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Necessity of Proof as the Principle of Evidence in Civil Proceedings of Ukraine

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Abstract: The paper deals with one of principles of evidence, the principle of necessity of proof. The conformance of this principle to requirements of normativity, regulatory, mandatory and inviolability is analyzed. Since the necessity of proof is directly connected with the distribution of proof actions between persons involved in the case, the nature of the burden of proof is investigated. The author also found the possibility to take part in the long doctrinal discussion, well known at post-Soviet area, about the nature of proof: is it the right of a person or is it the obligation of a person? The legal norms of the Civil Procedural Code of Ukraine, which regulate the necessity of evidence, were analyzed, and the conclusions on improving of these norms were given.

Key words: evidence, proof, the burden of proof.

I. Introduction

All the principles of civil procedure law are in force in trial proving, one way or another. Evidence is directly related with the adversarial principle and the principle of establishing of the judicial truth. However, proof has its own unique and specific rules. In modern procedural doctrine, they called as principles of evidence (proof).

Scientists have not reached definite conclusion about the composition of principles of proof yet; there are many points of view on this issue. It is assumed that principles of evidence should:

- be universal and common to all civil proceedings;

- not depend on the type of proceedings;

- have an equal role and the same degree of implementation in each proceeding;

- have the statutory and regulatory influence, be mandatory and immutable;

There are four principles of proof which respond to those specified conditions in civil proceedings. These principles are: 1) the relevance of evidence; 2) the admissibility of evidence; 3) the necessity of proof (evidence); 4) the free assessment of evidence.

This article focuses on the principle of necessity of proof in civil proceedings, its legal nature and content.

II. General provisions of the necessity of proof

According to the part 3 of Article 60 of the Civil Procedural Code of Ukraine from 18th of March 2004 (hereinafter – CPC of Ukraine), the circumstances that are relevant to solving the case and are the dispute subject of parties and other persons involved in case are facts in issue and should be proved. The obtaining of accurate and comprehensive court knowledge of the circumstances relevant to the case, it’s the basis of requirements and objections of persons involved in the case takes precedence of the rendering. Each of the circumstances of the case must be proved except as provided by law.

The principle of necessity of proof is embodied in the demand of the lawfulness of the court decision. Lawful is the decision taken on the basis of fully and comprehensively understood of circumstances which the parties refer to as the basis of their claims and

objections, confirmed by the evidence, which were examined in the court. A justified decision is the decision taken on the ground of fully and comprehensively understood circumstances which the parties referred to as the ground of their claims and objections, confirmed by those evidence that have been investigated in court (parts 2, 3 of Article 213 of the CPC of Ukraine). Results of the realization of the principle of necessity of proof are directly contained in the court decision: according to part 1 of Article 214 of the CPC of Ukraine, while making decisions the court decides whether there were circumstances that justified claims and objections, and what evidence they are confirmed by, and whether there are other actual data (the skipping of the deadline of claim duration, etc.) that are relevant to solving the case, and evidence for its confirmation. Circumstances established in case allow determining the relationships of the parties and the legal norm, which need to be applied to these relationships, to make the decision to sustain a claim or to reject a claim.

So the principle of necessity of proof is directly enshrined in law and that corresponds to characteristic of normativity, which is obligatory to all of law principles.

This principle also has the regulatory impact. Activities of all persons involved in the case aimed at proving of circumstances, which they refer to as the basis of their claims and objections, and the activities of a court, the decision of which must base on the full and comprehensive clarification of the circumstances, confirmed by evidence that were examined in court.

Mandatory nature of that principle means its action for each person involved in the case and the court. Availability of exhaustive list of grounds for exemption of proof does not create exceptions to the necessity of proof: circumstances recognized by the parties and other persons involved in the case, and notorious matters are considered as established; proving of prejudicial facts was already done in other civil, commercial, administrative or criminal case and results of this proving are reflected in a court decision that has come into legal force.

Inviolability of the principle of necessity of proof is in negative consequences for its failure. Persons involved in the case may get dismissal of the claim, denial or rejection if they

will not prove a basis of circumstances relevant to the case: if the court does not comply with the principle of necessity of evidence, it will make unjustified decisions that may be canceled.

In every single work devoted to the proof in civil proceedings, it is mentioned that evidence is mandatory for every civil case. But there are just few authors who consider that necessity of proof belongs to principles of evidence. Ukrainian scientist S. Vasylyev defining it as the idea that all the facts should be proved except those that cannot be proved by law.[1] Belorussian researcher T. Taranova proves that necessity of proof follows from the principle of objective truth and adversarial principle; it's a specific principle which defines the range of rights and obligations of court and the persons concerned in legal result of the case.[2] Russian researcher M. Fokina also writes about the necessity of evidence and considers this principle in interconnection to the problems of facts in issue.[3]

In my opinion, facts in proof are primarily concerned with the principle of relevance of evidence since the list of circumstances that are the facts in proof in a particular case permits to determine the relevant evidence in the case. Talking about the necessity of proof, we should search its legal nature in the light of the statutory allocation of evidence-based actions, which ensure the implementation of duties of proof between persons involved in the case.

According to paragraph 1 of part 1 of Article 60 of the CPC of Ukraine, each party must prove the circumstances which it refers as the basis of their claims and objections, except as prescribed in Article 61 of the Code. Article 61 provided for exemption from proving grounds: persons involved in the case don't prove circumstances recognized by the parties and others involved in the case; circumstances recognized by the court as notorious matters do not require to be proved; circumstances defined by court decision in civil, commercial or administrative

[1] Васильєв С. В. Цивільний процес: Навч. посібник / С. В. Васильєв. – Х.: Одісей, 2008. – С. 137 (Vasyl'yev S. V. Civil Procedure: Teach. manual. – Kharkiv, 2008. – P. 137).

[2] Таранова Т. С. К вопросу о принципах доказывания в гражданском судопроизводстве (на примере республики Беларусь) / Т. С. Таранова // Університетські наукові записки. – 2006. – № 3-4 (19-20). – С. 143 (Taranova T. S. On the question of the principles of proof in civil proceedings (in the case of the Republic of Belarus) // 'Universytets'ki naukovi zapysky'. – 2006. – No. 3-4 (19-20). – P. 143).

[3] Фокина М. А. Механизм доказывания по гражданским делам: дисс. … док. юрид. наук: 12.00.15 / Марина Анатольевна Фокина. – М., 2011. – С. 254 (Fokina M. A. The mechanism of proof in civil cases: Doctor of law dissertation. – Moscow, 2011. – P. 254).

case that has come into legal force, shall not be proved when considering other cases involving the same person or persons relevant to whom these circumstances were defined.

From Soviet Union times to present days many authors entitle this rule the obligation of proof. The attention was repeatedly drawn in the doctrine of civil procedural law that the obligation of proof has the particular importance. Failure of this obligation does not involve using of any sanctions but can have a result in a negative decision on the non-proof circumstances. Therefore, is it appropriate to entitle the rule as the obligation? The long scientific debate has not led to the development of clear understanding of the obligation of proof yet. On the one hand, there are serves of the advantages of using the term 'burden of proof' as having more in line with the content of this procedural rule. The other side is grounded on terminological accuracy of the definition of 'obligation of proof'. Before giving my own assessment of such proposals and conclusions, I consider that it is necessary to determine what the proving is, is it the right or the obligation of persons involved in the case.

III. Proof in civil cases: the right or the obligation?

The discussion on referring the court proving to the right or to the obligation is not new, in modern procedural works there are three main approaches on this issue.

According to the first of them, proving is the right because it's impossible to compel the claimant to submit evidence to substantiate the claim and the defendant – to justify objections since the first of them has the right to waive the claim and the second one – to admit the claim.[4] Laying the obligation to prove facts on the party would mean laying the obligation to protect its violated or disputed rights and interests. If the party exercising its right to seek judicial protection took on procedural obligations to protect its rights, including by means of

[4] Гусаров К. В. Проблемы гражданской процессуальной правосубъектности: дис. … канд. юрид. наук: 12.00.03 / Константин Владимирович Гусаров. – Харьков, 2000. – С. 136-137 (Gusarov K. V. Problems of the civil procedural legal subjectivity: PhD in law dissertation. – Kharkiv, 2000. – P. 136-137).

proof, it would be contrary to the fundamental principles of civil procedure, adversarial principle and dispositive principle.[5]

'Proving is the right' concept is often criticized by authors who propose to solve this issue from the perspective of procedural sanctions. In virtue of adversarial and dispositive principles court will make a negative decision adverse to the party which failures in the duties of proving.[6] Such statements expressed by representatives of the second approach under which proving is the obligation. Researchers supporting this view suppose that proving as the obligation takes origin from the adversarial foundation of civil procedure and corresponds to theory of legal relation which content consists of subjective rights and subjective obligations.[7] Proof as the obligation acts throughout the process of proving, it has many ways and forms of performance, generating negative legal consequences for the person who ignores proof.[8] Law establishes the obligation of proof and provides a variety of legal possibilities for its implementation.[9]

In accordance with the third approach, proving is the right and the obligation simultaneously. Supporters of this point of view think that the obligation of proof is carried out simultaneously with the right of evidence and cannot be performed without the right to submit

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[5] Молчанов В. В. Основы теории доказательств в гражданском процессуальном праве: Учебн. пособие / Молчанов В. В. – М.: Зерцало-М, 2012. – С. 105 (Molchanov V. V. Fundamentals of the theory of evidence in civil procedural law: Teach. manual. – Moscow, 2012. – P. 105).

[6] Балашова И. Н. Обязанность по доказыванию как мера должного поведения, определяющая правовое положение сторон в гражданском судопроизводстве / И. Н. Балашова // Право. Законодательство. Личность. – 2012. – № 1 (14). – С. 148-149 (Balashova I. N. The obligation of proof as a measure of proper behavior which determines the legal status of the parties in the civil proceedings // 'Pravo. Zakonodatel'stvo. Lichnost'. – 2012. – No. 1 (14). – P. 148-149).

[7] Мохов А. А. Доказательства и доказывание в гражданском судопроизводстве России: учеб.-практ. пособие / А. А. Мохов, А. Я. Рыженков / Под ред. Короткова М. Г. – Волгоград: Альянс, 2005. – С. 24-25 (Mohov A. A., Ryzhenkov A. Y. Evidence and proof in civil proceedings of Russia: Teach. manual. – Volgograd, 2005. – P. 24-25).

[8] Андрійцьо В. Д. Доказування обставин цивільної справи: право чи обов'язок? / В. Д. Андрійцьо // Теорія і практика правознавства. – 2013. – Вип. 2. – [Електронний ресурс]. Режим доступу: http://nbuv.gov.ua/j-pdf/tipp_2013_2_14.pdf (дата звернення 19.08.2015 р.) (Andrijtsyo V. D. В. Д. The proof of circumstances of civil case, the right or the obligation? // 'Teoriya i praktyka pravoznavstva'. – 2013. – Vol. 2. – [Electronic resource]. Access mode: http://nbuv.gov.ua/j-pdf/tipp_2013_2_14.pdf (date of appeal 19.08.2015).

[9] Нахова Е. А. Роль презумпций и фикций в распределении обязанностей по доказыванию: автореф. … дисс. канд. юрид. наук: 12.00.15 / Елена Александровна Нахова. – Саратов, 2004. – С. 16 (Nahova E. A. The role of presumptions and fictions in the distribution of obligations for proof: synopsis of PhD in Las dissertation. – Saratov, 2004. – P. 16).

evidence.[10] Parties have the right to defend their positions and to provide evidence to the court according to their discretion. Primarily the evidence is the right of the party but if it wants to win the dispute, it will be inevitably burdened of submission of evidence, which can convince the court to decide the case in its favor.[11] The obligation of proof functions by implementing of procedural rights of familiarization with the case, giving evidence, participation in the study of evidence etc.; giving evidence the party exercises its right to proof and simultaneously performs the obligation of proof.[12]

It is interesting to note that all these approaches of understanding of the meaning of proof are based on the findings on the content of adversarial and dispositive principles in their conjunction with the rule on the obligation for the person involved in the case to prove the circumstances to which it refers as the basis of their claims and objections. And none of these points of view is clearly convincing.

Understanding of the nature of obligation of proof needs to determine, what the obligation of civil procedure is in general is and does the obligation of proof correspond to its legal system. Civil procedural obligation as the part of the content of civil procedural legal relations is a separate topic for scientific research. Within this article, it’s enough to make a brief analysis of characteristic features of the civil procedural obligation highlighted by V. Babakov who is one of the few researchers of civil procedural obligation. Essential features of the civil procedural obligation are:

1) it is a kind, a measure and a quality of required behavior of the subject of civil procedural legal relations;

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[10] Сахнова Т. В. Курс гражданского процесса: теоретические начала и основные институты / Т. В. Сахнова. – М.: Волтерс Клувер, 2008. – С. 393 (Sakhnova T. V. The course of civil proceedings: the theoretical beginning and major institutions. – Moscow, 2008. – P. 393).

[11] Руда Т. В. Докази і доказування в цивільному процесі України і США: порівняльно-правовий аналіз: автореф. дис. … канд. юрид. наук: 12.00.03 / Тетяна Володимирівна Руда. – К.: 2012. – С. 10 (Ruda T. V. Evidence in Civil Procedure: Comparative Study of Ukraine and the United States of America: synopsis of PhD in Law dissertation. – Kyiv, 2012. – P. 10).

[12] Треушников М. К. Судебные доказательства / Треушников М. К. – М.: Городец, 2004. – С. 52 (Treushnikov M. K. The court evidence. – Moscow, 2004. – P. 52).

2) it exists only within the civil procedural legal relationship which is governed by the rules of civil procedure law;

3) it provides in the purpose of the protection of the constitutional rights, freedoms and interests of subjects of civil procedural legal relations;

4) it is one of the most important controls that ensure the efficiency of the mechanism of legal regulation;

5) it is provided by powerful mandatory of civil procedural rules which sanctions are caused by the obligatory participation of a court;

6) it is the base standard that allows to consider and to decide every case of civil proceedings unanimously, correctly and in accordance with established procedural terms in a one civil procedural form.[13]

At first sight, the obligation of proof responds to the criteria of civil procedural obligation, but there are no mandatory procedural rules in the form of sanctions for failure to perform of the obligation of proof or its improper performance. Without exception, all researchers who believe that proof is obligation or both right and obligation, they affirm that the breach of the obligation of proof entails negative consequences in form of unfavorable court decision. But in terms of the law an unfavorable court decision is not the sanction in its legal meaning. As V. Molchanov rightly observes, sanctions are applied in the consequence of a violation which is miss in this context. Recognition of the fact as non-existent or adverse court decision is not measure of state coercion but just a consequence of failure of evidence of the fact.[14]

State coercion in civil proceedings provides corrective measures statutory by sanctions (dispositions) of law norms on the subject of civil procedural legal relations. These measures

[13] Бабаков В. А. Гражданская процессуальная обязанность / В. А. Бабаков // Известия высших учебных заведений. Правоведение. – 1997. – № 3. – С. 122 (Babakov V. A. Civil procedural obligation // 'Izvestiya vysshih uchebnyh zavedenij. Pravovedenie'. – 1997. – No. 3. – P. 122).
[14] Молчанов В. В., зазначена праця. – С. 104 (Molchanov V. V., op.cit. – P. 104).

ensure the fulfillment of person's obligations against their will, or prevent the implementation of procedural law by this subject in order to ensure of normal movement of justice.[15] Procedural law does not provide corrective measures for the failure of the obligation of evidence for a person who is involved in the case. We can only talk about the possibility of some adverse effects that are not obligatory or unavoidable.

May visualize the civil case where the defendant is objecting to the claim but did not submit any evidence and don't make any proof actions to support of the facts of his objections. Court decision that is unfavorable to this defendant can be negative only if the claimant will prove all of circumstances to confirm the claim and that would give grounds to sustain claim. However, the claimant may lose their interest in the case and stop participating in it, abandon the claim or submit inappropriate or invalid evidence. Finally, the claimant may be wrong about the belonging rights to them or the court may establish that the right belongs to the claimant but was not broken. The court also may determine that the claim was submitted to the person who doesn't have to response for the claim and our imaginary defendant is improper party in this case. There may be cases when a defendant gives only a part of evidence in substantiation of their objections and it means that the obligation of proof is not satisfy because the CPC of Ukraine does not envisage the possibility of its partial implementation. Nevertheless, the part of the evidence submitted by the defendant may be sufficient to disprove the legality of the claim and to get the rejection of it.

If one deals with the civil procedural obligation, the use of sanctions against offending person would happen each time when the violation is committed and regardless of interrelated actions or omissions of other persons involved in the case. However, as illustrated above, in judicial practice there may be many cases when the defendant who has not fulfilled the obligation of proving will not have any adverse effects. These considerations confirm the impossibility of including the obligation of proving to the civil procedural obligation.

[15] Нохрин Д. Г. Государственное принуждение в гражданском судопроизводстве: монография / Д. Г. Нохрин. – М.: Волтерс Клувер, 2009. – С. 30 (Norkhin D. G. State coercion in civil proceedings. – Moscow, 2009. – P. 30).

As for including of proof to the obligation only or to the right and the obligation simultaneously, those two approaches are based on the formula – 'the obligation of proof is the civil procedural obligation so the evidence is the obligation only or the right and the obligation simultaneously'. If to take the obligation of proof (which is not the civil procedural obligation) out of the formula, there are no other studies to confirm that evidence can belong to obligations at all. Proving is the right of persons involved in a case and I can substantiate it with the following arguments.

The right to judicial protection is the universal opportunity. Realizing that right the person is not a carrier of the obligation of judicial protection. Nobody is obliged to defend one's right, freedom or interest and act in court defending their position. The right to judicial protection and activities aimed at its implementation is the choice of every person who is free of any procedural means of influence. A person may abandon a claim or actually stop participating in a case at any time and there will be no sanctions for refusing to judicial protection or non-implementation of rights, freedoms and interests.

Adversarial system of civil proceedings of Ukraine builds up the procedural competitive behavior of persons in proving). Persons involved in a case have equal rights and opportunities and the court provides assistance in proving within the limits prescribed by law. If a person wishes to achieve the desired outcome, some efforts must be made to prove circumstances underlying their claim or objections to it. However, this need does not oblige a person to implement evidence-based activities but still is the right that disposes freely virtue of the dispositive principle. Disclaimer of proof doesn't have the effect of bringing a person to justice for violation or breach of obligation of proof. All evidence activities base on the person's initiative but not under the influence of coercion or the possibility of sanctions applying.

The proof could be the obligation in the inquisitorial (investigative) model of civil proceedings. But adversarial and dispositive principles completely negate that possibility. The proof is the right of a person involved in a case. For the obligation of proof provided by the

paragraph 1 of part 1 of Article 61 of the CPC of Ukraine, it is advisable to use the term 'burden of proof' as one that more accurately reflects the essence of the notion.

IV. The meaning and the legal nature of burden of proof in civil cases

The burden of proof, despite the doctrinal widespread use of the term, still is not characterized by clear understanding of its contents. Scientific studies identify the burden of proof and the obligation of proof as synonyms: 'the burden of proof, i.e. the obligation to provide evidence and proof of facts that are legally relevant to the case';[16] 'court distribution of obligations for proving of circumstances in a particular case is called the burden of proof between persons involved in a case';[17] 'the main obligation (burden) on evidence-based activities is incumbent on the parties';[18] 'the obligation or the burden of proof includes the need for representation, research and evaluation of evidence'.[19] Since the obligation of proof is not the civil procedural obligation, the feasibility of applying the 'burden of proof' term is conditioned by the purpose of separating the burden of proof from the category of civil procedural obligation. In the abovementioned identification, the logic of distinction between 'obligation' and 'burden' is lost.

O. Baulin gives the interesting but not indisputable meaning of the burden of proof. In his opinion the burden of proof is a complex procedural occurrence which includes a combination of: 1) rights of a person involved in a case, and 2) their need to put forward and prove the grounds for their claims and objections due to their material and legal interest, and 3) their obligations of proving facts that have a procedural value, and 4) a complex of procedural

[16] Осокина Г. Л. Гражданский процесс. Общая часть : учебник / Г. Л. Осокина. – 3-е изд., перераб. – М.: Норма, ИНФРА-М, 2013. – С. 602 (Osokina G. L. Civil process. Overview: The textbook. – Moscow, 2013. – P. 602).
[17] Миронов В. И. Гражданский процесс: учебник / В. И. Миронов. – М.: Эксмо, 2011. – С. 175 (Mironov V. I. Civil process: The textbook. – Moscow, 2011. – P. 175).
[18] Тимченко Г. Основні поняття доказового права України: проблеми законодавчого закріплення / Г. Тимченко // Право України. – 2010. – № 12. – С. 224 (Tymchenko G. Тимченко Г. Basic concepts of evidence law of Ukraine: problems of legislative consolidation // 'Pravo Ukrainy'. – 2010. – No. 12. – P. 224).
[19] Мохов А. А., Рыженков А.Я., зазначена праця. – С. 23 (Mohov A. A., Ryzhenkov A. Y., op.cit. – P. 23).

obligations of court to establish legally significant circumstances.[20] I do not consider the opinion on the inclusion of court's procedural obligations on establishing legally significant circumstances of the case to the burden of proof on the grounds of the following.

First, the court's powers in proving are to implement the assistance to persons involved in the case in their proving. If it is necessary to collect the evidence outside court's territorial jurisdiction the court may order the collection of evidence to the relevant court (Article 132 of the CPC of Ukraine). At the request of the parties or other persons involved in the case the court may make securing of evidence (Article 133 of the CPC of Ukraine) or vindication of evidence (Article 137 of the CPC of Ukraine). However, the implementation of those court actions does not mean that the proving of circumstances which can be confirmed by these evidences rests with the court. Securing of evidence or vindication of evidence or making the order to another court to collect the evidence has the effect of taking evidence by the court. These evidences are incorporated in the case file and can be used by persons involved in the case in their proof activities.

Secondly, during the investigating of the evidence in court session and the assessing of the evidence before making a decision the court is working with all the evidentiary material existing in the case. While the content of the burden of proof is the distribution of function of proving of circumstances relevant to the case by the persons involved in the case in accordance with their requirements and objections. The role of the court in proving is the same in every civil case and it doesn't change because of circumstances which must be proved by the claimant or by the defendant.

The burden of proof in civil proceedings is the instrument that helps to determine the optimal, rational, logical and proportional participation of persons involved in the case in proof activities. The court's powers in this sphere are always the same: the court explains the persons involved in the case, their rights and responsibilities, warns of the consequences of committing

[20] Баулин О. В. Бремя доказывания при разбирательстве гражданских дел: автореф. … дисс. док. юрид. наук: 12.00.15 / Олег Владимирович Баулин. – М., 2005. – С. 7 (Baulin O. V. The burden of proof at trial of civil cases: synopsis of Doctor of Law dissertation. – Moscow, 2005. – P. 7).

or non-committing of proceedings and assists the realization of their rights in cases established by law (part 4 of Article 10 of the CPC of Ukraine).

The court's role is to set the right direction to procedural activity of parties while remaining truly independent and to apply the substantive law to legal relations based on the assessment of the evidence submitted by the persons involved in the case.[21] However, the court does not carry out the proof of certain facts so the court's procedural obligations are not included in the contents of the burden of proof.

O. Baulin also supposes that the proving of substantive nature facts cannot be regarded as a legal obligation; using of the term 'obligation' is possible only on the facts that have a procedural value and on the court's needs to define facts to proof, distribute the burden of proof and collect evidence.[22] This thesis raises a number of comments. First, the delimitation of facts of substantive and procedural nature in the context of necessity of their proof is not clearly understandable. The procedural law (including the Civil Procedure Code of the Russian Federation on which O. Baulin's research was grounded) proceeds from the rule that each party must prove the circumstances to which it refers as the basis of their claims and objections unless otherwise is provided by law. The distribution of the burden of proof includes all the facts needed to be proved in a case without exception. So the question is why the proof of substantive facts is only the necessity and proof of procedural facts is the obligation?

Secondly, it is hardly fair to admit that the burden of proof is determined by the court. Some other Russian lawyers expressed this position[23] but it does not follow from the content of the relevant procedural rules. First, the burden of proof is determined by the legal rule of the Civil Procedure Code that establishes the general rule that each person must prove the

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[21] Головков В. Л. Роль бремени доказывания юридически значимых доказательств в современном гражданском процессе / В. Л. Головков, И. Е. Воронцов // Политические, экономические и социокультурные аспекты регионального управления на европейском севере. Материалы итоговой Всеросс. научн.-практ. конференции. – 2014. – С. 198 (Golovkov V. L., Vorontsov I. E. The role of the burden of proof legally relevant evidence in the modern civil process // Political, economic and socio-cultural aspects of regional governance in the European North. Materials final All-Russian scientific-practical conference. – 2014. – P. 198).
[22] Баулин О. В., зазначена праця. – С. 7 (Baulin O. V., op.cit. – P. 7).
[23] Миронов В. И., зазначена праця. – С. 175 (Mironov V. I., op.cit. – P. 175).

circumstances to which it refers. Second, the law contains a list of circumstances which don't need to be proved (circumstances recognized by the parties and others involved in the case; circumstances recognized by the court as notorious matters; circumstances defined by court decision that has come into legal force). Third, presumptions that directly involve proving of circumstances by corresponding side of the case should be mandatorily considered in the burden of proof. At Post-Soviet area the burden of proof is always determined by law and the court has no authority to redistribute the value of the actions in proving of persons involved in a case.

Ukrainian researcher V. Komarov rightly notes that the burden of proof is a specific legal phenomenon. Provisions of adversarial principle are not base law coercion and describe the obligation of proving as a certain legal status that is determined by the procedural positions of the parties and is harmonized with the contemplations of civil justice in the context of their own interest in obtaining a judgment.[24] In my opinion, this interpretation is very good: indeed, the burden of proof execution is not based on legal coercion but in the interest of a person involved in a case to prove the circumstances that directly weigh with the achievement of the individual procedural goals.

The burden of proof is a procedural rule that determines the distribution of evidence of circumstances relevant to the case and serves as the basis of claims and objections between persons involved in the case. Being the one of the ways of implementing of the principle of rational procedural form of civil justice, the burden of proof creates a reasonable and proportional participation in the evidence of the parties and other persons involved in the case.

As noted in European procedural doctrine the issue of distribution of the burden of proof is important not only when ascertaining legal facts of substantive legal nature, but also when deciding different procedural issues (regarding the suspension, termination of

[24] Курс цивільного процесу: підручник / [В. В. Комаров, В. А. Бігун, В. В. Баранкова та ін.]; за ред. В. В. Комарова. – Х.: Право, 2011. – С. 479 (автор глави – В. В. Комаров) (Komarov V. V., Bigun V. A., Barankova V. V. and others. Course of Civil Procedure: a textbook. – Kharkiv, 2011. – P. 479 (creator of a chapter is V. Komarov).

proceedings, the ordering of expert examination, the application of interim measures, etc.).[25] Indeed, it would be wrong to assert that the evidence activity is shared between persons involved in a case only on the facts with substantive nature because facts to be proven in the case are not limited to the following facts. The burden of proof is shared between parties involved in the case on all the facts that must be proved: substantive, procedural, evidentiary facts.

V. Directions of improvement of Ukrainian legislation of necessity of evidence

Since this part of the article is devoted to the legislation improvement, it is necessary to recall that according to paragraph 1 of part 1 of Article 60 of the CPC of Ukraine, each party must prove the circumstances to which it refers as the basis of their claims and objections, except cases established by Article 61 of the CPC of Ukraine. Article 61 provides for exemption from proving grounds: persons involved in the case don't prove circumstances recognized by the parties and others involved in the case; circumstances recognized by the court as notorious matters do not require the proof; circumstances established by the court decision which has come into legal force, commercial, administrative or criminal case don't have to be proved in other cases with the same person or persons.

Since the burden of proof is not a civil procedural obligation, I suppose that the word 'must' in paragraph 1 of part 1 of Article 60 of the CPC of Ukraine should be replaced by 'should'. In addition, the legal structure of this provision requires some other adjustments.

In part 2 of Article 60 of the CPC of Ukraine it is determined that the evidence submits by the parties and other persons involved in the case. According to part 3 of Article 60 of the CPC of Ukraine, all the circumstances that are relevant to the decision in the case and are relative to a dispute of parties and others involved in the case should be proved. The right to submit the evidence and to participate in the examination of evidence belongs not only to

[25] Tamosiuniene E., Terebeiza Z. Problems Inherent in the Abstract Nature of General Distribution Rule of the Burden of Proof in Civil Proceedings // European Scientific Journal. – 2013. – Vol. 9. – No. 22. – P. 327.

parties but also to other persons involved in the case what is directly provided by part 1 of Article 27 of the CPC of Ukraine. How come that the burden of proof in paragraph 1 of part 1 of Article 60 of the CPC of Ukraine shared between the parties only?

A third party claiming independent demands of the issue has all procedural rights and obligations of the claimant (part 1 of Article 34 of the CPC of Ukraine), but the third party holds a special, different from the claimant's and the defendant's procedural position. It claims independent demands and may assert objections to the arguments of the claimant and the defendant and shall submit its own evidence.

The third party that does not claim independent demands of the issue can enter into the case on the side of the claimant or the defendant but does not endowed with procedural position of the parties. This person may submit objections and evidence to substantiate them or evidence which reinforce the position of the party on which the third person stands.

The ability to implement evidence-based activities of all persons involved in the case directly provided by law but the burden of proof of the circumstances underlying the claims and objections in the paragraph 1 of the part 1 of Article 60 of the CPC of Ukraine entrusted only to the parties. It directly contradicts other procedural rules.

In addition, quoted legal norm does not take into account that the distribution of the burden of proof shall also be based on presumptions embodied in the rules of substantive law. The resumption is a legal tool that balances the interests of the parties. Using of the presumption assumes the existence of presumed fact without its proof by one party if the opposing party in court does not refute it.[26] Thus, the presumption implies the existence of a particular fact until the absence is proven. In the Ukrainian Civil Code (Article 1166) there is the presumption of guilt in causing of property damage: a person who has caused harm is excused from its compensation if they can prove that the harm is not their fault. The claimant must prove the unlawfulness of conduct of the defendant, the existence of damage and a causal link

[26] Феннич В. П. Доказові презумпції в цивільному судочинстві: автореф. дис. … канд. юрид. наук: 12.00.03 / Василь Петрович Феннич. – К., 2009. – С. 6 (Fennych V. P. Evidentiary presumption in civil proceedings: synopsis of PhD in Law dissertation. – Kyiv, 2009. – P. 6).

between the unlawful conduct and the damage caused. The presence of the defendant's guilt doesn't have to be proved by the claimant, it is presumed. If the defendant does not provide the conclusive evidence of the absence of their guilt, the guilt shall be considered even when the claimant didn't prove this circumstance at all.[27] The special aspect of presumptions is their use in evidence independently of the will and desire of the persons involved in a case because of their attachment to law.[28] Substantive law that established the presumption directly affects the distribution of the burden of proof and that should be included in the paragraph 1 of part 1 of Article 60 of the CPC of Ukraine.

Not only presumptions but also fictions make an impact on the distribution of the burden of proof. Fiction is a legal device that assumes the fact contrary to reality when some non-existent fact recognized as existing or vice versa.[29] Substantive fictions serve as an instrument to resolve the legal uncertainty; procedural fictions help to downsize the volume of evidence and facilitate the process of establishing the circumstances that are important for the proper resolution of a case.[30] Part 1 of Article 146 of the CPC of Ukraine can be cited as the example of procedural fiction: when a person involved in a case is absent oneself from submitting of necessary materials, documents or other participation in the expert examination when it's impossible to make an examination without them and it's impossible to establish a fact without the expert examination, the court can recognize the fact or refuse to recognize it without the expert examination (it depends on absenting person). In terms of the distribution of the burden of proof, this means, for example, that if the defendant is absent from

[27] Штефан А. Відшкодування майнової шкоди як спосіб захисту авторського права / А. Штефан // Теорія і практика інтелектуальної власності. – 2014. – № 1. – С. 31 (Shtefan A. Compensation for damage to property as a way to protect copyright // 'Teoriya i praktyka intelektual'noi vlasnosti'. – 2014. – No. 1. – P. 31).
[28] Мохов А. А., Рыженков А.Я., зазначена праця. – С. 28 (Mohov A. A., Ryzhenkov A. Y., op.cit. – P. 28).
[29] Болдырев С. Н. Фикция как юридико-технический прием / С. Н. Болдырев // Вестник Северо-Осетинского госуд. ун-та им. К. Л. Хетагурова. Общественные науки. – 2011. – № 4. – С. 126 (Boldyrev S. N. Fiction as a legal and technical device // Bulletin of the K. L. Khetagurov North Ossetian State University. Social science. – 2011. – No 4. – P. 126).
[30] Резиньков П. М. Юридическая фикция: теоретико-правовой анализ: автореф. дис. … канд. юрид. наук: 12.00.01 / Павел Михайлович Резиньков. – Волгоград, 2012. – С. 32, 34 (Rezin'kov P. M. The legal fiction: the theoretical and legal analysis: synopsis of PhD in Law dissertation. – Volgograd, 2012. – P. 32, 34).

conducting of expert examination, the court may recognize the fact that is the basis for the claim and thus will remove this fact from the claimant's burden of proof.

Therefore, the distribution of the burden of proof has a connection with many other norms but not just with the Article 61 of the CPC of Ukraine. The analysis made in this paper indicates that paragraph 1 of part 1 of Article 60 of the CPC of Ukraine shall be changed and replaced by the following: 'Every person involved in a case should prove the circumstances to which it refers as the basis of their claims and objections, except as prescribed by law'.

VI. Conclusions

The principle of necessity of evidence means that all circumstances relevant to a case should be established. This purpose can be succeed by virtue of the procedural rule of the distribution of the burden of proof that helps to reach an optimal order to clarify the circumstances that constitute grounds stated in the case of claims and objections and have another meaning for the proper resolution of the case.