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NATURE, IMPORTANCE AND LIMITS OF FINDING THE TRUTH IN CRIMINAL PROCEEDINGS

The paper analyzes reasonable possibilities of finding the truth in modern criminal proceedings. Instead of the often uncritical, and sometimes even populist referring to the so-called principle of "material truth" as the main objective of criminal proceedings in continental legal tradition, the authors point out that the nature, importance and limits of finding the truth in criminal proceedings must be perceived in relation to other values included in the modern procedure, such as the presumption of innocence, adversary principle, equality of arms, the rules in dubio pro reo etc. Therefore, in a brief overview of the relevant philosophical movements, the authors first point out that the very notion of truth, which is inevitably philosophical, is inaccessible and enigmatic. It is highlighted that referring to the truth as an objective which should be reached in criminal proceedings is often a specific alibi for many open issues inherent to the system of criminal justice coercion. It is specifically highlighted that due to its "normative" nature, judicial truth inevitably differs from scientific, philosophical, ethical or aesthetic truth, and that under the modern circumstances it also has a number of "rivals" in the form of the value of criminal procedure it must be harmonized with. The authors believe that modern criminal procedure is most appropriately demonstrated in the so-called "adversary" model of process which is a unique mixture of solutions taken from the two major legal systems. Instead of insisting on pure solutions taken from the continental or Anglo-American

legal heritage, the authors propose a formula which includes adequate solutions of both systems. The obligation of the prosecutor to prove the allegations of indictment in discussion with the defense, together with the judicial restraint in the search for evidence supporting the indictment and the possibility to introduce evidence ex officio in favour of the defense could eliminate the most significant objections raised in both systems. Thus, adversary proceeding would be spared from the complaints regarding its lack of efficiency when it comes to the accused without the professional support, while the inquisitorial procedure would cease to be a mechanism in which the court, searching for truth, could call into question its own impartiality and the presumption of innocence of the accused.

Key words: *Truth. – Evidence. – Objective of criminal proceedings. – Inquisitorial proceedings. – Adversarial proceedings. – Equity. – Equality of arms. – In dubio pro reo.*

1. INTRODUCTION

The increase in the number of criminal cases which is not supported by an adequate increase in the number of judges and prosecutors, the occurrence of serious crimes with a supranational character, excessive formalism with a view to providing a better defense of the accused, hypertrophy of criminal incriminations, the need to bring criminal matters to justice etc.,[1] are just some of the difficulties faced by the criminal justice system of continental Europe. In an attempt to find satisfactory solutions. classical procedural principles are reexamined, sharp differences between civil and criminal proceedings are blurred and the basic procedural concepts are brought into question.[2] When it comes to the principles of criminal procedure law, special attention is devoted to the inquisitorial principle, the principle of judicial responsibility and in particular the principle of examination of the so-called "material" truth. They are the principles that delienate the role of the court in determining the facts in criminal proceedings, which is one of the significant differences between the approaches of continental and Anglo-American models.

There is a widespread belief that any deviation from the above principles means abandoning the mixed (i.e. inquisitorial) model and acceptance of the accusatory type of criminal proceedings. Moreover, legal experts generally believe that adversarial proceedings imply abolishing the traditional role of investigative judges, but not abolishing the investigative monopoly of state officers which would be required in a consistent implementation of adversarial procedural concept.[3] In other words, advo-

[1] Jean Pradel, *Droit pénal comparé*, Dalloz, Paris 2002[2], 603.

[2] Mirjan Damaška, "Napomene o sporazumima u kaznenom postupku", *Hrvatski ljetopis za kazneno pravo i praksu* 1/2004, 4.

[3] Mirjan Damaška, "O nekim učincima stranački oblikovanog pripremnog postupka", *Hrvatski ljetopis za kazneno pravo i praksu* 1/2007, 5.

cates of investigation led by the prosecutor believe that the court should retain the leadership role at the main hearing (after all, this stand is also supported by defenders of judicial investigation), which is a deviation from the traditional role of judges in the Anglo-American procedure.

In the discussion conducted among legal experts regarding the solutions contained in the Serbian Criminal Procedure Code as of 2011[4] special emphasis is put on the need to determine the truth in criminal proceedings. Since the debate among "truth defenders" showed significant overtones of populism, an average Serbian citizen could have an impression that the methods applied by the medieval Inquisition were much more appropriate to determine the truth from those included in the new Serbian Criminal Procedure Code. There was even a claim of unconstitutionality of the new procedural solution, as Article 32, paragraph 1 of the Constitution of the Republic of Serbia[5] guarantees to the accused the right to public hearing about grounds for suspicion resulting in initiated procedure, and accusations brought against him, while the Criminal Procedure Code stipulates that the grounds of criminal charges shall be discussed *before* the court. "Truth defenders" neglect the fact that Article 6 of the ECHR contains the wording almost identical to the one included in the domestic Constitution, which recognizes the right to " ... public hearing ... by an independent and impartial tribunal ... ". However, the Convention gives full freedom to the member states when it comes to the choice of the type of criminal procedure, as it (rightfully) does not find the phrase "hearing by court" to necessarily imply the inquisitorial type of proceedings.

In this regard, it can be noted that advocates of the truth which would be determined by the court *ex officio* in criminal proceedings overlook that their conclusions regarding unconstitutionality of the new solutions are probably based on inaccurate translation of the original text of the specified provision of the ECHR which guarantees the hearing *by* an independent and impartial tribunal established by law (*par* un tribunal indépendat et impartial, établi par la loi). The very warranties contained in the right to a fair trial prescribed in Article 6, paragraph 1 of the ECHR (and also in Article 32, paragraph 1 of the Constitution), should contribute to overcoming the old dispute between supporters of accusatory and inquisitorial model in favour of "adversarial" model which is, according to the opinion of certain authors,[6] a future European model of criminal

[4] Criminal Procedure Code – the CPC, *RS Official Gazette* N^{os}72/11, 101/11, 121/12, 32/13 and 45/13.

[8] Constitution of the Republic of Serbia, *Official Gazette* N^{o} 98/06.

[6] Mireille Delmas-Marty, "Introduction", *Procédures pénales d'Europe (Allemagne, Angleterre et pays de Galles, Belgique, France, Italie)* (sous la dir. de M. Delmas-Marty), coll. "Thémis", Presses Universitaires de France, Paris 1995, 38. Delmas-Marty highlights that, as a result of atrocities and destruction committed in the Second World

proceedings. Accordingly, Article 15, paragraph 4 of the CPC stipulates that the court may order a party to propose additional evidence, or, exceptionally, order such evidence to be examined, if it finds that the evidence that has been examined is contradictory or unclear, and finds such action necessary in order to comprehensively examine the subject of the evidentiary action. Therefore we could say that the *limits of determining the truth in criminal proceedings are defined by guarantees contained in adversarial model of criminal proceedings*.

As the debate about truth among Serbian legal experts was chiefly biased, shallow and, considering the nature of the stated arguments, outdated, further analysis of the real reach of determination of the truth in criminal proceedings is justified and reasonable. In other words, the nature, importance and reach of truth determined by the court in criminal proceedings should be further considered.

2. ON (IM)POSSIBILITY OF DEFINING THE NOTION OF TRUTH

It would be difficult to find a notion that has historically caused more difficulties to those who tried to define it and thus mentally "tame" it, than the notion of truth. Dozens of philosophers have experienced the extent to which this notion, which is so commonly used in everyday conversation, is inaccessible and enigmatic. But it is not only philosophers who have always been attracted to the notion of truth. As noted, this deceptive notion has been a matter of interest to all those who desire to know about anything whatsoever.[7] As the absence of a satisfactory result is common to numerous approaches and attempts to define the notion of truth, it is not surprising that many authors question the justification of made efforts. "All that I can conclude now, as I concluded when I first encountered those theories, is that I have no idea how to define the truth" says Finkelstein,[8] while Vardy states that "more than ever the search for truth seems to b e folly".[9] For some, truth is "an indefinable con-

War, the liberal ideology regarding the state limited by law gave way to the concept of the state of law based on the existence of basic freedoms and rights. It is based on the awareness that the law could violate the core principles of respect and dignity of each human being, so the state must be protected not only *by* laws, but also *from* laws, and even from itself. Mireille Delmas-Marty, "Introduction", *Libertés et droits fondamentaux Introduction, textes et commentaires* (sous la dir. de M. Delmas-Marty, C. Lucas de Leyssac), coll. "Points Essais", Le Seuil, Paris 2002[2], 10.

[7] Lawrence E. Johnson, *Focusing on Truth*, Routledge, London 1992, 1.

[8] Ray Finkelstein, "The Adversarial System and the Search for Truth", *Monash University Law Review* 1/2011, 135.

[9] Peter Vardy, *What is Truth?*, UNSW Press, Sydney 1999, 179.

cept",[10] and there are other extreme views that defining truth is meaningless and that truth is dead.[11]

The extent to which all that is related to the definition of the notion of truth is tinged with controversy is perhaps best illustrated by the fact that there are disagreements even regarding the number of theories about this notion. According to Vardy there are "two basic theories of truth" – realism and anti-realism.[12] Schantz refers to three "substantive" theories of truth –correspondence, coherence, and pragmatic.[13] The Fontana Dictionary of Modern Thought refers to four not necessarily identical groups.[14] Although the scope of this paper does not allow any deeper analysis of various theories of truth, in order to facilitate following the discussion and the basic theses which will be presented, it is necessary to briefly outline the key ways of thinking about this notion.

According to classical realist theory, and the perception which is most frequently expressed in philosophy as well as in other areas of knowledge, truth is realized as simply a matter of correspondence between statements or sentences and the world or parts of the world (correspondence theory).[15] In a nutshell, according to classical theory as well as the widespread amateur view, "a statement is true just in case it corresponds to a fact, and false just in case it does not correspond to a fact".[16] For traditionalists, truth in no way depends on our beliefs, or on whether we are able to grasp it or not. Truth is objective and hinges only on the way the world is,[17] it is like a "hidden piece of gold", waiting to be discovered and brought to light.[18]

Nevertheless, although apparently simple and easy to accept, the mentioned view actually reveals little about the notion of truth. Here, an abstract notion such as truth is explained by other abstract notions which must be clarified as well. Classical theory does not provide an answer to

[10] Donald Davidson, "The Folly of Trying to Define Truth", *Journal of Philosophy* 6/1996, 263, 265.

[8] See Bill Kovach, Tom Rosenstiel, *The Elements of Journalism*, Crown Publishing Group, New York 2001, 40.

[12] P. Vardy, 28.

[13] Richard Schantz (edited by), *What is Truth?*, Walter de Gruyter, Berlin, New York 2002, 5.

[14] Alan Bullock et al. (editors), *The Fontana Dictionary of Modern Thought*, Fontana, London 1988[2], 876.

[15] Jeff Malpas, "Speaking the Truth", *Economy and society* 2/1996, 158.

[16] R. Schantz, 1.

[17] *Ibid*., 2.

[18] See Thomas Weigend, "Should We Search for the Truth, and Who Should Do it?", *North Carolina Journal of International Law and Commercial Regulation* 2/2011, 395.

the question what truth is if there are no clear concepts about the meaning of notions such as correspondence, reality and fact. Thus, criticisms claiming that classical theory contains a certain amount of tautology are justified, as their advocates do not provide a clear distinction between the notions used in determination, such as facts, and the very notion which is determined (the truth).[19] Nevertheless, perhaps the most important problem which the classical theory has failed to resolve is the view that it is possible to examine pure facts from the outside world without the restrictions imposed by the language and beliefs, i.e. that it is possible to compare the incomparable – statements to facts, bearing in mind that they are different categories. Therefore critics of the classical theory point out that statements and beliefs may be compared with other statements or beliefs to see if they harmonize with each other but we can never compare or confront statements or beliefs with the facts or with reality.[20]

Deficiencies of the classical correspondence theory caused the development of a number anti-realistic theories, the most characteristic of which is coherence theory of truth. The basis of this view is the negation of the stand according to which true facts exist *a priori*.[21] According to these theories, truth is what reasonable people agree upon after a complete and fair discourse.[22] Contrary to the classical theory, the stand of the correspondence theory is that "statements are compared with statements, not with "experiences", not with a "world" nor with anything else".[23] In that regard, "each new statement is confronted with the totality of existing statements that have already been harmonized with each other. A statement is called correct if it can be incorporated in this totality. What cannot be incorporated is rejected as incorrect... There can be no other "concept of truth" for science". In other words, instead of the view that truth is a statement which corresponds to the facts in the outside world,

[19] Horwich underlines: "But this idea, in the absence of elucidating accounts of "correspondence", "fitting", "reality", and "fact", seems more to relocate the issue than to settle it. Even worse, it may well be that some of these allegedly defining notions should themselves be explained in terms of "truth", rather than the other way around. For example, it is not implausible that our conception of a "fact" is simply that of a "true proposition"." Paul Horwich, *Truth – Meaning – Reality,* Oxford University Press, New York 2010, 3. Much the same, Schantz states that the traditional theory is a "bad metaphysical theory because the central concepts it invokes possess no explanatory value at all". R. Schantz, 2.

[20] *Ibidem*.

[21] T. Weigend, 395.

[22] Jacqueline S. Hodgson, "Conceptions of the Trial in Inquisitorial and Adversarial Procedure", *Judgment and Calling to Account* (eds. A. Duff et al.), Hart Publishing, Oxford 2006, 223, 225.

[23] See Wolfgang Künne, *Conceptions of Truth*, Oxford University Press, New York 2003, 381.

coherence theory points out that truth is the property of belonging to a harmonious system of beliefs.[24]

The mentioned philosophical and cognitive theories regarding the notion of truth have influenced major criminal procedure systems. In general, the correspondence theory has found its place primarily in the inquisitorial procedure of the continental legal heritage, while the adversarial procedural model, adopted in Anglo-American law, relies on coherence theory of truth in realization of the notion of truth.[25] In this case, as well as in other comparisons between the two major procedural systems, it is necessary to avoid stereotypes and simplified generalizations. Caution is much needed nowadays when mutual influences are obvious, while assuming certain solutions has become common, so it is becoming increasingly difficult to establish clear boundaries between the continental and Anglo-American model of criminal proceedings. Moreover, it is doubtless that determination of truth is one of the basic goals of criminal proceedings in both procedural systems.[26] Nevertheless, the ways of reaching this goal significantly differ.

The relationship of the continental type of criminal proceedings towards the determination truth has its roots in medieval law. Its origins are related to 12th century and the "Roman-canonical proceeding", which was a combination of certain elements of the secular and church law. Although Roman criminal proceedings were generally accusatory, new proceedings arose which were conducted against offenders who committed crimes so severe that they violated *Res publica*, i.e. public interest.[27] In such case, the state authorities were entitled to undertake criminal prosecution, i.e. to *ex officio* initiate the proceedings whose essence was the investigation (*inquisitio*) led by the judge. In late 12th and early 13th century, inquisitorial proceedings were accepted by the church as well, but only as one of the three forms of criminal proceedings. Over time, inquisitorial proceedings completely displaced accusatory type of proceedings from the church law, which had a decisive influence on the proceedings conducted before secular courts.[28]

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[24] Paul Horwich, *Truth*, Blackwell, Oxford 1998[2], 9.

[25] See T. Weigend, 396.

[26] Lord Denning says that, in English criminal proceedings, the judge sits to hear and determine the issues raised by the parties, not to conduct the investigation on behalf of society at large. Even in England, however, the judge is not a mere umpire to answer the question: "How's that?", but his ultimate object is to find the truth and to do justice according to law. John Spencer, "La preuve", *Procédures pénales d'Europe (Allemagne, Angleterre et pays de Galles, Belgique, France, Italie)* (sous la dir. de M. Delmas-Marty), "Thémis", Presses Universitaires de France, Paris 1995, 548, 549.

[27] See Jean-Marie Carbasse, *Introduction historique au droit*, coll. "Droit fondamental", Presse Universitaires de France, Paris 1998, 174, 175.

[28] In its original form, inquisitorial proceedings conducted before ecclesiastical courts did not know of torture. It appeared only after the introduction of a special kind of

Since inquisitorial proceedings were based on the principle that the public interest requires that severe crimes do not remain unpunished (*Interest rei publica not Maleficia remaneant impunita*),[29] one of its main characteristics is establishing the truth in the public interest. The very proceedings which included deciding about such an important bet had to be objective and stern, so it is logical that the truth was distinguished by objective character. This implied the existence of certain evidentiary rules whose objective was to eliminate the judge's self-will in assessing the evidence.[30] Therefore, such truth was named "formal", and after the introduction of free evaluation of evidence by the judge it was named "material" (informal) truth.[31] Although material truth is also objective in its character and determined in the public interest, evaluation of evidence is done according to the judicial discretion. Regardless of whether the truth in criminal proceedings is determined through the legal value of certain evidence or judicial discretion, the common denominator is the perception of the possibility of finding the truth in compliance with the correspondence theory.[32]

As opposed to inquisitorial principle of determining the truth, in jurisdictions of the common law legal tradition the truth in criminal proceedings was determined by a different method. It is based on the assumption that the presentation of different versions of "truth" by the opposing parties and their discussion of the introduced evidence brings to the surface untrue claims of the parties, which further results in reaching real knowledge about the historical event discussed before the court.[33]

As a contrast to the continental perception of the primary role of governmental authorities (prosecutor's office and the court) in the process of determining the truth, the adversarial system, leaving evidentiary initiative to the parties, grants to the court a generally passive role when it comes to searching for the truth. Accordingly, the judge's role is prima-

such proceedings (*inquisitio haereticae pravitatis*), which were conducted before special inquisitorial courts to suppress heresy. See Vladimir Bayer, *Kazneno postupovno pravno Prva knjiga Poviestni razvoj*, Knjižara Zlatko Streitenberger, Zagreb 1943, 49–58.

[29] In church law, it was the interest to preserve the purity of faith, i.e. to fight heresy.

[30] J.-M. Carbasse, 176.

[31] V. Bayer, 351.

[32] As for European countries which went through a period of socialism, the predominant Marxist doctrine had a specific importance in modeling their procedural systems. This, then officially accepted philosophy, promoted pure correspondence theory of truth, amended by certain ideological determinants. See George Ginsburgs, "Objective Truth and the Judicial Process in Post-Stalinist Soviet Jurisprudence", *The American Journal of Comparative Law* 1–2/1961, 54, 55.

[33] See Keith A. Findley, "Adversarial Inquisitions: Rethinking the Search for the Truth", *New York Law School Law Review* 3/2011–2012, 914.

rily to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies of the case on either side.[34] The very nature of the adversarial system, with special emphasis placed on the principle of judicial impartiality, cannot be easily connected to the inquisitorial powers which would be granted to the court. Nevertheless, it does not mean that the judge would be completely deprived of the possibility to intervene in exceptional cases during the trial. Lord Denning says that the judge's role is to ask questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points the advocates are making; and at the end to make up his mind where the truth lies.[35] Although in the English law the judge rarely takes evidentiary initiative, his power to interrogate witnesses not proposed by the parties is doubtless. In that regard, it is important to underline that the judge can and must act in this way when it is necessary to *ensure a fair trial to the defense*.[36]

Like various philosophical and cognitive theories of truth, various criminal procedural systems have certain advantages and deficiencies, which means they cannot be *a priori* considered absolutely correct or wrong. The fact that pure models are not adequate for the present moment is supported by a very strong influence of adversary solutions on the continental law in the previous decades,[37] while on the other hand, there are increasingly vocal demands that the traditional common law systems take over certain solutions typical for inquisitorial proceedings, especially those related to a more active role of the court in rules of evidence. Con-

[34] *R v Whitborn* (1983) 152 CLR 657, 682 (Dawson J), *in* Joseph M. Fernandez, "An Exploration of the Meaning of Truth in Philosophy and Law", *The University of Notre Dame Australia Law Review* 4/2009, 70.

[35] *Jones v. National Coal Board [1957] 2 QB 55 at 64, in* Mike McConville, Geoffrey Wilson (ed. by), *The Handbook of the Criminal Justice Process*, Oxford University Press, Oxford 2002, 339, 340.

[36] *R. v. Wellingborough Magistrates' Court, ex pte François (1994) 158 J.P.* 158J, *in* Spencer, 541.

[37] Significant influence which in particular American criminal justice system and procedural law had in other parts of the world, including continental Europe, has led many authors to name this process simply "Americanization of European criminal proceedings". Thus, Wiegand compares "Americanization" of modern European systems with reception of the *ius commune* in the Middle Ages in that continent. Wolfgang Wiegand, "The Reception of American Law in Europe", *American Journal of Comparative Law* 2/1991, 246–248. Even the legal systems such as German, Italian and French could not resist the impact of adversary procedural institute. See Máximo Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure", *Harvard International Law Journal* 1/2004, 1–3.

sequently, it is now much more difficult to define a system as a purely adversarial or inquisitorial model of criminal proceedings. The reality is such that it highlights an increasing number of mixed systems which combine positive solutions of "both sides".

Before the views about the solutions of inquisitorial and adversarial models which should be used in the search for truth in criminal proceedings are presented, it is necessary to discuss the problem of truth in the light of the limits which exist in respect of its determination in the court proceedings.

3. SPECIFICITIES OF DETERMINATION OF TRUTH IN CRIMINAL PROCEEDINGS

As specified above, regardless of any differences in the method and the position of determination of truth on the scale of values, both the inquisitorial and adversarial procedure underline finding the truth as one of their priorities. Is the truth really the main objective of modern criminal proceedings or is it an overestimated idea without any reasonable justification? And, is it justified to remember that truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much?[38]

Although justice is inconceivable without it, the truth reached in the criminal proceedings has certain specific features which distinguish it from scientific, philosophical, ethical or aesthetic truth. Volk claims that judicial truth is limited, distorted and formalized.[39] Limits of judicial truth is a consequence of the existence of such provisions of the criminal law which prescribe the elements of criminal offence (*premisa maior*), which is, according to Župančić, a too "raw" framework relative to numerous concrete factual (*premisa minor*) manifestations in real life.[40] Besides, the judge's acts are limited by the request of the authorized prosecutor, which is a consequence of the accusatory principle whose consistent application would order that the court be deprived of the initiative to introduce evidence by its own motion.[41] Although certain deviations from the court's wholly passive role in introducing evidence are present in the

[38] See J. M. Fernandez, 69.

[39] Klaus Volk, "Quelques vérités sur la vérité, la réalité et la justice", *Déviance et société* 1/2000, 103.

[40] In this regard, he denies applicability of syllogistic logic in law, finding that here premises are not given but have yet to be created. See Boštjan M. Zupančič, "Pravo na ne-samooptuživanje kao ljudsko pravo", *Primena međunarodnih krivičnih standarda u nacionalnim zakonodavstvima* (red. Z. Stojanović et al.), Tara 2004, 53.

[41] V. Bayer, 339.

English law as well, the main problem which arises in this regard relates to the ability of the court to introduce evidence within the limits of the indictment[42] not only in favour, but also to the detriment of the accused. The initiative of the court to introduce evidence to the detriment of the accused cannot be easily "reconciled" with the presumption of innocence, which is further discussed below.

One of the specific features of judicial truth is that, as a contrast to scientific truth which includes judgments about the reality, it refers to *normative* conclusions which are partially based on *factual* conclusions, and therefore it cannot be identified with the scientific, philosophical, ethical or aesthetic truth. Moreover, the conclusions reached in criminal proceedings are limited by the fact that none of them is characterized by purely determinative nature, but the authority of a judged matter gives it a partially "normative" nature.[43] Therefore, the *determinative dimension* of the conclusions forming the basis of the court judgment can be assessed in the light of truth understood in scientific sense, which justifies, at least partially, attributing the presumption of truthfulness to the judged matter.[44] On the other hand, its *normative dimension* does not allow for assessment within the boundaries of truth, unless this term is given another meaning which links it to values such as authority, validity, justice and legitimacy.

By introducing the concept of judicial discretion, finding the truth in criminal proceedings is made dependent on a subjective factor which plays an important role in determining the facts relevant to the adjudication of a criminal matter. That is why truth should not be seen as the ultimate objective of criminal proceedings, but rather as the concept of transfer, i.e. as a transitional stage between the reality, its normative boundaries and fair adjudication.[45] Therefore, the decision of the judge is one of the core factors in normative legitimacy of truth.[46] Also, the very process

[42] As a reminder, in German criminal proceedings, the court is authorized to make a judgment for criminal offense specified in the indictment which results from the main hearing, which is justified by the necessity of determining a "material" truth. Such crossing the boundaries of the indictment raises the question of the extent to which the function of criminal prosecution is performed by the prosecutor, and the extent to which it is performed by the court, i.e. what remains of accusatory principle and the initiative of the prosecutor without which the court does not act (*nemo iudex sine actore*) and does not cross the determined limits of the indictment (*iudex ne eat ultra petitum*).

[43] Michel van de Kerchove, "La vérité judiciaire: quelle vérité, rien que la vérité, toute la vérité", *Déviance et société* 1/2000, 95, 96.

[44] *Ibid.*, 96.

[45] K. Volk, 107.

[46] Grubiša correctly highlights subjective limitation in the determination of truth which is the result of the judge's prejudice and his relation to certain phenomena in life, susceptibility to pressure from public opinion and leniency towards various external influ-

of deciding in criminal proceedings is characterized by a specific type of conclusions based on argumentation. Its "adversarial" character and "dialogue" or dialectical structure of the proceedings are undoubtedly one of the best guarantees for determining the truth in criminal proceedings.[47] It is one of key differences in comparison to criminal proceedings of inquisitorial type, which insist on a model of a monologue, binding the court to determine the truth in criminal proceedings *ex officio*.[48]

Another consequence of adversarial structure of criminal proceedings is the existence of certain rules on exclusion of illegally obtained evidence.[49] Regardless of the particular system of unlawful evidence,[50] the existence of rules of evidentiary exclusion is a guarantee that the criminal proceedings include the possibility of control and discussion of introduced evidence.[51] Thus, according to the motto *ex iniuria ius non oritur*, the government limits itself in its repressive activity, which gives legitimacy to the moral power of criminal conviction, and also protects the presumption of innocence during the criminal proceedings.[52]

The existence of the presumption of innocence, as well as other elements of the right to a fair trial such as judicial impartiality, adversarity between the parties and equality of arms, relieves the criminal proceedings of unnecessary forms which were a goal in and of themselves and introduces the legality and guarantee into ethics of responsibility, rather than into ethics of forms which caused inefficiency of criminal proceedings.[53] Therefore, when it comes to the court's relation to the de-

ences. Mladen Grubiša, *Činjenično stanje u krivičnom postupku*, Informator, Zagreb 1980[2], 26.

[47] M. van de Kerchove, 96.

[48] Sergio Moccia, "Vérité substatielle et vérité du procès", *Déviance et société* 1/2000, 111.

[49] Geneviève Guidicelli-Delage (dir.), *Synthèse – Les transformations de l'administration de la preuve pénale: perspectives comparées. Allemagne, Belgique, Espagne, Etats-Unis, France, Italie, Portugal, Royaume-Uni*, Mission de recherche Droit et Justice, décembre 2003, 3 (*http://www.gip-recherche-justice.fr/catalogue/PDF/syntheses/107-preuve-penale.pdf*)

[50] The system of unlawful evidence depends on the very structure of the criminal proceedings (adversarial or inquisitorial, i.e. mixed), the relationship between the major criminal justice tendencies (for effective criminal prosecution on the one hand, and for protection of human rights and freedoms, on the other), the regime of determining unlawfulness of evidence (*ex lege* and *ex iudicio*) and the degree of court's discretion in assessing the lawfulness of evidence. See Igor Bojanić, Zlata Đurđević, "Dopuštenost uporabe dokaza pribavljenih kršenjem temeljnih ljudskih pava", *Hrvatski ljetopis za kazneno pravo i praksu* 2/2008, 974.

[51] S. Moccia, 112.

[52] See Davor Krapac, "Nezakoniti dokazi u kaznenom postupku prema praksi Europskog suda za ljudska prava", *Zbornik Pravnog fakulteta u Zagrebu* 3/2010, 1208.

[53] S. Moccia, 110.

termination of truth, the tension between the request for impartiality of the court and the presumption of innocence of the accused on one hand, and inquisitorial authorities of the court to introduce evidence in order to determine truth on the other hand comes to the forefront.[54] Namely, the investigative and judicial roles are fundamentally opposed in character, as to investigate means, according to Leclerc, to "heat up" the hypotheses, to believe in them, to strive to maintain them and to abandon them only when they fail. On the other hand, to judge means to doubt, to criticize hypotheses and not to accept them before they become doubtless.[55] In each of these cases, the concern for legitimacy overpowers a mere desire for truth, which may result in non-acceptance of the proposal which could lead to the determination of truth, or to acceptance of the proposals which will not have any impact on decision of the judge.[56]

In criminal proceedings, unlimited search for truth is abandoned also because a just outcome of the proceedings may be more important in public than the discovery of the whole truth. Such perception to some extent also governs the courts, which "recognize a greater competing public interest – the public interest in a just outcome – rather than the public interest in the discovery of the truth".[57] On the other hand, modern criminal proceedings also require cost efficiency of the procedure, which also prevents the unlimited search for the facts. Today, the excessive duration of proceedings, regardless of the fact that it may have been led by the efforts to fully establish the facts, is no longer considered acceptable in compliance with the well-known motto "justice delayed is justice denied". In addition to the above, there are other objectives which are competitors to determination of the truth in criminal proceedings. Thus, among other things, the alleged "rivals of the truth" in the proceedings are maintaining confidence in the legal system, creating a sense of its predictability and developing acceptable social values.[58]

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[54] The stand of the European Court of Human Rights – ECHR is that the existence of the presumption of innocence requires that members of the court in the exercise of their functions do not start from the prejudice that the accused committed the crime, that *onus probandi* rests on the prosecutor, and that doubt is in favour of the accused. Moreover, the prosecutor is obliged to provide sufficient evidence to form the basis for the conviction (ECHR, *Barberà*, *Messegué and Jabardo v. Spain*, 6 December 1988, § 77).

[55] Henri Leclerc, *Un combat pour la justice*, La découverte, Paris 1994, 271.

[56] M. van de Kerchove, 98.

[57] J. M. Fernandez, 72.

[58] Weinstein says: "Trials in our judicial system are intended to do more than merely determine what happened. Adjudication is a practical enterprise serving a variety of functions. Among the goals – in addition to truth finding – which the rules of procedure and evidence ... have sought to satisfy are economizing of resources, inspiring confidence, supporting independent social policies, permitting ease in prediction and application, adding to the efficiency of the entire legal system and tranquilising disputants." Jack B. Wein-

One of the procedural rules which come into "conflict" with the determination of truth in criminal proceedings which should be mentioned is the case of the acquittal for lack of evidence. The existence of this basis for acquittal shows that the truth about the event which is the subject matter of the trial shall therefore not be undoubtedly determined. Were the question of truth indeed central in the criminal proceedings, acquittal in this case would be possible only if it were indisputably established in the criminal proceedings that the accused did not commit the crime.[59]

The above leads to the conclusion that, in addition to the "social construction of reality", there is also its legal construction which arises in criminal proceedings.[60] It is reached through the discussion focused, in Kelsen's words, on the problem of attributability, i.e. finding or creating by the legal norms meaningful connections between a certain person and his behavior.[61] Moreover, the historic event which is the subject matter of the discussion in criminal proceedings is as a rule, by the very factual description contained in the indictment, reduced to elementary presentation of extremely rich, multidimensional events (metaphorically speaking, factual simplification of reality in criminal proceedings resembles the recomposition of a symphony for a mobile ringtone). In an effort to determine what really happened in the past, the judge moves within the framework of acceptability of the event set forth in the indictment, and if he assesses it as such, he considers it to be truthful.[62] Having satisfied him-

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stein, "Some difficulties in Devising Rules for Determining Truth in Judicial Trials", *Columbia Law Review* 2/1966, 223, 241.

[59] It is obvious that in most procedural systems there is a certain logical inconsistency when it comes to acquittal for lack of evidence. Namely, if it is not proven that the accused committed the crime, he is not declared innocent, but there remains a doubt regarding his guilt with the statement that there was not enough evidence for any other decision. Such approach can be doubtful if we keep in mind that throughout the proceedings the accused enjoyed the presumption of innocence, and that it is justified to confirm such presumption by the court decision at the end of the proceedings, if not proven otherwise. Such solution can be explained by the fact that most of the mechanisms for determining the truth emerged in the inquisitorial model which was above all designed to determine the truth about guilt.

[60] K. Volk, 106.

[61] Jacques Michel, "Procès du doute et vérité judiciaire", *Carrefours sciences sociales et psychanalyse* (sous la dir. de B. Doray et de J.-M. Rennes), L'Harmattan, Paris 1995, 4.

[62] One of the main problems in determination of the truth in criminal proceedings is that the whole concept in the continental legal tradition is based on a realistic understanding of truth, while on the other hand, the methods used in the proceedings are typical of the anti-realistic conception. Thus, for example, in continental legal tradition which is inclined to realistic understanding and *correspondance theory of truth*, it is hard to imagine that the court, even if such claim were true, would believe the defendant that he took someone else's wallet in the tram without the intention to achieve benefit, but just to see whether he is able to do it without being caught, and that he was ready to return it to the

self that the entire event, i.e. sequence of facts must be considered "real", the judge also considers separate facts included in such event to be accurate. It is, therefore, the narrative structure of reality in the determination of which the conviction of the judge plays an important role.[63]

The question of truth in criminal proceedings is paid much more attention in theoretical debates than in practice. Serious analysis definitely shows that truth in court practice does not have the importance attached to it by the doctrine. Besides the above difficulties on the way to determining truth in criminal proceedings, the courts face a relatively small number of cases in which the outcome of the proceedings essentially depends on resolving a certain factual mystery. Contrary to amateur understanding that the regular activity of the court includes discovering whether a person is "a killer or a thief", the reality is quite different. In a large number of cases which occur in practice, instead of determination of truth based on the facts, the court's attention is focused on purely legal questions in which beliefs rather than facts are of utmost importance.

Having all this in mind, why does truth still often stand out as the most important objective of criminal procedure, even in legal systems which are not founded on inquisitorial bases? It seems that the reasons are partially due to the need that, by underlining noble goals such as truth, the very proceedings in question be further justified, and those who carry them out reassured that they are doing the right thing.[64] On the other hand, the conclusion that truth as one of the objectives of criminal proceedings should be completely abandoned would not be correct This will be further discussed below.

4. TRUTH AND ADVERSARIAL MODEL OF CRIMINAL PROCEEDINGS

Zupančič rightly reminds us that "whenever in the history of criminal law there was a political desire for increasingly repressive punishment, it was ... done in the name of achieving greater efficiency in deter-

owner. Judicial understanding of the truth in such cases, regardless of the heritage of *correspondance theory* is deeply connected to the existing cultural pattern and the belief that certain events always develop under a specific matrix.

[63] Therefore Volk underlines that, contrary to the belief of advocates of the *correspondence theory*, in court proceedings "reality follows the truth" ("la réalité suit la vérité"). K. Volk, 106.

[64] Thus, Davidson metaphorically says: "We know many things, and will learn more; what we will never know for certain is which of the things we believe are true. Since it is neither visible as a target, nor recognizable when achieved, there is no point in calling truth a goal. Truth is not a value, so the "pursuit of truth" is an empty enterprise unless it means only that it is often worthwhile to increase our confidence in our beliefs, by collecting further evidence or checking our calculations." Donald Davidson, "Truth Rehabilitated", *Rorty and His Critics* (ed. R. B. Brandon), Blackwell, Oxford 2000, 67.

mining the truth", so that the determination of truth was, "after all, the central premise of the existence of the entire Inquisition – and it is still declarative procedural purpose of many dictatorial regimes on the planet".[65] However, contingency on the social context and the restrictions imposed by the criminal procedure itself should not lead to the belief that determination of truth should be completely abandoned.[66] Therefore, it is necessary to determine its place in the criminal proceedings where, as mentioned above, the limits of determination of truth should be understood from the aspect of guarantees included in the right to a fair trial.

Observation of the U.S. Supreme Court Justice Warren Burger, who metaphorically points to differences between adversarial and continental view of criminal proceedings and the place of truth in it, as well as to the consequences that arise from that can serve as a guideline for finding a satisfactory answer. Justice Burger once remarked that if he were innocent he would prefer to be tried by a civil law court, but if he were guilty he would prefer to be tried by a common law court.[67] Although it does not contain a developed theory about the desirable place of truth in criminal proceedings, the mentioned observation leads to the conclusion that this problem should be considered in the light of the presumption of innocence. It is the one of the key elements of legal certainty in the criminal law, and consequently in the guarantee associated with a fair trial.[68] The field in which it is primarily applied is the law of evidence, in particular the rules on burden of proof, but equally the field of assessment of introduced evidence.[69]

In this regard, Beljanski underlines[70] that in the interest of law and justice, the status of the accused, until proved guilty of an offense by final

[65] B. M. Zupančič, 57. For the challenges faced today by human rights in criminal proceedings in various parts of the world see also: Miodrag A. Jovanović, Ivana Krstić, "Ljudska prava u XXI veku: između krize i novog početka", *Anali Pravnog fakulteta u Beogradu* 4/2009, 3–13.

[66] Thus, Damaška states "although the truth we seek in legal proceedings is dependent on social context-contingent rather than absolute-this does not imply that our aspiration to objective knowledge is misconceived, or quixotic". Mirjan Damaška, "Truth in Adjudication", *Hastings Law Journal* vol. 49/1998, 297.

[67] Wayne A. Petherick, Brent E. Turvey, Claire E. Ferguson (ed. by), *Forensic Criminology*, Elsevier Academic Press, Burlington 2010, 55.

[68] For various views on the presumption of innocence see Renée Koering-Joulin, "La présomption d'innocence, un droit fondamental ?", *La présomption d'innocence en droit comparé* (colloque organisé par le Centre français de droit comparé et le ministère de la Justice), Paris 1998, 19–26; Jacqueline Décamps, *La présomption d'innocence: entre vérité et culpabilité*, Thèse, Pau et pays de l'Adour, 2009; Rinat Kitai, "Presuming Innocence", *Oklahoma Law Review* 2/2002, 257–295.

[69] Pierre Bolze, *Le droit à la preuve contraire en procédure pénale*, Thèse, Université Nancy 2, Nancy 2010, 23.

[70] Goran P. Ilić, Miodrag Majić, Slobodan Beljanski, Aleksandar Trešnjev, *Komentar Zakonika o krivičnom postupku*, Službeni glasnik, Beograd 2012, 61, 62.

and enforceable decision of the court, should be the status *quo ante*, i.e. the status in which the relationship between him and the offense he is charged with is not determined to his detriment. The fact that he is actually subordinated to coercion of the criminal proceedings does not change such legal position: the accused retains the extent of his abstract legal freedom. In the course of its validity, which is limited by the end rather than the beginning of its duration, presumption of innocence has its independent and undeniable meaning. Its practical and general importance is manifold. First, it excludes the relation towards the offense as to *crimina privata* and does not allow determination of guilt and labeling the offender only within the limits of *crimina publica*, after the final and enforceable completion of the proceedings before the court and under the legally prescribed procedure. On the other hand, it continuously actualizes the argument that burden of proof rests on the prosecutor and that in general, without real expression of the prosecutor's obligation resulting from this argument, all evidentiary initiatives of the remaining two procedural subjects are either unnecessary – when it comes to the accused, or unlawful – when it comes to the court.

In terms of burden of proof and procedural role of the court which can be established in that regard, we can distinguish two situations. First, when the prosecutor after the carried out rules of evidence, fails to refute the presumption of innocence and thus prove the guilt of the accused. In such case the court, consistently protecting the presumption of innocence, would have to remain restrained when it comes to introducing additional evidence, even if it were convinced that there is other evidence in support of the guilt of the accused which is not proposed by the prosecutor.[71] Such court's passive role in introducing evidence by its own motion results from the rule *actore non probante reus absolvitur* which imposes on the prosecutor, as the holder of the burden of proof, the obligation to persuade the court of certainty of the allegations of indictment, as otherwise the court acts *in favorem defensionis* and decides in favour of the accused. Any other solution would put the court into the position of an "auxiliary" subject of evidentiary initiative in favour of the indictment, which is incompatible with the court's impartiality as an element of the right to a fair trial.[72]

The situation if quite different if the prosecutor's role to introduce evidence would point out the possibility of refuting the presumption of innocence, where the court is satisfied that the parties failed to propose all

[71] Damaška believes that due to the absence of legal authority to introduce evidence by its own motion by which unjustified acquittal would be avoided, the judge could feel a moral discomfort. It also raises the question of protecting the interests of victims of criminal offenses. Mirjan Damaška, "Hrvatski dokazni postupak u poredbenopravnom svjetlu", *Hrvatski ljetopis za kazneno pravo i praksu* 2/2010, 825.

[72] G. P. Ilić (et al.), 249.

the evidence in favour of the accused. Contrary to the general adversarial restraint when it comes to introducing of evidence by its own motion, here the court not only could, but would be obliged to act in compliance with the observation of Justice Burger, i.e. with the stand expressed in the mentioned decision *R. v. Wellingborough Magistrates' Court, ex pte François* (1994) 158 J.P. 158J, about its obligation to provide the defense with a fair trial.[73]

Acting of the court in the mentioned situations would be also based on the principle *in dubio pro reo* which is one of the derived consequences of the presumption of innocence.[74] Consequently, the facts against the accused would have to be proven with certainty, so that any doubt regarding their existence would lead to the conclusion that they do not exist. On the other hand, if the court cannot with certainty exclude the doubt regarding the existence of the fact in favour of the accused, it shall be considered that such fact exists.[75]

Therefore, it can be concluded that proving would imply the obligation of the prosecutor to try to prove the allegations of indictment through the discussion with the defense, where the court would be reserved in looking for evidence in favour of the indictment, but it could *ex officio* introduce evidence in favour of the defense. Thus, adversary proceeding would be spared from the objections regarding its lack of efficiency when it comes to the accused without professional support, while the inquisitorial procedure would cease to be a mechanism in which the court, searching for truth, could call into question its own impartiality and the presumption of innocence of the accused.

Last, but not least, the above discussion leads to a conclusion that in legal systems of inquisitorial heritage, a special attention should be paid to the importance of evidence and development of evidentiary rules. In contrast to natural sciences, court proceedings discuss solely historical events which cannot be repeated and which consequently cannot be tested experimentally.[76] Court decisions necessarily rely on evidence, the only mediator between the one who decides and that what is decided. Therefore, instead of the dilemma whether material, formal or any other truth has been determined in the particular case, the fundamental question of

[73] A disputable question can be raised here – how to proceed when the court introduces certain evidence in the belief that it will be beneficial for the defense, but something quite opposite happens. In such case, the conviction should not be based on such evidence, since that would be in breach of the principle that the burden of proving the indictment rests of the prosecutor. Grubiša similarly interprets the possibility that the court, in light of the prohibition of *reformation in peius,* introduce evidence and determine the facts on the repeated main hearing. See M. Grubiša, 216, 217.

[74] P. Bolze, 26.

[75] M. Grubiša, 65.

[76] B. M. Zupančič, 54.

criminal proceedings should be whether the prosecutor has provided sufficient evidence that in the particular case the fundamental principle of criminal proceedings – that every man is presumed innocent until the contrary appears, can be refuted.

5. CLOSING REMARKS

Underlining truth as the objective of criminal proceedings was in various legal systems a kind of alibi for many open questions inherent to the system of criminal justice coercion. Thus, claiming that punishment is done "in the name of truth" similarly as that it is done "in the name of God", made "the hangman's hands shake less".

A more realistic approach to this problem reveals a somewhat different picture of the truth. Fist of all, it can be noticed that an easy motion for finding unconditional truth, to which the representatives of Serbian doctrine are generally prone, can hardly find its justification. It is undisputed that judicial truth has a number of "competitors" with which it comes into conflict, so it would be reasonable to ask whether nowadays it can be considered the "ultimate goal" of criminal proceedings. As the human rights standards require that each criminal procedure must provide, as basic aspects of the right to a fair trial, adversarity and "equality of arms" between the prosecution and the defense, [77] it is clear that truth should in a way be "harmonized" with these values.

In this sense, this paper tries to find a suitable place for truth in criminal proceedings. Although in the proposed approach adversarial model of establishing the truth would prevail, it would not be deprived of inquisitorial powers of the court. The fundamental role of the court in the proposed model would include ensuring that the prosecutor has an opportunity to prove his claims through adversarity and "equality of arms" of parties. Each failure in this area, i.e. any doubt about the allegations of indictment, would result in an outcome in favour of the accused. In exceptional cases, as a result of the obligation to provide the defense with a fair trial, the court would undertake evidentiary initiative if it believes that there is evidence which could also call into question the accuracy of the prosecutor's allegations. The objective of introducing such evidence would not be establishing the innocence of the accused with certainty, but raising doubts regarding the allegations of the prosecution, on the basis of which the court would, according to motto *in dubio pro reo*, decide whether the accused could be convicted.

[77] ECHR, *Row and Davis v. United Kingdom*, 16 February 2000, § 60.