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EVALUATION OF EVIDENCE IN CRIMINAL PROCEEDINGS (international experience)

X.Z.Kudratillaev
Lecturer of the Department of Criminal and Procedural Law of Tashkent State Law University, Tashkent, Republic of Uzbekistan

Abstract: this article discusses the importance of evidence, evidence in criminal procedure, the errors and omissions in the evaluation and evaluation of evidence, as well as in what order it will be carried out in other states.

Keywords: evidence in criminal procedure, the importance of evidence, evaluation of evidence, USA, Germany, France.

ОЦЕНКА ДОКАЗАТЕЛЬСТВ В УГОЛОВНОМ ПРОЦЕССЕ (международный опыт)

Х.З. Кудратиллаев
Преподаватель кафедры уголовного и процессуального права Ташкентского государственного юридического университета Ташкент, Республика Узбекистан

Аннотация: в этой статье обсуждается важность доказательств, доказательств в уголовном процессе, ошибок и упущений при оценке и проверке доказательств, а также в каком порядке это будет проводиться в других государствах.

Ключевые слова: доказательства в уголовном процессе, важность доказательств, оценка доказательств, США, Германия, Франция.

The problem of the admissibility of evidence is one of the central ones in the theory and practice of criminal proceedings. The appeal to foreign experience on the basis of comparative legal analysis allows us to penetrate deeper into the ideological content of the admissibility of evidence as a legal category, expand the understanding of the ways of legal implementation in criminal procedural norms. This article provides a brief overview of the approaches of the criminal procedure law of Western states to the admissibility of evidence, analyzes the patterns that determine these approaches.

1.Approaches of Anglo-Saxon and continental law to the admissibility of evidence obtained before the trial. The admissibility of evidence is a permission to use it, a "legal pass" to participate in the case. The verdict and other procedural decisions based on inadmissible evidence are illegal. Proof is admissible if it meets certain criteria established

by criminal procedural norms. For the purposes of comparative legal analysis, the very diverse criteria for the admissibility of evidence existing in different models of criminal proceedings can be divided into two large groups: 1) criteria for the admissibility of evidence formed at the stage of trial; 2) criteria for the admissibility of evidence formed in pre-trial proceedings. In an adversarial Anglo-American trial, testimony given before and outside the trial cannot be used. In the inquisitorial (according to the terminology of modern Western science) Romano-Germanic trial, also as a general rule, such testimony cannot be used as evidence (the exception is the criminal trial of the Netherlands).

This rule is conditioned by the principle of immediacy and the right of the accused to face-to-face (confrontation) with prosecution witnesses, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, there are exceptions. Exceptions in criminal proceedings vary from State to State. The differences are due to the peculiarities of the processes. If we compare the countries of continental Europe with each other, then the strictest rules regarding the prohibition of the use of testimony given at the preliminary investigation and the nature of exceptions are characteristic of the Italian criminal process.

In Western procedural science, the systems of continental criminal procedure are traditionally designated by the term "inquisitorial models" - inquisitorial models, and the systems of criminal procedure of common law countries are called "adversarial models" - adversarial models. A number of scientists criticize the use of such terminology on the grounds that the epithet "inquisitorial" is often perceived not neutrally, but in a negative sense, because it resembles the courts of the Holy Inquisition, witch trials, the use of torture, which characterizes the criminal proceedings of the Middle Ages. Although in reality, if we approach from the standpoint of legal values, it is obvious that at the present stage of development, each of the models has its advantages, and it is hardly possible to determine in which of them the ratio of advantages and disadvantages is optimal. The ratio of the evidentiary value of information obtained during pre-trial and judicial proceedings, characteristic of the adversarial process, reflected in the Italian criminal process, also determined the specifics of the legal regulation of the issue of the admissibility of evidence.

As noted above, during the preliminary investigation, only such evidence as the results of investigative actions that are not repeated in court proceedings (items, documents seized during the search, recordings of telephone conversations, etc.) are formed, which can be used to establish circumstances relevant to the case only after cross-examination of the officials who received them persons of the criminal prosecution authorities. Since the bulk of the evidence is formed at the stage of the trial, and only information is collected by the parties during the preliminary investigation, to the extent that the law does not attach importance to the criterion of admissibility of evidence to compliance with procedural norms when collecting this information. The judge has the right to admit evidence that is not directly provided for by the criminal procedure law. In other words, information obtained from sources not provided for by law and in a way

not provided for by law may be admitted as evidence.

However , at the same time art . 191 The Italian Code of Criminal Procedure establishes that evidence obtained in violation of prohibitions cannot be used. Article 188 of the Italian Criminal Procedure Code prohibits obtaining evidence using methods or techniques that restrict the freedom of will of an individual - the alleged bearer of the information sought, or affect his ability to store information about facts in memory and evaluate them. Evidence obtained in violation of this prohibition is inadmissible by virtue of Article 191 of the CPC. In addition, in accordance with art. 195 The CPC does not allow messages received from the words of another person, except in cases of his death, a mental disorder that makes it impossible for him to repeat his own message about the desired facts, or other reasons that make such repetition is impossible (for example, memory loss). In other cases, the person who is the primary source of the information must be interrogated in person. In fact, this rule is a ban on the so-called "hearsay" - hearing evidence, which is perceived from common law and which will be discussed when describing the rules of evidentiary law of England, Wales and the USA. Italian Criminal Procedure Law distinguishes between evidence that can be used to establish the guilt of a person in committing a crime, and evidence that can only be used to refute other evidence and establish the unreliability (bad faith) of a witness. The latter include the above-mentioned testimony of the accused and the testimony of witnesses given at the preliminary investigation to the prosecutor or the police and announced in court proceedings (Article 500 of the CPC).

In Germany, there are the following exceptions to the general rule on the admissibility of only those witness statements that were obtained at the trial stage. In accordance with Article 251 (I) (2) of the CPC, the testimony received by the investigating judge, as well as the testimony received by the prosecutor or the police, may be announced either with the consent of the defense and the prosecutor, or when the absence of a witness in the trial is unavoidable (in the event of the death of a witness or for other reasons). In accordance with art . 251 (II) (2) of the CPC, if it is impossible to interrogate a witness in court proceedings in the foreseeable future (due to the remoteness of his residence from the place of trial, illness, etc.), only the testimony received by the investigating judge can be read out. The procedure for obtaining testimony by the investigating judge, which provides for the participation of the defense party in it, ensures the right of the accused, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to confront prosecution witnesses, which is also of particular importance in cases where the appearance of a witness in court proceedings is impossible.

It is allowed to read out the testimony obtained at the stage of the preliminary investigation, if the testimony given by the witness at the stage of the trial contradicts them, as well as for the purpose of reminding them of their content, if the witness at the time of the trial does not remember the circumstances about which he testifies well enough (Sections 253 and 254 of the German Criminal Procedure Code).

2.Criteria for the admissibility of evidence in German criminal proceedings. The regulation of the question of the admissibility of evidence in German criminal proceedings is based on two rules: 1) prohibition of obtaining (i.e. inadmissibility of obtaining evidence by certain methods); 2) prohibition of use (i.e. inadmissibility of using evidence obtained by certain methods).

The Criminal Procedure Code of Germany establishes a number of prohibitions on obtaining evidence in a certain way, among which are: disclosure by an official of information constituting a state secret without appropriate permission; obtaining testimony from a person who has not been explained his right not to testify (§ 52-55 of the Criminal Procedure Code); use physical force, drugs, torture, hypnosis for the purpose of obtaining testimony (§ 136a of the CPC); conducting procedural actions without obtaining the appropriate permission of a competent person, for example, listening to and recording telephone conversations without first obtaining judicial permission.

The prohibitions of use are mainly contained in the case law created by the Supreme Court of Germany, and not in the CPC. The exception is the prohibition explicitly provided for in the CPC on the use of testimony obtained with the use of physical influence, drugs, torture, hypnosis and a number of other illegal actions, which will be discussed later (Article 136a of the CPC).

In the absence of an appropriate judicial precedent, violation of the prohibition of obtaining evidence in a certain way does not automatically entail their inadmissibility. Such aviolation is the basis for the participation of evidence in the proportionality test, through which the judge, taking into account the evidentiary value and reliability of illegally obtained evidence, determines whether recognition will meet the goal of achieving a balance between the interests of the individual and the public interests, whether the use of this evidence in a criminal case is permissible.

3.Criteria for the admissibility of evidence in French criminal proceedings. The French model of preliminary investigation is the most inquisitorial of all European models. It is perceived by the modern criminal process of only three European countries: Belgium, Spain and the Netherlands. The French model is characterized by a peculiar distribution of procedural functions between the prosecutor and the investigating judge conducting a preliminary investigation in cases of serious crimes under the jurisdiction of the assize court. The decision to initiate criminal prosecution belongs to the powers of the prosecutor (art. 706-24-1, 706-28 and 706-35 of the CPC).

The rules of interrogation are regulated (Article 170); tapping the phone of a lawyer or a member of parliament without notifying the chairman of the bar association or the chairman of the relevant chamber of parliament, respectively (Articles 100-7 of the CPC); confirmation that the person brought to the prosecutor of the republic has been explained his rights (Article 393 of the CPC), and a number of other circumstances, provided for in Articles 78-3, 215, Article 553 of the CPC. A confession obtained through the use of torture, cruel and degrading treatment is also prohibited as evidence. Substantive annulment occurs when a violation, not being prohibited under the penalty

of annulment, encroaches on the essential principles of the process, undermines the interests of the defense and the victim. This is established in Articles 171 and 802 of the Code of Criminal Procedure of France.

4.The rule on the inadmissibility of evidence obtained not from the original source, and exceptions from it. In the criminal proceedings of England and the USA, evidence obtained not from the original source, the so-called hearsay, is inadmissible, which is a feature of the criminal proceedings of common law countries. Information in this category includes any information reported or stated not during cross-examination in court proceedings. In addition, this information includes the testimony of a witness obtained during cross-examination, but containing information provided to him by another person, i.e., for example, when witness A. claims that his acquaintance B. saw the accused V. enter the house at a certain address on such and such a date at such and such a time.

Thus, information related to the hearsay category includes information reproduced by a witness from the words of third parties, protocols and other official written documents compiled by official lipsticks, written documents compiled by private individuals, as well as any witness testimony given outside of court proceedings.

The Criminal Justice Act of 2003, which came into force on April 4, 2005, fundamentally weakened the prohibitions on the use of hearsay. It contains, firstly, the concept of hearsay, which is restrictive in comparison with the concept developed by case law at the time of the adoption of the law; general rules extending the discretionary powers of the judge in respect of all types of hearsay to recognize them as admissible as evidence; secondly, provisions concerning such type of hearsay as communications witnesses whose appearance in court proceedings is impossible for objective reasons, and allowing their use as evidence, regardless of the discretion of the judge; thirdly, the provisions allowing the use of documents as evidence, and fourthly, the provisions allowing as evidence the previous testimony of the person being interrogated in court proceedings.

In the USA, there is a strict ban on the use of hearsay, from which there are exceptions created by case law, but which are not (and cannot be, due to the fact that their source is judicial decisions, not the law) of such a broad nature as the exceptions provided for by the English Criminal Justice Act discussed above twothousandthree

The American and English rules on the prohibition of hearsay have a common legal nature. The American rule, in addition, is consistent with the right of the accused to confront prosecution witnesses, guaranteed by Article 6 of the US Constitution.

American processualists note that the prohibition on the use as evidence of information obtained not during cross-examination is due to the inability to verify the reliability of this information. Cross-examination contains quite serious guarantees of the reliability of the testimony obtained during it, which consist in the fact that 1) the witness is sworn in and, therefore, feels obliged to tell the truth; 2) the opposite party has the opportunity to question the veracity of the witness, as well as his ability to correctly perceive the

circumstances relevant to the case and recall them; 3) the judge and jurors can see the behavior of the witness testifying. In relation to a report made outside of cross-examination, these guarantees cannot be applied, therefore, when the information contained in this message is used as evidence, in fact, the jury is asked to assume that this information is reliable and that it was reported by an honest and trustworthy person.

In the US criminal process, there are exceptions to the rule on the prohibition of hearsay and the so-called exceptions to the concept of hearsay. The latter means that, for some types of messages made outside of cross-examination in court proceedings, the concept of hearsay does not apply and they can be used as evidence. In accordance with rule 801 of the Federal Rules of Evidence, exceptions to the concept of hearsay, for example, include a prior statement by a witness testifying during the trial, if this message was given under oath and contradicts the testimony of the witness, that is, it is perjury; not contradicting the testimony of one witness given in the trial, his previous message, used to refute the testimony of another witness, given in support of the unreliability of the testimony of the first witness.

Exceptions to the rules on the prohibition of hearsay are conditionally divided into two groups: allowing the use of hearsay when witnesses - the primary sources of information - are available, and when they are unavailable.

Neither in Germany, nor in France, nor in Belgium is there a ban on the use of hearsay as evidence. As mentioned above, the Criminal Procedure Code of Germany establishes that the verdict of the court can be based on the testimony of only those witnesses who were questioned in the trial, except in cases where they cannot appear at the hearing for the reasons listed in the law. At first glance, it may seem that this rule is similar to the English prohibition on the use of evidence obtained not from the original source. However, this is not the case. The prohibition contained in English criminal procedure law on the use as evidence of witness testimony given in pre-trial proceedings is among the rules on the inadmissibility of evidence, while a similar prohibition existing in German criminal procedure law follows from the principle of the immediacy of judicial proceedings. If a court in Germany bases its verdict on the testimony of witnesses given before the trial, it will violate its duty to summon and interrogate witnesses in the trial, and, consequently, the principle of immediacy. If the court in England is based on the testimony given before the trial, then, from a procedural point of view, this will mean that inadmissible evidence was used in the case.

The difference in German and English approaches to information reported from the words of third parties can be demonstrated as follows: in Germany, the court can hear this information if it is possible to verify it, and in England, the court should not listen to this information at all. 5. Criteria for the admissibility of evidence in US criminal proceedings. The norms of US criminal procedural law on the admissibility of evidence obtained with procedural violations are very different from the English procedural rules governing this issue. In the USA, compliance with the procedure for obtaining evidence is given much more importance than in England.

The reason for the differences lies in the nature and purposefulness of the rules on the inadmissibility of evidence. As noted above, the rules on the inadmissibility of evidence in English criminal proceedings are intended to ensure the fairness of the proceedings in the case. The rules on the inadmissibility of evidence in American criminal proceedings are aimed at preventing procedural violations by criminal prosecution authorities, primarily by the police. In the US criminal process, the recognition of evidence as inadmissible is a procedural sanction for procedural violations. In other words, the criminal prosecution authorities are prohibited from violating the rules of criminal proceedings on pain of recognizing the evidence obtained as inadmissible and excluding them from the case materials.

The set of rules against the inadmissibility of evidence is called the exclusion rule (evidence) - exclusionary rule. This rule serves as a guarantee of respect for constitutional rights that are subject to restrictions in the course of criminal proceedings, the provisions of laws regulating the procedure for procedural actions, and the rules of criminal proceedings established by the courts. The exclusion rule controls compliance: 1) the constitutional right to protection from unreasonable searches and seizures, guaranteed by the IV Amendment to the US Constitution; 2) the constitutional right not to testify against oneself, guaranteed by the V Amendment to the US Constitution; 3) the right of the accused to the assistance of a defender provided for in the VI Amendment to the US Constitution; 4) the right to due process guaranteed by the V and XIV amendments to the US Constitution; 5) the rights of citizens in the control of telephone negotiations and electronic surveillance, which are protected by the Fourth Amendment to the Constitution, as well as the federal law on the control of crime on transport and security on the streets.

6.Comparative legal analysis of the criteria for the admissibility of evidence in the Anglo-Saxon and Romano-German criminal proceedings. The main feature of the English approach to the admissibility of evidence is that this property is formed (unlike, for example, the Russian approach) not only and not so much from compliance with the formal rules of criminal procedure established by criminal procedural norms, but includes such requirements as the reliability of evidence and the absence of the effect of prejudice.

Despite the similarity of the English and German criteria for assessing the admissibility of evidence obtained in violation of criminal procedural norms, there are discrepancies in the legal nature of the rules themselves on the admissibility of evidence. Whereas in Germany these rules are based on the idea of ensuring a balance between the interests of the individual being prosecuted, on the one hand, and the public interest in combating crime, on the other hand, in England the rules on the admissibility of evidence are aimed at ensuring the fairness of the process as a whole. This partly explains that the reason for excluding evidence in English criminal proceedings is not only (and perhaps not so much) a violation of the procedure for collecting them, but rather the ability of evidence to create the effect of prejudice, low evidentiary value and insufficient reliability.

According to the French criminal procedure law, many procedural violations entail

the annulment of the results of the relevant procedural actions, unlike the German Criminal Procedure Code, which links the absolute inadmissibility of evidence only with obtaining the testimony of witnesses and the suspect in certain ways prohibited by law. When deciding on the admissibility of evidence in French criminal proceedings, importance is attached to the degree of importance of the violated rule (based on its nature and orientation), while in England and Germany a whole set of factors is considered, including the degree of importance of the violated rule, i.e. the issue is resolved in a broader context. This French approach is criticized by the English procedural doctrine for excessive formalism.

So, what is common to the criminal process in England, Germany and France is that only procedural violations directly provided for in the law automatically entail the inadmissibility of the evidence obtained. In other cases, a violation of procedural norms committed during the collection of evidence is only the basis for assessing, taking into account certain circumstances, this evidence from the point of view of admissibility. It is noteworthy that in practice, English courts are not inclined to recognize material evidence as inadmissible if they were seized during an illegally conducted search, but have great evidentiary value. The same applies to the illegally recorded conversation between the accused and his accomplice. With regard to the testimony of the suspect obtained in violation of the procedure regulated by criminal procedural norms, there is a tendency to recognize them as inadmissible, especially in cases of violation of the rules concerning the detention of the suspect and his interrogation following the detention. In France, on the contrary, violation of the procedural order of search and seizure by the courts is traditionally considered as a basis for declaring evidence inadmissible, while violations by the police of the rules of detention, detention and interrogation of a suspect often do not entail judicial decisions on the inadmissibility of the resulting evidence.

As mentioned above, in the Belgian criminal process, the violation of the procedural norm in itself when collecting evidence entails their inadmissibility. In the criminal proceedings of Belgium the court has no right to determine what will meet the fairness of the procedure in the case as a whole: admission or refusal to admit such evidence, as provided for in England. Nor does he have the right to give his own assessment of whether a balance will be achieved between the interests of the individual and society if this evidence is excluded, as provided for in Germany.

So, in those systems of criminal procedure where the center of gravity of the formation of evidence is at the stage of judicial proceedings (common law countries and Italy), the rule on the inadmissibility of evidence is more flexible, less formalistic. It assumes taking into account the specifics of a particular criminal case when deciding on the admissibility of evidence and provides the court with considerable discretion in resolving this issue.

Compliance with the procedural form as a criterion for the admissibility of evidence in common law countries, as well as in Italy, is not as important as in most countries of continental Europe. Since, as a rule, only sources of information are collected in adversarial models during pre-trial proceedings, the admissibility of evidence there is

not directly related to compliance with the procedural form, which is sometimes simply not established. Unlike inquisitorial European models, in the USA and England, the rule on the inadmissibility of evidence is not aimed at ensuring their reliability, which is already sufficiently guaranteed by cross-examination as a necessary condition for the formation of each evidence, but at achieving other goals. As already noted, in the USA it is a prevention of violations of legal norms by criminal prosecution authorities, in England it is ensuring the fairness of the proceedings in the case.

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