This file corresponds to the principles relating to the Procecussion of Criminal Procedural Law in Portugal.

Principles relating to procedural pursuit

The principles relating to procedural pursuit are principles of investigation, adversarial proceedings, sufficiency and concentration. However, in relation to the first and fourth principles, it is justified that their explanation occurs in relation to the trial phase, along with those that affect the evidence and form.

Principle of Investigation

Notion and Foundation

It is a structuring principle of the model. Our model is integrated by a principle of judicial investigation, which characterizes the structure of the criminal process, and which is enshrined in one of the articles of the trial hearing - article 340/1 of the CPP.

In the Portuguese system, the judge does not remain passive and watch the evidentiary debate that unfolds before him. The judge has an active role in acquiring evidence. The judge cannot investigate autonomously and can only judge the facts brought to him by the accusation, but, within the limits of the object of the process defined by the accusation, the judge can, even ex officio, order evidence necessary to discover the truth: he is not bound the evidence presented by the prosecution or defense. He can, in fact, order the production of other evidence, even despite the indifference of the prosecution or the defense or even against the will of one or both of them.

According to article 348.º/5 of the CPP, judges and jurors may ask the witness, questioned by the person who presented it, any questions they deem necessary to clarify the testimony given and for a good decision in the case.

The principle of investigation, also known as the principle of material truth, which is at the same time a general principle of procedural pursuit and a general principle of proof, is the principle according to which:

The court investigates the fact subject or to be subject to trial, regardless of the contributions of the prosecution and defense, autonomously constructing the bases for its decision;

It is opposed by the principle of dispositive or formal truth, according to which, the accusation and the defense, as procedural parties, in the true sense of the expression, dispose of the process and it is up to them, them and only them, to bring the corresponding facts and evidence to the process, according to a principle of evidentiary self-responsibility.

The passivity of the judge gives rise to a judge with the burden of investigating and clarifying of his own motion the fact submitted for trial, regardless of the contributions of the prosecution and defense, the contributions of the procedural subjects or the parties. This principle is mainly of interest at the level of evidence, applying without distinction to the trial judge and the investigating judge.

Sufficiency Principle

Notion and Foundation

According to this principle, the criminal process is carried out independently of any other and all issues that are relevant to the decision of the case are resolved in it. It resolves, in particular, the so-called prejudicial questions of criminal proceedings.

Preliminary questions are those that have an object or even a different nature from the main question, but, nevertheless, the answer given to them is a sine qua non condition for knowing the answer to the main question. In simpler terms, these are questions that have a different object than the main question, that are resolved before the main question and that condition the meaning of the answer to be given to the main question. They thus constitute a concrete legal antecedent to the main issue, being autonomous in terms of object and nature.

For example: The crime of theft, taking someone else's movable property, is being discussed. But if the person who appropriates the thing claims that the thing was donated to him, it may be necessary to discuss the question of the existence and validity of the donation to find out whether the thing belongs to someone else and whether, in fact, there was a crime of theft. This is a questionthe harmful, with a legal-civil nature and not criminal and must be resolved first, because, to know if there was a crime, it is necessary to know if the thing is someone else's or not.

What does the law refer to in terms of preliminary questions? In article 7/1 of the CPP, the rule of sufficiency of criminal proceedings is stated, meaning that, in principle, prejudicial questions are resolved in the criminal proceedings themselves. This solution is related, on the one hand, to the demands of concentrating the criminal process over time and, on the other, to the certainty that the criminal resolution of the main issue will not always take advantage of the treatment, in its own right, of the non-criminal issue. .

There are several damaging issues:

Preliminary criminal issues in criminal proceedings: For example, if someone is accused of committing a crime of slanderous denunciation - article 365 of the CP - it is assumed that someone, with the awareness of the falseness of the accusation, denounces or attacks another person the suspicion of committing a crime with the intention of initiating criminal proceedings against it. In order to determine whether or not the crime of slanderous reporting took place, it is necessary to determine whether or not the person about whom the complaint was made committed the crime. This will be a criminal issue grafted onto another criminal proceeding, which admits a different object.

Preliminary criminal issues in non-criminal proceedings: For example, when someone files an execution based on a check and the

person being executed files an embargo, saying that this check is a forged document. The criminal issue will be the falsification of documents, grafted onto a non-criminal and executive process. The issue is resolved under the terms of article 92 CPC.

Preliminary non-criminal issues in criminal proceedings: We may have, as already seen, civil law issues necessary to resolve a criminal issue. Where are these issues resolved? In fact, there are several possible paths:

Absolute sufficiency: All issues, even those that are non-criminal in nature, are resolved in criminal proceedings, unless they had already been resolved independently in civil proceedings by final judgment or were in the process of being so. In other words, all issues had to be heard by the criminal court, except in cases of lis pendens or res judicata.

This path is advantageous due to the speed and procedural continuity. On the other hand, this is also demonstrated in terms of respect for an idea of

discovering material truth, since, for the criminal process, and unlike what happens in civil proceedings, the criminal process is less permeable to truthful solutions. formal than that, seeking the truth of the facts as they happened. If this is so, then it will not make sense to refer the decision of the case to the civil process, since the decision that results from that may not be relevant to finding the material truth.

We can also mention as an advantage the mere interest of looking at things from a legal-criminally relevant perspective, for example, returning to the example of theft, the agent could be honestly convinced that he owns the stolen thing, acting in error regarding the factuality typical and, therefore, should not be punished because he acted with the conviction that the thing was his.

Mandatory return: If a non-criminal prejudicial issue arises, it should be returned to the court competent in the matter, suspending the criminal proceedings. This has the advantage of not only greater functional adequacy, but also greater specialization of the court for a more accurate understanding of the issues. But there are also noticeable disadvantages when reading the advantages listed regarding the previous path.

Possible Resolution Paths

The law enshrines, in article 7/2, a principle of discretionary sufficiency or optional return, that is, it adopts neither sufficiency in absolute terms nor mandatory return, perpetuating a middle-term solution. That article thus states that the criminal courtmay suspend the process so that the competent court can decide the non-criminal issue, necessary to determine the existence of a crime that cannot be conveniently resolved in the criminal process. We are talking here about discretionary sufficiency: sufficiency because the criminal court is competent to hear the matter, but discretionary because it can return it when it understands that it is not sufficiently qualified to hear it. Therefore, the return is optional. But be careful, since the power of the court is not discretionary, so there are requirements established by law, that is, the power granted to the court constitutes a freedom in legal terms that does not translate into authentic discretion, as happens, for example , in terms of administrative law. There are several requirements that must be met before the question can be returned:

It is necessary that it is a non-criminal preliminary issue - 7th/2, 2nd part;

It must be necessary to know the existence of a crime, relevant to the fulfillment of an incriminating type or a cause of justification. For example, to know whether the crime of theft was committed, it is necessary to know whether or not the thing belongs to someone else, which is why this question deals with the incriminating element. As this is a relevant issue to assess the seriousness of the offense or guilt, but not to decide whether there is a crime or not, there can be no room for refund.

It is necessary that the issue cannot be conveniently resolved in criminal proceedings. The legislator uses an indeterminate concept, meaning that he does not mention in which cases it is appropriate to know and in which cases it is appropriate to return. This situation must be resolved by the interpreter, taking into account the complexity and specialization of the issue. If it is a very complex issue or a highly specialized field, return it; otherwise, you know the issue.

The decision taken may be subject to appeal - 400.º/1/b) a contrario.

Regarding deadlines and moments of decision: if the court concludes that it is not qualified to decide, it suspends the criminal proceedings and returns it to the normally competent court. This decision to suspend cannot happen during the investigation phase, since the stage of collecting evidence and clues must proceed quickly, not implying its interruption. Only after the accusation, or, if it has been archived, in the application for opening of investigation, can it be suspended - article 7.º/3 CPP. Suspension can, therefore, be ordered ex officio by the court or requested by the MP, the assistant or the accused after the accusation or in the request to open an investigation, since it is only after the investigation that the convenience of returning it to the court can be assessed. competent.

The suspension has a set period of time and cannot prejudice urgent evidentiary efforts, without prejudice to the fact that the question may end up being decided in the criminal proceedings, is not resolved within the defined period or the action is not proposed within a maximum period of one month, for the interest of temporal concentration becomes preponderant - 7th/3 and 4 and 328th CPP. The return of a prejudicial matter to a non-criminal court is a cause for suspension of the prescription of criminal proceedings - 120.º/1/a) of the CP - which also points to the fact that there are time limits for the suspension.

This suspension is not definitive or ad eternum, it occurs for a certain period. The court states that the suspension period is set and can be extended up to one year, which can be interpreted in two ways:
The court sets a deadline that can be any period of time and can be extended for a maximum period of one year;
The court sets a period, necessarily less than one year, and may extend this period, as long as the initial period and the extension do not exceed one year in total.
Paulo Pinto de Albuquerque tends towards the second option - one year has to be enough for the issue to be decided, as he did not want to stop thereimprove the progress of the criminal process. The professor considers this to be a reasonable solution, although it clashes with practical reality, as one year is a short period of time to conduct a process in the civil sphere.
Finally, there is another goal of speed: when it is necessary to bring an action, it must be brought within a maximum period of one month, so, if it is not, the issue must be decided in the criminal process.
Concentration Principle
Notion and Foundation
The principle of concentration points to a unitary and continuous criminal prosecution of all terms and acts of the process, whether from a special point of view or from a temporal point of view.
This principle gains special autonomy in the trial phase, at the hearing, being directly related to the principles of orality and immediacy. These are linked to the extent that the judge's conviction about the evidence must be a conviction based on his personal impression of the evidence. The law does not pre-establish the value of each piece of evidence. The judge assigns the weight he should give to the evidence. If this is so, then it is natural that a principle of immediacy and orality is also enshrined - if the judge has a personal conviction about the evidence, the judge must be the one to hear the evidence that must be produced before him. Therefore, direct and immediate contact between the judge and the evidence is required, especially in the case of procedural evidence.
This principle is linked to other procedural principles:
Principle of free assessment of evidence: The court assesses the evidence according to its conviction, implying that the judge has a close relationship with the people whose statements he will value as evidence. You must attend the production of evidence, as it not only highlights the statements produced, but also the way in which they are produced;
Principle of immediacy: Connects to this principle in its spatial aspect. Direct contact between the judge and the source of evidence is required, especially when it involves personal evidence.
This principle has three dimensions:
It must always be the same judge. In the case of a group of judges, there should be no modification to it, with article 328-A of the CPP providing for this, which establishes the principle of full assistance for judges. This applies from the beginning of the trial hearing until the final sentence is handed down;
Principle of spatial location: It is convenient for all evidence production to occur in the same place to see all procedural participants. The trial hearing must take place in a place capable of including all those, although there are exceptions:
Exceptions are permitted for residents outside the municipality, in accordance with article 318, allowing videoconferencing;
There are situations that relate to interrogation prerogatives - article 139/1 of the CPP ex vi. 503rd of the CPC. The PM or, for example, the PR enjoys these prerogatives, being able to provide them in writing and, when they must testify orally, they enjoy the prerogative of being questioned from their official residence;
There is also a witness protection regime in article 139/2 of the CPP, which refers to the witness protection law - law 93/99. Intimidated or vulnerable witnesses do not have to be called to the trial hearing - 349th to 352nd of the CPP.
Principle of temporal continuity: The trial hearing must take place continuously over time. This is the meaning of article 328/1 of the CPP, which does not fail to provide, in paragraph 2, for strictly necessary interruptions, especially for food and rest for participants. Gaps can be of two types:
Interruptions: 328.º/2 to meet participants' food and rest needs. If the hearing cannot be concluded on the day it begins, it is interrupted and continues on the immediately following business day. It can simply be interrupted, or even be postponed without exceeding 30 days if the mere interruption is not enough to remove the obstacle, depending onthe interruption and postponement of a reasoned ruling that is notified to all procedural subjects (art. 328.º/3, 5 and 6 1st part of the CPP). The law links these hypotheses to the effect of continuation of the hearing, which is resumed from the last procedural act carried out in the interrupted or postponed hearing (no. 4 of that article).
Adjournments: Referred to in article 328.º/3. The postponement lasts for the time necessary to remove the impediment, but the legislator wants it to be for the shortest possible time. In practice, even interruptions take place for longer, not only the time strictly necessary for food and rest. As for postponements, it is also noted that they are measured according to the court's schedule.
The law states that the postponement cannot exceed 30 days - 328.º/6. Until 2015, exceeding the deadline was associated with the consequence that the evidence could no longer be effective, and that the evidence previously produced would not be used. In 2015, the law was changed so that it is now a rule without sanction. This 30-day period does not include: judicial vacations; the time during

which the case awaits the completion of evidence collection for reasons beyond the court's control, between the time of the hearing and the issuing of the sentence; the time that elapses between the production of the evidence and the reopening of the hearing that must take place following the annulment of the decision - 328.º/6 and 7 of the CPP.

Sometimes, the trial is held, the decision is issued and there is an appeal. In an appeal, it is known that some nullity was committed during the course of the proceedings, this nullity cannot be remedied, the knowledge of which implies the annulment of the decision. Therefore, the trial must be repeated. Sometimes the validity of some acts that are not affected by the invalidity may be maintained. In these cases, a considerable amount of time may pass between the sessions in which there was no problem and the new sessions that occur following the annulment of the decision, and this does not count towards the 30-day period. However, even when this period is exceeded, there are no consequences.

In addition, the law states that if it is not possible to resume the hearing within 30 days, due to the court being prevented from doing so or due to the defence counsel being prevented from doing so as a result of another urgent judicial service already scheduled and taking priority over the hearing in progress, it may be postponed for more than 30 days, provided that the reason is recorded in the minutes, expressly identifying the procedure and the case to which it relates.

This regime replaces one that in fact safeguarded the advantages of the principle of immediate evidence:

Interruptions and postponements for a period not exceeding 5 days dictated the continuation of the hearing;

A postponement of more than 5 days and up to 30 days required the court to decide whether or not to repeat some acts already carried out;

Any postponement of more than 30 days would dictate that the hearing be restarted, and the evidence already produced would lose its effectiveness.

The legislator replaced the principle of concentration with a more diluted concentration - although there is a target, there are many situations that do not count towards the deadline, exceptions, and there are no consequences. Taking all this into account, it is normal that postponements for longer periods have become commonplace and the hearing no longer has this dynamic concentrated in time.

Even when postponements did not exceed 30 days, the legislator only established a maximum period between hearing sessions and not in relation to the duration of the hearing, which is why there were trials that lasted for months or years in the most complex cases. There is a certain naivety on the part of the legislator.

In fact, the current regime, by always allowing the hearing to continue, without providing for the evidence already produced to lose its effectiveness, seems to disregard the understanding that only temporal concentration allows the advantages arising from a relationship of close communication between the court and the subjects and participants in the proceedings to be safeguarded.

Principle of Adversarial Proceedings

Notion and Content

It is an important principle of criminal proceedings, soIt is relevant that the constituent legislator associated it with the accusatory structure of the process; article 32/5 CRP says that it is linked to the adversarial principle.

On a more elementary level, this principle means that no decision can be made without the court hearing or considering the reasons of the prosecution and defense. This principle also follows from the duty to listen to any subject of criminal proceedings or mere procedural participants when any decision that personally affects them must be taken. In other words, it means a right of audience. In ancient law, the idea was already affirmed that no one can be condemned without being heard - nemo potest inauditu amnari.

In a more current conception, the right to adversarial proceedings translates into an effective right to proof. The right to defend oneself by evidence means that no fact can be taken as proven and no means of evidence must be admitted without giving the counterparty the possibility of contradicting it.

No form of evidence can be admitted without questioning the viability of that form of evidence – articles 6/3/d) of the ECHR.

This right precisely embodies the possibility of cross-examining prosecution witnesses to discuss their credibility.

Cross-Interrogation Method: Witnesses are first questioned by those who nominated them, but then they are cross-examined by the procedural subjects they affect – the MP listens to the witness, but then the lawyers for the accused and the assistant can ask questions to the witness, in order to discuss his credibility.

We have the right to indicate means of proof and the right to discuss the means of proof indicated by the counterparty. It's a double dimension.

When viewed from the defendant's perspective, this principle is one of the defense guarantees that the criminal process must guarantee him (article 32/1 CRP).

It appears as a characteristic principle of the criminal process with an accusatory structure, closely connected with the criminal procedural purpose of protecting the fundamental rights of people (including the defendant).

As this principle is transversal to the entire criminal process, it does not have equal value in all phases of the criminal process:

Judgment: This principle is expressed par excellence in the trial hearing, where it is fully valid, article 327 CPP. It is also as an expression of this principle that articles 321.º/3, 323.º/g), 341.º, 348.º/4, 360.º/1 and 2 CPP must be complied with.

Instruction: It is valid in the instructional debate structured similarly to the trial hearing, recognized in article 298.º CPP. In the debate, the principle is valid, but with regard to acts of instruction, the contradiction is no longer fully valid. If the accused requests witnesses at the opening of the investigation, they may be heard by the criminal investigation judge, without the presence of the accused. The criminal investigating judge is not obliged to notify the defendant to attend the production of evidence by another witness. The law does not guarantee the right to cross-examine witnesses at this stage; something that was unthinkable at the trial stage, article 348 CPP.

Inquiry: It is a phase that tends to be non-contradictory, which is understandable, as certain means of proof are not compatible with the defendant's knowledge. The accused has the right to indicate evidence that results, in general, from article 61.º/1g), and the assistant also has rights of a similar nature at the level of this phase (article 69.º/2), but does not have the right of constitutively intervening in the acquisition of evidentiary means, does not have the right to be present at the inquisition of witnesses, or at the decision to carry out a home search or any evidentiary measures... In relation to the latter, the contradiction in the acquisition of evidence is ruled out, with reasons that relate to effectiveness, will harm the success and effectiveness of the investigation. It is necessary to guarantee the legal position of the accused in these forms of evidence and the legislator has found mechanisms to satisfy this claim:the judge intervenes, exercising the function of compensating the defense, the judge acts preventively, authorizing searches, etc. It is noted that the meaning of these interventions alludes to the symbolic (and real) figure of the “judge of guarantees and freedom”. If the accused cannot intervene, it is the judge who intervenes in his interest, to monitor the regularity and production of this evidence.

Principles Relating to Evidence

In studying these principles, we followed the perspective of Figueiredo Dias, focusing on three principles that are located at three different moments of the evidentiary procedure:

Admissibility of evidence: Refers to the definition of the object of the evidence, who has the evidentiary initiative, what are the admissible means of evidence, the admissibility or not of atypical evidence not regulated by the legislator and the prohibitions of evidence. In this first level, we will study the principle of investigation.

Producing or carrying out the test: It is interesting to see how each piece of evidence is produced in the process, taking into account the legal rules for producing the piece of evidence. It is noted that the rules of testimonial evidence are different from those of taking statements from the accused and that carrying out searches has its own rules, for example. But there are two transversal principles at this moment: that of immediacy and contradictory, which we have not studied in this chapter.

Valuation of evidence: The principle of free assessment of evidence is of interest (assumes that the evidence is admissible and has been produced regularly, as the judge cannot value evidence that has been produced irregularly, or is prohibited, article 127 CPP) and in dubio pro reo. Basically, it is discussed what probative weight to attribute to each means of proof.

Principle of Judicial Investigation

Notion and Content

As we have an adversarial system that is not pure, the principle of investigation is a high-water mark in our procedural system. What is its meaning and scope in an accusatory structure model? The judge is not passive in watching and collecting evidence. The judge has the evidentiary initiative, along with the evidentiary initiative of the MP, assistant and defendant, and can officially order the production of evidence necessary to discover the truth, which can be designated as the principle of material truth.

It consists of a power-duty that the court is responsible for independently investigating, instructing and clarifying, even beyond the contributions of the prosecution and defense, the fact subject to trial, creating the necessary bases for its decision.

Here are the following articles:

340.º/1 CPP: When it states “the court orders ex officio (...)”. Confirms that the judge has the power and duty to investigate ex officio, regardless of the contributions of the procedural subjects;

348.º/5 CPP: Regarding cross-examination - witnesses are questioned by whoever presented them and then cross-examined by the party they may affect. In our system, the judge and jurors have the prerogative to be able to interrupt this interrogation and ask additional questions at any time.

This structuring principle applies to all research matters and must be applied in the most complete way possible. In the case of the judge, he cannot investigate beyond the limits of the object, but must carry out an investigation as broad as possible and if he fails to order the production of means of evidence that are indispensable for the discovery of the truth, he incurs a nullity that can be remedied. is provided for in article 120/2/ paragraph d), final part.

It is also related to the in dubio pro reo principle, which will only intervene a posteriori. Let's understand that in case of irreducible doubt about the facts, the judge decides in favor of the defendant. But it does not work in any state of doubt, only being applicable to irremediable doubts, which cannot be clarified because no other proof can be produced.

As our model is accusatory, this principle must be accompanied by counterweights, present in article 340/2: The judge may request the production of prnew, but must inform the procedural subjects in advance to comment on evidence.

Principle of Free Appreciation of Evidence

This principle concerns the weight to be attributed to evidence. The aim is to offer the court the necessary conditions for it to form its

conviction about the existence or non-existence of the facts and situations that are relevant to the sentence.
However, the question arises here as to whether the assessment of evidence should take place on the basis of:
Legal rules pre-determining the value to be attributed (legal proof system);
Or rather on the basis of the judge's free assessment and personal conviction (free evidence system).
It applies to all procedural phases. We think, above all, of the judge at the end of the trial, but this principle also binds the MP when he makes a decision at the end of the investigation on whether the evidence produced results in signs of the production of a crime; and the investigating judge too. When the MP has to make a decision to archive, this decision is based on the evidence. The MP evaluates the evidence according to the principle of free assessment. The criminal investigation judge will have to do the same thing when issuing an order of indictment or non-indictment. In conclusion, this principle determines that the entity competent to assess the evidence that has been produced must be evaluated by it, particularly at the level of the trial hearing.
Brief Contraposition with the Legal Evidence System
The problem of the weight to be attributed to each form of evidence is one of the most complex in criminal proceedings and the answers oscillate between two major principles of opposite sign:
Legal evidence system: The value of the evidence is predetermined, in general and abstract, by the legislator, with the judge not having any freedom, limiting himself to subsuming the legal understanding into the evidence.
Free evidence in-time conviction system: Introduced after the French revolution, the value is assigned to the evidence by the judge himself.
Until the 18th century, a system of legal evidence was in force in continental Europe, which could be negative legal evidence or positive legal evidence:
Negative legal evidence: When they reduce or exclude the value of certain elements of evidence, establishing conditions without which a fact cannot be considered proven, even if this contradicts the judge's conviction.
The legal evidentiary rule is unus testis, nullus testis, which says that one witness is insufficient to convict, to convict you need two agreeing witnesses.
The rules of negative legal evidence have a guarantee nature, aim to avoid arbitrariness and are based on rules of experience that are consolidated. The probability of making a false imputation is great, but the probability of two people missing the truth and agreeing is smaller. Therefore, we demand that two witnesses be convicted, prohibiting one from being convicted (one witness would be the same as none).
Positive legal proof: They were in force between the 13th and 18th centuries.
They predetermine the value or effectiveness of the evidence and oblige the judge to accept a certain accusatory hypothesis as proven, as long as the quantum of evidence provided for by law is verified, even if the judge was personally convinced of innocence.
The rule of unus testis, nullus testis became the rule of positive legal evidence. It was said that when there is one witness, one cannot convict, but if there are two, the judge is obliged to convict.
In positive legal proof, with concordant testimony from two witnesses, the person is obliged to convict.
They had a positive nature, forcing people to convict even if they were convinced that the accused was innocent. It evolved into a system of proof hierarchy and proof arithmetic.
These systems were called into question at the time of the French revolution. Thinkers such as Voltaire criticized this system, and the institution of the jury was then introduced, as the competent entity for the assessment of evidence in criminal proceedings.
Regarding the issue of introducing the popular jury, this was inconceivable.iliable with the system of legal evidence, because secular judges could not apply the rules that were highly complex, not easily achievable by anyone who was not a jurist, and because it was understood that it was in the jurors' inner conviction, an emanation of individual reason and popular sovereignty, which was the ultimate criterion of truth. We have the jus rationalista conviction and the democratic principle that justified this consideration and transition to the “intime conviction” system.
In the intime conviction, they decided according to their conviction, which they did not have to justify. It did not matter what evidence had been produced or what weight the law gave to each piece of evidence, it only mattered the jurors' conviction, which did not have to be based on rational criteria. As there was no motivation in fact, there was no possibility of appeal.
This principle of free appreciation of evidence in this configuration was enshrined in the Code d'Instruction Criminelle, but suffered perversions in the 20th century, with the application of this system of intimate conviction to judgments made by career judges, authoritatively reinterpreting the principle of free appreciation of the test.
In short, the positive evidence system was abandoned with the enshrinement of the intime conviction criterion, but what were the reasons that justified this change?
The system of legal evidence was very complex and difficult for jurors to master, who were ordinary people who were unable to handle this system.
The legal evidence system promoted torture and coactive investigation methods, which, at the time, began to be condemned, due to

the emergence of a discourse protecting natural human rights and the understanding that torture was a source of miscarriages of justice.

The epistemological weaknesses of the model are based on a syllogism, which has as its major premise the rule that whenever two witnesses agree, it is true and as a minor premise the conclusion that what was witnessed is true. But this is not right. It may happen that both witnesses agree to lie. The major premise is not an unassailable general rule and the syllogism is flawed, making the conclusion unsafe. We have the transformation of a rule of probable experience into a universal rule, falling into the fallacy of abusive generalization.

The free conviction system exempted judges from respecting the evaluative criteria predetermined by the legislator.

Content and Limits of Free Appreciation of the Evidence

We can attribute a dimension to the expression of free appreciation of the evidence:

Negative: The judge is not bound by pre-established rules of evidence regarding valuation. He must decide according to his personal conviction. In this dimension, the judge is exempt from obedience to evaluative criteria predetermined by law.

Positive: The judge must decide according to his personal conviction, which must be based on objective and rational criteria, that is, it must be a motivated conviction and subject to review on appeal.

The principle of free assessment of evidence, enshrined in article 127 CP has this double dimension: negative, because it frees the judge from obedience to evaluative criteria pre-determined by the legislator, the judge is free to believe the evidence; and has a positive dimension, as the judge must evaluate the evidence according to personal conviction, but with respect for objective and rational criteria and is susceptible to motivation and re-examination in an appeal.

What are the Limits of Positive Content for Free Appreciation?

Internal Limits: These translate into obedience to objective and rational criteria, in respect for rules of experience:

Rules of experience or maxims of experience itself: The legislator, in article 127 of the CP, links the judge's conviction to respect for the rules of experience. Conviction about the test is linked to respecting the rules of experience, paying attention to typical ways of acting.

What are experience rules? These are stereotypical patternsthose of personal behavior that can be used to assess a person's conduct. It is the value that is established for certain signs, which is based on the maxim of experience, whoever is innocent does not run away, if he ran away, then he could be guilty, for example.

Logical rules: For example, the law of non-ubiquity which determines the acquittal of a defendant when it is proven that he was not at the place where the crime was committed at the time of the crime.

Universal scientific laws: Set of scientific knowledge that forms a certain paradigm, they are universal because they are not based on any probability games.

Probabilistic scientific laws: They are challengeable and depend on probability. They underlie the evidentiary value of DNA (genetic profiles) or blood type analyses. They are based on the probability of two people having the same blood type. These tests are based on their weight and must comply with probabilistic scientific laws.

External Limits: Those that translate into the duty to substantiate the conviction and the susceptibility to review on appeal.

The judge must substantiate the matter of fact - this follows from article 205 of the CRP and 97/5 of the CPP (on matters of fact and law for any decision-making act). But the legislator is especially careful in the grounds for conviction, which is what article 374/2 CPP follows from.

According to article 374 of the CPP, there is a list of proven and unproven facts, a list of means of proof and these evidentiary results. We understand which means of evidence were extracted and also the critical examinations of each piece of evidence (its cognitive contribution). The court explains what type of reasoning is based on its conclusion regarding the use of the evidence and its credibility. Furthermore, paragraph 2 says that the judge must indicate and critically examine the evidence that served to form the court's decision, must indicate the reasoning that was used to attribute more weight to one witness, to the detriment of the other. It must indicate which valuation criteria, maximum experience and logical criteria were used to form conviction in a certain sense and not the other.

These valuation criteria can be assessed on appeal, article 32/1 CP and 14 PIDH and 7 ECHR. The appeal on matters of fact allows the judge of the higher court to summarize the evidence of the decision that the lower court handed down, even when the appeal is a review. The court of the relationship is an appeal that can be on a matter of fact or law (art. 428 CPP), but an appeal to the supreme court is a review, it only concerns law.

But even so, being an appeal to the supreme court, a review appeal and the judge having to know the law, in article 410.º no. fact when the text of the reasons results in an irremediable contradiction in the reasons and between the reasons for the decision or an error in the assessment of the evidence.

Supreme court judges can only detect an error in the assessment of evidence if criteria for evaluating the evidence are set out in the text of the reasoning. The judge must follow logical criteria that are re-examined in an appeal, in matters of fact and even in a review appeal, under the terms of article 410/2.

This principle indicates that the judge decides according to his conviction based on logical criteria. But this principle of free assessment

of evidence suffers from normative limits. The legislator intervenes in matters of valuation, overriding the judge's conscience in the valuation of evidence, introducing legal probative evidence, whether negative or positive.
This principle imposes negative normative limits: This is the existence of norms that, as a rule, limit or exclude the value of certain evidence, preventing the judge from basing his conviction on it, even when he believes that it is reliable evidence.
Prohibition of unfavorably valuing silence: 61.º/1/b) it is prohibited to value silence unfavorablyagainst the accused, whether total silence or partial silence. It is valid for any procedural phase and for any entity whose function is to evaluate evidence, and is not valid only in the trial phase. Even if the judge or the entity called upon to decide considers the silence suspicious, they cannot value the silence to the detriment of the defendant. Article 61/1/b) has a general scope, so articles 343/1 and 345/1 concern the trial phase. This is a right to non-self-incrimination, which is constitutionally enshrined (article 32/1 and 3 of the CRP).
Prohibition of indirect testimony and hearsay, articles 129 and 130: When someone in court refers to facts that they did not witness, but that were told to them by another person, the judge must call the direct witness to testify, indirect witness cannot be valid and, furthermore, the information that the witness mentions without knowing who transmitted such information to him cannot be taken into account as “hearsay”.
Prohibition of evaluating the testimony of the accused who refuses to answer questions or requests for clarification formulated by other procedural subjects or by the judge, article 345.º/4 CPP: The statements made by the co-accused against another co-accused and to his detriment, when the declarant refuses to answer questions asked. The relevant procedural conduct is that of the declarant, since the co-accused are in a privileged position to lie and have a special interest in doing so, and are not bound by the duty to provide the truth, therefore, the credibility of their statements it's smaller. If the person who declares, in addition to the normal weaknesses of his testimony, still refuses to answer certain questions, his statement cannot be valid as evidence to the detriment of the other co-accused. This does not prevent the judge from evaluating the evidence presented by the co-accused regarding his own responsibility, but not against the other co-accused to his detriment, even if the judge believes such statements.
Requirement for corroboration of anonymous witnesses - law 93/99, article 19/2: Witnesses can give statements without their identity being known to the other procedural subjects. The statement about anonymity compromises the defendant's guarantees, making it difficult to discuss his credibility. The legislator thus establishes a requirement for corroboration that only applies when it is a sentencing decision. Can an anonymous witness corroborate another anonymous witness? No, there is no cross-corroboration, so the corroborating element must be another autonomous piece of evidence, even if it does not have to be evidence that confirms the testimony point by point, but only certain aspects of the witness's factual report that make it possible to determine that in its entirety this report was true.
In all these cases, the legislator excludes the value of the evidence or limits it, overriding the judge's conscience.
This principle also imposes positive normative limits: Situations in which, instead of excluding or limiting the value of certain means of evidence, a reinforced weight is attributed to certain means of evidence, not being true exclusions to the free assessment of evidence:
Confession: The legislator attributes full proof effectiveness - 344.º/2. The judge is sufficient with the confession to consider the alleged facts as proven, as the production of further evidence is not necessary. The confession must be free and cannot be coerced. It must be integral, fully assuming the matter of imputation, and cannot have reservations, since if the confession is partial or subject to reservations it does not admit full effectiveness. It is necessary for it to be a confession for a crime punishable by a prison sentence of no more than 5 years for it to be fully effective as evidence - this is a small and medium-sized crime in which the legislator is less committed to determining the historical facts, but which allows for reaching athe solution through consensus. If the crime is more serious, the legislator is more committed to discovering the material truth and does not accept that the conflict can be resolved through the defendant's confession. It is necessary that there are no co-accused or, if there are, everyone testifies in the same sense. One of them confessing and the others not, one cannot extend confession of what he declares to the others, because it would violate the others' freedom of declaration, eroding their right to silence. A confessing, the confession is valid in relation to A and the judge cannot prove the facts that A confesses and extend to others. Confession has the consequence of providing proven facts. The court cannot prove A's facts without B confessing. Facts cannot be considered proven in relation to one and considered controversial in relation to another. When one confesses and the other does not, the facts continue to be considered controversial: the confession does not have the value of full proof and can still be considered. The evidence will be seen and the judge will be convinced or not regarding the charge. It cannot be considered proven facts under the law. The confession having the value of full proof, does not require other means of proof (art. 344, paragraph a)). But the judge's free assessment is not totally excluded - 344.º/3/b) - confession, in certain cases, has a probative value that overrides the legislator's conviction - which is not entirely an exception to free assessment of the evidence, as the judge may, in his free conviction, doubt the veracity of the confession. In this case, the effect of full proof is not attributed.
Aspect in which the law attributes full value to expert evidence, article 163 of the CP: The judge is bound by the experts' opinion regarding technical, scientific or artistic matters. If the experts issue an opinion on legal matters, the judge will not be bound and, even with regard to those matters, the judge may depart from the expert's opinion as long as he substantiates the divergence.
In Dubio Pro Reo Principle

Notion and Foundation

The principle of free assessment of evidence requires that the judge be personally convinced of the veracity of the facts, beyond all reasonable doubt. However, it is not always possible to reach this level of conviction and doubt is not always eliminated. What should one do if, despite all the evidence collected by the court, requested by the prosecution and the defense, it is not possible to remove the facts from doubt? In civil proceedings there are specific mechanisms for overcoming doubt, which result from the burden of proof. The author has the role of proving the constitutive facts and the defendant has to prove facts that extinguish or modify the plaintiff's facts. If the plaintiff cannot prove it, then these facts cannot be proven, which is equally true for the defendant. The functioning of the burden of proof solves problems, but is not transposable to criminal proceedings. In civil cases, the object of the process is the availability of the procedural subjects. In criminal proceedings there is no formal burden of proof, according to which the parties have the duty to produce the necessary evidence to support their statements of fact, under penalty of not seeing the respective facts being considered as proven, with no available rights being at stake. . Thus, situations of evidentiary impasse are resolved using this in dubio pro reo principle. As for doubts that remain after all the evidence has been produced, the decision must be the one most favorable to the defendant.

Could we say that this principle, which translates into rendering a decision in favor of the accused, could be the same as imposing a unilateral burden of proof on the prosecution? In other words, some authors do not accept the existence of a burden of material proof in criminal proceedings, meaning that if the court, even through its evidentiary activity, does not manage to obtain certainty about the facts, but rather remains in doubt, it will have principle of deciding in favor of the accusation, acquitting the accused for lack ofthe proof. Will this be true? No, a decision in favor of the accused is not a decision unfavorable to the prosecution, and is not a burden of proof either in a formal or material sense. The burden of proof results in a decision unfavorable to the person who had the burden of proving, which is why this does not happen in criminal procedural law.

The doctrine points as its foundation to the principle of presumption of innocence, which is the adjective correlate of the principle of guilt, since there can be no punishment without guilt, nor punishment without proof of guilt. But this dimension, strictly read, would leave out all questions that do not concern guilt, such as security measures, and the principle of in dubio pro reo would not apply in this matter. To avoid this consequence, the doctrine points to another foundation, linking in dubio pro reo to the principle of the rule of law - it results in a need to impose limits on the exercise of the state's criminal persecution that are justified either in crimes that presuppose guilt, or in matter of applying security measures in typical illicit acts committed by an unaccountable person. This solution, which shifts this principle to a broader and more general idea, eliminates the constitutional support of in dubio pro reo and makes ordinary law solutions contrary to it legitimate. Cristina Monteiro puts forward the duty to justify decisions as a basis since, if there is no reason to justify that decision, then it cannot be taken.

The professor considers that the basis must continue to rest on the principle of presumption of innocence, but this must be understood not as an adjective correlate of the principle of guilt, but in a broader sense, all the assumptions on which the application of penalties and measures depends of security. Thus, it would allow the inclusion of any assumptions on which the state's criminal persecutory intervention depends, without failing to include security measures.

If the judge has a doubt in the interpretation of a legal type, he must use the general criteria for the interpretation of legal norms, from article 9 of the CC, and not the in dubio pro reo principle. Does the violation of this principle presuppose a question of fact or a question of law? It has been understood that it constitutes a question of law, but there is only a violation if the judge has expressed doubts and resolved these doubts in a way that is unfavorable to the defendant. For example: There are doubts as to whether the victim consented to an act of sexual rape, so the judge, faced with doubt, takes as proven the fact that the victim did not consent. How are such doubts resolved? It all depends on the fact on which the doubt concerns. If the doubt arises from a fact that concerns the practice of an incriminating type, the judge declares the facts as unproven and absolves the accused from the case. If the doubt concerns an aggravating circumstance or qualifying element of the type, the judge declares the fact as not proven and sentences without the aggravating substance or without the qualifying type. If the doubt is about a cause of justification, the judge declares the fact and acquits the agent. If the doubt concerns a mitigating modifying circumstance, it is proven and condemns taking into account the mitigation.

Are the objective conditions of proceedability also covered by this principle? Under these conditions, the existence of the process is at stake. With the broader reading we made of the in dubio pro reo principle, these conditions are also covered by it, as those assumptions that we saw that would become part of the principle are not only substantive, but also procedural.

The legislator establishes exceptions to the in dubio pro reo principle in certain areas:

Crimes against honor - article 180 CP: Establishes a specific cause of justification that translates into proof of the truth of the accusation. Proof of the truth of the charge must be made by the accused, so if he is unable to prove it, the corresponding fact is considered proven and the accused is condenado. The doubt is resolved in favor of the defendant. It has been understood that this article is not unconstitutional, as there is no introduction of the presumption of guilt, since the departure from the in dubio pro reo principle is done in a very limited way that does not violate the presumption of innocence, since for In addition to being limited, the

removal is justified as it represents the counterpart of an area of

risk permitted in crimes against honor.

Economic-financial crimes: These crimes, such as corruption, embezzlement and others that generate large economic profits, are difficult to investigate, because they have no concrete victim and have effective concealment mechanisms, such as tax havens. Here, the behaviors are very fluid, their meaning of action is important. It is to overcome these research difficulties that solutions have been proposed that translate into the removal of in dubio pro reo. Law No. 5/2002 establishes measures against this crime, enshrined in its articles 7 and 9, through the mechanism of extended confiscation of assets. It is assumed that all assets inconsistent with their net income come from the benefit of illicit activity, which may go beyond the direct proceeds of delinquency. This is a iuris tantum presumption, which can be rebutted by the defendant, if he can prove the lawful origin of the assets. The doctrine understands that, considering the loss of assets as an administrative measure of deprivation of assets, it is not unconstitutional. It is intended to deter the commission of crime, and does not affect the core of the legal-criminal qualification of the conduct. However, it must be applied in criminal proceedings, in order to safeguard the defendant's defense guarantees. Another solution that is not enshrined in law, but is discussed and the legislator has already tried to introduce it, but always with the veto of the Constitutional Court, is the criminalization of illicit or unjustified enrichment: it consisted of the application of a prison sentence of up to five years, if the defendant was unable to prove the lawful origin of his assets. The Constitutional Court ruled that this measure is unconstitutional, as it completely reverses the in dubio pro reo principle.