



## Assurance of Evidence

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### Abstract

*This paper reflects the detailed theoretical and interpretative treatments of criminal evidence and the process of proving according to criminal procedural legislation, based on the Constitution and E.C.H.R. Theoretical and interpretive deepened treatments, are based on the scientific research closely connected to the judicial practice of the implementation of this legislation, the positions held by judicial practice. Special attention is paid to all criminal evidence, meaning, object, features, procedural rules of receiving, verification and evaluation of them throughout the penal process, the rights and obligations of the parties in this process. The implementation of legal provisions onto evidence, evidence search tools and the process of proving, by procedural subjects in judicial practice has recognized and shown the most important issues in relation to other institutes of criminal procedural law. The terminology used in this paper is supported and conditioned by the terminology used by the legislator in dispositions of the Criminal Procedure Code. Provision of proof is a relatively new institute in the criminal proceedings. It first became known in the procedure code of 1995, in order to preserve the value of the data found during the preliminary investigation. Providing of proof would be applied in all those cases where evidence risks to be damaged, disappear, et lost and receiving it can not be deferred until the trial. Regarding to the relevant literature in Albanian language, only few authors have mentioned it sporadically, not emphasizing the real importance of evidence assurance institute. Even in the commentary of criminal proceedings this institute is dealt with very little, in summary, if we refer to its importance. Assurance of proof is provided in the Criminal Procedure Code in Articles 316-322. In these provisions is expressed the whole procedure of securing evidence, from the definition of specific cases in which it might apply (Article 316 Criminal Procedure Code), continuing with the presentation of evidence and the application for evidence assurance and subjects legitimized in its appearance (Articles 317,319 Criminal Procedure Code), as well as the right of the court in disposition of this requirement. An important element to be treated is to determine the scope of the institute of evidence assurance. Often in practice it is said that the demand for evidence assurance, is applied more in criminal offenses smuggling of women for sexual exploitation, trafficking of minors for other exploitation purposes, sexual relations with minors etc. In this paper is also treated the evidence assurance institute as well as that of the research means of evidence, these institutions closely linked to criminal trials and the process of proving. Of the most important institutes of criminal procedural law is that of "criminal evidence and proving process" which is rightly considered as the backbone institute of this right. The importance of criminal evidences and the process of proving is determined by the purpose itself and content of the criminal legislation. These institutes are directly related to the content and task of this science, to what is the process of detecting and proving the truth in criminal trials. While acknowledging the special place it occupies the evidence assurance institute it is not yet determined its importance really. In this brief theoretical material, I tried to treat through a slightly wider framework assurance of evidence focusing on its importance, theoretical and practical problems in determining the scope of these institutes.*

### 1. Historical Development of Evidence Assurance

Institute of evidence assurance for the first time was recognized in 1995 in the new code of criminal procedure. Only then the court was able to provide proof in the preliminary investigations. Previously the existence of this institute was not seen as necessary for reasons of procedural

system. The first code of criminal procedure after release, is that of 1953, which defined the basic rules of criminal procedure. Its changes were reflected in the 1957 code, and then that of 1979 which came into force on April 1, 1980. Until the 1990s, in our country is implemented a procedural system based entirely on inquisitorial elements as codes themselves support the inquisitorial system applied in almost all of the east countries. In the inquisitorial system evidence took value in the preliminary investigation and there was no fear of damage, disappearance or the impossibility of making it up in anticipation of the court hearing. So the court provided the evidence without making a direct administration of it at the hearing, it is sufficient just to read the statements submitted in the organs that deal with investigation. This is because in such a system lacks the publicity and fluency, as well as the equality of the parties before the court, so the basic principles of the procedure. Also the court was not independent, what prevented it from making a direct evidence administration at the hearing, in which it will be determined the value of each of them. Therefore the investigations get a particular importance and many times become decisive for the way of development and completion of the investigation. Passing to a new level and with the establishment of standards and democratic state, made possible an improvement of the code of criminal procedure. The new Code of 1995, took as a basis the Italian model and were oriented more towards the accusatory system by recognizing the equality of the parties in the process, the principle of immorality, position of the judges, etc. The adoption of elements of the accusatory system in the criminal proceedings has introduced new concepts and has made changes in terms of taking, evaluation and assessment of the evidence. All these changes have come as a result of new principles that were sanctioned in the code, as the principle of innocence, the independence of judges etc. Also the code brought a juridical regulation of the position of procedure of all the subjects of the criminal proceedings, as well as a change of theoretical understanding and practical means of evidence seeking and assessment of them, compared to what we have known in the inquisitorial system. Preliminary investigations aim the finding and fixing of exhibits, documents, and objects related to the criminal offense which preserve the value of evidence and in other stages of the proceedings. Unlike the inquisitorial system, the evidence does not take its value in preliminary investigation but only in the judicial debate which gives the parties the opportunity to actively participate in the review and evaluation. The active role of the defendant and his defense in judicial debate, known in democratic systems, and that apply widely in countries with adversarial system. A system that is distinguished for its progress and guarantees a high degree of equality of parties in the criminal process. Evidence does not have a predetermined value, it gets its value only in the judicial debate. The court makes a straightforward administration of it by taking it into consideration with other evidence. In this system the court begins the judicial review with a general knowledge of the case based on acts that contains the judicial fascicle, unlike the way of proceeding in the inquisitorial system, where it possesses all actions performed from the preliminary investigation and only makes their verification. This is the reason that when an evidence might be damaged, lost, or changed, the court at the request of the prosecutor takes it from the preliminary investigations. Preliminary investigations fail in forming the evidence, but allow the prosecutor to get information about the accusation evidence and to compile acts for the circumstances and facts that can not be repeated (inspections, confiscations, interceptions, etc.). Thus arose the need for evidence assurance on this stage of the proceedings, which was defined also as a special institute, giving thus the value and place it deserves in our system. Regarding to the features of our code we can not say that it has the characteristics of a pure accusatory system. Of course it has a dominant accusatory nature which has substantially the equality of the parties, the role of debate etc, but it still retains features of an inquisitorial system code, especially regarding to the rights of the parties and the court functions.

## **2. The Meaning and Importance Evidence Assurance**

Based on our procedural system accepted by the criminal procedure code, verification and evaluation of the evidence takes place during the judicial debate. But it may happen that the data for the criminal offense, because of their nature may be damaged, may get lost. In order to preserve the value of the data found during the preliminary investigation, it is allowed the evidence

assurance, taking it at this stage of the proceedings. The evidence is taken by the court upon the request of the prosecutor, defendant or injured accuser. The judge should make the assessment of the claim filed if it is in accordance with the requirements of procedural law and only after that it decides on the acceptability of it or not. The fact that the judge makes such an intervention during the initial investigation does not give him a leading or administrative role of investigation because he is simply put into motion only on the request of the parties. The judge has no power in search of evidence, they remain still in the hands of the prosecutor, who administers them in the file of the trial. In this way the principle of institutional independence is not compromised. Assurance of evidence should be done only in cases explicitly defined by law and the judge must be in the role of guardian of law and the principle of contradiction. It must take action that this institute does not exceed legal limits. The institute also has not escaped debates regarding the prosecutor-court relationship. In the Italian literature is alleged that the judge intervening in this way in the investigations could affect the independence of this institution and the prosecutor seeking the formation of evidence in this phase of the proceedings, it will diminish in some way the role of debate in the hearing session. So we would not have a proper session where the formation of evidence would be subject to debate. However such an argument does not rests because the court is put in motion only at the request of the parties, who through their requirements clearly define the objective and subjective limits of the institution.<sup>8</sup> Institute of evidence assurance is reflected as a procedural space that appears before the judge during the preliminary investigation and aims the formation and acquisition of evidence that at this stage of the proceeding according to requirements determined in the law for judicial debate and at the request of the parties.<sup>9</sup> Submitting application for the security must be made within the timeframe limits prescribed taxatively and only when it can be proven the need for the formation of the evidence in advance. The aim of this institution is to allow the parties to obtain the evidence that represent importance to the case, and that can not be postponed until the judicial process. This institution is considered as an incredible tool, to which we refer whenever we find ourselves in front of situations that pose the need to freeze or crystallize an evidence in the state that it is because due to its nature it can be ruined, lost or damaged. In such a case it would have no more probative value in the criminal process. So the assurance of evidence is presented as a tool that applies only in exceptional way when it can be proved the importance of the formation of evidence before the matter has gone to court. The demand for evidence assurance can not find application analogically.<sup>10</sup> However, if we refer to the Italian system different opinions are thrown about this point, where one of the arguments for the acceptance of analogy is that of its application in cases not included in the code. So evidence assurance cases are numerous and therefore not all can be set in code. Practice puts us in front of different and unpredictable situations that need to turn to this institute for assistance.

### 3. Cases of Evidence Assurance

Assurance of evidence cases are foreseen in the Article 316 of the criminal procedure, which are:

- Obtaining testimony from a person, when there are reasonable grounds to think that he could not be questioned due to serious illness or other obstacle.
- Obtaining testimony when there are reasonable grounds to believe that the person may be object of violence, threat or promise to give money or other benefits in order not to make statements or to make false testimony.
- The questioning of the defendant on the facts relating to the responsibility of others, when the grounds mentioned above exist.
- Confrontation of the people who have made contradictory statements to the prosecutor when the grounds mentioned in letters "a" and "b" exist.
- Surveying or experimenting when they relate to people, objects or places, the state of which may vary inevitable.
- Identification of persons or objects when for particular reasons the action of recognition can not be postponed til the judicial process.

Most of these cases are included in the category of those actions that can not be postponed

until the judicial process, while others go into unrepeatable actions such as: obtaining the testimony of a seriously ill person, or when there are serious obstacles to appear at a court hearing, as well as expertise and experimenting related with objects or places that may be subject inevitably changes. The term action that can not be postponed until the judicial process is anticipated in the code. By clarifying the boundaries within which the institute of evidence assurance can find application, the law wanted to provide to the judge the correct parameters on the basis of which to verify and assess the present case that may present if it is included in the requirements of Article 316 of the criminal procedure code. In this way the court turns into a guarantor of law at this stage. These goals that aim to achieve procedural law may appear even better on concrete analysis that can be done in each separate case. Lack of spaces for the practice of this institution can be critical, especially for those who see it as a necessary tool in the investigation of organized crime. The cases in which applies this institute are those of taking testimony, questioning of the defendant, questioning of his responsibility to others, confrontations, experiments, expertise and knowledge. For each of these cases the law has provided conditions that should be fulfilled by everyone, so that assurance evidence can find application. In the case of the testimony some of the terms are valid also for some other acts.

### *3.1 Taking of testimony from a person, when there are good reasons to think that he can not be questioned due to serious illness or other obstacle.*

In this case it is about those people who are harmed by criminal offenses, their life is in danger, for those who are elderly, what prevents them to appear at the hearing or when for the same people there is fear that over time they can die without stating what they know about the crime or even lose memory. In such a situation where the witness carries important facts that present importance about the issue and can not be questioned in a court session, the judge allows their statements made before the judicial police or the prosecutor to be read. In the criminal procedure code there is no precise definition of the term "serious obstacle" and how the court shall assess such a case, which could possibly turn into even an abusive situation. We mentioned that a disease should not only be obvious but also verified by medical specialists, which somehow facilitates the work of the court, but the case of "serious obstacle" has not found a definition in our legislation, but is evaluated case by case.

### *3.2 In taking of testimony, when there are reasonable grounds to believe that the person may be subject to violence, threat or promise to give money or other benefits, in order not to testify or to give false testimony "*

The second case of obtaining the testimony relates to the existence of reasons to believe that the person may be subject to violence, intimidation, different threats and promises to make a false testimony or make no testimony at all. Such elements should be concrete and specific, that may result due to interception of telephone collected by the investigating body. So in this case the person is exposed to such actions, actions that might be undertaken by the authors or there is a great opportunity to be carried out over time.

## **4. Obtaining of Evidence and Its Use**

### *4.1 Obtaining of evidence*

Assurance of evidence aims the preliminary formation of evidence, from the stage of preliminary investigation. Assurance of evidence session mimics a normal session of judicial proceedings, based on debates. It should be developed with the necessary participation of the prosecutor and defense of the defendant. It has the right to participate also the representative of the injured party (Article 321/1). Their participation is necessary, because the evidence is formed by a judicial debate accompanied by questions and consquestions between the parties. When from the offense results that there are damaged and he has a defense, the latter has the right to participate in the session of

assurance but his absence does not hinder the development of the proceeding. He also has no right to participate directly in debate, but is entitled the right to obtain permission from the session judge to direct questions. The defendant and the injured have the right to participate in the session only when a witness or another person shall be asked, while in other cases they can participate only with the prior authorization of the court. When the injured party has not been able to be present at the taking of evidence, this evidence has no value, except when he himself has accepted that, even in silence (Article 322 of the criminal procedure code). Accused person's presence in the session of evidence assurance has been criticized because it can be a potential source of embarrassment for the person who is called to declare. However it is not established a clear idea of how this presence may put in question the authenticity of the persons' allegations. During the session for evidence collection, the judge plays a very important role in preserving and presenting it as a guarantor of the procedural law and the defense of the principle of adversary.

#### 4.2 *The use of obtained evidence*

In Article 322 of the Criminal Procedure Code is determined that evidence obtained according to the provisions of chapter on "Assurance of evidence", Can be used in judicial review only to the defendants, the defense of which have assisted in obtaining of them (evidence). This rule is an expression of the general principle, set in criminal proceedings, and relates to the ability to provide at the maximum the contradictions in the session of evidence assurance..

### 5. Conclusions

The changes that occurred in our country around the 90s, were also reflected in the legislation of the time. It was seen as a necessity the introduction of democratic principles and standards, which would be a guarantee more in protecting the rights and freedoms of the individual. For the first time the notion of evidence assurance was recognized, as an institution, whose purpose is to preserve the value of evidence. Providing of the evidence as a new institute in the criminal proceedings displays theoretical and practical problems. It is understood that after a theoretical treatment always stands a practical study. Undoubtedly the recognition and enforcement of the rules of procedure, must be accompanied by a literature of the time, built through practical debate. This literature would help particularly the judicial practice. Problems in practice are numerous and can come as a result of not consolidating. Number of judicial decisions for assurance of evidence is small, and their distribution is lacking in the cases stipulated by Article 316 of the Criminal Procedure Code. This practice remains loyal to Articles 316/a and 316/b of Criminal Procedure Code, therefore obtaining of testimony. Other cases are limited or missing. With regard to criminal offenses there is no defined field of application to this institute. What appears more problematic is the lack of reasoning of court decisions. Often decisions have no regular form of law where the wording referred in the relevant articles of the code is distinguished. There are instances when there are displayed incorrect application of the criminal procedural law.

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