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FACULTY OF LAW

GATHERING AND ASSESSING OF EVIDENCE IN CRIMINAL TRIAL

Doctoral Thesis
(précis)

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Cluj-Napoca
2020

THESIS OUTLINE

KEY WORDS

evidence; the object of the proof; presumptions; hearsay; means of proof, evidentiary procedures; finding the truth; the principle of loyalty; evidence gathering; evidence research; admissibility of evidence; obtaining evidence; exclusion of evidence; the fruits of the poisonous tree; standard of proof; beyond any reasonable doubt; *in dubio pro reo*; reasonable doubt; assessment of evidence; sufficiency of evidence; the continental system; the accusatory system; common law; benefit of the doubt; the burden of proof, presumption of innocence

SUMMARY

This paper addresses the matter of evidence from a dual perspective, the gathering and assessment of evidence, emphasising, at the same time, the importance of evidence in criminal proceedings.

In the 1st Title of this paper, we addressed the introductory aspects necessary for the heuristic study of evidence. In the first chapter, we tried to understand the notion of evidence, its importance and evolution from a historical perspective. Thus, we presented the polysemantic valences of the term 'evidence'. The terminological homonymy of 'evidence' is not only specific to national law, but also to the French, Italian, English and American law; we stressed that evidence is the central nerve of the criminal process; we approached the evidence from the perspective of historical evolution: starting with the primitive system and the religious system, and continuing with the system of legal evidence specific to the inquisitorial model. We also made a comparative presentation of the accusatory and continental system in order to highlight the conceptual differences outlined during their development, differences that inevitably radiate in the matter of evidence.

In the second chapter (of the introductory title), entitled 'Object of evidence (*Thema probandum*)', we presented, from a comparative perspective, the 'object of evidence' in different countries belonging to the continental system or the common law tradition. We also made an analysis of the subject-matter of the evidence in national law. In the following sections of this chapter, dedicated to the object of the evidence, we analysed the classification of facts and circumstances according to the criterion of the need to prove them and the criterion of the possibility of proving them.

In the last section (of the second chapter) we dealt with the rule against hearsay from the perspective of historical development, regulation in the United Kingdom and the United States of America. We pointed out the position of the Anglo-American authors who, unequivocally, concluded that this rule was very complicated by the regulation of an impressive number of exceptions to it. At the same time, we appreciated how the hearsay evidence was approached (and should be addressed) in positive law. We concluded that, at this point, it is not necessary to regulate the hearsay, because it would generate more questions than it would provide answers.

In the third chapter (of the introductory title) we presented the relationship between 'evidence', 'means of proof' and 'evidentiary procedures'. In the first section we aimed to address

the legal definition of evidence and its interpretations of the literature in Romania and abroad, and we concluded, by reference to British and Romanian doctrine in the interwar period, that the evidence is a piece of 'information about a past fact'. We also concluded that the link between 'evidence', 'means of proof' and 'probative proceeding' is intrinsic because the 'probative proceeding' ensures the 'means of proof' which provides the information necessary for a fair settlement of the case.

The fourth chapter was dedicated to the classification of evidence by reference to the various criteria identified by the doctrine and analysed the practical importance of these classifications. At the end of the introductory title, the fifth chapter was devoted to the role of evidence in the construction of judicial truth. We presented various theories (correspondence theory and consensual theories) outlined by American doctrine that proved to be very concerned with the correspondence between objective truth and judicial truth.

In the 2nd Title, we have selectively addressed the principles governing criminal procedural law. Observance of the rules of the criminal process by applying them and the matter of evidence which, as argued, is the central nerve of the criminal process, keeps the entire criminal process away from arbitrariness and gives the whole procedure the fairness imposed by national law, the Constitution and procedural law as well as the Convention for the Protection of Human Rights and Fundamental Freedoms and the jurisprudence propagated by the European Court of Human Rights.

We have found that there are principles that are specific to the evidence. We first treated the principle of freedom of evidence which can be approached from a threefold perspective. First, from the perspective of the freedom of evidence, then from the perspective of the freedom of the object of the evidence and, finally, from the perspective of the free assessment of the evidence. Regarding the principle of loyalty, we found that it ensures compliance with the 'rules of the game' by prohibiting any tricks that may determine the unfairness of the proceedings as a whole, in which sense the European Court of Human Rights has ruled. At the same time, we addressed the principle of 'respect for human dignity', the principle of 'respect for sources in some special situations', the principle of 'respect for the rights of the defence' and the principle of 'respect for privacy' by referring to the jurisprudence of the European Court of Human Rights. Violation of these principles usually raises serious issues regarding the fairness of the proceedings.

The application of the guiding principles of the criminal process, as well as those specific to the matter of evidence, creates the necessary framework for the gathering of evidence in a way that ensures the finding of the truth and that keeps the criminal process away from arbitrariness.

The 3rd Title is dedicated to the gathering of evidence. This is a complex activity that brings together several evidence-specific operations and involves, in a first phase, the investigation of evidence, when the means of evidence and sources of evidence are identified and then, in the second phase, the admission of evidence and finally, the obtaining of evidence, which is the materialization of the evidence through the probative procedure. We found that most Romanian authors generically approached the administration of evidence, without distinguishing between research, admission and obtaining evidence.

We have noticed that, apart from including the condition of conclusion in the legal definition of evidence (from art. 97 para. 1 Code of Criminal Procedure), the admissibility of evidence is related to the same conditions of the old regulation, regarding the relevance and usefulness, two new conditions being added, namely the legality of the evidence and the possibility of obtaining it.

The administration of evidence cannot be approached generically but by reference to the phases of the criminal process. Thus, we approached the research, the admission and obtaining of evidence from the perspective of procedural phases and procedural stages. Thus, we found that in the criminal investigation phase, the characteristics of this phase produce direct effects on the way evidence is administered. We have noticed that the stage of criminal prosecution *in rem* has an absolutely secret character towards the perpetrator and thus, even when the perpetrator is known, he cannot contribute to obtaining evidence.

In the stages of a criminal investigation against the suspect, but also against the defendant, the investigation of the evidence is done mainly by the criminal investigation body and, in isolation, the injured person, the suspect or the defendant may also contribute insofar as he formulates proposals. The evidence is admitted by the criminal investigation body. The admissibility of the evidence is unilaterally ruled exclusively by the criminal investigation body, without contradictory debates, and the admitted evidence is obtained by the criminal investigation body, and the injured person, suspect or defendant through their lawyers (participating in performing the act). The fundamental difference between the stage of criminal prosecution *in rem* and the other stages of criminal prosecution is given by the real possibility of the suspect or

defendant to exercise his 'right of defence', manifested in plenary by the lawyer's ability to participate in any prosecution. by the possibility of proposing the administration of evidence.

In the preliminary chamber, the examination of evidence is done, in principle, by the defendant who is interested in supporting his requests and exceptions in the preliminary chamber and, in the alternative, by the injured party, the civil party, the civilly responsible party and even the prosecutor. The admissibility of evidence is the exclusive attribute of the preliminary chamber judge, and the defendant, the injured person, the prosecutor and, insofar as he participates in this procedure, the civil party and the civilly responsible party can contribute. According to the Decision of the Constitutional Court of Romania no. 802/2017, in the preliminary chamber procedure, the principle of 'freedom of evidence' applies, and any means of proof may be administered. However, the principle of 'freedom of object of evidence' does not apply, as probation must be subsumed and limited to the object of the preliminary chamber.

In the trial phase, the adversarial nature is fully manifested, an aspect that essentially contributes to the administration of evidence in this procedural phase. However, in the abbreviated procedure, there are limitations in the administration of evidence. In this procedure, the object of the evidence is limited (no evidence can be proposed that tends to change the factual situation retained in the indictment), there is a limit from means of evidence (only documents are admissible) and, finally, there is a limitation from the perspective of the holder of the proposal (being excluded the prosecutor from the sphere of persons who can propose the administration of evidence).

Instead, the administration of evidence, in the common procedure, is governed by the principles of freedom of evidence and object of evidence. Moreover, the statements of the witnesses heard in the criminal investigation phase may be administered, in conditions of adversarial proceedings, orality and immediacy, and new evidence may also be administered.

In the common procedure, the investigation of evidence is required of the holder of the proposed evidence: the prosecutor, the parties and the injured party. The admission of evidence is the exclusive attribute of the court which rules by reasoned decision on the proposals for evidence in the light of art. 100 para. 4 of the Romanian Code of Criminal Procedure. Obtaining evidence is a complex operation, because all parties, the injured person, the prosecutor and, in the alternative, the court can contribute.

Starting from the order of asking the questions during the hearing of the witness and the expert, we found that the one who proposed the witness will address the questions first, followed by the prosecutor, the injured person and the other parties. This way of regulating the order of asking questions is specific to the accusatory system, and we found that art. 381 of the Romanian Code of Criminal Procedure governs the 'cross-examination' where the questions are asked in the following order: examination, cross-examination and re-examination. The active role of the court is diminished, turning from duty into a faculty. Consequently, in the trial phase, in conditions of adversarial proceedings, in the strongest sense of the word, the parties contribute directly to obtaining evidence.

When we stressed the importance of evidence in criminal proceedings, we argued that the administration and assessment of evidence occur throughout the criminal process, including in the extraordinary cycle. Some extraordinary remedies seek to eliminate errors of judgment while others seek to eliminate errors of procedure. We have noticed that most appeals, which aim to eliminate procedural errors, do not allow the administration of evidence, while those aimed at eliminating errors of judgment, provide for this possibility.

In the last chapter of this title we analysed the proposal of evidence because it is mentioned several times in the Code of Criminal Procedure, but the doctrine did not pay attention to this subject. We approached the proposal of evidence from the perspective of the notion, form, holders and attributions of the competent administrative body to decide on it.

In the 4th Title we addressed the exclusionary rules in comparative law. The exposition was structured in two distinct chapters: the exclusion of evidence in the accusatory system and the exclusion of evidence in the continental system.

After examining the exclusion rules in the United Kingdom, the Republic of Ireland and the United States of America, we have found that the common law has developed the 'rule of exclusion' somewhat in contradiction with the accusatory tradition. The principle underlying the admission of evidence, in the common law, is that of including evidence based on its relevance in relation to the facts in issue, there being no concern for how the evidence was obtained. Comparing the three systems, we can conclude that the exclusionary rule in the Republic of Ireland is the most drastic, but it has been mitigated as a result of the constant criticism of the severity of this rule. The rule in the United States is the least severe, with four categories of exceptions to the exclusion rule. In the middle is the law of the United Kingdom, which has sought to strike a balance between

the imperative of respecting the rights of the accused and that of prosecuting those who have committed crimes.

In continental law, it is seldom possible to speak of the exclusion of evidence. In France, evidence is administered in accordance with the principle of freedom of evidence which has two limits: the legality of the evidence and the loyalty of the evidence, which is concerned with obtaining evidence. In order to invalidate the evidence obtained in violation of the legal provisions, the system of nullities is used, which are strictly regulated.

In Italy, the illegally obtained evidence cannot be used in criminal trial, and it is seen from a dual perspective: as a pathology that affects the act and as a legal regime that applies to the defective act, namely the impossibility of using it to substantiate any decision of the judiciary.

In the Netherlands, the Code of Criminal Procedure provides that if the evidence was obtained in the preliminary investigation phase in violation of legal provisions and there is no sanction attached, then the court may order: a) reduction of the sentence in a manner directly proportional to procedural infringement, in so far as the injury or damage caused can be compensated in this way; b) non-use of evidence obtained in violation of procedural provisions; c) the rejection of the accusation, if the errors or procedural omissions affect the right to a fair trial.

The most interesting regulation in mainland law is the Slovenian Code of Criminal Procedure which provides the exclusion of evidence obtained in violation of legal provisions whether it is a violation of constitutional rights or the Code of Criminal Procedure. The exclusion rule is built on three levels: first, the judge cannot base his decision on illegally obtained evidence; secondly, the judge must exclude (physically) the evidence from the file and thirdly, the judge, who ordered the exclusion of the evidence, becomes incompatible with judging the case in the first instance, appeal or extraordinary remedies. Thus, in addition to regulating the un-usability of the evidence, the evidence is physically excluded from the file, and the judge becomes incompatible, so that the judge who will rule cannot be ‘contaminated’ by the ‘pathology’ affecting the evidence and its impartiality is guaranteed.

Comparing the two major systems, we can see that there are major conceptual differences, but the purpose expressed (or deduced) seems to be the same: finding a balance that is often very fragile, between respecting the rights of the accused and punishing those who committed crimes, so that, in the end, judgments are handed down in accordance with the truth and, at the same time, fair for all parties involved in the criminal trial.

In the first chapter of the 5th Title, we wrote a brief presentation on how to regulate the invalidation of evidence obtained illegally by reference to the provisions of the 1968 Code of Criminal Procedure.

The invalidation of the evidence obtained in violation of the legal provisions was regulated for the first time in the Romanian legislation in 2003, in a relatively straightforward manner, stating that 'illegally obtained evidence cannot be used in criminal proceedings', thus establishing the 'rule of un-usability of evidence'.

The generic mention contained in art. 64 para. 2 of the 1968 Code of Criminal Procedure, intertwined with the tradition of national law and due to doctrinal and jurisprudential intervention became an effective mechanism for removing illegal evidence.

The presentation of the way of regulating the un-usability of evidence, under the rule of the 1968 Code of Criminal Procedure, was necessary to understand the normative evolution in the matter of invalidation of illegal evidence. In other words, in order to assess whether the current Code of Criminal Procedure has succeeded in effectively transposing a legal institution used in common law and abandoning the continental tradition, we must analyse the previous regulation and, by comparison, determine whether there is a normative progress.

In the second chapter, we proceeded to the analysis of the legal provisions contained in art. 101 Code of Criminal Procedure which regulates the principle of 'loyalty in the administration of evidence' and art. 102 Code of Criminal Procedure on the 'exclusion of unlawfully obtained evidence'.

Regarding loyalty, we made an analysis of the jurisprudence of the European Court of Human Rights generated by the application of art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms which prohibits torture, inhuman or degrading treatment or punishment. We correlated it with the provisions of art. 102 para. 1 Code of Criminal Procedure which expressly prohibits the use of evidence thus obtained in criminal proceedings. By reference to art. 101 para. 2 Code of Criminal Procedure, we have presented the evolution of narcoanalysis (the truth serum) and hypnosis from the perspective of the admissibility of such evidence in the American criminal trial and the Romanian criminal trial. We have found that the prohibition of the use of methods or techniques of listening (which affects the person's ability to remember and report consciously and voluntarily the facts) is addressed to the judiciary body when conducting the evidentiary procedure, but no legal provision prohibits witness' statements about issues he

remembered as a result of private hypnosis sessions. Before addressing the institution of excluding evidence, we also referred to the entrapment.

In analysing the provisions of art. 102 para. (1) - (3) Criminal Procedure Code, we noticed that the legislator uses, at the same time, several notions, without being able to distinguish if we are talking about effects, consequences, sanctions, or remedies. Specifically, the law uses institutions such as un-usability, nullity and exclusion, without knowing when and under what conditions they are applicable and what is the procedure to follow. Consequently, the doctrine could not agree whether 'the exclusion of illegally obtained evidence', as regulated by art. 102 Code of Criminal Procedure, represents a real sanction applicable in the matter of evidence or is subsumed to the common regime of nullities.

We have concluded that, although the aim was to introduce a separate sanction in the matter of evidence, the legislator intervened inexplicably by Law no. 255/2013 which introduced the third paragraph of art. 102 of the Criminal Procedure Code, which conditions the exclusion of the evidence from the nullity of the act by which the evidence was ordered, authorised or by which the evidence was administered. Thus, the legislator did not give any chance to the exclusionary rule and refused to give the jurisprudence the opportunity to apply this institution that has proven its efficiency, but also its limits. By doing so, the legislator limited the effect of art. 102 para. 2 - 3 Criminal Procedure Code to the effect of the un-usability of the previous regulation. Only by the decision of the Romanian Constitutional Court no. 22/2018, the exclusion of evidence was also recognised the size of the physical elimination of evidence obtained illegally (in addition to the legal dimension). This is a real step forward from previous regulation.

However, analysing the provisions of the Romanian Code of Criminal Procedure, we were able to identify certain situations in which exclusionary rule operates independently of the nullity system, as a real exclusionary rule in the common law. 'Automatic exclusion' means the exclusion of evidence whenever the judge finds a breach of a legal provision, without having the right to make assessments as to the appropriateness of excluding the evidence in relation to the circumstances of the case. The current Code of Criminal Procedure regulates several cases of 'automatic exclusion': a) evidence obtained through torture (the case provided by art. 102 para. 1 Code of Criminal Procedure); b) the evidence obtained in violation of the confidentiality of communications between the detained or arrested person and his lawyer (the case provided for in art. 89 para. 2 Code of Criminal Procedure); c) the evidence obtained from the surveillance of the

relations between the lawyer and the person he assists (art. 139 par. 4 Code of Criminal Procedure); d) the evidence obtained from the physical examination of the person in the absence of his written consent (art. 190 para. 5 Code of Criminal Procedure).

We appreciated that in these situations automatic exclusion could be ordered, given that the legislator expressly provides that the evidence obtained in violation of the above legal provisions, 'may not be used', 'are excluded' or 'attract exclusion'. In all other cases, the exclusion of evidence is conditioned by the finding of nullity, by reference to the provisions of art. 102 para. 3 Code of Criminal Procedure.

In addition to analysing the 'theory of the fruits of the poisonous tree' in relation to its origin and the doctrine of comparative law, we considered it appropriate to address the issue of the procedure for excluding illegally obtained evidence.

In conclusion, after analysing the content of art. 101 Code of Criminal Procedure (regarding the loyalty of the administration of evidence) and the content of art. 102 Code of Criminal Procedure (on the exclusion of evidence), we found that the legislator did not achieve his goal to create an independent and autonomous institution through which to punish illegality and disloyalty in gathering of evidence. It seems that the legislator has failed to leave behind the continental tradition, which is why, in most cases, in order to give procedural efficiency to the exclusionary rule, it is necessary for the judge to resort to the common regime of nullities. The exclusion of evidence has become a relatively efficient and functional institution due to the repeated intervention of the Romanian Constitutional Court which, first of all, allowed the administration of evidence in the preliminary chamber in order to prove illegality or disloyalty in the process of gathering of evidence (Decision no. 802 / 2017 of the Constitutional Court) and, secondly, imposed the physical removal from the file of the excluded evidence (Decision no. 22/2018 of the Constitutional Court).

Thus, in the absence of a legal regime of the institution of the exclusionary rule and the presence of normative inconsistency, we cannot conclude that the current regulation represents a materialized evolution in the combination of two traditions, but rather a legislative inconsistency that generates innumerable doctrinal controversies and a non-unitary practice.

The 6th and 7th title make up the second division of this paper - 'Assessment of evidence'. In the 6th Title, we examined the doctrine of 'reasonable doubt' in comparative law, from the perspective of the accusatory and the continental system, so that later we would have determined

whether the standard of evidence in Romanian law is an accusatory standard or has a mixed nature, given that the legal text refers to the notion of 'conviction'.

In the first chapter of the 6th Title, we focused on the evolution of the doctrine 'beyond any reasonable doubt', which is as old as the common law system and is related to the way in which the criminal process has developed after the abolition of ordeals. The doctrine is also related to the ideas of the philosophers of the seventeenth century regarding probabilities that were taken over by jurists, developing theories related to the types of certainties. Certainty is that conclusion which comes from simple and clear evidence so that any 'reasonable cause for doubt' is excluded. There are three categories of certainties: 'physical certainty', 'mathematic certainty' and 'moral certainty'. 'Physical certainty' is that which is formed through the senses, is perceived immediately, and represents the highest degree of certainty that the human is capable of. 'Mathematical certainty' is achieved through logical demonstrations. To describe 'moral certainty', authors would refer to the testimonial evidence and to 'persuasion beyond a reasonable doubt', concluding that 'moral certainty' is the same as 'indubitable certainty'.

The transition from the 'any doubt' standard to the 'beyond any reasonable doubt' standard was generated by the spiritual anxiety of jurors who would lose the chance to the salvation of their soul if they convicted an innocent man. Thus, the doctrine of reasonable doubt was outlined in order to avoid the eternal damnation of the soul of those involved in the act of justice.

In the United States, there are at least three evidentiary standards that apply: 'preponderance of evidence,' 'clear and convincing evidence,' and 'beyond a reasonable doubt'. The first standard is the least strict, it is used in civil matters, and it means that the fact to be proven is more probable than not. 'Beyond any reasonable doubt' is the standard required in criminal proceedings for convictions and is the strictest standard of proof that must strive for certainty. 'Clear and convincing evidence' is an intermediate standard between the two extremes presented above.

Although things seem relatively simple, the application of the standard of proof has led to serious controversies in judicial practice regarding the standard of proof required in the phases of the accusatory criminal process: the guilt phase and the sentencing phase.

At sentencing, in order to determine the level of the offence in question by reference to the 'The Federal Sentencing Guidelines', the judge may consider various circumstances, classified as 'relevant conduct'. In order to determine the sentence, the judge may take into consideration the

character of the convict, offences that have not been charged or even crimes for which the jury reached the 'not guilty' verdict.

Moreover, US case law has highlighted that the standard of 'preponderance of evidence' is satisfactory in the sentencing phase because once convicted, the accused lost his rights from the trial.

The case law has illustrated a consistent practice of punishing the accused considerably more severely for the offences presented by the prosecution in the sentencing phase than for the offences for which he was found guilty by the jury. This effect has been called by the American doctrine 'a tail which wags the dog of the substantive offense', because the main punishment is applied not for the crime for which he was tried, but for the facts proven by 'preponderance of evidence' at sentencing.

We must emphasise that the sentencing phase, in the light of the Guidelines, presents the characteristics of a trial and a real second chance for the prosecutor to obtain a considerably severer punishment for offences that have not been charged. Thus, if for American doctrine it seems inconceivable to prove the character of the accused during the guilt phase, in the inquisitorial criminal trial, it seems inconceivable that a person should be sentenced for offences that have not been charged and which have been proved using the lowest standard of proof. It is also inconceivable that a person should be punished for offences for which the jury has pronounced the verdict 'not guilty', motivated by the fact that this verdict presupposes the existence of a reasonable doubt which does not amount to proving the innocence of the accused.

There are jurisprudential and doctrinal differences arising from the need to define the standard of evidence and provide instructions to the jury. In this context, two positions have emerged, antagonistically: those who vehemently oppose the instruction of the jury and those who support the importance of this approach.

When it comes to the instruction of the jury, there were two main approaches: the 'analogy approach' and the 'moral certainty'. The first approach compares the decision-making process in criminal proceedings with the process of making important decisions in the private life of the juror, focusing on the idea that a reasonable person will hesitate to act when he encounters a reasonable doubt. The instructions given by the judges proved to be very diverse and colloquial so that the standard of proof was trivialized as long as, for example, it was compared to the doubt that a person has when buying a new car.

The Supreme Court of the United States of America has not taken a firm position on defining the standard of proof, but instead has ruled, on a case-by-case basis, whether the instructions given to jurors were constitutional or not.

Regarding the death penalty, it was suggested that in the guilt phase it should be applied the standard 'beyond any reasonable doubt' and, for the sentencing, it should be applied the standard 'beyond any doubt', in order to remove residual doubts that are not reasonable and, implicitly, does not preclude conviction. In essence, the death sentence is sought only when there is certainty, given that there have been relatively many miscarriages of justice among death row inmates.

Summarising, we can say that 'doubt beyond a reasonable doubt' is a complex concept that, despite its appearance, is not manifest. For clarity, reference was made to expressions such as 'firmly convinced', 'satisfied that you are sure', 'thoroughly convinced', and the use of the expression 'firmly convinced' was recommended, because it best reflects the concept that the accused should not be convicted unless the government has proven his guilt to the point of near certitude.

In British law, the standard of proof is much more lucid. Although there has been controversy over the expression which most accurately describes the strictness of the 'beyond any reasonable doubt' standard applicable in criminal matters, the case-law has revolved around the notion of 'sure of guilt'.

Modern jurisprudence does not emphasise the formula to be used in the jury instructions but brings to the attention of the jury the importance and rigour of the standard in criminal matters that require the highest degree of probability. It is recommended that the judge's instructions do not deviate from the instructions that the higher courts have ruled to be adequate.

In Canada, as in the United Kingdom, even though it has been held that the phrase 'beyond a reasonable doubt' is comprehensible and self-defining, the standard of proof must be understood by each member of the jury in order to ensure the right to a fair trial.

In *R v. Brydon* (1995), five members of the British Columbia Court reviewed articles, studies and previous Canadian and American court rulings on the standard of proof - 'beyond a reasonable doubt' - and subsequently drafted standardized instructions which emphasise the objectivity of the standard of proof and also refer to concepts borrowed from British law, such as 'firmly convinced'.

The ‘beyond a reasonable doubt’ standard applies in South Africa as well, and, as in the United States, the South African Supreme Court has not ruled on the need to define the standard of proof or on how it must be applied. Moreover, the jurisprudential orientation is against the definition of the standard of proof, an aspect criticized by a part of the doctrine that militates for its definition.

In the second chapter, we approached the standard of proof in continental law. In France, the ‘intimate conviction’ marked the transition from the system of legal evidence, in which the judge was bound by the arithmetic of evidence, to the system of free evidence and the freedom to assess the evidence.

Italian law has taken over the standard of proof from the common law, namely beyond any reasonable doubt (*al di là di ogni ragionevole dubbio*). The rule beyond any reasonable doubt is ambivalent, being both a rule on evidence, establishing the burden of proof, but also a substantive rule that must be taken into account when pronouncing the decision. Italian doctrine also tried to discern the meaning of the phrase beyond any reasonable doubt but concluded that it is the judge who must define and apply it.

In this chapter, we also addressed the standard of proof in China, where the standard of proof is ‘clear facts and credible and sufficient evidence’ that refers directly to the common law standard - beyond any reasonable doubt.

In Japan, the principle of free assessment of evidence is regulated, and the common law standard - beyond any reasonable doubt - which is applied in relation to the burden of proof and the presumption of innocence is recognised.

Therefore, after examining the origin of the standard of proof in common law, as well as the actual way in which it is applied in the United States, the United Kingdom, Canada and South Africa, we were able to find that the Romanian law borrowed from common law a very controversial institution. With its takeover, we will certainly not borrow the controversies related to the definition of reasonable doubt, since in Romanian law the evaluation of evidence is done by a professional judge and not by lay jurors. It remains to be analysed in the following title whether, for the Romanian doctrine and jurisprudence, the standard of proof in criminal matters generates dissensions in terms of its meaning and application.

The analysis of the standard of proof in the continental system strengthens our conclusion that there is a hybridization of the legal systems, which is why, in a few countries, the standard of

proof is that of intimate conviction. We found that Italy, among many other institutions, has also borrowed the common law standard of proof that it is rigorously applied.

Following the analysis, we noticed that the desideratum of an exclusively objective standard of proof cannot be achieved as long as the process of analytical thinking leads to the formation of a rational belief based on evidence, but which is ostensibly subjective. Therefore, both 'intimate conviction' and 'beyond any reasonable doubt' are subjective standards as long as they seek to form the conviction of the judge or jury, as the case may be.

The 7th Title, approaches the standard of proof in the Romanian criminal trial from the perspective of its evolution under the rule of four Codes of Criminal Procedure: the one from 1864, the one from 1936, the one from 1968 and the one from 2014.

The Code of Criminal Procedure of 1864 and that of 1936 contained legal provisions relating to the intimate conviction which was to be the basis of the judgment.

Regarding the 1968 code, given that it was in force for quite some time, during which time the Romanian society underwent major transformations, and the code, in turn, underwent substantial changes in terms of standard of proof.

The 1968 Code of Criminal Procedure conceived the assessment of evidence as a final activity of capitalizing all the evidence in order to find out the truth, since the ultimate goal was a judgment in which the objective reality was exposed, as it was reconstructed, at an ideational level, through evidence. The materialist conception created equivalence between judicial truth and objective reality, trying to exclude probabilities, in order to make room for certainty. The purpose of assessing the evidence was to form the conviction of the judicial body that was to be governed by 'its socialist legal conscience'.

The text of art. 63 para. (2) 1968 Code of Criminal Procedure was amended to replace the phrase 'conducting themselves according to their socialist legal conscience' with the phrase 'conducting themselves according to their conscience', without this change having any effect in relation to the way in which the standard of proof was applied in criminal matters. In 2001, the Constitutional Court of Romania found that the provisions of art. 63 para. (2) of the 1968 Code of Criminal Procedure, are unconstitutional and, as a result, the legislator amended art. 63 para. (2) 1968 Code of Criminal Procedure by eliminating the phrases 'conviction' and 'conscience'.

In the second chapter, we analysed the assessment of evidence and the standard of proof in the regulations in force, by reference to the presumption of innocence and the burden of proof. We

chose this way of presentation because, in common law, there is an immanent link between the standard of proof, the presumption of innocence and the burden of proof. Or, as long as the Romanian legislator introduced the standard of proof 'beyond any reasonable doubt' in the national law, we appreciated that we had to refer to the standard of proof in the same way as the system from which we acquired it.

We analysed the presumption of innocence from the perspective of its development in common law: The United Kingdom, the United States of America and Canada. We approached the presumption of innocence by referring to the provisions of art. 6 pg. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the jurisprudence created around this article which guarantees the presumption of innocence.

Studying the presumption of innocence, in common law, we found that it produces effects at the guilt phase. On the other hand, in Romanian law, the accused is presumed innocent until the conviction remains final, which means that the pronouncing of a conviction, in the first instance, does not entail the replacement of the presumption of innocence with the presumption of guilt.

Next, we analysed the burden of proof in comparative law and then in Romanian law. In common law, the burden of proof involves, in addition to the production of evidence, the persuasion of jurors who act as factfinders who, in relation to evidence, must establish the state of affairs based on which to provide the verdict. The judge has no responsibility in the gathering of the evidence of the prosecution or defence, other than to ensure, in an impartial manner, that the evidence is administered in compliance with legal provisions.

We noticed that the current legislator transformed the active role of the court from an obligation, as provided by the Code of Criminal Procedure 1968, into a faculty, without suppressing it. Although the current trend is to bring evidence closer to common law by introducing the standard of proof and excluding illegally obtained evidence, the legislature was not prepared to give courts the prerogative to dismiss the charge without taking evidence ex officio, when the accusation has not been proved by the prosecutor.

After analysing the presumption of innocence and the burden of proof, we distinctly approached the standard of proof. We noted that Anglo-American doctrine distinguishes between an external standard of proof that is reached as a result of external analysis and an internal standard of proof that is achieved as following the internal analysis. It was noted that the standard of proof has an implicit function, intimately related to the burden of proof, which means that the one who

has the burden of proof must prove, otherwise it will be decided against him. The standard of the proof has a regulatory function, a function that presupposes the existence of a benchmark with a probabilistic value that must be reached as a result of the evaluation of the evidence. The external standard is fixed, predetermined and implies the existence of a threshold that must be reached by the one who has the burden of proof.

The internal standard involves the provision of instructions that must be taken into account in the deliberative process, without establishing a certain probabilistic threshold. It has also been called the standard of caution because the more serious the charge, the higher the level of caution. This standard is a variable standard.

We have found that Romanian doctrine defines the standard of proof given the external analysis, which, as we have seen, requires the existence of a threshold.

In the same section, we defined the assessment of evidence as that activity of evaluating evidence either from a quantitative or a qualitative perspective, which precedes the formation of a conclusion, regardless of whether or not it concerns the facts of the case. I noticed that the assessment of evidence occurs throughout the criminal process, even if it is specific to the deliberative process attached to the pronouncement of solutions in solving the criminal action and the civil action.

The standard of proof, although approached with the assessment of evidence, differs fundamentally from the latter. The standard of proof implies the existence of a decision-making threshold that allows the judicial body to formulate a fair conclusion. The assessment of the evidence, on the other hand, aims at the activity preceding the conclusions formed by reference to the standard of proof, activity materialized in the analytical and synthetic evaluation of the evidence.

Since the standard of proof in national law appeals to both ‘conviction’ and ‘doubt beyond a reasonable doubt,’ we wondered whether it was of a mixed nature, by combining intimate conviction with the specific standard in the Anglo-American system. We have established that the standard of ‘intimate conviction’ is a positive standard that tends towards an ‘affirmative construction’, which means that the prosecution must bring evidence that, after a fair assessment, materialized in an analytical and synthetic examination of all evidence, has the ability to form in the judge’s mind the ‘intimate conviction’ of the facts brought before the court. Thus, intimate conviction is the purpose for which the prosecution produces evidence.

The ‘beyond any reasonable doubt’ standard is a negative standard aimed at ‘deconstructive exclusion’, which assumes that the evidence produced by the prosecution must reach a certain threshold so that there is no reasonable doubt. The purpose of this standard is to rule out the doubt.

Obviously, the formation of intimate conviction, respectively the affirmative construction, presupposes precisely the exclusion of reasonable doubts, and the exclusion of reasonable doubts presupposes the formation of conviction. We consider that in Romanian law, the standard of proof is the one borrowed from the common law.

In the next section, we have indicated the relevant jurisprudence of the Romanian High Court of Cassation and Justice regarding the rule *in dubio pro reo* to establish how this rule relates to the standard of proof. The jurisprudence has managed to capitalise on the rule *in dubio pro reo* in various objective situations generated by the vulnerability of the evidence.

In the third chapter of the final title, we analysed the moments when the assessment of evidence takes place according to the phases of the criminal process and, at the same time, whether the criminal procedural law establishes evidentiary standards for performing certain procedural acts or for taking measures.

Regarding the criminal investigation phase, we found that for the criminal investigation *in rem*, the law does not require any standard of proof or assessment of evidence. Instead, in order to continue the criminal investigation *in personam,* the legal provisions stipulate the probative standard of reasonable suspicion.

Despite the regulatory inaccuracies, we have found that, with regard to the setting in motion of the criminal action, the Code of Criminal Procedure does not impose a decision-making threshold that reflects the level of conviction that the judiciary must have to rule in this regard. What is certain is that the level of persuasion must be higher than that required for *in personam* investigations, but lower than that for conviction.

We also referred to the standard required for indictment, and we found that the doctrine considered that the legal provisions impose the standard of the sufficiency of the evidence. Contrary to the majority opinion, we argued that the sufficiency of the evidence is not a standard of proof, as it does not indicate a decision-making threshold that reflects the level of certainty that the judicial body must have to resolve the case. In addition, the sufficiency of evidence is regulated both for the indictment and for dismissal and, as a consequence, the standard of proof cannot be the same, both for indictment and dismissal.

In the next section, we examined the way in which the preliminary chamber judge assesses the evidence, on the one hand in the complaint procedure against the non-prosecution solutions and, on the other hand, in the preliminary chamber procedure.

In the preliminary chamber procedure, preliminary chamber judge assesses evidence to verify the veracity of the statements made by the defendant through requests and exceptions regarding the criminal investigations (the loyalty and legality of the evidence gathered; the legality of the procedural acts and the legality of the indictment).

In the trial phase, the court proceeds to assess the evidence both in the first instance and on appeal. Concerning the first instance, we noticed that although the assessment of the evidence is immanent to the deliberative process, it also intervenes in other situations during the trial, situations that cannot be presented exhaustively.

In conclusion, we specified that the assessment and reassessment of evidence occur throughout the trial phase, which results from the corroboration of the legal provisions, even if there is no express regulation in this regard.

The assessment of the evidence also takes place in the appeal, according to the rules provided by the Code of Criminal Procedure for the trial in the first instance. However, there is a limitation in the sense that in order to give a conviction, the appellate court must hear all persons whose statements were considered by the first instance court in order to acquit the accused.

We considered that it is necessary to approach the assessment of the evidence in the extraordinary remedies that are made according to the specifics of each of them. We proceeded to an analysis of those extraordinary remedies. We noticed that the only extraordinary way of appeal, in which there is a real (re)appreciation of the evidence administered in the extraordinary cycle, is the review. When re-trialling the case, after admitting in principle, the court makes an assessment of the evidence administered in the two procedural cycles and in some cases also applies the standard of proof ‘beyond any reasonable doubt’.

In the penultimate section, we analysed the probative value of the statements of anonymous witnesses from the perspective of domestic jurisprudence and the constant jurisprudence of the European Court of Human Rights which emphasised the disadvantage created for the accused by the impossibility of contesting evidence resulting from hearing anonymous witnesses. If this disadvantage is not compensated by the procedures followed by the judicial bodies, it determines the lack of fairness of the procedures.

In the last section, we analysed the link between the standard of proof and the reasoning of decisions. We consider that the ideal of objectifying the standard of proof could be achieved more easily if the pronouncing of the sentences and decisions that solve the case were made after the motivation. As we have already mentioned, the reassessment of evidence can occur without constituting a procedural pathology, and the fact that the magistrate transposes his conviction in writing allows him to reflect longer.