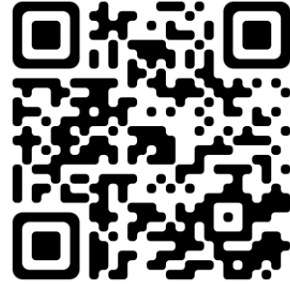




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FEATURES OF CRIMINAL PROCEDURAL PROVING DURING JUDICIAL DEBATES IN PROCEEDINGS IN THE COURT OF FIRST INSTANCE

In the article the authors emphasize the differences in the process of proving during pre-trial investigation and judicial proceedings, which is naturally caused by different tasks, conditions and features of these stages of the process. Proving during judicial proceedings in a court of first instance is characterized by a shift in emphasis to logical and mental activity related to researching of evidence, presenting arguments, persuading of other participants, justifying decisions, etc. Judicial debates are treated as a part of the trial, the basis of which is the carefully thought-out speeches of the parties and other participants of the process and the exchange of remarks. They analyse the evidence examined in court hearing, provide arguments regarding their propriety, reliability, sufficiency and admissibility, as well as interpret and discuss the circumstances of the criminal proceedings. It is important that each participant tries to convince the court of the correctness of his position based on the examined evidence. For the court, this is an important stage in the formation of internal conviction, including through the assessment of communication and syndication elements of speeches, remarks and the last word of the accused, on the

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basis of which the court will adopt and substantiate the court decision at the next stage of the trial. It is stated that the basis of judicial debates is the guaranteed by Art. 34 of the Constitution of Ukraine the right to freedom of thought and speech, usually within the framework of certain criminal proceedings under consideration by the court. The court takes a passive position in debates, it only listens to the speeches of the parties and, as a rule, does not have the right to limit their duration to a certain time. The substantive part of the debates is limited to the results of the previous stage — the research of the evidence, and therefore participants of judicial proceedings have the right to refer in judicial debates only to those evidences that were examined at the court hearing. It is emphasized that important role is played by argumentation with reference to the evidence, through which the participants of the proceedings can influence the formation of the judge's internal conviction and as a result the content of the court decision. The practice of the Supreme Court regarding the exercise of the right to participate in judicial debates is considered.

Keywords: evidence, proving, judicial proceedings, trial, court of first instance, judicial debates.

Formulation of the problem. At various stages of the development of the criminal procedural doctrine, one of the central problems is the problem of criminal procedural proving, which has always attracted considerable attention of scientists. However, despite this, scientific circles have not developed a single vision regarding a number of aspects of criminal procedural proving. On the contrary, scientific works demonstrate extremely different, original approaches to understanding of proving in criminal proceedings as a whole and at its individual stages.

When studying the outlined problems, as a rule, proving in criminal proceedings is traditionally considered as collection, verification and evaluation of evidence. However, the process of proving in judicial proceedings is significantly different, which is naturally due of the tasks, conditions, and features of this stage of court proceedings. If proving at the stage of pre-trial investigation is characterized by practical activities aimed at actively searching for factual data, then in judicial proceedings the emphasis shifts more to logical and mental activities related to their research, presenting arguments, persuasion, and justification of the decisions made. This thesis is clearly manifested at the stage of judicial debates during proceedings in the court of first instance.

The status of processing the topic. Separate issues of criminal procedural proving in judicial proceedings were the subject of research in the scientific papers of N. R. Bobechko, V. V. Vapnyarchuk, V. P. Hmyrko, Y. M. Groshevyi, O. B. Zahurskyi, O. E. Zvirko, E. H. Kovalenko, O. V. Lytvyn, A. O. Lyash, Yu. M. Myroshnychenko, M. M. Mykheienko, V. T. Nor, V. O. Popelyushko, O. V. Rybalka, S. M. Stakhivskyi, V. V. Sukhonos, M. Ye. Shumylo and other scientists. However, to a lesser extent, attention was paid to the study of the specifics of criminal procedural



proving actually at the stage of judicial debates in the proceedings in the court of first instance, which determines the relevance of the chosen topic.

The purpose of the article is to identify the features of criminal procedural proving at the stage of judicial debates during proceedings in the court of first instance.

Presenting of main material. In our understanding of criminal procedural proving in judicial proceedings in the court of first instance, we proceed from the fact that it is a cognitive-practical and logical-intellectual activity of participants in judicial proceedings and the judge, which is regulated by the criminal procedural law, which consists of the formation, research and evaluation of evidence, as well as their further use for the purpose of establishing circumstances relevant to criminal proceedings, defending the legal positions of the participants in court proceedings and making legal, justified and motivated court decisions [1, p. 631].

One of the characteristic features of modern adversarial criminal proceedings in the court of first instance is such a stage of the trial as judicial debates, in which participants take part, both from the party of the prosecution and from the party of the defence. V. Sukhonos and O. Zvirko emphasizes that the content of the concept of judicial debate in criminal proceedings is a clearly structured and specially organized public exchange of opinions between two parties regarding the provenance of the accusation [2, p. 89].

O. Zahurskyi emphasizes that judicial debates are an independent part of the trial in which through polemics between the participants of the trial process, with the help of judicial speeches, which they have the right to make, using the creative abilities and knowledge of the speaker, the results of the court investigations are summarized, collected facts are evaluated, conclusions and statements are made, opinions on issues to be decided by the court are formulated [3, p. 7].

According to N. Bobechko opinion, judicial debates are a stage of a judicial proceeding in which the participants of the judicial proceedings sum up the investigation of the circumstances of the criminal proceedings, give an assessment of the evidence examined at the court hearing and justify their legal position taking into account the criminal procedural functions performed by them [4, c. 380].

Although the evidentiary activity of the participants in the judicial proceedings and the court is traditionally associated with the stage of research of evidence (which is sometimes called the judicial investigation), such activity takes place at the stage of judicial debates. It is rightly noted in the scientific literature that the competitive nature of the criminal process is most evident in judicial debates. At this stage of the judicial proceedings all the circumstances of the case are highlighted by the parties from different positions, thereby providing conditions for a comprehensive and objective approach to resolving the case and rendering a fair, legal and well-founded court decision [5, p. 268].



Such an element as the use of evidence in the form of it manipulating, presenting arguments with reference to evidence, etc., is most clearly manifested in the stage of judicial debates. Argumentation of the parties is an important component of evidentiary activity in criminal proceedings, which gives them the opportunity to convince the court of the correctness of their legal position through the evaluation of factual data and thereby help to make a legal, well-founded and fair court decision.

At the stage of judicial debates one of the sides of criminal procedural proving — substantiating side is clearly visible. Its essence is manifested in putting forward certain propositions (theses) and presenting arguments (indisputable factual data) for their justification, convincing other persons of the correctness and truth of these propositions [6, p. 17].

The term «debates» comes from the French «debat» and means a structured, organized public exchange of opinions between two parties on a certain current topic. This type of public discussion between debate participants has a clear direction — to convince the third party of their rightness, to form a positive impression of one's own position in the audience.

Adapting this understanding to criminal proceedings, it is quite possible to agree that judicial debates are an independent part of judicial proceedings in which the parties in speeches and remarks evaluate the circumstances established in the process of finding out the circumstances and verifying them with evidence, based on their positions, sum up a result of trial. They analyse and evaluate the evidence examined during the trial, substantiate their conclusions on issues to be decided by the court in the deliberation room [5, p. 268]. At the same time, it is worth clarifying that court debates are not limited to the participation of only parties of criminal proceedings. So, Part 1 of Art. 364 of the CPC of Ukraine gives the right to speak in judicial debates also to the victim, civil plaintiff, civil defendant, their representatives and legal representatives, the representative of the legal entity in respect of which the proceedings are being conducted [7].

The stage of judicial debate quite logically follows the examination of the evidence. In this way, the debate participants build their arguments and conclusions about the circumstances of the criminal proceedings based on the researched evidence, and have the opportunity to base their speeches on the strongest arguments. N. Bobechko rightly asserts that this stage of the trial is interrelated with the previous one — clarifying the circumstances of the criminal proceedings and verifying them with evidence. During a clarifying the circumstances of a criminal proceeding and verifying them with evidence a considerable amount of information about the facts is investigated, some of which establish the presence, others — the absence of circumstances that are subject of proving or that are important for the criminal proceeding. Sometimes the evidence on the same fact is contradictory. Hence, there is a need to summarize such evidence, which contributes to the correct resolution of issues following the consequences of the trial [4, p. 380].

The basis of judicial debates is the guaranteed by Art. 34 of the Constitution of Ukraine the right to freedom of thought and speech, usually within the framework of certain criminal proceedings under consideration by



the court. The court takes a passive position in debates, it only listens to the speeches of the parties and does not have the right to limit their duration to a certain time. At the same time, the presiding judge has the right to stop the speech of a debate participant if, after making a remark, he repeatedly went beyond the limits of the ongoing criminal proceedings, or repeatedly made offensive or obscene remarks, and give the floor to another debate participant [7]. Thus, to a certain extent, the presiding judge is entrusted with the control function of ensuring the proper course of judicial debates.

The substantive part of the debates is limited to the results of the previous stage — the research of the evidence. On the basis of Part 5 of Art. 364 of the Criminal Procedure Code of Ukraine participants of judicial proceedings have the right to refer in judicial debates only to those evidences that were examined at the court hearing. The provision quite logically follows from the principle of immediacy of examination of testimony, things and documents (Art. 23 of the CPC of Ukraine). On the other hand, the criminal procedural law provides that if during the judicial debates there is a need to submit new evidence, the court resumes the previous stage of the trial to examine it, after which it reopens the judicial debates regarding the additionally investigated circumstances.

It is also worth noting that in judicial debates the participants of the proceedings do not give testimony, but explanations about the investigated facts. Testimony obtained in a clearly defined procedural form is not the same as an explanation, which is not a source of evidence in criminal proceedings regarding crimes in accordance with Part 2 of Art. 84 of the CPC of Ukraine. If the accused refused to give a statement regarding the indictment brought against him and his interrogation was not carried out, the court of first instance does not have the right to include the information received from the accused during judicial debates in the form of explanations in the justification of the sentence, since they were not obtained from the sources provided by the criminal procedural law (Supreme Court resolution of August 1, 2022) [8]. In such case, the presiding judge should explain to the accused the importance of their statements for the trial and the possible consequences for them if their statements are confirmed [9, p. 183].

During the judicial debates apart from the speeches of the participants of the judicial proceedings any other procedural actions, with the exception of the decision to resume the court investigation of the circumstances, are not provided for by the current legislation. The stage of judicial debates does not involve consideration of motions and statements. So, for example, the refusal of the court of first instance to grant the request of the defender to postpone the case for preparation for judicial debates, which was declared after the speeches of the prosecutor, the victim and the accused, is not a violation of the right of defence and a fair trial. In this situation, the court reasonably doubted the defender's statement that the break in the debate was necessary for him to agree the legal position with the accused, who has a personality disorder, and therefore needs a detailed explanation regarding the procedural consideration of the case, since the defender made the request not before, but already after



his client's speech in the debate (Supreme Court resolution of July 6, 2022) [10].

It is another matter if such a request was made by the defence before the start of the judicial debates. Thus, the Supreme Court recognized as a violation of the principles of legal equality, adversarial and fairness of the trial the refusal of the court of first instance to grant the defence's request to postpone the trial and to give time to prepare the speech in the judicial debates, submitted after the clarification of the circumstances and their verification with evidence. The Supreme Court noted that the court of first instance in this case did not take the necessary measures to ensure the exercise of defender's right to speak in judicial debates, did not provide the parties with equal conditions for the exercise of their procedural rights, especially taking into account the consideration of this proceeding under the special procedure "in absentia" (Supreme Court resolution of July 19, 2022) [11]. A similar approach was demonstrated by the Supreme Court in the resolution of November 24, 2021, stating a violation of the right of the accused to have sufficient time to prepare for judicial debates [12].

Of course, in the speeches of the parties, the most important role is played by argumentation with reference to the evidence, which according to the participants of the judicial debates has the most persuasive effect on the court. It is through argumentation that the participants of the proceedings can influence the formation of the judge's internal conviction and as a result the content of the court decision. Judicial debates are especially important for the defence party, because in their speeches the accused and his defender have the opportunity to draw the attention of the court to their own interpretation of the event of a criminal offense, the involvement of the accused in its commission, certain contradictions, disputed facts, inadmissibility or unreliability of some factual data, etc.

At the stage of judicial debates, the parties and other participants of the proceedings interpret the circumstances of the proceedings and the examined evidence, which is subjective in nature, related to individual legal awareness, knowledge, experience, level of professionalism, etc [13, p. 100].

At the same time, an important role is given to the eloquence (oratorical art) of the participants of judicial debates, because the ability to clearly formulate statements and logically present conclusions is an effective means of persuasion. This is most clearly manifested in a jury trial, because jurors decide the main issue of the trial regarding the guilt of the accused, based on their personal legal awareness, understanding of the law [14, p. 119] and they are more susceptible to emotions than professional judges. The psychological basis plays a significant role here, because participants in judicial debates are dealing with living people. Their conviction depends on the extent to which the necessary atmosphere and contact with the jury was created.

Given the importance of this stage of the trial, not giving any of the participants in the proceedings the right to speak in judicial debates is a significant violation of the requirements of the criminal procedural law. For example, in one of the resolutions the Supreme Court recognized that de facto depriving the prosecutor of the opportunity to speak in judicial debates in



support of the indictment makes it impossible to ensure equal conditions for parties to exercise procedural rights and perform procedural duties and violates the principles of equality and adversarial between parties [15].

Conclusions. Thus, the judicial debates are a part of the trial, the basis of which is the carefully thought-out speeches of the parties and other participants of the process and the exchange of remarks. They analyse the evidence examined in court hearing, provide arguments regarding their propriety, reliability, sufficiency and admissibility, as well as interpret and discuss the circumstances of the criminal proceedings. It is important that each participant tries to convince the court of the correctness of his position based on the examined evidence. For the court, this is an important stage in the formation of internal conviction, including through the assessment of communication and syndication elements of speeches, remarks and the last word of the accused, on the basis of which the court will adopt and substantiate the court decision at the next stage of the trial.

The arguments presented in the article give grounds for the conclusion that in the process of proving during judicial debates the logical and intellectual activity of the participants in the trial procedure comes first. It related to the interpretation of evidence by participants and the justification of their legal position with their help. That is, in contrast to the stage of researching of evidence, during judicial debates there is mainly proving-justification, the constituent elements of which are the expression of a certain statement, conclusion and presenting of arguments in support of it.

This makes it possible to propose a definition of proving in judicial debates as a logical and intellectual activity of the participants in trial procedure which consists of interpreting the researched evidence and expressing statements, conclusions and arguments based on them in order to convince the court of the correctness of their legal positions.

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Особливості кримінального процесуального доказування під час судових дебатів у провадженні в суді першої інстанції

Наголошується на відмінності процесу доказування під час досудового розслідування і судового провадження, що зумовлене різними завданнями, умовами та особливостями цих стадій процесу. Для доказування під час судового провадження в суді першої інстанції характерним є зміщення акценту на логіко-розумову діяльність, що пов'язана з дослідженням доказів, наведенням аргументів, переконанням інших учасників, обґрунтуванням прийнятих рішень тощо. Судові дебати розглядаються як частина судового розгляду, основу якої складають ретельно обмірковані промови сторін та інших учасників процесу з обмін репліками. Аналізуються досліджені в суді докази, наводяться аргументи стосовно їх належності, достовірності, достатності та допустимості, а також інтерпретуються і обговорюються обставини кримінального провадження.



Важливим при цьому є те, що кожен учасник намагається переконати суд у правильності своєї позиції, спираючись на досліджені докази. Для суду це важливий етап формування внутрішнього переконання, зокрема через оцінку комунікаційного та синдикативного елементів промов, реплік та останнього слова обвинуваченого, на підставі якого суд буде ухвалювати та обґрунтовувати судові рішення на наступному етапі судового розгляду. Констатовано, що в основу судових дебатів покладено гарантоване ст. 34 Конституцією України право на свободу думки і слова, звичайно, у рамках, що стосуються конкретного кримінального провадження, що перебуває на розгляді суду. Водночас у дебатах суд займає пасивну позицію, він лише вислуховує промови сторін і, як правило, не має права обмежувати їхню тривалість певним часом. Змістовна частина дебатів обмежена результатами попереднього етапу — дослідження доказів, а тому учасники судового провадження мають право в судових дебатах посылатися лише на ті докази, які були досліджені в судовому засіданні. Наголошено на важливій ролі аргументації з посиланням на докази, за допомогою якої учасники провадження можуть вплинути на формування внутрішнього переконання судді і, як наслідок, на зміст судового рішення. Розглянуто практику Верховного Суду щодо реалізації права на участь у судових дебатах.

Ключові слова: доказ, доказування, судове провадження, судовий розгляд, суд першої інстанції, судові дебати.