CONFERENCE AND ROUNDTABLE DISCUSSION

"DOUBT IN FAVOUR OF THE DEFENDANT, GUILTY BEYOND REASONABLE DOUBT"

SYNOPSIS OF PRESENTATION BY MICHAEL G. KARNAVAS

Overarching thesis. *There is no universal definition of reasonable doubt applicable to all common law systems. In fact, some jurisdictions refrain from providing a definition of what amounts to proof beyond a reasonable doubt in their jury instructions, leaving it up to the individual jurors to exercise their reason, common sense, logic and personal experience in figuring out what is a reasonable doubt. Historians and legal scholars have debated as to how, when, and for what purpose reasonable doubt emerged as the standard of proof in common law systems. Its historical roots can be traced to the ancient Greek and Roman periods, the moral theology of the Middle Ages, the philosophical underpinnings of reason and probabilities of the Age of Reason and Enlightenment. While the story of the development of the reasonable doubt standard is fascinating, it does not resolve the persistent difficulties in framing a clear, concise and consistent definition of what amounts to proof beyond a reasonable doubt. The pesky conundrum is how to define reasonable doubt without injecting terms into the definition that require further defining, such as "certainty," "moral certainty," "reasonable person,"* or *"reasonably prudent person." All attempts to define, explain, and analogize the definition of reasonable doubt has often led appeal courts to question the accuracy, clarity, and legality of the definitions.*

I. Theoretical approaches: purpose and origin of the reasonable doubt standard

Although there is a virtual consensus that the first recorded use of reasonable doubt standard appears in the 18th century in the American colonies, there is no uniform point of view among scholars as to why and how the reasonable doubt standard was conceived. Scholars take different and contradictory positions:

(1) The reasonable doubt standard is a *prosecutorial invention to make it easier to achieve convictions* (Professor Anthony A. Morano);

(2) The reasonable doubt standard is *an effort to create procedural safeguards for the accused* (Historian John H. Langbein);

(3) The reasonable doubt standard is *an effort to find "moral certainty" in the 17th century philosophy of reason* (Professor Barbara J. Shapiro).

Professor James Q. Whitman, another preeminent scholar, advances the thesis that the reasonable doubt standard has theological underpinnings. He concludes that it was conceived in the moral theology of the Middle Ages: to provide jurors and judges with moral comfort, protecting their "souls" when convicting a fellow man to blood punishment, as opposed to protecting and creating procedural safeguards for the accused.

II. Historical milestones

The historical evolution of the reasonable doubt standard and its close cousin, the principle of *in dubio pro reo*, starts with the ancient Greeks and Romans, evolves through the times of ancient Christianity and the Middle Ages, through the Age of Reason and Enlightenment in the 17th century, and finally crystallizes in the 19th and early 20th centuries in the United States (US) case law.

1. Early developments

The earliest references of doubt can be traced back to the works of the ancient Greeks and Romans, such as Aristotle's (384 – 322 BC) *Problemata*, which encapsulates the *in dubio pro reo* principle:

> Further, anyone of us would prefer to pass a sentence acquitting a wrong-doer rather than condemn a guilty one who is innocent, in the case, for example, of a man being accused of enslavement or murder. For we should prefer to acquit either of such persons, though the charges brought against them by their accuser were true, rather than condemn them if they were untrue; **for when any doubt is entertained, the less grave error ought to be preferred.**

Roman Emperor Justinian's (530 and 533) *Roman Digesta* echoes the same principle: "In doubtful matters, the more benevolent opinion is to be preferred…. The condition of the defendant is to be favored rather than that of the plaintiff."

The ancient Greek and Roman ideas were revisited by Christian reformers and canonical jurists in the Middle Ages, agitating against the irrational practices of

criminal judgments employed at the time – *ordeals*. Ordeals were an ancient test of guilt or innocence, when the accused was subjected to severe pain (usually inflicted by hot iron or by submerging into cold water), survival of which was taken as divine proof of innocence. The ordeal of hot iron required the accused to hold a piece of red-hot iron. The burnt hand was bound and examined after three days: if the burn was healing, it was taken as a sign of innocence and the person was acquitted. The ordeal of cold water involved an accused being thrown into water: accused who sank were acquitted, and those who floated were deemed guilty and punished. A priest was present during the procedure and would pray to God to bless the water or iron and to deliver his judgment. Effectively, in the process of ordeals, the accused was condemned to punishment irrespective of facts; the prayer to divine powers for guidance replaced the fact-finding process.

In 1215, after decades of agitation, the Catholic Church abolished the ordeals. On the European continent, where the inquisitorial procedure had been developing over the course of the 12th century, ordeals were replaced by the Romano-canonical inquisition process. In England, where an early form of the jury had been introduced in the late 12th century, ordeals were replaced by jury trials. The two different

responses to the abolition of ordeals explain how the common and civil law systems split off.

While the inquisitorial process put a secular judge, responsible for a certain area, in charge of investigating and gathering evidence to determine the guilt or innocence, English judges were less frequently residents of the locality. They traveled to the country from Westminster and relied on jurors (members of the local community) for their knowledge of the case. Early on, jurors were witnesses, gatherers of evidence, and triers of fact at the same time. They were self-informing and were expected to arrive at findings based on their personal knowledge of the facts, their own investigation, and common knowledge and sense.

Over the years, with the development and increasing mobility of society, jurors gradually became more passive observers. The introduction of punishment for perjury in the mid-16th century drew a clear line between witnesses and jurors. Residential requirements became less important and the selection of jurors was based more on status and administrative experience, rather than geography.

The juror's evolution towards passive observers and triers of fact required some rules and standards to guide jurors in their evaluation of the evidence given in court. This process was the beginning of the development of formal rules of evidence, including the reasonable doubt standard.

2. The Age of Reason and Enlightenment

By the 17th century Continental Europe and England developed a new philosophy moving away from theology and faith-based arguments. This period in philosophy is also referred to as the Age of Reason or Enlightenment. The philosophers of this period came to the view that all knowledge can be gained by the power of reason or through sense and experience, and developed new ideas about certainty and probability.

The highest level of knowledge of practical matters in human affairs was rational belief or moral certainty. Rational belief was the highest category of mathematical

knowledge, which could be established by logical demonstration, such as geometric proofs. Moral certainty involved areas where mathematical certainty was not possible.

The philosophical debates of the Age of Reason on knowledge, probability, and certainty served as the handmaiden to the development of the reasonable doubt standard. Jury instructions in cases from the 17th century contain phrases such as: "if you believe" or "if you are satisfied with the evidence."

It is not clear from the cases that survived as to whether the jury instructions of that period articulate the standard of proof. Some scholars refer to the standard of proof at the time as the *satisfied conscience* standard. Interpretations vary as to whether this standard was higher or lower than the modern reasonable doubt standard:

(1) According to Morano, satisfied conscience meant that "jurors were to convict the accused only if they were satisfied in their consciences that he was guilty; … unless [jurors] were morally certain of the correctness of a guilty verdict, they would violate their oath if they failed to acquit."
(2) According to Langbein, jurors convicted the accused on whatever evidence persuaded them, and thus the reasonable doubt standard was connected to the emergence of defense lawyers, who developed evidentiary and other practices to protect the accused.
(3) According to Shapiro, the reasonable doubt standard was not a change in the required standard of proof, but rather "a clarification of the notion of moral certainty and satisfied belief," a secular alternative.

Regardless of whether the standard applied in the 17th and early 18th centuries was higher or lower than the modern reasonable doubt standard, it became central to the development of a uniform evidentiary standard. Jury instructions of those times used terms such as "moral certainty", "satisfied conscience", alongside the language of "doubt," "reason," and "reasonable cause for doubt."

Scholars agree that the first recorded use of the term "reasonable doubt" appeared in the 1770 Boston Massacre Trials, *Rex v. Preston* and *Rex v. Wemms*, in the American Colonies.

John Adams (who would go on to become the second President of the United States of America) appeared for the defense. In his closing statement, he argued that "the best rule in doubtful cases, is, rather to incline to acquittal than conviction…. If you doubt the prisoner's guilt, never declare him guilty…." Arguing for the Crown, Robert Treat Paine agreed with Adams that jurors had to acquit if they had doubts, but the doubts had to be reasonable ones:

> If therefore in the examination of this Cause the Evidence is not sufficient to Convince you beyond reasonable Doubt of the Guilt of all or any of the Prisoners by the Benignity and Reason of the Law you will acquit them, but if the Evidence be sufficient to convince you of their Guilt beyond reasonable Doubt the Justice of the Law will require you to declare them Guilty….

The judges' instructions to the jury were only partially preserved so it is not clear if they used the reasonable doubt language. Chief Justice Matthew Hale instructed the jury: "Where you are doubtful, never act; that is, if you doubt the prisoner's guilt, never declare him guilty; this is always the rule, especially in cases of life." Superior Court Justice Peter Oliver instructed the jury that "if upon the whole, ye are in any reasonable doubt of their guilt, ye must then, agreeable to the rule of law, declare them innocent."

Little information survived about the standard of proof in the 17th and early 18th centuries because no verbatim transcripts or notes have survived. It is unsurprising that scholars interpret the early practices and the applicable standard of proof of that period in different ways. Undoubtedly, this period was a watershed in the shaping of a standard of proof based on reason and common sense, with *reasonable doubt* being the moral linchpin to verdicts.

3. History of the reasonable doubt standard in the United States

In the US, various terms used to describe, explain, and analogize "reasonable doubt" were oftentimes approved in one case, and then overturned in subsequent cases involving substantially similar jury instructions. Up until the mid-19th century, vague formulas such as "moral certainty" created more confusion than clarity.

In 1970, in the seminal case of *In re Winship*, the US Supreme Court constitutionalized the reasonable standard of proof, holding that it was protected by

the Due Process clause of the Fourteenth Amendment to the US Constitution. The Court put forward two reasons. First, the Court reasoned that the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error" since "[it] provides concrete substance for the presumption of innocence, … because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." Second, the Court reasoned that the reasonable doubt standard is "indispensable to command the respect and confidence of the community in applications of the criminal law," giving individuals the confidence that "[their] government cannot adjudge [them] guilty of a criminal offence without convincing a proper fact-finder of [their] guilt with utmost certainty."

Though the reasonable doubt standard was constitutionalized in *In re Winship*, there was little consideration of its operation and effect. The US Supreme Court did not define reasonable doubt, nor did it address the issue of whether and to what extent, the reasonable doubt standard should be explained to the jury. The failure to address the relationship or conflict between the reasonable doubt and the ideas reflected in such terms as certainty and moral certainty, has led the US Supreme Court to revisit the issue and discuss the reasonable doubt instructions several subsequent cases, but to no avail.

Overall, the US Supreme Court's case law on the reasonable doubt standard boils down to little analysis of the actual meaning of reasonable doubt and the effect the reasonable doubt instruction has on juries.

III. Definition of the reasonable doubt standard in the Anglo-Saxon world

There is no definitive definition on what amounts to reasonable doubt that is universally applied to the common law systems. Nor is there a consistent definition applied within any one common law jurisdiction. Common law systems, where jury instructions are central to criminal trials – because the jury has to weigh the evidence and decide the facts – have not yet developed a definition that escapes criticism.

In the US, the definition of reasonable doubt varies not only from state to state, but also among the Federal Circuit Courts of Appeal. Some jurisdictions adopt pattern criminal jury instructions, which provide a definition of sufficient clarity to enable an ordinary juror to understand it and apply it. For example, Pattern Criminal Jury Instructions of the US Court of Appeals for the Sixth Circuit provide:

> Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence.
> Proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives. If you are convinced that the government has proved the defendant guilty beyond a reasonable doubt, say so by returning a guilty verdict. If you are not convinced, say so by returning a not guilty verdict.

By contrast, the US Court of Appeals for the Seventh Circuit contains no instruction regarding the definition of the reasonable doubt standard. In *United States v. Glass*, the Seventh Circuit stated that attempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury. In *Glass*, the Court stated:

> [T]hat is precisely why this circuit's criminal jury instructions forbid them. 'Reasonable doubt' must speak for itself. Jurors know what is 'reasonable' and are quite familiar with the meaning of 'doubt.' Judges' and lawyers' attempts to inject other amorphous catch-phrases into the 'reasonable doubt' standard, such as 'matter of the highest importance,' only muddy the water. This jury attested to that. It is, therefore, inappropriate for judges to give an instruction defining 'reasonable doubt,' and it is equally inappropriate for trial counsel to provide their own definition. Trial counsel may argue that the government has the burden of proving the defendant's guilt 'beyond a reasonable doubt,' but they may not attempt to define 'reasonable doubt.'

Similar to the Seventh Circuit's position, the United Kingdom Court of Criminal Appeal (now superseded by the Court of Appeal of England and Wales) advised lower courts judges against providing a definition of what amounts to proof beyond a reasonable doubt. Lord Chief Justice Goddard of the Court of Criminal Appeal remarks in *Regina v. Summers* (1952) are telling:

> I have never yet heard any court give a satisfactory definition of what is a "reasonable doubt," and it would be very much better if

> that expression was not used. Whenever a court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity.

Canadian appellate courts have also declined to define reasonable doubt.

IV. Reasonable doubt in the practice of the European Court of Human Rights

In 1969, the European Commission of Human Rights rendered what appears to be the first definition of the reasonable doubt standard in what is known as the *Greek* case. The Commission was tasked with deciding what standard of proof to apply in evaluating evidence related to allegations of torture under Article 3 of the European Convention on Human Rights (ECHR). The Commission held that allegations of breaches of Article 3 must be proved beyond a reasonable doubt, defining it as "not a doubt based on a merely theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be given drawn from the facts presented."

Nine years later, the European Court of Human Rights (ECtHR) reaffirmed and elaborated this definition in *Ireland v. United Kingdom* (1978). It added that proof of beyond reasonable doubt may follow from "the coexistence of sufficiently strong, clear, and concordant inferences, or of similar unrebutted presumptions of fact."

This definition, although not very detailed or precise, sets the minimum standard to which States party to the ECHR and subject to the ECtHR's jurisdiction are obliged to adhere. Of course, nothing prevents national legislators from developing a standard that provides more protection than the minimum standard allowable under ECtHR jurisprudence.

V. Burden of proof

In common law systems the term "burden of proof" can have two meanings: the *burden of persuasion* and the *burden of production*. Distinguishing between these two meanings is important and necessary due to the distribution of functions between the judge and the jury. Generally, the trial judge decides questions of law, whereas the jury decides questions of fact. This explains why juries are referred to as the fact-

finder (also known as the trier of fact), a term that also applies to judges when conducting a non-jury trial, also known as a bench trial.

Throughout the trial proceedings, the judge instructs the jury on its obligations, the various rights afforded to the accused, how to weigh the credibility of witnesses, and how to assess other evidentiary matters, such as the testimony from the accused, expert witness testimony, conflicts of interest, and character evidence. At the end of the trial and before the jury deliberates, the judge gives the jury final instructions on what it must consider before reaching a verdict.

The judge instructs the jury that the burden of proof is always on the prosecution and that the accused has the right to rely upon the failure or inability of the prosecution to establish beyond a reasonable doubt any essential element of a crime charged.

The defense is not required to present any evidence, save for when raising a defense, and, even then, the evidence need not rise to the reasonable doubt standard. The defense can remain silent during the trial proceedings yet still argue that the prosecution failed to prove the charges beyond a reasonable doubt. This refers to the first meaning of the burden of proof, also characterized as the ***burden of persuasion***, risk of non-persuasion, the legal or persuasive burden, or the ultimate burden – a party's obligation to prove an assertion or charge. When it comes to the ultimate issue of guilt, in common law systems the prosecution bears the burden.

The second meaning of the burden of proof, characterized as the ***burden of production*** or the burden of going forward or evidential burden, refers to the order of presentation of evidence prescribed by law. This meaning generally applies when the defense opts to raise an affirmative defense or claim an alibi. In other words, the burden of production specifies who is required to present the requisite evidence in order for the fact-finder to decide on the affirmative defense or claim of alibi. The burden of production can also be referred to as the duty of passing the judge, since it is the trier-of-law (the judge) who decides whether a party has met its burden of production for the issue to go before the fact-finder (the jury).

VI. Summary and cautionary notes

The reasonable doubt standard, together with the *in dubio pro reo* principle and the presumption of innocence, is the bedrock of criminal trials in common law systems.

Whatever catapulted the reasonable doubt standard to the forefront as the preeminent and universally accepted standard of proof in common law systems is no more relevant today than the historical backdrop of how *intimate conviction* (generally described as the personal opinion the judge forms after inward reflection on the evidence discussed by the parties at trial) became the standard of proof in civil law systems. It does little in resolving the persistent difficulties in framing a clear, concise and consistent definition of the standard. The US jurisprudence is rather telling: recurrent problems in defining and applying the reasonable doubt standard persist, as the different US Circuit Courts of Appeal accept a wide variety of instructions on the reasonable doubt standard.

Arguably, the definitional differences between the reasonable doubt standard and *intimate conviction* standard are a matter of semantics. There appears to be little, if any, difference in the quality of proof between these two different standards. Both require application of the *in dubio pro reo* principle, resulting in a high degree of proof tantamount to near certainty, eschewing fanciful or inconsequential doubts.

Just as for civil law judges there should be no real dilemma in discerning the qualitative substance of evidence required to be satisfied of the guilt of an accused to an *intimate conviction*, the lack of a concise and universally accepted definition of reasonable doubt should not pose a dilemma for judges in judge-tried cases in common law systems. Judges, by virtue of their training and knowledge of the law and rules of evidence, are expected to assess the testimonial and documentary evidence presented during a criminal trial and apply the requisite law in determining whether the prosecution has met his or her burden of proving the elements of the charged crimes.

The reasonable doubt standard does not operate in the abstract. It is intrinsic to a number of other mechanisms, from rules of procedure and evidence to a set of jury instructions invoked throughout the trial. Were jury trials to be introduced in a hybrid

system, such as in Macedonia, numerous obstacles and challenges can be anticipated, such as:

- Procedures would have to be developed to select juries free of bias, and to keep them that way for the duration of trial and deliberation;
- Formal rules of procedure and evidence would have to be developed to protect the jury fact-finder from prejudicial and other inadmissible evidence;
- A list of evidentiary objections would be required to ensure that the rules of procedure and evidence were being implemented;
- The judges would have to be trained in addressing the evidentiary objections while assessing the evidence contemporaneously as it is presented at trial;
- The lawyers would have to be trained in making the timely and specific objections at trial to make a record for appeal;
- Clear instructions for the jurors would have to be developed to guide the jurors at each phase of the trial; and
- A clear, concise and easily understood definition of reasonable doubt would need to be developed.

Another critical challenge is the lack of transparency. Jurors do not explain their verdicts. They deliberate secretly. They do not give an accounting on what evidence was accepted or rejected, what weight was afforded to any particular evidence or testimony, the credibility of witnesses or how they reached their individual decision on the evidence.

Finally, aside from the challenges already noted, there is also a host of issues related to resources that must be considered, such as:

- Retrofitting the courthouses and courtrooms to accommodate jurors, compensating jurors for their time (similar to paying lay judges who are currently striking in demanding higher fees);
- Imposing disciplinary measures on those unwilling to respond to jury summons;
- Costs for summonsing and holding disciplinary hearings on causes for not being sanctioned for failing to respond to summons; and
- The added time it would take to conduct jury trials, which by all accounts and

measures, take considerably longer than judge-tried cases.

Macedonia is well advised not to succumb to the siren calls of legal experts from the US Embassy and consulting contractors from the United States Agency for International Development (USAID), who in the past have urged Macedonia to adopt a jury system.