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Evidence and the Object of Probatorium in Criminal Cases: Features, Particularities and Regulation

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ABSTRACT: A necessary condition for the administration of justice in criminal cases is the appropriate establishment of the circumstances of the crime and the correspondence of the conclusions of the criminal investigation body regarding the circumstances of the cause of the existing factual situation. The achievement of this objective is ensured due to the presence of a universal connection between the phenomena of the reality that surrounds us. The crime, representing such a phenomenon, has, in turn, a certain connection with various facts and events. Some of them determine the commission of the crime, while others appear or change due to the commission of the criminal act. All these facts, reflected in the environment, leave certain traces. These, in turn, represent the information that gives the criminal investigation body the opportunity to restore the picture of the crime and identify the perpetrator.

KEYWORDS: evidence, probatorium, evidentiary procedures, criminal case, investigating body, court, main fact, probatorium fact, auxiliary fact, intermediate fact, means of evidence, criminal trial, elements of fact

In order to solve criminal cases, judicial bodies need data or information that led to the conclusion of the existence or non-existence of the crime, the guilt or innocence of the perpetrator, etc. Data or information that helps solve the criminal case is provided through evidence (Neagu and Damaschin 2020, 451). Under these conditions, the criminal process is made up of a sequence of procedural acts carried out by the judicial authority or under its control, in order to confirm or deny the existence of a crime and to draw consequences in terms of general and special criminal law. In this way, establishing the truth, which must be understood in the material sense of the term, is part of the objective pursued. The discovery of this factual truth falls under the attributions of a criminal court, which cannot be satisfied with a formal truth, in the shadow of the reality of the facts. The procedural acts carried out during the criminal process, both in the criminal investigation phase and in the trial phase, tend to establish the facts and legal frameworks, which are indispensable for the administration of justice in criminal matters.

The elements of fact and law on which the court decision that resolves the material criminal law conflict brought before the court must be based are established by means of the evidence and the means of proof provided by law (Mateuț 2012, 1).

In the criminal process, probatorium occupies a central place. In order to make a decision that will influence the lives of some people, the magistrate must fully know the reality of all the circumstances of the case and be convinced that the solution he adopts is

the only correct one. However, this decision - whether or not to sue, or whether to convict or acquit a person - is fundamentally determined by the probatorium (Sava 2002, 5).

It is obvious that the changes in the environment determined by the fact of the crime are reflected in all its components - on objects, in the memory of people etc. But, by themselves, the objects of the environment with the traces left by the criminal acts are still not evidence - they are only the epistemological premise of them. However, in order to appear as evidence in criminal cases, they must be discovered, fixed, lifted and perfected in the appropriate manner by certain special subjects: criminal investigation officer, specialist, prosecutor. And the discovery, and the fixing and, respectively, the certification of the presence of the necessary information on the specific objects is carried out in strict accordance with the provisions of the criminal procedural law.

The law is also guided by these premises - art. 93 of the Criminal Procedure Code of the Republic of Moldova (2003), which defines the concept of "evidence": *"Evidences are factual elements acquired in the manner established by Criminal Procedure Code, which serve to establish the existence or non-existence of the crime, to identify the perpetrator, to establish guilt, as well as to establish other important circumstances for the just resolution of the case"*.

All these elements of fact, all information cannot exist by itself, outside of the carrier object and the procedural form in which it is to be materialized. The sources and form of this information are determined by the criminal procedural law: statements of injured parties, statements of witnesses, suspects, accused, expert reports, technical-scientific and medico-legal findings, criminal bodies, documents, minutes of criminal prosecution actions etc. In these circumstances, the question arises whether all these means of evidence constitute evidence or probative value can only have the information they contain. The question in question has been subject to debate for a long time in the specialized literature. Initially, the opinion regarding the "dual character" of the evidence prevailed, this status being attributed to the sources from which the evidence was obtained, and the facts that were established with the help of means of proof (Hmirov 2005, 12-13).

Later, the discussions on this subject were resumed, as a result of which the opinion became predominant according to which the evidence represents an inseparable unit of important information for the criminal case and the procedural form in which this information is materialized, reflected. However, we believe that this opinion is correct: neither the procedural form, if it does not contain certain information relevant to the criminal case, nor the information outside the procedural form can be examined as evidence in criminal cases. Only their unity forms the notion and concept of "evidence" in the criminal process. Probably, based on these considerations, the authors of the Criminal Procedure Code of the Republic of Moldova recognized, in para. (2) from art. 93, as evidence, expert reports, minutes of criminal prosecution actions and documents, thus emphasizing the unity of their content and procedural form.

Also important is the question of the probative value of the facts established in criminal cases, the information about which is contained in the procedural sources (means of proof) if, based on these facts (known in the doctrine as intermediate facts), conclusions are made regarding the presence or the absence of the criminal act, the guilt of the accused or regarding other important circumstances for the criminal case.

In the specialized literature it has been mentioned that they are also recognized as evidence in criminal trials (Fatkullin 1976, 109). For the most part, we cannot accept this opinion. The intermediate facts, obviously, prove the existence of the circumstances to be proven in criminal cases, but the character of these "evidences" is substantially different from that of procedural evidence. However, to recognize them as being identical to the information contained in the procedural sources is not correct. Intermediate facts are established, as a rule, on the basis of several sources, means of evidence (for example, the

fact of hostile relations or threats can be established on the basis of the statements of several people; the presence of the suspect at the scene of the crime can be established by the presence of traces at the scene of the act, moment reflected in the report of the crime scene investigation, in the expert report on the belonging of these traces and in the statements of the witnesses or the injured party etc.). In this way, the intermediate facts usually have a cumulative source, from which the criminal investigation body is supposed to resort to abstraction in the process of operating with the intermediate facts. Or, from another point of view, they represent the argument of logical probatorium, something that is mentioned in the specialized literature (Kokorev and Kuznetsov 195, 111). In this way, until the intermediate facts are used in logical operations, they are to be established with certainty, which can only be established with the help of evidence. Precisely for this reason, such facts are called "intermediate", occupying a middle place between the evidence and the facts to be proven, ascertained.

The intermediate facts that give us grounds to conclude about the presence of the crime or the guilt of the accused are known as circumstantial evidence. Accordingly, similar facts are recognized as anti-evidence, which establish the absence of the criminal act or the innocence of the accused. Thus, with the help of the evidence, three categories of facts are established: *the probatorium fact; the intermediate fact and the necessary fact* (Hmîrov 1996, 14).

Probative facts are those facts about which the information is contained directly in the respective means of evidence. For example, the fact of the presence of fingerprints on the box in which certain jewels were kept, ascertained and fixed in the crime scene report; the finding by the expert of the fact that these fingerprints belong to a certain person is also a means of proof.

With the help of evidentiary facts, other categories of facts are established - intermediate facts, which are also called "secondary facts". The intermediate fact represents some knowledge inferred from the analysis of evidentiary facts. Thus, in the example mentioned above, based on the two evidentiary facts we can conclude about a certain intermediate fact: the suspected person was at the place where the crime was committed.

The necessary facts are the facts of a certain importance and legal value, the presence of which depends on the resolution of the substantive moments and issues in criminal cases in strict accordance with the rules of substantive and procedural law. The sum of all these facts constitutes *the object of probatorium* (the circumstances to be proven in the criminal trial). However, this notion is of particular importance from a procedural-criminal point of view. Its correct determination makes it possible to properly identify the tasks, directions and volume of the investigation in the framework of the criminal investigation and the examination of criminal cases in the substantive court, the investigation and resolution of criminal cases objectively, fully, in all aspects with minimal "expenditure" of time, means and forces. The definite and precise determination of the object of the probatorium will allow us to correctly solve the question of the classification of the evidence, in particular, regarding their division into direct evidence and indirect evidence (Hmîrov 2005, 14-15).

The specialized literature also tells us about other categories of facts and circumstances. Thus, *auxiliary facts or circumstances* can form the object of probatorium when they help to specify and implicitly to assess the evidence administered in the case (for example, a statement made extrajudicially by a relative of a witness from which it follows that a certain testimony of that witness is or is not serious). *Similar facts*, in turn, are alike to those that form the object of probatorium in a specific case, but without being in a relation of connection with that fact (for example, the fact that the defendant was in the past prosecuted or convicted for a similar crime), does not generally constitute conclusive evidence and as such cannot constitute the object of probatorium in the case under investigation (Dongoroz et al. 2003, 178). Auxiliary facts consist of circumstances that

attest to the accuracy or inaccuracy of some evidence. The auxiliary facts can form the object of the probatorium because they serve, by default, for the exact ascertainment of the main fact (Theodoru and Chiș 2020, 372).

Probatorium can have as its object all those realities that are necessary to know the truth regarding a criminal case. It can therefore constitute the object of probatorium: establishing the existence or non-existence of the crime; identification of the person who committed it; knowledge of the circumstances necessary for the just resolution of the case. Therefore, in relation to the object of the probatorium, the use of evidence must serve to establish: a) the existence of all the elements that constitute the content of the crime; b) all the circumstances that refer to the guilt or innocence of the perpetrator; c) circumstances that aggravate or mitigate the guilt of the perpetrator; d) the consequences of the crime, knowledge of which is necessary for qualifying the act; e) data relating to the parties; f) the factors that determined, facilitated or favored the commission of the crime (Dongoroz et al. 2003, 176).

The object of evidence (*thema probandum*) represents what is proven in the criminal trial, respectively any fact, factual circumstance or situation that is proven in a criminal case in order to resolve it (Mateuț 2012, 11). The author Gr. Theodoru claims that "the facts and factual circumstances that form the object of the evidence are related to both the criminal and civil side, as well as to some issues adjacent to the case (for example, when the law conditions a procedural activity on a certain factual circumstance, this must be proven, such as the suspension of the trial which can only take place after a medico-legal examination has been carried out to establish the fact that the defendant suffers from an illness that prevents him from participating in the trial)" (Theodoru 2007, 334).

Rationally, the evidence has a double object: the existence of the deed and knowledge of the personality of its author (character traits and criminal antecedents). Determining the personality is important both to clarify the guilt and to determine the punishment. From this, it follows that only facts and factual circumstances can constitute the object of evidence. *Per a contrario,* the applicable legal text cannot be subjected to proof, namely the legislative text or the incrimination and repression regulation on which the initiation of the criminal trial is based, which must be discovered by the judicial bodies, mainly, since the legal element is only *"a pseudo-element of the crime"* (Mateuț 2012, 11; Decocq 1971, 62).

Each piece of evidence contains one or more elements of fact that serve to establish the truth about the object of the probatorium. Together, these elements form the object of evidence, that is, what they reveal (fact, circumstance, incident, data etc.) and is likely to constitute evidence.

The object of evidence (*factum probans*) must concern the object of probatorium (*factum probandum*); this correlation makes it possible to qualify the evidence as admissible, pertinent, conclusive and useful (Dongoroz et al. 2003, 176-177).

According to art. 96 of the Criminal Procedure Code of the Republic of Moldova (Law of the Republic of Moldova no. 122-XV of 14 March 2003), in a criminal trial the following circumstances must be proven: a) the facts relating to the existence of the elements of the crime, as well as the causes that remove the criminal character of the deed; b) the circumstances provided by law that mitigate or aggravate the criminal liability of the perpetrator; c) personal data characterizing the defendant and the victim; d) the nature and size of the damage caused by the crime; e) the existence of assets intended or used for the commission of the crime or acquired through the crime, regardless of the fact to whom they were transmitted; f) all the circumstances relevant to determining the penalty.

Simultaneously with the circumstances to be proven in the criminal trial, the causes and conditions that contributed to the commission of the crime must be discovered. In this way, the legislator included in the object of probatorium only such circumstances, the establishment of which directly depends on the judgment of the court, pronounced in

accordance with the norms of criminal law and criminal procedure, regarding the existence or absence of the crime, its qualification, the guilt or innocence of the perpetrator, the application or non-application of a certain punishment measure. Or, in the content of the probatorium object, only those circumstances can be found that have value from a legal point of view and the establishment of which allows the correct solution of all problems, legal issues of the criminal case (Hmîrov 2005, 16).

The determination of the object of the probatorium in a criminal case cannot be carried out by a single action, and the conclusions reached by the criminal investigation body or the court after carrying out this action cannot be considered definitive. The range of issues to be determined in a criminal case may change depending on the analysis of the evidence that has already been collected. Or, there is a generic object and a specific object of probatorium (one abstract, and one concrete, characteristic for a certain criminal case. The generic object is characteristic for any criminal case (Dolea et al. 2005, 268). Knowing the object of the probatorium is of particular importance for the legal and thorough resolution of criminal cases, because it tells us everything that needs to be proven, guiding the judicial bodies to clarify, through evidence, all the aspects that interest the case, but, at the same time, preventing them from wasting time and means of proving some deeds and circumstances that have no interest in the case.

Although the object of probatorium is initially determined by the accusation against a person, this determination does not remain unchanged during the trial, it adapts in relation to the change of the accusation, by narrowing or expanding it both with regard to facts and persons. The law admits the proof of certain new facts and circumstances in the case of revision, which means that it is possible that the object of evidence will not be exhausted even at the time of the final judgment (Theodoru and Chiș 2020, 370-371. See also Bitanga, Franguloiu and Sanchez-Hermosilla 2018, 30).

The generic or abstract object of probatorium can be determined in its general components, because no matter how varied the causes and therefore the concrete object of probatorium, certain generic elements are present in any proof activity. The specific or concrete object of probatorium can only be determined in relation to a certain particular case, due to its infinite variety (Volonciu 1996, 342-343).

The facts or circumstances contained in the object of the probatorium are particularly varied, having informative relevance only in concrete terms to the problems raised by the resolution of a certain criminal case. Even if the criminal files have the same crime as their object, the facts or circumstances to be included in the object of the probatorium are different, because both the circumstances in which the crime was committed and the manner in which the crime was committed can be different in each criminal case (Neagu and Damaschin 2020, 457).

The facts and factual circumstances that constitute the object of the evidence in the criminal process may concern: the existence or non-existence of the crime; the identity of the person who committed it; the circumstances that establish its criminal and civil liability (Mateuț 2012, 13). This opinion is recognized and unanimously accepted in the science of criminal procedural law. At the same time, some authors are in favor of including *intermediate facts* in the content of the object of probatorium. The position invoked in this regard is justified by the fact that the facts, used as arguments in a probatorium, must be established truthfully, with certainty, namely proven (Şeifer 1994, 57; Trusov 1960, 74). That finding does not raise doubts nor is it contested by researchers in the field of procedural-criminal law, but, at the same time, it cannot serve as a basis for the inclusion of intermediate facts in the content of the object of probatorium.

Like any event, in reality, the crime is characterized by several signs. They can be cataloged to the object of the crime, to the objective side (method, time, place of commission, socially-dangerous consequences) and to the subject of the crime. Some of

these signs have a juridical-material importance: the recognition of a certain deed as a crime, the qualification of the deed, the responsibility of the perpetrator etc., depends on their presence. Other signs may have little procedural importance: their presence depends on the resolution of the issue related to the suspension or termination of the criminal prosecution etc. At the same time, we can also encounter signs that are devoid of both juridical-material value and procedural order. However, establishing them is generally not necessary in certain concrete cases. At the same time, in their system, such signs are often found, the establishment of which becomes mandatory, as they appear as a means of establishing the circumstances that are important for the criminal case. They prove these circumstances, having, from the probatorium point of view, a certain value (Hmîrov 2005, 16-17).

The first group of signs is characteristic of all criminal cases and all criminal acts. Their accumulation forms the object of probatorium in criminal cases. The group of circumstances that have only an evidentiary value includes certain individual facts for each criminal case – the intermediate ones, the sum of which forms *the limits of probatorium* in the criminal process (Lupinskaya 1976, 78-79; Treushnikov 2004, 15-16.). The object of probatorium reflects a general category, common to a certain category of criminal cases (Banin 1975, 36). The limits of probatorium represent the expression of singularity for each individual criminal case.

The concept of "object of probatorium" is intended to serve to fulfill the tasks of the criminal process: in order for these tasks to be successfully fulfilled, it is necessary that, in the process of investigation and examination of criminal cases, they should be determined with absolute certainty. Namely, this is where the meaning of the notion of "object of probatorium" can be found. For this reason, the law includes in the content of the object of probatorium only those circumstances whose establishment will represent the final purpose of probatorium in criminal cases. The intermediate facts represent the means of establishing the criminal fact and other elements of the object of the probatorium. Even if a certain separate intermediate fact cannot be proved, then the circumstance for the finding of which it was used can be established with the help of other truthful facts. Meanwhile, such a substitution of circumstances, which are found in the object of the probatorium, is not admitted.

The limits of the object of the probatorium as a criterion for determining the tasks and objectives of the probatorium must be clearly determined. Otherwise, the notion of "object of probatorium" loses its practical meaning. However, the inclusion of the intermediate facts in the object of the probatorium would deprive it of the boundaries of a necessary certainty. Arsenev (1964, 24) claims, rightly, that "the change, the substitution of the circumstances to be proven with the intermediate facts can have the effect of improper completion of the procedural documents. Thus, the exposition of the facts to be proven is replaced by certain evidentiary facts, from which the accusation loses its clarity and limits, and the evidentiary material is exposed, improperly, with certain gaps."

Some authors come up with the proposal to incorporate the *intermediate facts* into the object of the probatorium not as an obligatory element of it, but with the status of an optional element: in cases where the probatorium is carried out with the help of indirect evidence, the evidentiary facts that form them must also, to be proven (Arsenev 1964, 24).

The practice of judicial bodies tells us that in most criminal cases emphasis and a certain weight is placed on circumstantial evidence. This would mean that the intermediate facts would not represent the optional elements, but the mandatory elements of the object of the probatorium. However, this situation is a specific one. We cannot predict exactly which intermediate facts are to be established in each criminal case. At the same time, admitting the cataloging of an indefinite number of unknown facts to the object of probatorium would deprive this notion of its enormous practical relevance. Or, in the content of the object of

probatorium, only those facts can be found that contain signs of the crime and are of legal importance for the resolution of the issue regarding the guilt of the person held criminally liable and the application of the punishment measure regarding him (Eisman 1973, 93-94).

We will remember the moment that in the opinion of several Romanian doctrinaires, the facts and circumstances that must be proven can refer to: a) the substance of the case; b) the normal conduct of the criminal trial. Those that refer to the the substance of the case are of two types: 1) the main facts (*res probandae*) that are identified with the very object of the criminal trial (the guilty commission by the accused or defendant of the act provided for by the criminal law for which he is prosecuted or judged); 2) evidentiary facts (*res probandes*), which, although they are not included in the main facts, through their existence or non-existence ensure the establishment of the existence or non-existence of the main facts (Theodoru 2007, 290-291; Mateuț 2012, 14).

Neagu (1997, 260) claims that "the evidentiary facts are nothing more than indirect evidence because, through the information they provide, they lead to the indirect establishment of the main facts". This author also claims that they are also called "clues", in the sense of facts or circumstances that allow the formulation of logical deductions.

The main facts are, in terms of the classification of evidence, direct evidence, through which it is possible to prove the existence or non-existence of the deed, its socially dangerous consequences and the guilt or innocence of the perpetrator. The main facts, through the quantity and quality of the information they provide, can alone lead to solving the criminal case (Neagu and Damaschin 2020, 456).

Next, if we catalog the facts and circumstances that refer to the normal conduct of the criminal trial, they refer to: 1) the circumstances that attract the suspension of the process; 2) the circumstances that justify the absence of the parties from the trial or the non-fulfillment of some obligations established by law; 3) the circumstances that justify the prosecution without listening to the accused (Mateuț 2012, 19).

Finally, against the inclusion of intermediate facts in the content of the object of probatorium, the following argument is also invoked: the totality of the circumstances to be proven in the criminal trial is precisely determined by art. 96 Criminal Procedure Code of the Republic of Moldova, by the rules of the general part of the criminal law, which refer to the grounds of criminal liability and the composition of the crime, as well as by the corresponding articles of the special part of the criminal law that describe the signs of the investigated criminal deeds.

If necessary, to determine the object of the probatorium, we will also resort to the provisions of administrative, contraventional, civil, labor law etc. The particularities of the object of probatorium in criminal cases with minors, as well as regarding persons who have committed crimes in a state of irresponsibility, are also determined by law (art. 488-489 Criminal Procedure Code of the Republic of Moldova). In all these cases, the circle of circumstances to be proven in the criminal trial is defined by the law.

The content and nature of the intermediate facts, obviously, cannot be determined by legal rules - they are determined, each time, by the criminal investigation body and the court depending on the concrete situation created. The legal norm contains indications regarding the purpose of probatorium in criminal cases, and the means of achieving this purpose within the framework of criminal procedural law are determined by the criminal investigation body and the court.

The concept of "object of the probatorium" is sometimes associated with the notion of "main fact". This concept is purely conventional because, in reality, the "general fact of probatorium" does not exist. For this reason, there is no single opinion in the criminal process regarding the content of this notion. In addition, several researchers have categorically spoken against the use of this notion, considering that, with the adoption of the legal norm, which determines with certainty and clarity the spectrum of circumstances to be

proven in the criminal trial, it has turned into a fiction, in a term devoid of content, which does not add any added value to the criminal trial and judicial practice (Grozdinsky 1964, 7-8; Tanasevici 1962, 38).

Curâlev also spoke categorically against the application of this notion, considering the construction of the main fact to be useless. He argued for its removal on the grounds that it can serve as a basis for the incorrect perception and interpretation of the grounds for classifying direct and indirect evidence, for meaningless discussions about the volume of circumstances that are found in the content of the main fact (Curâlev 1969, 52). However, in the last period of time, statements regarding the need to apply this term in the theory of procedural-criminal law have been repeated, referring to the argument that the main fact is expressed in three basic issues that are to be clarified by the court: 1) did the respective deed take place? 2) is it proven that this act was committed by the defendant? 3) is the defendant guilty of committing this act? (Ugolovno-proțessualnoye pravo Rossiyskoy Federations. Upravleniye, Lupinskoy 2003, 223).

In his time, this notion was introduced into the theory of procedural-criminal law with one goal – to simplify the classification of evidence into direct and indirect. Direct evidence was considered to be those that directly and directly establish the "main fact", and indirect - those that do not establish the main fact, but the secondary one (Hmîrov 2005, 20).

It seems that this particular "project" determined the rooting in the theory and practice of the criminal process of the opinion regarding the secondary character of indirect evidence, they being considered less important in relation to the direct ones, a fact that obviously does not contribute to the proper realization of the tasks of the criminal trial.

Conclusions and recommendations

Evidence represents an inseparable unit of important information for the criminal case and the procedural form in which this information is materialized, reflected. However, we believe that this opinion is correct: neither the procedural form, if it does not contain certain information relevant to the criminal case, nor the information outside the procedural form can be examined as evidence in criminal cases. Only their unity forms the notion and concept of "evidence" in the criminal trial. Probably, based on these considerations, the authors of the Criminal Procedure Code of the Republic of Moldova recognized, in para. (2) from art. 93, as evidence, expert reports, minutes of criminal prosecution actions and documents, thus emphasizing the unity of their content and procedural form.

The legislator included in the object of probatorium only such circumstances, on the establishment of which depends, directly, the judgment of the court, pronounced in accordance with the norms of criminal law and criminal procedure, regarding the existence or absence of the crime, its qualification, the guilt or innocence of the perpetrator, the application or non-application of a certain penalty measure. Or, in the content of the object of the probatorium, only those circumstances are found that have value from a legal point of view and the establishment of which allows the correct solution of all the problems, the legal issues of the criminal case.

The concept of "object of probatorium" is intended to serve to fulfill the tasks of the criminal trial: in order for these tasks to be successfully fulfilled, it is necessary that, in the process of investigation and examination of criminal cases, they should be determined with absolute certainty. Namely, this is where the meaning of the notion of "object of probatorium" can be found. For this reason, the law includes in the content of the object of probatorium only those circumstances whose establishment will represent the final purpose of probatorium in criminal cases.

The limits of the object of the probatorium as a criterion for determining the tasks and objectives of the probatorium must be clearly determined. Otherwise, the notion of "object of probatorium" loses its practical meaning.

We also propose the exposition of para. (1) from art. 99 Criminal Procedure Code of the Republic of Moldova - (*Probatorium*) - in the following wording: *"Within the criminal trial, probatorium consists in the collection, verification, invocation, proposal and administration of evidence in order to establish the circumstances specified in art. 96 of the present code."*

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