



Implementation of the Criminal Code Procedure

Rules of Evidence: Interpretation according to the European Court of Human Rights

OPEN LECTURES
May 2013



Principles new CPC

Adversarial Procedure and Evidence

- equality of arms (art. 22.1 CPC)
- procedural safeguards (arts. 7 to 29 CPC)
- defence rights: the accused as party (art. 42 CPC)
- presumption of innocence (art. 17 CPC)
- trial as the main stage of the procedure: general rule only assessment of evidence produced at trial (art. 95.4 CPC)



Equality of Arms

- Article 6.1 ECHR – fair trial
- “Fair balance” or “equality of arms”
“each party shall be afforded a reasonable opportunity to present his case, **including evidence**, under conditions which do not place him at a substantial disadvantage to his opponent” *Delcourt v Belgium* 17.1.1970;
Dombo Beheer v Netherlands, 27.11.1993



Equality of arms: pre-trial stage

Meaning of equality of arms with regard to evidence at the pre-trial stage

Participation of the defence in:

- Requesting evidence and investigative measures (art. 42 CPC)
- Carrying out investigation (art.42.4 and 93.3 CPC)
- Being informed of the investigative acts and evidence (42.3 CPC, art. 223.3 CPC))
- Being present at evidentiary acts carried out at pre-trial stage (for search 236.1 CPC)
- Challenging validity and legality of investigative and evidentiary acts
- Have access to prosecution file: when? (art. 317 CPC)



Access to file

- **Right to Access to the prosecution file**
- **Art. 317 CPC**
“the opportunity to acquaint himself, with the purposes of preparing his defence, with the results of the investigation carried out through the proceedings”
- **Jespers v. Belgium** of 14 December 1981
- **Dowsett v UK** of 24 June 2003



Equality of arms: trial stage

- right to be heard in public trial:
 - *Hakaanson and Sturesson v Sweden* 21.2.1990
- right to be present and assisted by lawyer of own choosing:
 - *Poitrimol v France* 23.11.1993; *Hulki Günes v Turkey* 19.6.2003; *Saldus v Turkey* 27.11.2008;
- right to cross-examination:
 - *Luca v Italy* 27.2.2001
- right to challenge admissibility of evidence (art. 42.3 and 4)
- right to exclude unlawful evidence (arts. 86 and 87 CPC)



Admissibility of evidence

- Legally obtained:
 - Article 87 CPC
- Aim: respect HR, deterrence effect
- Presented at trial:
 - Article CPC....., *Barberá Messegué et al v Spain*
6.12.1988
- Aim: confrontation clause, oral and public hearing, judicial control and defence right



Gathering evidence pre-trial stage

Investigative measures restrictive of fundamental rights need to comply with:

- Principle of legality
- Principle of necessity
- Principle of adequacy
- Principle of proportionality

Breach of these principles: illegally obtained evidence and exclusionary rule applies.



Questioning suspect

Questioning of suspect:

- right to be silent
- right to interpretation
- right to be assisted by lawyer

Breach of these principles: no evidentiary value



Admissibility of evidence

- General rule: evidence will be admissible only if produced in trial with possibility of contradiction
- Production in adversarial trial:
 - *Kostovski v The Netherlands* of 20 November 1989
 - *Bricmont v Belgium* of 7 July 1989
 - *Kamasinski v Austria* of 19 December 1989
- Exceptionally: admissibility of out-of court evidence



Admissibility of evidence

- Exceptional admission as evidence of written statements of:
 - Defendant/suspect
 - Witness
 - Expert witness



Admissibility of evidence

- **Pre-trial statements of the defendant**
- No evidentiary value.
- Not possible read out at trial.
- Exception: limited assessment of pre-trial statement: if assisted by lawyer.
- ECtHR: “Sole and decisive evidence doctrine”:
Panovits v Cyprus, 11.12.2008: statement made by suspect in the absence of his lawyer cannot be used to secure conviction, even if it is not the sole evidence



Admissibility of evidence

- **Pre-trial witness statements**
- Unavailable witness
- Victims minors to avoid double victimisation
- Assistance by lawyer
- Opportunity of cross-examination
- Rule of “sole of decisive evidence”: lack of opportunity to cross-examine will not lead to exclusion, but cannot be the only or decisive evidence to convict the defendant (*Hümmer v Germany* 19 July 2012)



Admissibility of evidence

- **Article 97. Hearsay testimonies**
- 1. Hearsay testimony shall be a statement made orally, in writing or in any other form with regard to a certain fact, such statement being based on explanations of another person.
- 2. The court shall have the right to recognize as admissible evidence hearsay testimony irrespective of the possibility to examine the person who provided the initial explanations, in exceptional cases if such are admissible evidence in accordance with other rules of evidence admissibility.



- When taking such decision, the court is required to take into account the following:
- 1) importance of explanations, testimonies, should they be reliable, for ascertaining a circumstance, and their significance for the understanding of other knowledge;
- 2) other evidence in respect of issues referred to in paragraph 1 of this part which have been produced or can be produced;
- 3) circumstances under which initial explanations are given which give rise to confidence in their reliability;
- 4) cogency of knowledge with regard to the fact that initial explanations have been given;
- 5) difficulties for the party against which hearsay explanations, testimonies were given in disproving such explanations, testimonies;
- 6) relationship between hearsay testimonies and interests of the person who has given these hearsay testimonies;
- 7) possibility to examine the person who has given initial explanations, or reasons for the impossibility of such examination.



- 3. The court may find examination of a person to be impossible only if such person:
 - 1) does not appear in court session because of the death or serious physical or mental disease;
 - 2) waives testifying in court session under Article 63 of the Constitution of Ukraine or disobeying court's request to give testimonies;
 - 3) does not appear before court and his location has not been established through conducting required search measures;
 - 4) stays abroad and waives testifying.
- 4. The court may admit hearsay evidence if the parties agree to recognize such as evidence.
- 5. The court may admit hearsay evidence if the suspect accused has created or facilitated the creation of circumstances under which the person concerned may not be examined.
- 6. Hearsay testimonies may not be evidence of the fact or circumstance to prove which they were given unless they are supported by other evidence found admissible in accordance with rules other than those contained in part two of this Article.
- 7. In no event shall the hearsay testimony given by an investigator, public prosecutor, officer of an operational unit or another person with regard to any explanations given by an investigator, public prosecutor or an officer of an operational unit during the criminal proceedings that they were conducting be admissible.



Assessment of evidence

-
- **Article 17. Presumption of innocence and conclusive proof of guilt**
 - 1. An individual shall be considered innocent of the commission of a criminal offence and may not be imposed a criminal penalty unless their guilt is proved in accordance with the procedure prescribed in the present Code and is established in the court judgment of conviction which has taken legal effect.
 - 2. **No one shall be required to prove their innocence** of having committed a criminal offence and shall be acquitted unless the prosecution proves their guilt **beyond any reasonable doubt**.
 - 3. Suspicion, charges may not be based on **evidence obtained illegally**.
 - 4. **Any doubt as to the proof of the guilt of an individual shall be interpreted in this person's favor**.
 - 5. A person whose criminal guilt has not been found in a valid judgment of conviction shall be treated as an innocent one.



Cases of the ECtHR

Pre-trial statements and violation of ECHR:

- *Yeremenko v. Ukraine* of 14.12. 2006.
- *Shabelnik v. Ukraine* of 19.2. 2009.
- *Nechiporuk and Yonkalo v Ukraine* of 21.4. 2011.
- *Zamferesko v Ukraine* of 15.11. 2012.



THANK YOU FOR YOUR ATTENTION