the copies of documents that were requested by the defense counsel on the grounds of Part 3 of Art. 93 of the CPC of Ukraine and provided as evidence in criminal proceedings, will be considered inappropriate, as the form of consolidation does not meet the requirements of Part 3 of Art. 99 of the Criminal Procedure Code of Ukraine.

In practice, there are many cases when investigating judges refuse to satisfy the defense lawyer's petition to initiate a reasonable time frame by the investigator or prosecutor, arguing that the person was not notified of the suspicion. Therefore, there are facts when investigating judges ignore the norm of Art. 55 of the Constitution of Ukraine, which guarantees everyone the right to protect their rights and freedoms from violations and unlawful encroachments by any means not prohibited by law. Thus, the above facts additionally indicate the need for the effective protection of the rights, freedoms and legitimate interests of the person in criminal proceedings. In this case, there is a violation of Art. 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as disregard for the decisions of the European Court of Human Rights (for example, the judgment of the ECHR in the case "*Zagorodniy v. Ukraine*")

In order to constructively eliminate legislative gaps, it is necessary to harmonize the provisions of the CPC of Ukraine and the Law of Ukraine "*On the Advocacy and advocacy practice*". Meanwhile, the complexity of this issue is that the latest law defines the powers of a lawyer not only in criminal proceedings, but also in commercial, civil and administrative, which makes it impossible to make appropriate changes to it. Therefore, we consider it advisable to provide for the relevant rights granted by the Law of Ukraine "*On the Advocacy and advocacy practice*" in a separate article of the CPC of Ukraine in order to determine a clear mechanism and form of their implementation (Drozd, 2019).

Slovakian Criminal Procedure Code and it's Engagement towards Recent Evidences Process in Criminal Proceedings

The bodies' active in penal proceedings and the courts can identify the act, subject to criminal proceedings, indirectly by using other mediating factors (*evidence*) to reconstruct it. This special process, which is strictly and precisely regulated by the Code of Criminal Procedure, is called taking evidence (Ivor et al., 2017).

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14

Reaching the very purpose of penal proceedings is impossible without making taking evidence, which is irreplaceable and decisive in this process and meaning. It is the basic element on which the individual stages of the criminal proceedings are based and the results of taking evidence depend on the decision and the level of the decision rendered.

Reliable investigation of the facts is a prerequisite for a fair, equitable and convincing decision in every criminal case. Investigating the facts of the case is the role of taking evidence, which is therefore the central issue of the entire criminal proceedings (Mathern, 1984).

The aim of taking evidence is to know all the essential facts important for further applicable procedure or for rendering a merit decision. It constitutes an essential and irreplaceable part of the criminal proceedings and is carried out at all stages of criminal proceedings. The indisputable taking evidence is that it is the only way the bodies active in penal proceeding and the court have to obtain the basis for further action and decision. It is possible to learn about the act indirectly by reconstructing its course using the evidence carried out (Ivor et al., 2017).

The process of taking evidence can be theoretically divided into the different phases, namely: seeking evidence, executing and documenting evidence, reviewing and its evaluation.
When dealing with the issues of taking evidence in criminal proceedings, it is necessary to consider, in addition to national legislation and relevant case law, adequate international standards, in particular the Convention on the Protection of Fundamental Rights and Freedoms, as amended by the Protocols and Additional Protocols of 04/11/1950, becoming effecting for the former Czechoslovakia on 18/03/1992 and the case law of the European Court of Human Rights. The Convention also guarantees a fair trial (the Art. 6(1)) and the right of the accused to prove their guilt in a lawful manner (the Art. 6(2)), but it does not regulate explicitly taking evidence (the course, scope and other) as such. In general, it can be said that the regulation of taking evidence is primarily a matter for the contractual States and that the Convention does not prescribe any of the existing evidence systems. This approach is necessary in view of the wide variety of regulating the evidence, existing not only between the continental system and the common law system but also within these systems.

The ECHR respects national law and national courts in assessing the issues of admissibility of evidence, assessment of national courts in relation to the strength of the evidence, its relevance, the veracity and the evidential value. However, the ECHR reserves the right to examine whether the act considered in its entirety, including the execution of evidence for the benefit or disadvantage of the accused, was of a fair nature within the meaning of the Art. 6 of the convention.

The current law on evidence is anchored in the Chapter 6 of the Code of Criminal Procedure (S. 119-161). The evidence can be characterized as follows: it is a legal procedure of the bodies active in criminal procedure and the court or other persons seeking to find, secure, execute and evaluate knowledge relevant for the facts crucial for the guilt and punishment decision as well as for the procedure within proceedings (Ivor et al., 2017).

The subject of taking evidence is always all the facts that are important in criminal proceedings for the decision in a particular case. In each criminal case, the subject of the evidence has an individual character. The admissibility of evidence is characterized by a broader meaning than the legality of the evidence. Not every illegally obtained proof is inadmissible, but

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14

not every unacceptable evidence is illegal. Inadmissibility includes not only the inadmissibility resulting from unlawful evidence, but also the inadmissibility given by the sources of evidence and the inadmissibility of the formal cause of the time-lapse of submitting evidence by the parties to the court.

According to legal theory, the admissibility of evidence is its essential feature, characterized in particular by compliance with the provisions of the Code of Criminal Procedure ode, the basic principles of criminal proceedings and the sources, or bearers of evidence and consistency between the provisions of the Code of Criminal Procedure, the basic principles of criminal proceedings and the methods, means and procedures used to obtain information constituting the evidence (Ivor et al., 2017).

In order for some evidence to be admissible, the following rules must be observed when searching for and executing:

1. Knowledge of the origin of the source of evidence, or evidence information, the possibility of verifying it.
2. Identifying the persons from whom the evidence information originates.
3. Competences of the subjects of criminal proceedings for taking of evidence.
4. Compliance with the general procedural rules for the search and execution of evidence.
5. Adherence to the rules for completeness and accuracy of the fixation of the evidence information (Záhora, 2013).

The Code of Criminal Procedure in the Slovak Republic uses the concept of legality. Legality in the given case means that a certain means of evidence is lawful and has been obtained through a process carried out by a body active in the criminal procedure and a court, which is in compliance with legal regulations. Not only the evidence, the unlawfulness was caused by, but also any evidence obtained on the basis of such evidence, is considered to be evidence. Evidence obtained through unlawful interference with the constitutional rights of natural persons may not be used in criminal proceedings because it does not meet the conditions of the provisions of S. 119(3) of the Code of Criminal Procedure (Zahora, 2013).

The legal theory also applies to 5 criteria for assessing the legality of the evidence quoted by Repík:

1. Whether the evidence was obtained from the source, as provided for by the law.
2. Whether the evidence was obtained and executed by a procedural subject entitled legally to do so.
3. Whether the evidence was obtained and executed at the procedural stage in which the competent processor is legally entitled to seek and execute evidence in a procedural context, i. e. such evidence which may be the basis for a decision in a criminal prosecution, in particular for a court decision.
4. Whether the evidence obtained and executed relates to the subject-matter of the proceedings, i. e. whether it relates to an act which is the subject of proceedings or to questions which are required by law to be decided on under this act.
5. Whether the evidence was obtained and executed in a manner stipulated or admitted by the law (Repik, 1982).

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14

From the case law of the European Court of Human Rights, it also implies that the Convention on the Protection of Human Rights and Fundamental Freedoms does not regulate evidence as such, while dealing only with a few of its aspects. Regarding the question of the admissibility of evidence, it has repeatedly emphasized that the Convention does not address the issue of the admissibility of evidence and that area falls within the scope of the national law of the subjects given.

The European Court of Human Rights further stated that the wording of Art. 6(1) of the Convention does not stipulate any rules on the admissibility of evidence and it is for the court to determine whether the proceedings were fair as a whole. However, although the European Court of Human Rights refuses to address the issue of the admissibility of evidence, in several cases it concluded that the use of certain evidence against the accused violated their right to a fair trial (Mole & Harby, 2006).

According to Svák, a lot of tendencies can be seen, including the fact that, within this context, the right to privacy is a positive commitment of the state and it extends to the sphere of interpersonal relations, there is more precise delineation of the limits or limitations of interference with the right to privacy, a preference for a national remedy for violation of the right to privacy, and an extensive interpretation concepts contained in the right to privacy (Svák, 2006). Gradually, the interpretative rule for the interpretation of the right to privacy became an extensive interpretation, including the right to privacy, the right to a family house, the inviolability of dwelling and the protection of correspondence.

This is also the case with the interference with the right to privacy regulated by the Convention in Art. 8. This article also states that interference with the right to privacy is permissible once the conditions are met. State authorities are entitled to interfere with this right if such interference is lawful and necessary in a democratic society in the interests of national security, public security, the country's economic well-being, the prevention of disturbances or crime, the protection of health or morals or, if necessary, rights and freedoms of others.

It should be noted at this point that the intervention of state authorities in the right to privacy is assessed by the ECHR based on three aspects: legality, Legitimacy, proportionality.
Legality means that the competent authorities may restrict that right solely on the basis of the law, what implies directly from Art. 8 par. 2 of the Convention. When assessing compliance with the condition of legality, it is based on whether the availability and predictability of the law have been respected (Svák, 2006).

In Art. 8 par. 2 of the Convention, the legitimacy of interference with the right to privacy is directly determined. This means that the right to privacy may be affected only if it is in the interests of the public authorities to protect national security, public security, the country's economic well-being, the prevention of disturbances or crime, health or morality, or if necessary to protect rights and the freedoms of others. When assessing legitimacy, the question is whether the measure in question corresponded with a permissible objective, as mentioned above.

The proportionality of the intervention of the public authorities means that it must be respected in relation to the right to privacy and the choice of means available to the state authorities in fulfilling the legitimate aim. In principle, state authorities have an option of exercising discretion when choosing the means by which they want to achieve a legitimate aim while being limited by the fact they will interference with the right to privacy only when it is

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14

necessary, thus in the spirit of the requirements of a democratic society. In other words, the state authorities can only intervene only when it is necessary and the objective pursued cannot be attained by any less severe means. That implies that the interference with the right to privacy can only be carried out if they are legal, legitimate and proportionate, and the conditions must be fulfilled at the same time (Vasko, 2019).

The applicable Act no. 301/2005 Coll. on the Criminal Code within the meaning of S. 119(3) states:

> *"It shall be possible to use as evidence anything that may contribute to properly clarifying the matter and that has been obtained in a lawful manner from the means of evidence or under special law."*

Essentials Peculiarities Existing in the Criminal Proceedings Process in Concept of Evidence under the Criminal Procedural Laws of Slovakia and Ukraine

The Existence of the Concept of Evidence in the CPC of Ukraine: The concept of proving is inextricably linked with the term "*evidence*", which was first enshrined in law in Art. 16 of the Fundamental Principles of the Criminal Procedure of the USSR and the Soviet Republics of 1958, where they were defined as factual data, although researchers at the time were convinced that the legislator talks about "facts". Without resorting to in-depth controversy, we believe that it is worth talking about the actual data, and not about the facts. The main argument in favor of this is that during the investigation of a criminal offense, the investigator, prosecutor and other participants in the process find out about the circumstances that took place in the past, i. e. carry out cognitive activities. In most cases, they face not with the facts themselves, but with information about them that has been preserved in people's memory or left as traces on the objects of the material world. For example, there is the fact of a damaged lock on the door, through which the offender got into the house, and there is factual data - the crime scene report, which recorded this fact. That is, it can be argued that each fact of revealing the circumstances of the crime committed must be recorded and fixed in the relevant procedural source, which will allow it to be confirmed in court.

Combining the positions of different scientists, Yu. K. Orlov identified five main interpretations (models) of the concept of "*evidence*", such as: 1) pre-scientific; 2) logical; 3) "*dual*"; 4) informational; 5) mixed (synthesized) (Orlov, 2009). According to V. V. Vapniarchuk, the most productive and one that fully reveals the essential legal nature of the concept of "*evidence*", is a model (interpretation) that reflects the following main aspects: informative (information), material (procedural sources), logical (fact known using information contained in a particular source, a segment of objective reality) and procedural (the procedure for obtaining information about the facts and the procedure for their consolidation in procedural sources determined by law). According to this scientist, the name "*complex-system*" is most suitable for such a model (Vapniarchuk, 2018).

Concluding the representation of views, we see that the concept of evidence is not a new phenomenon for the theory of criminal procedure, as it plays a very important role in achieving the objectives of criminal justice. This is clearly confirmed by the fact that in the CPC of Ukraine of 2012 the legislator provided a separate Chapter 4 "*Evidence and proving*", where Art. 84 states that:

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14

> *"In criminal proceedings, evidence is factual knowledge, which has been obtained in a procedure prescribed in the present Code on grounds of which investigator, public prosecutor, investigating judge and court establish the presence or absence of facts and circumstances which are important for the criminal proceedings and are subject to be proved".*

A.V. Zaklyuka noted that the current CPC of Ukraine of 2012 established the procedural distribution of evidence. First, the facts that are procedurally established as evidence have two independent forms, in particular the circumstances that are subject to be proved of a criminal offense and establish the subject of evidence. The second form is factual data that is not included in the subject of evidence, but using them the investigator, prosecutor, judge establishes the origin of the facts, build versions, give instructions to operational units to establish the circumstances of the criminal offense (Zaklyuka, 2016).

Analysis of the legislative approach to the interpretation of evidence makes it possible to argue that the structural model enshrined in Art. 84 of the CPC of Ukraine of 2012, generally corresponds to the modern doctrine of evidence. At the same time, we support the scientific position on the inexpediency of indicating only the reference to the investigator, prosecutor, investigating judge and court in the concept of evidence and to refrain from mentioning any subjects of criminal proceedings or to reflect in it other participants of criminal proceedings - subjects of proving (Yanovska, 2014). The arguments in favour of this position are the following legislative provisions. Part 1 of Art. 20 of the CPC of Ukraine stipulates that a suspect, accused, acquitted, convicted person has the right to defence consisting in the opportunity to give oral or written explanations in respect of the suspicion or accusation, collect and produce evidence; Part 2 of Art. 22 of the CPC of Ukraine stipulates that the parties to criminal proceedings have equal rights to collect and produce items, documents, other evidence; paragraph 8 of Part 2 of Art. 42 of the CPC of Ukraine establish that the suspect, accused has the right to collect and produce evidence to investigator, public prosecutor, investigating judge. Thus, the above legislative provisions clearly indicate that the defence has the right to collect and produce evidence in criminal proceedings, which, in turn, allows arguing about the inexpediency of narrowing the entities authorized to collect evidence, as done by the legislator in the official interpretation of the concept of evidence.

Norming of the Concept of Evidence in the CPC of Slovakia

The Code of Criminal Procedure of the Slovak Republic, in compliance with the established rules, also allows to be used, within taking evidence, any information obtained under other laws and thus intelligence information.

The term criminal offense means a lawful procedure of the bodies active in penal proceedings of courts, or any other persons involved in criminal proceedings, whose task is to find out without reasonable doubt whether the offense was committed and, if so, to identify its perpetrator and to impose a legal punishment or protective measure under the law, the decision to execute or to provide for its execution, to decide on the claim of damages for the damaged person, while respecting the fundamental rights and freedoms of natural and legal persons. While, at the same time, to strengthen the rule of law, prevent and suppress criminal activity and educate citizens.

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14

In the conditions of the Slovak Republic, the criminal law is procedurally regulated by a generally binding legal regulation - the Act no. 301/2005 Coll. on Criminal Code of 24 May 2005, as subsequently amended. This Act came into effect on 1 January 2006. This Act is, for its complex character, of the code-like nature. It is a general rule used for different stages of criminal proceedings, and the sources of criminal procedural law are also formed by other legislation containing standards of procedural criminal law (national, international) (Ivor et al., 2017).

The main purpose of criminal proceedings is to regulate procedures used by the bodies active in penal proceedings (prosecutors, policemen) and the courts to ensure that criminal offenses be properly investigated and their perpetrators justly punished under the law (S. 1 Code of Criminal Procedure). In criminal proceedings, an event that happened in the near or far past is always decided on the merits. The bodies active in penal proceedings, which have to determine whether the act that is the subject of criminal proceedings happened, whether it is a criminal offense and who is its perpetrator, have not directly observed the act of committing an offense. If this was the case, they would be disqualified from the execution of the acts of criminal proceedings due to doubts about their impartiality (S. 31(1) of the Code of Criminal Procedure).

The boundaries of taking evidence are always determined by a specific case. The Act exemplifies a set of circumstances to be demonstrated in the provisions of S. 119(1) as follows: In criminal proceedings, it must be proven in particular

1. Whether the act which has the particulars of a criminal offence has really occurred.
2. Whether the act was committed by the accused and on what motives.
3. Seriousness of the offense, including the causes and conditions of its commission.
4. Personal circumstances of the perpetrator to the extent necessary to determine the type and extent of the punishment and the imposition of a protective measure and other decisions.
5. Consequences of and the extent of damage caused by a criminal offense.
6. Proceeds of a criminal act and the means of committing it, its placement, nature, status and cost.

If we want to deal with the actual process of taking evidence, it is necessary to characterize the concept of evidence and the means of proof.

In the provision of S. 119(3), the Code of Criminal Procedure stipulates the legal definition of the concept of evidence as follows:

> *"Anything that may contribute to properly clarifying the matter and that has been obtained in a lawful manner from the means of evidence or under special act."*

This definition of evidence is based on the principle that only what has been obtained in a lawful manner may be used to prove the guilt and impose the punishment. "*Admissibility*" or "*Inadmissibility*" of evidence is based on the individual stages of the criminal proceedings, the provisions of the Code of Criminal Procedure and other laws (e.g. the Infringement Act no. 372/1990 Coll., as subsequently amended, the Civil Code no. 40/1964 Coll., as subsequently amended, etc.), international treaties and decision-making process of national and international courts. Despite the fact that there is no precedent in the Slovak legal system, the settled decision-making practice of the national courts together with the Constitutional Court of the Slovak

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14

Republic as well as the European Court of Human Rights creates a legal framework affecting not only the extent, the form and the way of taking evidence.

It is not necessary that evidence that is admissible for the accusation, respectively justifying the commencement of criminal prosecution in the case is lawful to bring the accused to court, or their conviction. At each stage of the process, the material value of the evidence resulting from the form and manner of its security must be assessed.

A procedural step through which the bodies active in criminal proceedings and the court acquire important knowledge to clarify the case is the means of evidence. In accordance with S. 119 (3) of the Code of Criminal Procedure, the means of evidence is:

> *"The means of evidence shall include, in particular, interrogation of the defendant, examination of witnesses and expert statements, verification of the testimonies on the scene, identification line-up, re-enactment, investigation attempts, examination, things and documents materially relevant for criminal proceedings, notification, information obtained using information and technical means or means of operational and search activities".*

Despite the fact that the means of evidence are practically exhaustively listed in the cited provision of the Code of Criminal Procedure, the other sources of evidence provided, for example, by new scientific discoveries are not excluded. The condition that evidence may indeed be "all that may contribute to clarifying the case" is to be the evidence obtained in a lawful manner. The most recent information and technical means *electro technical, radio, photographic, optical, and mechanical*, and other technical means and devices or their files, used in a classified manner when searching for, opening and examining transported shipments and their evaluation, associated with the use of forensic methods in recording telecommunication techniques, when evaluating video or audio recordings, can be taken into consideration.

In connection with the provisions of the evidence and means of evidence, we also refer to the provision of S. 119 (3) of the Code of Criminal Procedure, on the basis of which the parties may also take evidence at their own expense. Increasing the contradictory nature of the criminal proceedings required explicit emphasis on the fact that evidence can also be obtained by the parties. They must, of course, bear the costs associated with obtaining such evidence. Their reimbursement by the state is taken into consideration only if an acquittal is rendered under S. 285 (a), (b) or (c) of the Code of Criminal Procedure.

In terms of guarantee of fundamental rights with liberties, the provision of S. 119(5) of the Code of Criminal Procedure*:*

> *"Evidence obtained by means of unlawful duress or threat of duress cannot be used in the proceedings with the exception of the case when it is to be used as evidence against a person who has used duress or threat of duress".*

CONCLUSION

The study makes it possible to formulate the author's vision of the concept of evidence in criminal proceedings, which should be understood as the activities of authorized participants (subjects) regulated by the norms of the criminal procedural law aimed at collection, verification and evaluation of evidence, resulting in ensuring the adoption of legal and reasonable procedural

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14

decisions on the existence or not of a person's guilt for committing a criminal offense, and therefore the application of due process to each participant in criminal proceedings.

The collection, verification and evaluation of evidence is a whole unit of cognitive activity, but with different intermediate tasks. If we talk about the collection of evidence during the pre-trial investigation, the investigator, prosecutor during the collection of evidence also carries out cognition, which is the perception of information contained in a particular piece of evidence (for example, recording the testimony of the victim during interrogation, the investigator perceives and fixes them simultaneously). Later, the testimony provided is verified, in particular, having analysed the information received during the interrogation, the investigator clarifies their significance regarding establishing the circumstances to be proved, taking into account the requirements of Art. 91 of the CPC of Ukraine and the corresponding disposition of the article of the Special Part of the Criminal Code of Ukraine. In other words, the investigator, analyzing the testimony received, decides on the conduct of procedural actions to receive additional evidence to establish the circumstances provided for in Art. 91 of the CPC of Ukraine.

In the Slovak Republic, great attention is currently paid to the observance of citizens' rights and freedoms in criminal proceedings. In their activities, public authorities follow the case law of the European Court of Human Rights and in this context also carry out the evidentiary process and critically evaluate the current legislation. At the same time, they are actively proposing changes to the criminal justice system to reflect the requirements of the protection and guarantee of human rights and freedoms in the broadest sense.

REFERENCES

Drozd, V.H. (2019). *Ensuring rights, freedoms and legal interests of the person at the stage of pre-trial investigation: Monograph/state research institute*. Kharkiv Nationa University of Internal Affairs. Kherson: Publishing House, Helvetica.

Dyeyev**,** M. (2015). Limits of criminal procedural proof. *State and Regions Series: Law, 3*(1), 43-49.

Francisco, J.R., & Rojas-Quinay, L.F. (2019). *Interdisciplinary study on valuation systems and probate standards in Colombian procedural law*. DIXI.

Honcharenko, V.G. (2014). *Evidence in criminal proceedings: A scientific and practical guide.* Academy of Advocacy of Ukraine.

Ivor, J., Polak, P., & Zahora, J. (2017). *Criminal procedural law.* Bratislava: Wolters Kluwer.

Kirmach, L.A. (2003). *Proof as a method educational of crime investigation*: *The dissertation on grace of Candidate of juridical science by specialty 12.00.09.* Criminal process and criminalistics; adjudicative expertise. Yaroslav Mudryi National Law Academy of Ukraine, Kharkiv.

Komissarchuk, Y.A. (2011). *Definition and content of criminal procedure evidence*.

Lukashevich**,** V.G. (2009). Criminal procedure and evidence for knowledge: The history and present. *Bulletin of Zaporizhzhya National University, Law, 2*(1), 172-185.

Lytvyn**,** O.V. (2016). *Criminal procedure of proof in trial: Dissertation for the candidate of law degree, specialty 12.00.09. Criminal process and criminalistics; forensic examination, operational-search activity*. National University *Odessa Law Academy* Odessa.

Maliuha, R.V. (2013). Evidence in criminal proceedings: Problems of determining structural elements. *Scientific notes of Lviv University of Business and Law, 11*(2), 280-298.

Mathern, V. (1984). *Evidence in Czechoslovak criminal law*. Bratislava: Obzor.

Mladsheva, I.A., & Tataryn, I.I. (2018). *Problems of evidence during the pre-trial investigation.*

Citation Information: Ablamskyi, S., & Vasko, A. (2022). Evidentiary process in Ukrainian and Slovakian criminal proceedings: a comparative analysis and implications on criminal proceedings. *Journal of Legal, Ethical and Regulatory Issues, 25*(S1), 1-14