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Standards of proof in criminal justice of Ukraine: the essence of the concept and the purpose of implementation

Vasyl Nor[1]
Marta Mazur[2]
Khrystyna Slyusarchuk[3]
Ivan Franko National University of Lviv, Ukraine

Abstract: For a long time there has been an active study of the advantages and disadvantages of the adversarial type of criminal procedure on the pages of scientific publications. However, not so long ago, the attention of scientific community of Ukraine was attracted by the concept of "standard of proof", as one of the integral attributes of the adversarial type of criminal procedure. Scholars try to comprehend the essence of the relevant concept, to single out its types, to study foreign experience of its functioning, to analyze the "pros" and "cons" of its introduction into the national doctrines of criminal procedure. The article provides an analysis of the essence of the concept and the purpose of introduction standards of proof into criminal proceedings. Also, the article examines the correlation between standards of proof and knowledge formation in criminal justice and the system of standards of proof in criminal proceedings.

As a result, it is concluded that the standards of proof meant to serve as a "key" to achieve the correct establishment of the circumstances of criminal proceedings, as well as – the successful implementation of criminal proceedings in general.

Keywords: standards of proof, criminal procedure, probability, likelihood, reliability, knowledge in criminal proceedings, standards of persuasion.

[1] Dr. Sc. (Law), Prof., Full Member (Academician) of the National Academy of Legal Sciences of Ukraine, Head of the Department of Criminal Procedure and Criminalistics, Ivan Franko National University of Lviv, Ukraine. https://orcid.org/0000-0002-5597-9768
vasyl.nor@lnu.edu.ua

[2] PhD (Law), Assoc. Prof. of the Department of Criminal Procedure and Criminalistics, Ivan Franko National University of Lviv, Ukraine. Member of the Committee of Criminal Procedure Law of the Bar Council of the Lviv Region. https://orcid.org/0000-0001-9274-6261
marta.mazur@lnu.edu.ua

[3] PhD (Law), Assoc. Prof. of the Department of Criminal Procedure and Criminalistics, Ivan Franko National University of Lviv, Ukraine. Deputy Chairman of the Committee of Criminal Procedure Law of the Bar Council of the Lviv Region. https://orcid.org/0000-0003-0337-6436
khrystyna.slyusarchuk@lnu.edu.ua

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1. Introduction

Recalling in law about such evaluative concepts as "reasonable doubt", "reasonable suspicion", "sufficient grounds", "beliefs", "probability" and others, we can see that the legislator does not provide them with a proper definition in Criminal Procedure Code of Ukraine (CrPC). Moreover, one of the provisions of the presumption of innocence that "a person should be acquitted unless the prosecution proves guilt beyond a reasonable doubt"[4] (Art. 17 CrPC) has not been properly defined in law doctrine of Ukraine. All this does not contribute to the provision and maximum realization of human rights and freedoms in the field of criminal justice. In foreign doctrines of criminal procedure these terms are called "standards of proof".

The standard of proof is one of the relatively "newly formed" theoretical construct, that is being used in the criminal procedure of countries in both Continental and Anglo-Saxon legal systems. Therefore, the formation of its concept and defining the interconnection between the standards of proof and the way of forming (mechanism of formation) knowledge of the circumstances of the criminal proceeding is the task of the science of law.

A closely related issue to the concept of "standards of proof" in criminal proceedings is the interconnection between such categories as "probability", "likelihood", "reliability"[5] and "truth" of the knowledge in criminal proceedings.

In scientific literature we can find examples of defining standards of proof as a balance of probabilities, which is necessary to determine the degree of reliability, should be proved by the party on which the burden of proof lies.[6] In the understanding of B. Ratushna, the standard of proof is a criterion for the reliability of the result of judicial knowledge. V. Ishchenko noted that the standard of proof follows from the qualitative level of probability of knowledge.[7] In the interpretation of another researcher I. Petrukhin, the concept of reasonable doubt, which is one of the standards of proof in criminal proceedings, generally rejected the requirement to establish the truth and replaced it with the assumption of a high probability of conclusion.[8] In turn, V. Vapnyarchuk repeatedly used the categories of "probability" and "reliability" of knowledge in the study of standards of proof in criminal proceedings.[9]

Other authors assert the standard of proof as a sufficient degree of probability of knowledge for a judge to make a decision in criminal proceedings, i.e. such a degree of probability that allows the court to dispel doubts in a particular case.[10]

Thus, the question of determining the interconnection between the probability and reliability of knowledge in criminal proceedings is an integral part of the study of the content and essence of the concept of standards of proof in criminal proceedings. The issue of distinguishing probable, likelihood and reliable knowledge in the criminal procedure, as well as the direct study of relevant categories, has been the subject of consideration and rethinking among the

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[4] UKRAINE. Code of Ukraine No 4651-VI, of 13 April 2012,"Criminal Procedure Code of Ukraine" (as amended of 21 July 2020). [Last accessed: 03-01-2021].

[5] GÓMEZ, F. *Burden of Proof and Strict Liability: An Economic Analysys of a Misconception.* Universitat Pompeu Fabra, Bafcelona, Spain, 2001, p. 5.

[6] RATUSHNA, B. "The standard of proof as a criterion for the reliability of the result of judicial knowledge", *Pravo Ukrainy,* 2012, vol. 6, p. 282 – 291.

[7] ISHCHENKO, V. "Prospects for the formation of standards of proof in the modern criminal procedure of Ukraine", *Forum prava,* 2009, No 3, p. 302 – 307.

[8] PETRUKHIN, I. "Truth, reliability and probability in court", *Legal world,* 2003, vol. 8, p. 17 – 25.

[9] VAPNYARCHUK, V. "Standard of criminal procedural evidence", *Bulletin of the National Academy of Legal Sciences of Ukraine,* 2015, vol. 80, p. 100 – 105.

[10] VERSHININ, A. *Civil process: textbook*, 2002. 472 p.; GMYRKO, V. *Evidence in criminal proceedings: activity paradigm. Theoretical analysis. Problematization. SMD-representation*: monograph. Dnipro, 2010. 314 p.

scientific community many times over the last few decades. However, the introduction of standards of proof in criminal proceedings has "raised" the relevant discussion to a qualitatively new level.

The fact is that, for a long time period of rethinking the concept of probability, likelihood and reliability was not only thought of philosophically, but also as legal categories, took place due to the issue of the existence (necessity of existence) of truth in criminal proceedings. At the same time, the discussion among scholars was mainly reduced to the questions of what exactly should be the truth in criminal proceedings: objectiveor formaltruth? What is its significance in criminal proceedings? Namely, why is it needed in criminal proceedings: as the general purpose of criminal proceedings; as the principle of criminal procedure or as a certain reference point, a value criterion in criminal proceedings.[11]

However, the probability and reliability of knowledge in the application of standards of proof in criminal proceedings should not be investigated and considered in the "coordinate system" of establishing the truth in criminal proceedings. As has been repeatedly noted, the standards of proof do not provide for and do not aim to establish any truth in criminal proceedings, whether formal (legal) or even more objective one.[12]

Therefore, the purpose of the relevant article is a comprehensive analysis of the concept of standards of proof in criminal justice of Ukraine.

2. The essence of the concept

2.1. The concept of standards of proof in the doctrine of criminal procedure law

Continuing the analysis of the previously raised issue of defining standards of proof, based on the analysis of doctrinal views, it should be noted that the concept of "standard of proof" is a multifaceted category and is interpreted ambiguously in scientific research.

For example, Yu. Korenevsky understands the concept of "standard of proof"as the minimum allowable set of evidences, in case of lack of which, the recognition of a legal fact as proven is excluded.[13]

However, a rhetorical question logically arises: is there a maximum admissible set of evidences in criminal proceedings? Is it possible to answer the question: how much evidences in the aggregate forms a person's inner conviction that a legal fact has been proved or unproven? According to Yu.Korenevsky, this is a minimal set! However, the minimum is how much? Will this "minimum set" be sufficient? What is the correlation between the "minimum admissible set of evidences" and the principle of a full, comprehensive and impartial investigation of the circumstances of criminal proceedings? And, in general, is it possible to "measure" subjective confidence by a quantitative characteristic?

As rightly noted in the scientific literature, in each case criminal proceedings, the sufficiency of evidences is assessed individually and it is impossible to give any unambiguous advice on determining the sufficiency of evidences, which would be

[11] BASSISTA, I. "On the question of establishing the objective truth in criminal proceedings", *Visnyk of Lviv National University*, 2015. No 61, p. 417 – 422. NOR,V. "Truth in criminal justice: the idea, dogma of law, implementation", *Pravo*, 2015, p. 674 – 680. PAVLYSHYN,A. "Influence of procedural form on the establishment of truth in criminal cases", *Bulletin of the Prosecutor's Office,* 2011, Vol. 4, p. 75 – 82.

[12] GMYRKO, V. *Evidence in criminal proceedings: activity paradigm. Theoretical analysis. Problematization. SMD-representation:*monograph. Dnipro, 2010, p. 314.

[13] KORENEVSKY, Yu. "Evidence in criminal proceedings: traditions and modernity", *Lawyer,* 2000, p.163-164.

acceptable in all cases.[14] So, is it possible (and necessary) to determine the minimum set (limit) of sufficiency of evidences? In our opinion, the answer is obvious – no.

Sufficiency of evidences is either present or not, and it is not entirely justified to introduce a gradation of the sufficiency of evidences in criminal proceedings.

A. Rudenko in developing the concept of substantive logic of criminal procedure and highlighting such a property of evidence as "strength of evidence", which characterizes the intrinsic systemic significance of individual evidence, noted: "if the strength of the evidence is not subject to assessment, the result of the addition (multiplication) of the strength of each of the evidence, expressed in the category of their sufficiency, is assessed".[15] The relevant scientific opinion once again confirms the futility of attempts to introduce a gradation of the sufficiency of evidences and determine their "quantitative necessity" in criminal proceedings, as the significance (weight) of the evidence is not a subject of "mathematical calculation".

It seems that in order to define the concept of a "standard of proof", it is better to use such a property of evidences as their "sufficiency" and to avoid the assertion of their "minimum admissible set". In this context, the above-mentioned Yu. Korenevsky's concept of "standard of proof" does not seem fully justified, because it indicates only a "quantitative" characteristic (set of evidences) and does not fully reveal the essence of the concept.

Departing from the quantitative characteristics of the standard of proof, B. Ratushna emphasizes its qualitative side, noting that the "standard of proof" is a certain conditional limit beyond which the quantitative characteristics of knowledge obtained in the course of the case, passes into such a quality that gives grounds to court to make, in his opinion, a judicial decision.[16] The scholar, given the case law of the ECHR, believes that it is reasonable to introduce into the current procedural law a unified definition of the term – the concept of "standard of proof" as a requirement for the quality of knowledge obtained by the court as a result of court proceedings, circumstances of a particular case for its proper resolution. In turn, the quality of knowledge obtained in the field of criminal procedure depends on the completeness of the establishment of depth of the study of the circumstances of the subject of proof in criminal proceedings.

The definition of the standard of proof proposed by V. Gmyrko deserves special attention: "the standard of proof in criminal proceedings is a set of normatively established requirements to the results of evidentiary activity of the prosecution, the fulfillment of which is a condition for the court to make a lawful procedural decision"[17]. It is special, at least because the scholar "reorients the vector" of attention from the key role of judicial knowledge in criminal proceedings to the important role of the evidentiary activity of the prosecution in criminal proceedings. Thus, drawing attention to the fact that the condition for the court's legal procedural decision is an indicator of how well the prosecution has fulfilled its obligation to prove the guilt of the accused in the commission of a criminal offense and in general the circumstances to be proved in criminal proceedings – its burden of proof in criminal proceedings. However, it should be noted that this understanding of the standard of proof is most characteristic of the adversarial type of criminal proceedings, where the court acts as an "arbitrator" and is characterized by passivity in the field of proof.

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[14] RATUSHNA, B. "The standard of proof as a criterion for the reliability of the result of judicial knowledge", *Pravo Ukrainy,* 2012, vol. 6, p. 282 – 291.

[15] RUDENKO, A. *The substantive logic of evidence: dialectical and formal logical foundations (criminal procedural and criminalistic research).* Krasnodar, 2011.

[16] RATUSHNA, B. "The standard of proof as a criterion for the reliability of the result of judicial knowledge", *Pravo Ukrainy,* 2012, vol. 6, p. 282 – 291.

[17] GMYRKO, V. *Evidence in criminal proceedings: activity paradigm. Theoretical analysis. Problematization. SMD-representation:*monograph. Dnipro, 2010, p. 220.

In general, we can agree with the corresponding definition of the standard of proof in criminal proceedings. However, it should be noted that an important role in the implementation of the standard of proof in criminal proceedings is assigned to the defense. Despite the fact that in the field of criminal justice no one is obliged to prove his innocence in committing a criminal offense and the obligation to prove the guilt of the accused in committing a criminal offense - is the exclusive "prerogative" of the prosecution (and in general, no one "canceled" presumption of innocence), in the Anglo-Saxon legal system in matters of compliance with the standard of proof, such as "beyond a reasonable doubt", the "last word" is always left to the defense and depends on whether the defense was able to "sow" reasonable doubt among the jury or judges.

In the American doctrine of criminal procedure in the question of the ratio of the participation of the parties in criminal proceedings, a long-standing aphorism is given as an example, according to which: "sometimes you cannot see forests through trees". As David S. Gould points out, this means that sometimes we are so focused on the details that we can lose sight of the whole picture. The defense in criminal proceedings always seeks and does everything possible to ensure that the judge or the jury are focused on the "trees", while the prosecutor tries to do everything so that they can see the general appearance of the "forest". He often tells the jury that it is like looking at one of the modern French paintings of pointillism. If you stand too close to it, all you see is a whole bunch of dots that seem unconnected and unconnected. However, when you step back a little – a clear picture suddenly appears in front of you.[18]

All this indicates that the standard of proof can be implemented only with the active participation of both parties in criminal proceedings.

However, such "activity" of the defense in practice should not lead to erroneous and unreasonable replacement of the presumption of innocence by its antipode - the presumption of guilt.[19] The defense party is not obliged to prove the innocence and non-involvement of the accused in the criminal offense. No one may require the accused to present evidence in his defense. However, by using the opportunity to provide oral or written explanations about the suspicion or accusation, the right to collect and present evidences, to participate personally in criminal proceedings and other procedural rights, the accused (suspect) thus exercises his right to defense. And, anyway, the degree to which the accused (suspect) uses his right to defense, which is aimed at "undermining the position of his procedural opponent", ultimately affects the formation of the result of criminal procedural (including judicial) knowledge and the adoption of appropriate procedural decision.

Thus, the standard of proof does not revolve only around the evidentiary activity of the prosecution, but also depends on the ways and possibilities of exercising procedural rights of the accused (suspect), provided in the context of adversarial criminal proceedings. The essence of the standard of proof is created by the evidentiary activity of both parties of the criminal proceedings.

It is worth considering another question: will the standard of proof as a criterion for the prosecution's compliance with the normatively established requirements for its evidentiary activity be a condition for the court to make a lawful procedural decision?

If the prosecution has succeeded in proving its obligation to prove the circumstances to be proved in the criminal proceedings and if the accused is found guilty of a criminal offense as a result of the criminal proceedings, the court shall pass a guilty verdict. If the prosecution fails to fulfill its obligation to prove the

[18] GOULD, David S. (eds). *Do juries see "beyond a reasonable doubt? The view of a Former prosecutor,* Phoenix Books, 2006, p. 8 – 14.

[19] KALINOVSKY, K. Di*stribution of the burden of proof in criminal proceedings: is it always in favor of the accused?*, CJSC Aktion-Media, 2012, p. 40 – 43.

circumstances to be proved in criminal proceedings and to prove the guilt of a person in the commission of a criminal offense during the trial, the court shall issue an acquittal. One way or another, the sentence is legal (or at least the legality of the sentence is always presumed). The question is: to what extent will such procedural decision be fair? The answer to this question remains open for discussion, despite the rhetorical nature of the issue.

Based on the analysis of the scientific literature and legislation of foreign countries, in particular the United States of America and the United Kingdom, it should be noted that in the Anglo-Saxon legal system, standards of proof are an indicator not only of the burden of proof in criminal proceedings.

This is due to the fact that in the science of the relevant system of law, in addition to the "burden of proof", there are also "burden of confirmation" ("burdenofgoingforward") and "burden of persuasion" are single out.[20]

The burden of proof in the criminal proceedings in these countries presupposes that the prosecution bears the burden of proving guilt of the accused and is defined as the burden of establishing the ultimate truth in the relevant matter by the set of evidences required by law. This burden remains with the prosecution throughout the criminal proceedings and can never be transferred to the defense. As American researcher J. Klotter notes: "the burden of proof" emphasizes "the result of the criminal proceedings in general rather than certain issues that arise within its implementation".[21]

However, in criminal proceedings, the defense may be required to provide a sufficient set of evidences to substantiate a particular fact, namely "those particular issues that arise in criminal proceedings". For example, if the accused alleges an alibi or insists that he has a mental disorder while committing a criminal offense or committing it in a state of insanity, then in view of the indisputable fact of the presumption of innocence and realizing that the accused does not have any procedural charges, in order to prove his innocence or deny his guilt in committing a criminal offense, the defense will still be "obliged", to some extent, to provide credible evidence to prove his "defense". This is due to the need for the defense to establish those circumstances, not establishment of which may cause negative consequences for the accused, for example, the adoption of a procedural decision not in his favor.[22]

Thus, any allegation made by a defense in defense of its legal position must be supported by relevant evidences. Therefore, the American legal system stipulates that the prosecution's performance of its procedural duties (powers), in particular the establishment of circumstances to be proved in criminal proceedings (circumstances of the subject of proof) is the burden of proof, while the defendants' defense of the burden of "burden confirmation". This burden is sometimes defined as "burden of evidences".[23]

It seems interesting that in the Anglo-Saxon legal system, in particular in the United States, such a theoretical category as the "burden of persuasion" in criminal proceedings is being singled out.

The burden of persuasion rests with the parties in the criminal proceedings and consists in the need to convince the judge of the veracity of the versions put forward by each of the parties and the reliability of the evidences provided in support of them. The scientific literature states: "The burden of persuasion falls on the prosecutor and defense counsel involved in criminal proceedings and is of

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[20] SLYUSARCHUK,Kh."Correlation of the terms "standards of proof" and "standards of persuasion"",*Law and society,* 2016, no 1, p. 164 – 170.

[21] KLOTTER, John C. *Criminal evidence. Fourth edition* (Justice administration legal series, Criminal justice studies). Anderson Publishing Co., 1987, p. 28.

[22] Ibid.

[23] KALVEN, Harry Jr., ZEISEL, H. *The American Jury*. Little, Brown and Company, 1966, p. 29. GÓMEZ, F. *Burden of Proof and Strict Liability: An Economic Analysys of a Misconception.* Universitat Pompeu Fabra, Bafcelona, Spain, 2001, p. 6.

particular importance during their closing speeches before the jury, in which each of them tries to convince each juror that it is his version of "truth" is true".[24]

Thus, the Anglo-Saxon system of law distinguishes between the concepts of "prove" ("proof") and "persuade" ("persuasion"). This fact raises the question: is it possible to "prove" the existence of a certain fact, but not "convince" a person of its existence? ("prove, but do not convince").[25] It seems that the answer to this question, in countries with adversarial form of criminal proceedings, is positive.

Without finding a definition of "belief" ("conviction") in the legislation, we turn to the essence of these words. Thus, "conviction" means "proving to someone the correctness of something" or "firmly established opinion about something; confidence in something; established view of something". In turn, the concepts of "persuade" and "persuasion" are seen as a certain process, a method of psychological influence and a way to induce a certain action and means "to prove something to someone; to force to admit something", "the process by which the message causes a change in beliefs, views or patterns of behavior", and the concept of "to be convinced" – "to reach a certain conclusion, to believe in something on the basis of evidences, observations, reflections, etc." Instead, "prove" ("proof") means "to confirm the truth, the correctness of something with facts, indisputable arguments".[26]

Undoubtedly, we should agree with opinion that conviction should be understood as:

1) the process of inclining someone (including yourself) to a certain view or action;

2) the result of this process, as a specific opinion;

3) a person's attitude to their knowledge, actions, as a state of confidence, persuasiveness.[27]

In addition, as noted in the scientific literature, "internal conviction is not only the result of evaluation of evidence, as the conclusions reached by the investigator or court during the investigation of the circumstances of the case, but also the process of forming consciousness, conviction of the investigator or judge that a person is guilty".[28]

It is the "process of persuasion formation" that is influenced by the "burden of persuasion" in criminal proceedings. In turn, V. Gmyrko defined "persuasion" as a psychological means of proof in criminal proceedings and as an objectively available, purely individual, subjective, uncontrolled psychological attribute of human.[29]

Also, considering the internal conviction as one of the main components of the criminal – procedural principle of free evaluation of evidence, it is noted that the internal conviction should be considered primarily as an independent legal criminal - procedural category.[30] According to that opinion, its psychological and epistemological aspects are being important for revealing the essence of inner conviction. In the psychological aspect the inner conviction can be considered in the

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[24] KLOTTER, John C. *Criminal evidence. Fourth edition* (Justice administration legal series, Criminal justice studies). Anderson Publishing Co., 1987, p. 28.

[25] SLYUSARCHUK,Kh."Correlation of the terms "standards of proof" and "standards of persuasion"",*Law and society,* 2016, no 1, p. 164 – 170.MAZUR, M., SLYUSARCHUK, Kh."Standard of proof in criminal proceedings: "variable" or "stepwise"?", *Uzhhorod National University Herald. Series: Law,* 2021, Vol. 63, p. 298 – 301.

[26] BILODID, I. *Dictionary of the Ukrainian language*: *in 11 volumes*. Naukova dumka, 1971.

[27] NOR,V. *Problems of theory and practice of judicial evidence.*Higher School Publishing Association, 1978, p. 103.

[28]Ibid.

[29] GMYRKO, V. Evidence in criminal proceedings: activity paradigm. Theoretical analysis. Problematization. SMD-representation: monograph. Dnipro, 2010, p. 92 – 93.

[30] MIKHEENKO, M. *Problems of development of criminal process in Ukraine: Selected works*. Jurinkom Inter, 1999, p. 125 – 144.

dynamics (as a process of its formation) and in statics (as a result). In the process of its formation one's own opinion is created, doubts and uncertainties are overcome and eliminated. In the epistemological aspect, the inner conviction is the knowledge of both – the individual facts of the criminal proceedings and their totality, which is the subject of proof in the criminal proceedings, and the conclusions in it.[31]

Thus, from the point of view of the epistemological aspect of inner conviction, a person can "gain", "acquire" knowledge (information) about the circumstances of criminal proceedings, but can "believe", "make sure" of the relevant knowledge only when fulfilling the burden of persuasion, as a dynamic element of the psychological aspect of inner belief (the process of its formation). If we consider these two aspects of persuasion as interrelated but mutually unattainable categories (for example, when achieving only the epistemological aspect, without psychological), it turns out that in criminal proceedings it is still possible to "prove" the existence of a fact, but not "convince" a person in its existence. The transition from knowledge to persuasion is a long and complex process which, of course, is influenced not only by the burden of proof in criminal proceedings. It seems that the burden of proof (confirmation) is aimed at obtaining "knowledge" in criminal proceedings, and the burden of persuasion - to obtain "conviction" in the validity of the relevant knowledge.

Therefore, summarizing the above, we can conclude that the standards of proof are an indicator of fulfillment not only of the burden of proof and confirmation, but also the burden of persuasion. The indicator of the burden of proof in criminal proceedings is an element of rationality in the sense of the concept of "standards of proof", because proof always has an impact on the mind of the person (external rational influence). Instead, the indicator of fulfillment of the burden of persuasion is an element of empiricism, because "persuasion" is addressed to the feelings, emotions, will and experience of human, thus exerting an internal sensory-volitional influence on the consciousness of the person. In addition, if the burden of proof and the burden of confirmation are more focused on determining the admissibility and relevance of the evidences, the burden of persuasion is on "convincing" their credibility.

Thus, in essence, the standards of proof are aimed not only at "proof", but primarily at stating the fact of establishing the category of "persuasiveness" in criminal proceedings.

Based on a systematic analysis of the scientific literature and interpretation of regulations, it is concluded that such standards of proof as: "beyond reasonable doubt", "reasonable suspicion", "persuasion with a higher probability", "probable cause", "preponderance of evidence", "clear and convincing evidence" in their form are "standards of proof", but in their essence, should be considered as "standards of persuasion" in criminal proceedings.

Incidentally, it should be noted that the standard of proof is not a "purely" legal category, as it is "filled" not only with "evidence", as procedural aspect of the criminal proceedings, but includes a number of other aspects: psychological, moral and ethical, emotional, volitional, anthropological and others.

Given the complex problem of understanding the concept of "standard of proof" and given the lack of unity in the interpretation of many aspects of it among the scientific community, first of all, this applies to the very concept and name "standard of proof", based on analyzed scientific works on this issue, have been identified some criteria (features, provisions) that characterize the standards of proof and which seem to include the following:

- the standard of proof provides a quantitative component (characteristic), which consists in a sufficient set of evidences, in the presence of which a legal fact can be considered proven;

[31]Ibid.

- the standard of proof contains a qualitative component (characteristic, aspect), which provides the appropriate quality of knowledge about the criminal offense, which guarantees the reliability of the circumstances of the criminal proceedings;

- the standard of proof contains an element of completeness, summary of evidentiary activity of the subjects of criminal proceedings at a certain stage of criminal proceedings (aimed at the result of evidentiary activity);

- as a general rule, the standard of proof can be achieved only with the active participation of both parties in the criminal proceedings, in particular, with the proper performance by the prosecution of its obligations, use of evidence and depends on the ways and methods of using the procedural rights;

- achieving any standard of proof in criminal proceedings involves fulfilling not only the burden of proof, but also the burden of persuasion.[32]

Given all the above, it can be concluded that the **standards of proof** are enshrined in the criminal procedure law and legal positions of higher courts **rules**, which are covering the quantitative and qualitative component of proof, the implementation of which by the prosecution (in some cases, also by the defense) provides conviction, which is suitable for the adoption of procedural decisions that restrict the rights and freedoms of the individual in criminal proceedings.

It should be noted that the standards of proof provide the level of persuasion required for a conviction or other current or final decision in criminal proceedings not in favor of the defense (a decision restricting the rights and freedoms of a person). This level of persuasion is achieved on the basis of compliance with all evidentiary rules (requirements) in criminal proceedings. Such rules (requirements) are: rules for declaring evidence inadmissible; rules for sharing the burden of proof in criminal proceedings; rules for evaluating evidence in criminal proceedings; the rule of interpretation of irrefutable doubts in favor of the suspect (accused); taking into account evidentiary presumptions and prejudices in criminal proceedings; correct definition of the limits of proof in criminal proceedings; execution and observance of the principles of criminal proceedings, etc.

Why do the standards of proof in criminal proceedings establish a "framework" for making a decision "not in favor of the defense"?

Firstly, according to the presumption of innocence, no one is obliged to prove his innocence in committing a criminal offense and must be acquitted if the prosecution does not prove the guilt of a person beyond a reasonable doubt. The burden of proving a person's guilt rests solely with the prosecution.

The defense is not obliged to prove its innocence or refute any allegation made by the prosecution, taking into account the presumption of innocence. However, even if the defense carries the burden of "confirmation", questions the allegation of the prosecution (thus reaching the so-called standard of proof "with probability") and on this basis the court decides in its favor, it will mean that in criminal proceedings the relevant standard of proof has not been reached.

It is no secret that the greatest restrictions on human rights and freedoms are experienced in the field of criminal justice. Therefore, standards of proof are introduced in the relevant field to achieve such a restriction, and the presumption of innocence implies that a person can be convicted only if the prosecution proves his guilt in accordance with the highest level of conviction – the standard of proof "beyond reasonable doubt". Standards of proof essentially serve as a kind of "filter" to avoid unfounded or questionable cases of restriction of human rights and freedoms and the occurrence of negative consequences for it during decision-

[32] SLYUSARCHUK,Kh. *Standards of proof in criminal proceedings*. Lviv, 2017 [Last accessed: 10-03-2021]. Avaible from: https://law.lnu.edu.ua/wp-content/uploads/2016/02/Avtoref_Slusarchyk_.pdf.

making in criminal proceedings. Standards of proof establish certain "limits" in criminal proceedings on achievement, the implementation of which may be decided not in favor of the person, as the decision which restricts human's rights and freedoms in criminal proceedings.

Secondly, one of the tasks of criminal proceedings is to ensure prompt, complete and impartial investigation and trial so that everyone who has committed a criminal offense is prosecuted to the extent of his guilt, no innocent person has been charged or convicted. In essence, the "driving force, the idea" of building all criminal proceedings is the "goal" of bringing a person to justice. Therefore, it is inappropriate to talk about standards of proof from the standpoint of making a decision in favor of the suspect (accused).

However, in this context, it is not necessary to emphasize or talk about the "repressive", "punitive" nature of criminal proceedings. Taking into account the principles of criminal proceedings (in particular, the rule of law, publicity and the presumption of innocence), the standards of proof are the "standard" for establishing a person's guilt in committing a criminal offense. The introduction of standards of proof that would establish a "framework" for making a decision in favor of a person in criminal proceedings would be contrary to the essence of the criminal process. At least it is illogical to establish rules for proving the innocence of a person in criminal proceedings, because according to the presumption of innocence a person is "initially" considered innocent.

Incidentally, it is worth agreeing that the problem of a two-pronged approach to understanding the standard of proof in various forms of criminal proceedings is rooted in the public consciousness, which was formed under the influence of the specific historical development of the states. Because, in the Anglo-Saxon legal system, the fundamental principle of society is the understanding that the conviction of an innocent person is a more dangerous act than allowing the perpetrator to avoid responsibility and punishment for the crime committed by him. Unfortunately, in Ukraine, as one of the states of the continental legal system, such a principle has not been properly enshrined and has not gained fundamental importance in the minds of not only ordinary people but also those who are called to administer justice and establish the rule of law in criminal proceedings. Unfortunately, the establishment of "truth" in criminal proceedings prevails, and in some cases justifies, the question of observance of universal values.

In addition, based on the analyzed scientific literature and the practice of applying standards of proof in criminal proceedings, it can be concluded that in Ukraine standards of proof do play a more indicative role, endowed with a declarative character, while in the Anglo-American legal system they acquire legally - regulatory significance and have become more practical due to the presence in the relevant system of law less formalized legislation (lack of clear legal norms governing the process of proof, in particular: legislative definition of "evidence", list of sources of evidence, etc.) and the presence of judicial precedent as a source rights.[33]

2.2. The concept of standards of proof in the practice of the Supreme Court of Ukraine

The category of the standard of proof has only relatively recently begun to be applied in judicial practice of Ukraine.

Ukrainian jurisprudence, which in a relatively short time adopted this category, namely the concept of "standard of proof", has acquired the meaning with which it is used in the doctrine of the legal systems from which it originates.

This last of the mentioned aspects is important, because the Supreme Court of Ukraine in its decision of 21 January 2016 concluded that "if the appellate court actually acts as the last resort in exercising the right to a fair trial, adversarial

[33]Ibid.

parties, immediacy of the examination of evidence and their admissibility, then any simplifications are not allowed in the appeal procedure, and the standards of proof must be the highest". That is, the term "standards of proof" was used in a different sense, which referred to the quality of the procedure, the requirements for the examination of evidence, rather than the original meaning of the standard of proof as the required level of probability, given at the beginning of this article. Despite the fact that in the practice of courts in criminal proceedings there are still many cases of using this concept with such a changed meaning, yet in general in 2018-2019 this term was introduced in its original sense[34].

Thus, in its ruling of 21 February 2018, the Supreme Court cites the classic definition of the standard of proof "beyond a reasonable doubt": "A conviction may be handed down by a court only if the guilt of the accused is proved beyond a reasonable doubt, the prosecution must prove in court its professional duty under Art. 92 of the CrPC of Ukraine by means of proper, admissible and reliable evidence that there is a single version by which a reasonable and impartial person can explain the facts established in court, namely the guilt of a person. The standard of proof beyond a reasonable doubt means that the set of circumstances of the case established during the trial precludes any other understanding of the explanation of the event which is the subject of the trial, except that the incriminated crime has been committed and the accused is guilty of committing that crime".

In cases of commercial jurisdiction in 2018-2019, the Supreme Court also repeatedly referred to the category of standard of proof and noted that in assessing the sufficiency of evidence there are special rules – standards of proof, which should guide the court in deciding the case. The court emphasized that standards of proof are an important element of adversarial proceedings. If the party has not submitted sufficient evidence to confirm a certain circumstance, the court concludes that it is unproven.[35]

In addition to the correct use of the concept of standard of proof in judicial practice, recently under the influence of the case law of the European Court of Human Rights (ECtHR) there has also been an understanding of the negative consequences of establishing an excessive standard of proof.

Allegations that the court had established an extraordinary and previously unattainable standard of proof, citing the fact that the ECtHR had identified this in its practice as a sign of arbitrariness, were used in some cases by the Supreme Court to substantiate applications for disqualification, namely in those cases, when the court pointed to the need to submit certain evidence.[36] These cases do not illustrate any approach of the court, but indicate the widespread practice of using these categories by participants in cases to justify their positions on procedural issues.

While the Supreme Court, apparently influenced by the case law of the ECtHR and using wording borrowed from that case, concluded that the legality of a court decision was negative for a party to establish an extraordinary and unattainable standard of proof, it also ruled on which standard should be apply. We have already analyzed the standard of proof of guilt in criminal proceedings and the

[34] PILKOV, K. "The standard of proof as a component of ensuring the right to a fair trial" (based on the report at the II scientific-practical round table "Implementation of international standards in civil and commercial litigation of Ukraine"), 2019. [Last accessed: 08-02-2021]. Avaible from: https://jurliga.ligazakon.net/ua/analitycs/190632_standart-dokazuvannya-yak-skladova-zabezpechennya-prava-na-spravedliviy-sud.

[35] SUPREME COURT OF UKRAINE. Case No 910/8763/17, 31 January 2018.SUPREME COURT OF UKRAINE. Case No 909/105/15, 29 August 2018. SUPREME COURT OF UKRAINE. Case No 910/23428/17, 29 August 2018. SUPREME COURT OF UKRAINE. Case No 922/1163/18, 27 February 2019.

[36] SUPREME COURT OF UKRAINE. Case No 826/9855/18, 10 January 2019.SUPREME COURT OF UKRAINE. Case No 9901/949/18, 12 July 2019.

relevant practice earlier in this article. Instead, determining the preferred standard of proof in civil and commercial matters is an open question.

So far, only in commercial cases has the Supreme Court pointed out that the principle of adversarial proceedings is best met by the standard of precedence of more compelling evidence, ie when the finding of the alleged circumstance in the light of the evidence appears more likelihood than the opposite[37], and this standard, as a rule, should be applied in the consideration of commercial disputes.[38] It seems that, given the closeness of the principles of commercial and civil litigation, as well as the relationships from which disputes are resolved in the courts of these jurisdictions, the same standard should preferably be applied in civil proceedings. It should be borne in mind that the standard of proof depends on the circumstances, the proof of which is necessary, and not purely on jurisdiction.

2.3. The concept of standards of proof in the practice of the ECtHR

Although the approach approved by the ECtHR regarding its subsidiary role is that this court does not interfere in the issue of proof in national courts and does not set any specific standard of proof, at the same time the Court recognized that this standard in criminal cases should be higher than in civil cases.[39] It is safe to say that this position logically implies that in civil cases the standard of proof should be lower than in criminal cases. In Khamidov v. Russia[40], the ECtHR based its finding that the respondent State had violated Art. 6 of the European Convention on Human Rights (ECHR) that the domestic courts had established an extreme and unattainable standard of proof for the applicant (in particular the standard of proof "beyond a reasonable doubt"). Similarly, in Dyuldin and Kislov v. Russia[41], the ECtHR noted that the courts applied an unusually high standard of proof. R. Kuybida, author of the analytical report "Judicial error: criteria for distinguishing between abuse (arbitrariness), negligence and good faith", analyzing, among others, these decisions of the ECtHR, concluded that among the examples of court decisions that can be considered arbitrary, can be called decisions, in which the court sets aside an extraordinary and unattainable standard of proof.[42]

The ECtHR cases illustrate the Court's position on the importance of an adequate standard of proof in national courts for the right to a fair trial, but do not indicate that the ECtHR distinguishes between certain standards that can be applied in proof and does not allow to conclude whether standard of proof is preferred by the Court's own practice.

At the same time, in other cases the ECtHR, reiterating its subsidiary role and emphasizing that it does not normally assume the function of a trial court, acknowledged that it applied the standard of proof "beyond a reasonable doubt"

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[37] SUPREME COURT OF UKRAINE. Case No 916/2403/18, 10 September 2019.

[38] SUPREME COURT OF UKRAINE. Case No 905/2382/17, 14 August 2018.SUPREME COURT OF UKRAINE. Case No 910/18036/17, 02 October 2018.

[39] EUROPEAN COURT OF HUMAN RIGHTS.Ringvold v. Norway App no 34964/97, 11 February 2016. [Last accessed: 05-02-2021].Avaible from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60933%22]}.

[40] EUROPEAN COURT OF HUMAN RIGHTS. Khamidov v. Russia App no 72118/01, 15 November 2007. [Last accessed: 05-02-2021]. Avaible from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-83273%22]}.

[41] EUROPEAN COURT OF HUMAN RIGHTS. Dyuldin and Kislov v. Russia App no 25968/02, 31 July 2007. [Last accessed: 05-02-2021].Avaible from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-82038%22]}.

[42]PILKOV, K. "The standard of proof as a component of ensuring the right to a fair trial" (based on the report at the II scientific-practical round table "Implementation of international standards in civil and commercial litigation of Ukraine"), 2019. [Last accessed: 08-02-2021]. Avaible from: https://jurliga.ligazakon.net/ua/analitycs/190632_standart-dokazuvannya-yak-skladova-zabezpechennya-prava-na-spravedliviy-sud.

(para. 480, 481 in the case of Abu Zubaydan v. Lithuania[43], para. 26 (1) in the case of Ilascu and Others v. Moldova and Russia[44]). At the same time, with regard to proving certain circumstances, the Court considered it necessary to deviate from this standard. Thus, as a result of the Government's failure to provide the material evidence requested or sufficient explanations of certain circumstances to be proved by another party, the Court pointed to the possibility of concluding adverse circumstances and deciding on such circumstances using a much lower standard of proof (preponderance of evidence) (para. 107 in the case of Trepashkin v. Russia (no. 2)[45]).

The Court emphasized that, in accordance with its settled case-law, evidence could result from the coexistence of sufficiently strong, clear and mutually agreed inferences or the same plan of undisputed presumptions (para. 481 in the case of Abu Zubaydan v. Lithuania[46]). In addition, the level of persuasion required to reach an appropriate conclusion and, therefore, the question of the burden of proof are necessarily related to the specific facts, the nature of the allegations and the law in question under the ECHR. The Court also takes into account in its case-law the seriousness of the consequences of a possible decision that a Contracting State has violated fundamental rights (para. 481 in the case of Abu Zubaydan v. Lithuania[47]). It is therefore important to note that the ECtHR in its practice distinguishes between separate standards of proof, mentions and applies the standard of precedence of evidence, and also notes that the standard of proof depends on the specifics of the circumstances in question (case of Bendersky v. Ukraine[48], case of Grubnik v. Ukraine[49]).

3. The correlation between standards of proof and knowledge formation in criminal justice of Ukraine

3.1. Probability and reliability of the knowledge in criminal proceedings

In criminal proceedings, the standards of proof "require" the correct decision in the adversarial criminal process, i.e. taking into account the parties' burden of proof and persuasion and understanding of the "priority" of human rights in criminal proceedings. In this context, we should agree with the opinion expressed in

[43] EUROPEAN COURT OF HUMAN RIGHTS. Abu Zubaydan v. Lithuania App no 25968/02, 31 May 2018. [Last accessed: 12-01-2021]. Avaible from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-183687%22]}.

[44] EUROPEAN COURT OF HUMAN RIGHTS. Ilascu and Others v. Moldova and Russia App no 48787/99, 08 July 2004. [Last accessed: 08-01-2021]. Avaible from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61886%22]}.

[45] EUROPEAN COURT OF HUMAN RIGHTS. Trepashkin v. Russia (no. 2) App no 14248/05, 16 December 2010. [Last accessed: 08-01-2021]. Avaible from:https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-102282%22]}.

[46] EUROPEAN COURT OF HUMAN RIGHTS. Abu Zubaydan v. Lithuania App no 25968/02, 31 May 2018. [Last accessed: 12-01-2021]. Avaible from:https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-183687%22]}.

[47] EUROPEAN COURT OF HUMAN RIGHTS. Abu Zubaydan v. Lithuania App no 25968/02, 31 May 2018. [Last accessed: 12-01-2021]. Avaible from:https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-183687%22]}.

[48] EUROPEAN COURT OF HUMAN RIGHTS. Bendersky v. Ukraine App no 22750//02, 15 November 2007. [Last accessed: 10-01-2021]. Avaible from:https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-171889%22]}.

[49] EUROPEAN COURT OF HUMAN RIGHTS. Grubnik v. Ukraine App no 58444/15, 17 September 2020. [Last accessed: 10-01-2021]. Avaible from:https://zakon.rada.gov.ua/laws/show/974_f52#Text.

scientific literature that in general the truth does not play any special role in the adversarial criminal process, significantly inferior to expediency.[50]

What is the "probability", "likelihood" and "reliability" of knowledge? How do the relevant concepts relate in criminal proceedings?

Literally "reliable" means "one that is beyond doubt, accurate, completely true" and "probable" is defined as "possible".[51] In turn, the term "likelihood" is mainly used as a synonym for the word "reliable", "authenticity".

However, there is no consensus among scholars due to answer the question of: how do exactly these categories relate in criminal proceedings?[52]

M. Shumylo noted that probability and likelihood are different aspects of knowledge. In this case, likelihood of knowledge has its degrees and forms, one of which is probability. This approach, according to the scientist, gave grounds for recognizing probability as a stage of cognition on the way to likelihood. Therefore, the probability is nothing but a measure of the possible.[53] However, as the scientist notes, it should be borne in mind that probable knowledge is not necessarily false. Thus, the scientist identifies probability as a certain level of likelihood. In turn, according to this scientific approach, likelihood is identified with reliability, and "truth" so to speak "accompanies" or "does not accompany" the probability of knowledge.

Similar views are expressed by M. Strogovych, noting that the categories of probability and likelihood are the degrees of cognitive activity.[54]

B. Ratushna holds the opposite opinion, noting that reliability and probability are synonymous characteristics as the result of judicial knowledge. However, according to the scientist, when it comes to judicial knowledge, you need to use the term "reliability" as such a characteristic, which means "the maximum approximation of the court to the full and correct establishment of the facts of the case".[55] In judicial law enforcement, true knowledge is possible only with regard to the establishment of individual facts. And the result of judicial knowledge consists of the sum of knowledge about certain facts, some of which may be objectively true, while others may be probable. Therefore, as the scientist continues, the result of forensic knowledge always contains an element of probability, which is why to use the term "truth" to characterize such knowledge seems unfounded.[56]

Thus, in the science of criminal procedure of Ukraine, there are at least two scientific approaches to determining the mechanism of formation of "reliability" of knowledge in criminal proceedings.[57]

According to the first, reliable knowledge is created as a result of the gradual "enrichment" of probable knowledge in the process of knowing the circumstances of criminal proceedings, namely qualitative gradual transition and transformation of probable knowledge.

According to the second, a reliable conclusion about the circumstances of a particular proceeding is formed on the basis of generalization of a set of individual,

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[50] PAVLYSHYN,A. "Influence of procedural form on the establishment of truth in criminal cases", *Bulletin of the Prosecutor's Office,* 2011, Vol. 4, p. 75 – 77.

[51] BILODID, I. *Dictionary of the Ukrainian language*: *in 11 volumes*. Naukova dumka, 1971.

[52] PAVLYSHYN, A., SLYUSARCHUK, KH. "Standards of proof and formation of knowledge in criminal proceedings". *Visnyk of Lviv National University. Legal Series,* 2016, vol. 62, p. 119 – 209.

[53] SHUMYLO, M. "Probability and reliability of knowledge in criminal proceedings as a prerequisite for the need to objectify the results of proof".*Pravo Ukrainy*,2014, No 10, p.44 – 52.

[54] STROGOVYCH, M. *"Material "truth" and "judicial evidence" in the Soviet criminal procedure:* monograph. AN SSSR, 1955, p. 370 – 384.

[55] RATUSHNA, B. "The standard of proof as a criterion for the reliability of the result of judicial knowledge", *Pravo Ukrainy,* 2012, vol. 6, p. 286.

[56] Ibid.

[57] PAVLYSHYN, A., SLYUSARCHUK, KH. "Standards of proof and formation of knowledge in criminal proceedings". *Visnyk of Lviv National University. Legal Series,* 2016, vol. 62, p. 119 – 209.

single probable and reliable knowledge. In other words, general reliable knowledge about the circumstances of a particular criminal proceeding is created as a result of a qualitative advantage of single reliable knowledge, which is obtained in current criminal proceeding.

However, it seems that the second scientific approach is inherent in other types of proceedings, in particular civil, commercial, administrative and can not be used in criminal proceedings (criminal justice), because, in any case, the results of criminal proceedings should form an unambiguous reliable conclusion about the circumstances of criminal proceedings.

Taking into account the views of B. Ratushna, it can be argued that if the "reliable" knowledge will be formed only on the basis of a simple advantage of some "reliable" knowledge over a certain part of the probable, the court's conclusion on the circumstances of the criminal proceedings in general will not be deprived of the probabilistic character, which makes it impossible to pass a conviction in criminal proceedings, because, as correctly noted by O. Shylo, Ju. Groshevyj and O. Kaplina: "a probable conclusion means the lack of unambiguity of the knowledge obtained by the court, which due to its uncertainty can't be put by the court in the basis of the conviction".[58]

In turn, a reliable conclusion means that it is unambiguous, substantiated and exhaustively proven by evidence, established by law procedural sources, and that corresponds to the established and verified by the court set of evidence.[59]

According to M. Pogoretsky: "quantitative increase in probabilistic knowledge does not lead to reliability, from the sum of probabilities no reliability is born, because, as before, no matter how high the degree of probability, we are dealing only with the assumption".[60] A. Piyuk's statement that "if something remains unproven, if any evidence of the guilt of the accused remains doubtful, the judge has no moral right to pass a guilty verdict in criminal proceedings, and in the endof a trial it does not matter how will be called the result of criminal proceedings: "truth" or "proven reliability".[61] In addition, the existence of stages in criminal proceedings (i.e. stage-by-stage construction of criminal proceedings in general) and the purpose of introducing standards of proof in criminal proceedings testify to the fact that the probability of knowledge in criminal proceedings gradually increases to the "limit" beyond which reliable knowledge is formed.

Scientific community, in turn, relentlessly argues that the final decision in criminal proceedings is made not on the basis of complete knowledge, but only to the extent that forms an internal conviction, and this leads to the inexpediency of further investigation of the circumstances of the proceedings, because it is this reliability of knowledge required by law to decide on the guilt of a person in the adversarial model of the criminal process.[62]

In the context of the above, it is worth agreeing with the opinion expressed in the scientific literature that "the main ultimate goal of any process of cognition is to obtain knowledge as close as possible to objective reality, in other words – proof in criminal proceedings is aimed at obtaining reliable knowledge, first of all, regarding the event of the criminal offense and the guilt of the accused".[63] Thus, the probability of knowledge continuously "accompanies" certain stages of the pre-trial investigation of criminal proceedings, in particular, from the beginning of criminal proceedings to notification of suspicion and indictment.

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[58] TATSIYA, YA., PSHONKAV., *Criminal procedure:* a textbook. Pravo, 2013, p.824.
[59] Ibid.
[60] POGORETSKY, M. "Probability and reliability in criminalproceduralcognition".*State and Regions. Series: Right,* 2004, No 1, p. 62 – 65.
[61] PIYUK, A. "Truth" or "proven reliability"? *Russian Justice,* 1999, No 5, p. 43.
[62] BEZNOSYUK, A. "Proof beyond a reasonable doubt" and "reliability" as standards of proof in the criminal procedure of Ukraine". *Judicial appeal*, 2014, No. 3, p. 23 – 28.
[63] TATSIYA, YA., PSHONKAV., *Criminal procedure:* a textbook. Pravo, 2013, p.802.

At the same time, an integral feature of the probability of knowledge in criminal proceedings is its ability to "gradually qualitatively enrich", as the probability of knowledge at the stage of an indictment must be qualitatively higher than at the stage of notifying a person of suspicion. That is why, as rightly stated by M. Shumylo, in criminal proceedings there were assessments of such knowledge as unlikely, sufficiently probable or with little or high probability.[64]

3.2. "Reliability of evidence" and "reliability of the circumstance" in criminal proceeding

Based on the study of scientific positions on determining the ways (mechanisms) of forming the reliability of knowledge in criminal proceedings, it should be noted that the scientific community in studying the relevant issues did not understand the distinction between such categories as "reliability of evidence" and "reliability of establishing the circumstances of criminal proceedings".

In accordance with part 1 of Art. 94 of the CrPC the investigator, prosecutor, judge on their inner conviction, guided by law, evaluate each piece of evidence in terms of relevance, admissibility, reliability, and totality of evidence – in terms of sufficiency and interrelationship for making the appropriate procedural decision.[65]

The credibility of the evidence does not appear to have any degree. As a result of the assessment, the evidence is recognized as either reliable or unreliable.

However, establishing reliability of the evidence does not provide for an automatic reliable establishment of the circumstances of the criminal proceedings. For example, indirect evidence is reliable (at least its reliability is always presumed), but such evidence confirms a certain circumstance of criminal proceedings with some probability. In addition, it is necessary to support the scientific position of D. Sergeeva, who believes that the reliability of evidence – is a subjective property of the factual data that makes up the content of the evidence, to establish the presence or absence of circumstances relevant to criminal proceedings with a high probability, based on the inner conviction of the subject of proof, which is based on a comprehensive, complete and impartial investigation of all the circumstances of criminal proceedings.[66] The formation of knowledge about the circumstances to be proved in criminal proceedings is carried out on the basis of an assessment of the totality of evidence. But the established reliability of evidence or even a totality of evidence at a certain stage of criminal proceedings cannot guarantee the reliable establishment of a certain circumstance of criminal proceedings (for example, in particular the guilt of a person in committing a criminal offense).

As noted in the scientific literature, reliability can relate to each individual piece of evidence obtained in criminal proceedings (for example, the testimony of a witness), and to the "general conclusion obtained from the totality of evidence".[67]

Thus, the reliability of the evidence and reliably proven guilt of a person in committing a criminal offense in criminal proceedings is not the same thing.

In this context, it can be noted that in criminal proceedings the notions of "reliability of evidence" and "reliability of establishing the circumstances" of criminal proceedings (establishing circumstances with reliability) are distinguished. For establishing the reliability of proving the circumstances of criminal proceedings standards of proof are introduced. The system of standards of proof, in essence, is

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[64]SHUMYLO, M. "Probability and reliability of knowledge in criminal proceedings as a prerequisite for the need to objectify the results of proof". *Pravo Ukrainy*, 2014, No 10, p.47.

[65] UKRAINE. Code of Ukraine No 4651-VI, of 13 April 2012,"Criminal Procedure Code of Ukraine" (as amended of 21 July 2020). [Last accessed: 03-01-2021].

[66] SERGEEVA, D. "Problems of determining the reliability of evidence as its properties under the new Criminal Procedure Code of Ukraine". *Lawyer of Ukraine*, 2013, No 4, p. 106 – 111.

[67] EISMAN, A. "The relationship between truth and authenticity in the criminal procedure".*Derzhava i pravo,* 1966, Vol. 6, p.92 – 97.

designed to ensure the "reliability" of the result of obtaining knowledge about the circumstances of criminal proceedings.[68]

The issue of distinguishing between "reliability of evidence" and "reliability of the establishment of a circumstance" in criminal proceedings is closely related to the problem of the possibility of assessing the circumstances of a criminal offense in criminal proceedings. It seems that the objects of assessment should include not only the evidence and its sources, but also the circumstances that are subject to proof in criminal proceedings. This conclusion is prompted by the provisions of Part 4 of Article 17 of the CPC, according to which all doubts about the guilt of a person are interpreted in favor of such a person. Where do such doubts come from, if in criminal proceedings reliable evidence in their totality is investigated (evaluated)? This means that the totality of reliable evidence can establish the circumstances of the criminal proceedings with a certain probability, which, in turn, means that the circumstance has not been proven. Thus, the court in the deliberation room assesses not only the evidence, but also whether the circumstance of the criminal proceedings has been proven, taking into account the fulfillment of the burden of proof and persuasion by the parties in criminal proceedings of compliance with a certain standard of proof. It is possible to establish the proof of circumstances of criminal proceedings only by having estimated them. It is not possible to establish the circumstance without its assessment. Thus, the court establishes the reliability or unreliability of the evidence, as well as the proven or unproven circumstance by the information contained in the relevant evidence.

In this aspect, we can say that the reliability of evidence and, for example, the reliability of the establishment of guilt in a case involving a criminal offense are not the same thing, because the latter involves the accumulation of knowledge about the relevant circumstances of criminal proceedings, its content increases. Knowledge of the circumstances of criminal proceedings involves a certain gradation from their probability to reliability, which leads to a gradual "strengthening" of the belief in the correctness of the conclusions about the relevant circumstances and the need to make a decision in criminal proceedings. The reliability of the establishment of the circumstance increases gradually, and the level of validity of knowledge about the circumstances of the criminal proceedings must continuously increase in the process of criminal proceedings.

3.3. "Likelihood" of knowledge in criminal proceedings

As part of the study of standards of proof in criminal proceedings, the question of what role "likelihood" of knowledge plays in criminal proceedings remains unclear.

Analyzing the scientific positions on the mechanism of knowledge formation about the circumstances of criminal proceedings, we can see that the "likelihood" of knowledge as a separate independent category is not distinguished by the scientific community. For example, scientists often equate likelihood with the reliability of knowledge in criminal proceedings.[69] However, in the field of criminal justice, along with the probability and reliability of knowledge, there also seems to be the likelihood of knowledge in criminal proceedings, and the attempt to equate the relevant category with "probability" or "reliability" is not entirely justified.

As noted in the scientific literature, the concept of "reliability" is word-forming motivated to understand and is perceived as "real liability" (as a "sufficient

[68] PAVLYSHYN, A., SLYUSARCHUK, KH. "Standards of proof and formation of knowledge in criminal proceedings". *Visnyk of Lviv National University. Legal Series,* 2016, vol. 62, p. 119 – 209.
[69] Ibid.

fidelity").[70] Following this line (sequence) of thinking, we can say that "likelihood" is perceived as "something worthy of faith". And from such a morphological study we can conclude that the "likelihood"[71] and "reliability" of knowledge are not identical concepts, because something that is "worthy of faith" is not always "sufficiently true" or "completely true".

Therefore, it seems more appropriate to think about the proximity of "likelihood" to the probability of knowledge in criminal proceedings than to reliability.

"Likelihood" differs from "probability" by the degree of validity of "belief" in the assumption. However, the court must operate only with "likelihood" knowledge and if the probable conclusions (knowledge) of the prosecution do not acquire signs of "likelihood" (the necessary degree of validity) in court, they can't be grounds for a judge to make a decision in criminal proceedings (at the stage pre-trial investigation). "Likelihood" is the highest degree of "probability" and only such a maximum degree of validity can be achieved at the stage of pre-trial investigation of criminal proceedings.

This conclusion can be confirmed by the standards of proof in criminal proceedings, which are used (achieved) at the stage of pre-trial investigation – "preponderance of evidence" ("persuasion with a higher likelihood") and "clear and convincing evidence" ("strong conviction").[72] For example, in part 3 of Art. 87 of the draft CrPC of 2008, "persuasion with a higher likelihood" was defined as a belief that follows from an impartial and conscientious examination of all evidence provided by the parties and indicates that the conclusion of the existence or absence of the circumstance or set of circumstances proved by the party is more likelihood than the opposite conclusion. In turn, in part 5 of Art. 110 of the draft CrPC of 2007 "strong conviction" meant that the evidence available at the time of the decision-making process creates a very high degree of likelihood that the statement is true.

It should be noted that in the scientific literature it is mentioned that in the United States the standard of proof "beyond a reasonable doubt" is used both to prove the guilt of a person and in the assessment of evidence.[73] In particular, A. Beznosyuk notes that the "evidence beyond a reasonable doubt" and "reliable evidence" means the same thing. The scholar refers to the definition of "evidence beyond a reasonable doubt" provided by the American Electronic Law Library, according to which "it is evidence of such convincing nature that you would be willing to rely on it and act without hesitation in your most important matters. However, this does not mean absolute confidence".[74] However, it seems that the understanding of the standard of proof "beyond a reasonable doubt" in criminal proceedings as a "standard of assessment of evidence" and as a "standard of proof of guilt" needs some clarification.

The standard of proof "beyond a reasonable doubt" in countries with the Anglo-Saxon legal system, in particular the United States, is used in the assessment of evidence in criminal proceedings. However, in accordance with such a standard of proof, it is assessed not so much the reliability of the actual content of factual data (information contained in the evidence) and compliance with the form of their receipt (assessment related to compliance with the rules of

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[70] PANCHENKO, N. "Cognitive categories "truth" and "authenticity": general and difference". *Knowledge. Understanding. Skill: Scientific Journal of Moscow Humanities University,* 2009, Vol. 1, p. 133.

[71] GÓMEZ, F. *Burden of Proof and Strict Liability: An Economic Analysys of a Misconception.* Universitat Pompeu Fabra, Bafcelona, Spain, 2001, p. 5

[72] SLYUSARCHUK, KH. "Types of standards of proof in criminal proceedings". *Problems of state formation and protection of human rights in Ukraine:* materials of the XXII reporting scientific-practical conference, Lviv, 2016, p. 233.

[73] BEZNOSYUK, A. "Proof beyond a reasonable doubt" and "reliability" as standards of proof in the criminal procedure of Ukraine". *Judicial appeal*, 2014, No. 3, p. 25.

[74] Ibid.

admissibility of evidence), as *the degree of possibility* of relevant evidence to prove one of the circumstances of the criminal proceedings, in particular the guilt of a person committing a criminal offense (estimated "degree" of confirmation (establishment) of the circumstances by the evidence).

In conclusion, it should be emphasized that in countries with a continental legal system, standards of proof are considered in terms of "justification of actions" in the case of "accidental" conviction of the innocent (explanation: conviction of the innocent). The existence of such a system is supported by ongoing "historically immortal" debate over the concept of establishing "truth" (either "reliability" or "high probability") in criminal proceedings and incorrect literal understanding of the principle of "inevitability of punishment". Instead, in countries with an adversarial form of criminal proceedings, the standards of proof are an explanation of the "acquittal of the probable culprit" and serve as a "standard" of guarantees for the protection of the rights of the accused in criminal proceedings (explanation: acquittal of the guilty).

Standards of proof in criminal proceedings should be considered not from the point of view of proving the "reliability of guilt", but from the standpoint of establishing the "probability of innocence" of a person in the commission of a criminal offense. Only with such a perception and awareness of the essence of the standards of proof in criminal proceedings, they will be able to properly "function" in the field of criminal justice, regardless of the form (type, model) of the criminal procedure.

Thus, based on the above, we can conclude that the standards of proof in criminal proceedings are the key to both the correct establishment of the circumstances of criminal proceedings (formation of knowledge about them) and the successful implementation of the tasks of criminal proceedings in general.

4. The purpose of introduction standards of proof into the field of criminal justice

For properly understand the essence of the concept of "standards of proof" it is necessary to determine the purpose of their introduction into the field of criminal justice.

Based on the analysis of doctrinal views, it should be noted that the purpose of introducing standards of proof in criminal proceedings, as well as their concept, is interpreted ambiguously in scientific researches. Namely, it is determined that the standards of proof are introduced in order to: determine the appropriate model of procedural proof; serve as a means (basis) of evaluation activities; objectification of the results of proof.

Let's briefly consider each of them.

The constituent elements of the category "model of procedural proof", which are distinguished in science, include: the purpose and objectives of procedural evidence; principles of criminal procedure; the rights and responsibilities of the participants in the process in the field of evidence; rules for evaluating evidence; features of evidence formation; the specifics of substantiating the persuasiveness of the thesis of defense or prosecution in court; rules for sharing the burden of proof at the pre-trial and trial stages.

As you know, each model (type, form) of criminal proceedings is characterized by a corresponding criminal procedure form, which determines the order of criminal proceedings in general, including the nature, content and procedure of procedural evidence. Standards of proof cannot introduce a model of procedural proof other than the corresponding procedural form. In this sense, the model of procedural proof will be determined by the model (form, type) of the criminal process.

Thus, it seems impractical to define the purpose of the introduction of standards of evidence as the establishment of an appropriate model of procedural

proof, as its definition is the "responsibility" of the criminal procedure form, and the category "standard of proof" will be considered as part of it.

As V. Gmyrko notes: "the concept of "standard" defines the essence of the requirements and criteria that must meet a certain recurring object of a particular activity, and therefore it is intended to serve as a means of evaluation".[75]

According to the scientist, in the evaluation of any phenomenon, importance is attached to the basis of evaluation, because of what the evaluation is performed. In his opinion, the standard of proof in criminal proceedings should serve as such a basis. According to this doctrinal approach, a number of procedural decisions in criminal proceedings are made through the prism of assessing the outcome of the evidentiary activities of the subjects of criminal proceedings for compliance or non-compliance with the relevant subjects of their evidentiary requirements.

As you know, by its nature, any activity is subject to certain principles, laws. Criminal procedure in the field of evidence is no exception.

However, the decision-making process in this area is endowed with certain features, as it provides both internal (subjective) and external (relatively objective) grounds (components). The internal basis of decision-making during criminal proceedings includes the patterns of psychological, emotional, volitional, mental and intellectual factors, which together form beliefs and motivate a person to make a decision. In turn, the external basis includes the results of the evidentiary activity of the subjects of criminal proceedings, which, however, are relatively objective because they are not completely devoid of subjective perception.

The process of forming knowledge about the circumstances of a criminal offense, from the beginning of the criminal proceedings to its completion, goes from probable to reliable. Probable knowledge of the circumstances of a criminal offense differs from the reliable degree of proof of the fact and the validity of the thesis expressed in support of it. In parallel with the gradual "substantial" increase and "accumulation" of relevant knowledge is the "strengthening" of inner conviction.

However, the internal conviction (persuasion) on which the evidence is assessed for its reliability and on which a number of procedural decisions are made during criminal proceedings may contain an element of chance and abuse on the part of the investigator, prosecutor or court.

Therefore, taking into account the factor of uncertainty, science proposes to "objectify" such a subjective category as "inner conviction" as much as possible. Objectification of the results of proof, according to M. Shumylo, means that the judge should not consider whether his proof convinces, and build their conclusions on some other criterion, which, however, is mandatory and independent of opinion judges.[76]

Such an "other criterion" should be the standard of proof, which should weaken the influence of the subjective factor on the formation of probable and reliable knowledge in criminal proceedings. However, in our opinion, it seems that the standard of proof should not replace an internal conviction, but should only become a means of legal control over its formation.

Summarizing, it should be noted that each of the doctrinal views on determining the purpose of introducing standards of proof in the science of criminal procedure is justified and relevant. Standards of proof, one way or another, are aimed at the process of forming a final decision in criminal proceedings. They stand in the way of knowledge formation from probability to its reliability. This is the opinion of the scientific community, consciously or unconsciously, despite the differences in the definition of the concept of "standard of proof".

Thus, it seems that the most complete purpose of the introduction of standards of proof in criminal proceedings is revealed by both concepts proposed by

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[75] GMYRKO, V. *Evidence in criminal proceedings: activity paradigm. Theoretical analysis. Problematization. SMD-representation:*monograph. Dnipro, 2010, p. 171.

[76] SHUMYLO, M. "Probability and reliability of knowledge in criminal proceedings as a prerequisite for the need to objectify the results of proof".*Pravo Ukrainy*,2014, No 10, p. 44 - 52.

V. Gmyrko and M. Shumylo – one of the subjective side (basis for evaluative activity), the other – from the objective (objectification of the results of proof).

Also, it is interesting to note that the purpose of introducing standards of proof in criminal proceedings within the continental legal system is fundamentally different from its understanding in the Anglo-Saxon legal system, as well as from the "initial" understanding of the purpose of functioning of evidentiary standards in criminal proceedings.

The fact is that the introduction and development of standards of proof, in particular such a standard of proof as "beyond a reasonable doubt" dates back to the birth of Christian religion and tradition and is actually due to the solution of the problem of balancing and harmonizing the two parallel and integral spheres of human life: the sphere of "human" justice and the sphere of observance and execution of God's laws ("God's" justice).

Despite the fact that the standards of proof have become an integral guarantee of protection of the rights and legitimate interests of the accused (defendant), and in general in the modern sense have acquired the status of fundamental principles of law, especially in the Anglo-Saxon legal system, criminal proceeding was not directed at the identity of the accused (defendant), in particular at his defense.

James Whitman, examining the origin of such standard of proof as "beyond a reasonable doubt", said: "our modern law is the product of a profound transformation and evolution of "primordial" law, in connection with which some ancient religious foundations of criminal justice have been forgotten. Reasonable doubt was not initially aimed at defending the defendant. On the contrary, it had a significantly different goal. This may sound strange, but the standard of "reasonable doubt" was originally associated with the protection of the souls of jurors from curse and condemnation".[77]

According to the researcher, given the theological roots of the criminal process, "judging" posed great threats and danger to the souls of those who carried it out, because: "in the Christian past, during the criminal proceedings, more than just the fate of the accused was at stake. The fate of those who administered justice (sat in judgment) was also at stake, and the famous injunction: "Judge not lest ye be judged!" ("Do not judge and you will not be judged") had a specific meaning: the condemnation of the innocent, in the Christian tradition, was considered a potential mortal sin".[78]

Standards of proof were one of many rules and procedures developed in response to such a probable threat. They embodied a theological doctrine designed to reassure jurors and so that they could condemn a person without risking their own "salvation" ("salvation of the soul").

5. The system of standards of proof

In the countries of the Anglo-Saxon legal system, where the adversarial model (form) of the criminal procedure is most pronounced, the system of standards of proof is clearly traced. The number of standards of proof, which are enshrined in the legislation of such states as: the United States, the United Kingdom, New Zealand, Canada and Australia, ranges from two to twelve, which are used in various forms of justice.

For example, in England, New Zealand and Australia, only two standards of proof are used: the civil standard of proof - the superiority of evidence (balance of probabilities) or, as it is also called - preponderance of evidence, and the criminal standard of proof – "beyond reasonable doubt". Instead, in the United States, in

[77] WHITMAN, Q. J. *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*. Yale University Press, 2008, p. 2.
[78] Ibid, 3.

addition to the above standards of proof, a "higher" civil standard of proof is used – "clear and convincing evidence". However, in general, the system of standards of proof used in criminal proceedings in the United States consists of: mere suspicion; reasonable suspicion; probable cause; preponderance of evidence; clear and convincing evidence; persuasion beyond a reasonable doubt.[79] Also, in the scientific literature it is noted that the system of standards of proof should include: scintilla of evidence; mere suspicion; reasonable suspicion; probable cause; credible evidence; substantial evidence; preponderance of evidence; clear and convincing evidence; persuasion beyond a reasonable doubt; conviction beyond a shadow of a doubt.[80]

It should be noted that not all of the above can be attributed to the standards of proof. Thus, it does not appear to be fully in line with the standard of proof – "simple suspicion", as it does not reach the level of conviction required to make any current decision in criminal proceedings. Simple suspicion is equivalent to "intuitive feeling", according to which, as noted in the scientific literature, the law does not even allow to "stop a person".

In addition, "convincing" and "substantial" evidence do not belong to the standards of proof in criminal proceedings, as they appear to serve as "tools" of achieving a certain standard of proof in criminal proceedings, are an integral part of it, but themselves do not constitute a direct standard of proof in criminal proceedings.

In turn, the so-called standard of proof "beyond the shadow of reasonable doubt" is a "non-legal" standard of proof (not required by law). The requirement to prove a person's guilt in a criminal offense "beyond the shadow of reasonable doubt" is a purely scientific statement, which is inherently close (and in some respects equivalent) to the establishment of the so-called objective truth in criminal proceedings and implies absolute certainty (conviction) of the reliability of knowledge in criminal proceeding.

It should also be noted that most of the above standards of proof are used in criminal proceedings. However, some of them are standards of proof, which in some states are used either purely in civil proceedings or are mixed (the scope applies to both civil and criminal proceedings). Given the fact that standards of proof in civil proceedings are not the subject of relevant research, however, in the relevant section some attention will be paid to the relevant issues, as they will contribute not only to the systematic separation of standards of proof used in criminal proceedings, but also more deep awareness of their legal essence and significance.

The standard of proof "scintilla of evidence" ("the existence of minimum evidence") is the lowest degree of conviction required to create (cause) "awareness" of the "probable" possibility of the existence of a particular circumstance (fact) to be established. Thus, the United States District Court for the Northern District of Alabama in the case of "Hayes v. Luckey"[81], in the context of determining the content of the standard of proof "scintilla of evidence" said: "if there is at least "just glitter, flicker, spark, smallest particle or smallest trace" of evidence in support of a particular version (assumption), then the corresponding assumption must be submitted to the court". In turn, the South Carolina Supreme

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[79] ROBERT, M., KEITH, N. *Introduction to criminal justice*. Glencoe/McGraw – Hill, 1997, p. 513.

[80] FERDICO, N. JOHN, HENRY, F., TOTTEN, CHRISTOPHER D. *Criminal Procedure for the Criminal Justice Professional*, Tenth edition, Cengage Learning, 2009, p. 842. KLOTTER, C. JOHN*Criminal evidence.* Fourth edition, Anderson Publishing Co., 1987, p. 525. MURPHY, P. *Evidence, Proof and Facts*. Oxford University Press, 2003, p. 620. VIDMAR, N. *American Juries: the verdict*, 1st American hardcover ed., New York, 2007, p. 428. WALTON, D. *Burden of proof, presumption and argumentation*. University of Windsor, 2014, p. 300.

[81] THE UNITED STATES DISTRICT COURT.Case No. CIV.A. CV95-S-3049-NE "Hayes v. Luckey", 11 December 1997. [Last accessed: 10-01-2021]. Avaible from:https://law.justia.com/cases/federal/district-courts/FSupp2/33/987/2519142/.

Court in case "In re Crawford"[82] noted that a standard of proof such as "minimum evidence" means that information arising from testimony should shed light on the facts and allow the court to reach a "reasonable" conclusion, however, at the same time, do not allow speculative, theoretical and hypothetical assumptions (views)". Thus, the relevant standard of proof specifies that if there is any (at least one suitable argument) evidence in support of the plaintiff's claim, then the relevant claim should be the subject of litigation (trial).

However, it should be noted that the relevant standard of proof is applied only in civil proceedings, the independence of which as a standard of proof can be questioned. Why? Today the jurisprudence has refused to use the relevant standard of proof due to the fact that it has actually been replaced by "convincing evidence". The court can make a decision only on the basis of substantial "convincing" evidence in the case. Therefore, the jurisprudence has established a "requirement" according to which the submission of relevant evidence must be carried out at the time of filing a civil lawsuit in order to comply with the principle of procedural economy.

Thus, the relevant standard of proof does not fully meet the requirements of today. However, the allegation can be criticized in light of the fact that there may not always be relevant evidence at a moment of filing a lawsuit. Obtaining "convincing" evidence is possible at the stage of proceedings before the trial by demanding them. In addition, we should not forget about the right of every person to go to court to protect their violated, unrecognized or disputed rights, freedoms or interests, as well as the existence of a presumption of guilt of the defendant in civil proceedings.

Also, there are some doubts about the possibility of attributing the so-called "reasonable possibility" (or "reasonable doubt") to the system of standards of proof in criminal proceedings.

In particular, as noted in the scientific literature, the standard of proof "reasonable possibility" ("reasonable doubt") is used exclusively by the defense and is essentially the opposite of the standard of proof "beyond a reasonable doubt".[83] It is argued that "reasonable possibility" ("reasonable doubt") is used as a standard of proof in criminal proceedings in the following cases: 1) when the defense bears the burden of proving the fact on which it insists (for example, under Part 2 of Article 92 of the CPC Ukraine – the fact of belonging and admissibility of evidence); 2) when the evidentiary activity of the defense is aimed at the appearance of certain reasonable doubts of other subjects of proof (for example, the defense party, in contrast to the accusation, provides certain evidence that may raise some reasonable doubt as to whose version (accusation or defense) is true.

In view of the above, "reasonable possibility" ("reasonable doubt") is not an independent standard of proof in criminal proceedings, but "follows" from another standard of proof – "beyond a reasonable doubt". At the same time, "reasonable possibility" ("reasonable doubt") is an integral part of the relevant standard of proof, because, according to the legal nature of the standard of proof "beyond a reasonable doubt", the allegations of the prosecution themselves do not "raise" doubts, until the defense "sows" them.

Indicative in this regard is the opinion of J. Weinstein, who noted that in theory, the presumption of innocence should mean that at the beginning of the trial (immediately before the examination of evidence in criminal proceedings), the jury should be guided by the following assumption: "the statement that the defendant

[82] THE SOUTH CAROLINA SUPREME COURT. Case No.02-9410 "Michael D. Crawford, petitioner *v.*Washington", 08 March 2004.[Last accessed: 12-01-2021]. Avaible from: https://law.justia.com/cases/south-carolina/supreme-court/.

[83] VAPNYARCHUK, V. "Standard of criminal procedural evidence", *Bulletin of the National Academy of Legal Sciences of Ukraine,* 2015, vol. 80, p. 109.

has committed a criminal offense in which he is accused is equal to 0%".[84] However, as the scientist continues, in court practice, jurors are guided by a percentage that is much higher than the above. This is due to the fact that the jury, and sometimes the court, suggests that if there was not enough strong and convincing evidence to indicate the guilt of the accused in committing a criminal offense, the prosecutor would not send the criminal proceedings to court; there would be no need to select jurors; the trial of the criminal proceedings itself would not have started. Taking into account the adversarial form of criminal proceedings, it seems that about 50% of jurors are already at the beginning of the trial are convinced that the defendant has committed a criminal offense in which he is accused.[85]

Therefore, the evidence of the defense should be aimed at giving the jury reasonable doubt as to the allegations made by the prosecution, as otherwise such a standard of proof as "beyond a reasonable doubt" will not be able to "operate" properly in criminal proceedings. "Reasonable possibility" ("reasonable doubt") is not inherently the opposite of the standard of proof "beyond a reasonable doubt", it is an integral part of this standard of proof in criminal proceedings.

The evidentiary activity of the defense party in criminal proceedings is always an integral part of a certain standard of proof in criminal proceedings, which, accordingly, can be implemented only with the active participation of both parties in criminal proceedings (sometimes achieving the required standard of proof in criminal proceedings depends on activity of the defense in the process of proving).

However, it is worth considering the question: should the defense be guided at all by a certain standard of proof in criminal proceedings (or to apply a certain standard of proof in criminal proceedings)?

In view of all the above, it is concluded that the separation of independent standards of proof for the defense in criminal proceedings is contrary to the nature of the standards of proof. Standards of proof are governed by the "initiator" of the proceedings, namely by the prosecution party who accuses the person. On the other hand, the standards of proof are aimed at "the one who is authorized to make the relevant decision" in criminal proceedings, namely at the court that decides whether the "initiator of the proceedings" has demonstrated the relevant standard of proof in criminal proceedings. That is why they are "standards" of proof, which are destined to establish "rules", "frameworks" for proving the charge (accusation). Would it not be logical to establish "rules" of proof of innocence for the defense?

Thus, "reasonable possibility" ("reasonable doubt") should not be selected in the system of standards of proof in criminal proceedings as an independent standard of proof.

The system of standards of proof, which are used in the criminal justice, consists of:

1) standard of proof "reasonable suspicion";
2) standard of proof "probable cause";
3) standard of proof "preponderance of evidence";
4) standard of proof "clear and convincing evidence";
5) standard of proof "beyond a reasonable doubt".

The above standards of proof are listed from the lowest to the highest level of conviction, the presence of which is necessary to make a current or final decision in criminal proceedings not in favor of the accused (suspect). Also, these standards can be divided into: standards of proof required for current (intermediate) decisions in criminal proceedings, which are not related to the resolution of criminal proceedings on the merits (mainly used in the pre-trial investigation stage), and to the standard of proof required to make a final decision in criminal proceedings -

[84] WEINSTEIN, J.,DEWSBURY, I. "Comment on the meaning of "proof beyond a reasonable doubt". *Law, Probability and Risk,* 2006, No 5.
[85] Ibid.

sentencing in criminal proceedings, which is related to the decision criminal proceedings on the merits (based on the results of the trial). In turn, the standards of proof that are necessary for making current (intermediate) decisions in criminal proceedings form a certain subsystem.

No less important is the issue of distinguishing the features of the system of standards of proof in criminal proceedings. This, in turn, will contribute to a deeper understanding of the legal nature and essence of the standards of proof in criminal justice.

6. Concluding remarks

Based on the analysis of legal norms and scientific literature, it is possible to identify such features of the system of standards of proof that are necessary for making current (intermediate) decisions in criminal proceedings (not related to the resolution of criminal proceedings on the merits and which are mainly used at the pre-trial investigation stage), which seem to include the following:

(1) The system of standards of proof is hierarchical in its structure: each subsequent standard of proof provides more substantiated (more probable) knowledge in criminal proceedings. Thus, the system of standards of proof in criminal proceedings provides (creates) a "growing" sequence of validity of knowledge in criminal proceedings.

(2) Taking into account the above feature of the system of standards of proof, we can distinguish the following: each previous standard of proof is a "prerequisite" (condition) for the application of the next.

(3) There is a direct and consistent logical connection between the standards of proof in criminal proceedings.

Despite the fact that even if in criminal proceedings such a standard of proof as "probable cause" (sufficient reason) has been achieved, which provides a higher level of conviction to make the necessary decision in criminal proceedings and a higher (more reliable) level of knowledge in criminal proceedings, it cannot be used instead of such a standard of proof as "reasonable suspicion", which provides a lower level of conviction and validity of knowledge in criminal proceedings, because the essence of legal issues (cases) to which the relevant standards of evidence are different.

According to the results of the generalization and theoretical comprehension of scientific works devoted to the study of standards of proof in criminal proceedings, as well as analysis of national and foreign legislation and case law, this manuscript states that the formalized nature of European evidentiary law, in particular the legislative (normative) definition of evidence in criminal proceedings, the establishment of a "closed" list of sources of evidence in criminal proceedings, that can be used during criminal proceedings, etc., does not fully contribute to the implementation of standards of proof in criminal proceedings of European countries in their authentic meaning.

The introduction of standards of proof as one of the "attributes" and achievements of the adversarial form of criminal proceedings in the mixed form of criminal proceedings contradicts the so-called "information concept of evidence" in criminal proceedings and the requirement to establish objective truth in criminal proceedings.

Despite the fact that the standards of proof in criminal proceedings create a consistent system of validity of knowledge in criminal proceedings, they still remain completely independent ("original", "autonomous") and indispensable in nature. Standards of proof in criminal proceedings are meant to serve as a "key" to achieve the correct establishment of the circumstances of criminal proceedings (formation of knowledge about them), as well as – the successful implementation of criminal proceedings in general.

7. Literature

BASSISTA, I. "On the question of establishing the objective truth in criminal proceedings", *Visnyk of Lviv National University*, 2015. No 61, p. 417 – 422.

BEZNOSYUK, A. "Proof beyond a reasonable doubt" and "reliability" as standards of proof in the criminal procedure of Ukraine". *Judicial appeal*, 2014, No. 3, p. 23 – 28.

BILODID, I. *Dictionary of the Ukrainian language*: *in 11 volumes*. Naukova dumka, 1971.

EISMAN, A. "The relationship between truth and authenticity in the criminal procedure". *Derzhava i pravo,* 1966, Vol. 6, p. 92 – 97.

EUROPEAN COURT OF HUMAN RIGHTS. Abu Zubaydan v. Lithuania App no 25968/02, 31 May 2018. [Last accessed: 12-01-2021]. Avaible from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-183687%22]}.

EUROPEAN COURT OF HUMAN RIGHTS. Bendersky v. Ukraine App no 22750//02, 15 November 2007. [Last accessed: 10-01-2021]. Avaible from: https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-171889%22]}.

EUROPEAN COURT OF HUMAN RIGHTS. Dyuldin and Kislov v. Russia App no 25968/02, 31 July 2007. [Last accessed: 05-02-2021]. Avaible from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-82038%22]}.

EUROPEAN COURT OF HUMAN RIGHTS. Grubnik v. Ukraine App no 58444/15, 17 September 2020. [Last accessed: 10-01-2021]. Avaible from: https://zakon.rada.gov.ua/laws/show/974_f52#Text.

EUROPEAN COURT OF HUMAN RIGHTS. Ilascu and Others v. Moldova and Russia App no 48787/99, 08 July 2004. [Last accessed: 08-01-2021]. Avaible from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61886%22]}.

EUROPEAN COURT OF HUMAN RIGHTS. Khamidov v. Russia App no 72118/01, 15 November 2007. [Last accessed: 05-02-2021]. Avaible from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-83273%22]}.

EUROPEAN COURT OF HUMAN RIGHTS. Ringvold v. Norway App no 34964/97, 11 February 2016. [Last accessed: 05-02-2021]. Avaible from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60933%22]}.

EUROPEAN COURT OF HUMAN RIGHTS. Trepashkin v. Russia (no. 2) App no 14248/05, 16 December 2010. [Last accessed: 08-01-2021]. Avaible from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-102282%22]}.

FERDICO, N. John, HENRY, F., TOTTEN, CHRISTOPHER D. *Criminal Procedure for the Criminal Justice Professional*, Tenth edition, Cengage Learning, 2009, p. 842.

GMYRKO, V. *Evidence in criminal proceedings: activity paradigm. Theoretical analysis. Problematization. SMD-representation*: monograph. Dnipro, 2010. 314 p.

GÓMEZ, F. *Burden of Proof and Strict Liability: An Economic Analysys of a Misconception.* Universitat Pompeu Fabra, Bafcelona, Spain, 2001, 20 p.

GOULD, David S. (eds). *Do juries see "beyond a reasonable doubt? The view of a Former prosecutor,* Phoenix Books, 2006, p. 8 – 14.

ISHCHENKO, V. "Prospects for the formation of standards of proof in the modern criminal procedure of Ukraine", *Forum prava,* 2009, No3, p. 302 – 307.

KALINOVSKY, K. Di*stribution of the burden of proof in criminal proceedings: is it always in favor of the accused?*, CJSC Aktion-Media, 2012, p. 40 – 43.

KALVEN, Harry Jr., ZEISEL, H. *The American Jury*. Little, Brown and Company, 1966, p. 29.

KLOTTER, JohnC. *Criminal evidence.* Fourth edition, Anderson Publishing Co., 1987, p. 525.

KORENEVSKY, Yu. "Evidence in criminal proceedings: traditions and modernity", *Lawyer,* 2000, p. 163-164.

MAZUR, M., SLYUSARCHUK, Kh."Standard of proof in criminal proceedings: "variable" or "stepwise"?", *Uzhhorod National University Herald. Series: Law,* 2021, Vol. 63, p. 298 – 301.

MIKHEENKO, M. *Problems of development of criminal process in Ukraine: Selected works*. Jurinkom Inter, 1999, p. 125 – 144.

MURPHY, P. *Evidence, Proof and Facts*. Oxford University Press, 2003, p. 620.

NOR, V. "Truth in criminal justice: the idea, dogma of law, implementation", *Pravo*, 2015, p. 674 – 680.

NOR,V. *Problems of theory and practice of judicial evidence.*Higher School Publishing Association, 1978, p. 103.

PANCHENKO, N. "Cognitive categories "truth" and "authenticity": general and difference". *Knowledge. Understanding. Skill: Scientific Journal of Moscow Humanities University,* 2009, Vol. 1, p. 133.

PAVLYSHYN, A. "Influence of procedural form on the establishment of truth in criminal cases", *Bulletin of the Prosecutor's Office,* 2011, Vol. 4, p. 75 – 82.

PAVLYSHYN, A., SLYUSARCHUK, KH. "Standards of proof and formation of knowledge in criminal proceedings". *Visnyk of Lviv National University. Legal Series,* 2016, vol. 62, p. 119 – 209.

PETRUKHIN, I. "Truth, reliability and probability in court", *Legal world,* 2003, vol. 8, p. 17 – 25.

PILKOV, K. "The standard of proof as a component of ensuring the right to a fair trial" (based on the report at the II scientific-practical round table "Implementation of international standards in civil and commercial litigation of Ukraine"), 2019. [Last accessed: 08-02-2021]. Avaible from: https://jurliga.ligazakon.net/ua/analitycs/190632_standart-dokazuvannya-yak-skladova-zabezpechennya-prava-na-spravedliviy-sud.

PIYUK, A. "Truth" or "proven reliability"? *Russian Justice,* 1999, No 5, p. 43.

POGORETSKY, M. "Probability and reliability in criminalproceduralcognition". *State and Regions. Series: Right,* 2004, No 1, p. 62 – 65.

RATUSHNA, B. "The standard of proof as a criterion for the reliability of the result of judicial knowledge", *Pravo Ukrainy,* 2012, vol. 6, p. 282 – 291.

ROBERT, M., KEITH, N. *Introduction to criminal justice*. Glencoe/McGraw – Hill, 1997, p. 513.

RUDENKO, A. *The substantive logic of evidence: dialectical and formal logical foundations (criminal procedural and criminalistic research).* Krasnodar, 2011.

SERGEEVA, D. "Problems of determining the reliability of evidence as its properties under the new Criminal Procedure Code of Ukraine". *Lawyer of Ukraine*, 2013, No 4, p. 106 – 111.

SHUMYLO, M. "Probability and reliability of knowledge in criminal proceedings as a prerequisite for the need to objectify the results of proof".*Pravo Ukrainy*, 2014, No 10, p. 44 – 52.

SLYUSARCHUK, Kh."Correlation of the terms "standards of proof" and "standards of persuasion"",*Law and society,* 2016, no 1, p. 164 – 170.

SLYUSARCHUK, Kh. "Types of standards of proof in criminal proceedings". *Problems of state formation and protection of human rights in Ukraine:* materials of the XXII reporting scientific-practical conference, Lviv, 2016, p. 233.

SLYUSARCHUK,Kh. *Standards of proof in criminal proceedings*. Lviv, 2017 [Last accessed: 10-03-2021]. Avaible from: https://law.lnu.edu.ua/wpcontent/uploads/2016/02/Avtoref_Slusarchyk_.pdf .

STROGOVYCH, M. *"Material "truth" and "judicial evidence" in the Soviet criminal procedure:* monograph. AN SSSR, 1955, p. 370 – 384.

TATSIYA, YA., PSHONKA V., *Criminal procedure:* a textbook. Pravo, 2013, p. 824.

THE SOUTH CAROLINA SUPREME COURT. Case No.02-9410 "Michael D. Crawford, petitioner *v.* Washington", 08 March 2004. [Last accessed: 12-01-2021]. Avaible from: https://law.justia.com/cases/south-carolina/supreme-court/.

THE UNITED STATES DISTRICT COURT. Case No. CIV.A. CV95-S-3049-NE "Hayes v. Luckey", 11 December 1997. [Last accessed: 10-01-2021]. Avaible from: https://law.justia.com/cases/federal/districtcourts/FSup2/33/987/2519142/.

SUPREME COURT OF UKRAINE. Case No 826/9855/18, 10 January 2019.

SUPREME COURT OF UKRAINE. Case No 905/2382/17, 14 August 2018.

SUPREME COURT OF UKRAINE. Case No 909/105/15, 29 August 2018.

SUPREME COURT OF UKRAINE. Case No 910/18036/17, 02 October 2018.

SUPREME COURT OF UKRAINE. Case No 910/23428/17, 29 August 2018.

SUPREME COURT OF UKRAINE. Case No 910/8763/17, 31 January 2018.

SUPREME COURT OF UKRAINE. Case No 916/2403/18, 10 September 2019.

SUPREME COURT OF UKRAINE. Case No 922/1163/18, 27 February 2019.

SUPREME COURT OF UKRAINE. Case No 9901/949/18, 12 July 2019.

UKRAINE. Code of Ukraine No 4651-VI, of 13 April 2012, "Criminal Procedure Code of Ukraine" (as amended of 21 July 2020). [Last accessed: 03-01-2021].

VAPNYARCHUK, V. "Standard of criminal procedural evidence", *Bulletin of the National Academy of Legal Sciences of Ukraine,* 2015, vol. 80, p. 100 – 109.

VERSHININ, A. *Civil process: textbook*, 2002. 472 p.

VIDMAR, N. *American Juries: the verdict*, 1st American hardcover ed., New York, 2007, p. 428.

WALTON, D. *Burden of proof, presumption and argumentation*. University of Windsor, 2014, p. 300.

WEINSTEIN, J., DEWSBURY, I. "Comment on the meaning of "proof beyond a reasonable doubt", *Law, Probability and Risk,* 2006, No 5.

WHITMAN, Q. J. *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*. Yale University Press, 2008.