

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

Comparative study

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Authors: Zoran Dimitrievski, Radmila Dragicevic-Dicic, Gianfranco Gallo, Michael G.Karnavas, Ruzica Nikolovska, Gordan Kalajdziev, Denis Pajic.

**Edited by:** Ljubica Mishevaska, OSCE Mission to Skopje

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## \* Editor's note

The principle of *in dubio pro reo* was introduced in the national criminal procedure legislation in 1997. The new, party driven, Law on criminal procedure from 2010, (hereinafter: domestic LCP)<sup>1</sup>, continues to regulate this principle in Article 4, which reads that “*The Court shall decide in favour of the defendant whenever there is doubt regarding the existence or non-existence of facts comprising the elements of crime, or facts which lead to the application of a certain provision of the Criminal Code*”. The domestic LCP goes a step further by introducing the standard, in Article 403, that the prosecution shall prove the guilt *beyond reasonable doubt*, without giving any further definition.

In order to make a distinction between the suspicion whether a person has committed a crime (suspicion that is detrimental to the defendant and is always in favour of the indictment) and the suspicion whether that person is really the perpetrator of the crime, i.e. suspicion which is in favour of the defendant's innocence (positive suspicion which is always in favour of the defendant and is reflected in the principle of *in dubio pro reo* as well as in the standard that the prosecution has the burden of proof *beyond reasonable doubt*), the countries in the Anglo-Saxon world, as well as Italy, have been using two different terminologies. Namely, the term suspicion (in Macedonian language: сомневање) is used in a detrimental sense for the defendant and is in favour of the indictment, while the term doubt (in Macedonian language: двојба, двоумење, несигурност) is used to favour the defendant and the definition of the principle of *in dubio pro reo*, as well as for the standard of the prosecution bearing the burden of proving the guilt *beyond reasonable doubt*.

Unfortunately, the domestic LCP does not offer different terminologies for these two types of suspicion. The Law uses the term “suspicion” (сомневање) when it refers to the required level of suspicion that a person has committed the crime so that certain investigative measures, restrictions or charges can be undertaken or pressed against him/her., it also refers to the application of the principle of *in dubio pro reo* and the standard that the guilt shall be proven *beyond reasonable doubt*. For the purposes of this research, however, efforts have been made to make terminological distinction between these two types of suspicion/doubt, despite the fact that such terminological distinction does not correspond with the current legal terminology.

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<sup>1</sup> Law on criminal procedure, Official gazette 150/10, 200/12, 142/16 and Constitutional Court Decision no. 2/2016 Official gazette no.193/16.



## FOREWORD

“If you would be a real seeker after truth, it is necessary that at least once in your life you doubt, as far as possible, all things.” (Rene Descartes)

What is doubt and what kind of feeling is doubt? Should a judge being an independent arbiter not be doubtful for the most time of the trial? Nonetheless, is the judge not required to decide at the end? How can a judge decide if in doubt, and can a judge remain in doubt despite all?

The criminal procedure principle *in dubio pro reo*-when in doubt in favour of the defendant- and the standard that the guilt shall be proven *beyond reasonable doubt* deal with the doubt, so their essence and use could probably throw some light on the above questions.

Whilst *in dubio pro reo* principle is common for most of the continental law countries, the standard of *beyond reasonable doubt* developed in the Anglo-Saxon world, but it has been ‘recently’ introduced on the continent as well. Nowadays, the two can have very similar, if not identical, effect and probably could have had it at different stages in the past as well. It does not mean the origin and the circumstances in which the two emerged and developed were the same. Yet, most scholars would probably agree that today both of them reflect the realistic tendency of any conscientious person or a good society to protect themselves from injustice because the purpose of the overall criminal justice to punish the guilty at the same time has the other side, acquitting the innocent.

By comparing the two one can notice that unlike the standard of proving the guilt *beyond reasonable doubt* by the prosecution, which is applied in the end of the trial once the court has heard and seen all the evidence and is to decide on the guilt (or innocence) of the defendant, the *in dubio pro reo* principle literally does not restrict the moment of its application. Therefore, some may argue that *in dubio pro reo* has wider application and can be used in all stages of the criminal procedure, such as the stage when the court decides on imposing detention or when it accepts or rejects the Indictment, etc. However, given the fact that a judge can be doubtful during the trial, moreover, even prior to the trial, a question arises whether a judge should always apply the principle of *in dubio pro reo* and decide in favour of the defendant by halting the criminal procedure? Certainly not. Instead, the judge shall decide whether the prosecution has met the other necessary standards for undertaking certain investigative measures, restrictions and charges, such as the standard of reasonable suspicion that the defendant has committed the crime. Moreover, the domestic LCP requires that the court applies the principle of *in dubio pro reo* only when decides whether facts exist or not, which the court decides

on in the end of the trial. This basically means that the application of *in dubio pro reo*, more or less, focuses also on the ultimate question about the defendant's guilt. So, if the judge, having considered the evidence, has *doubts about the existence of facts that define the crime*, the judge basically doubts the defendant's guilt and, by applying the principle of *in dubio pro reo*, shall decide that those facts are not existent (were not proven beyond doubt) and shall adopt an acquitting decision.

Another obvious difference between the two principles is the level of doubt. While *beyond reasonable doubt* standard requires taking into consideration only 'reasonable' doubt, the principle of *in dubio pro reo* does not require it explicitly. The principle of *in dubio pro reo* does not give gradation of the doubt, so it is up to the judge to do the same (to determine whether he/she is in doubt or not). Although the doubt is an inner state of mind and it is connected with the process of thinking as well as the consciousness of the person, it cannot be detached from the society in general and the overall level of awareness of the society at a particular point in time. In other words, an individual cannot derogate much from what could be considered doubtful in a society in a particular period of time. For example, a judge cannot doubt whether the defendant has committed the crime only because they may have twin brother or sister nobody knows about, including the judge, and who may have committed the crime instead. Even if the judge has such doubts, these doubts will not be reasonable for most of the people around him/her. But, what if such evidence corroborating this theory exists? What if, for instance, the defence presents evidence showing that a twin brother really exists, that he is not in good relations with the defendant, and he actually wants to set the defendant up? In such a case, the judge may have solid grounds to reasonably doubt the prosecutor's case and the defendant's guilt. So, although not specifically stated, the principle of *in dubio pro reo* refers also to the reasonable doubt, because any unreasonable doubt is just an assumption that may lead to a *cul-de-sac* with reemerging doubts, doubts in everything and anything, with only limit being one's imagination.

The next question would be whether doubt always exists? Probably yes. Doubting is inevitable part of the thinking process and the judge should be doubtful throughout the trial. Having a doubt is equally important, as it is healthy. But whether the reasonable doubt always exists? Probably not. If the case is clear (that is, the prosecutor manages to refute the allegations of the defence about the twin brother beyond reasonable doubt), there will be no reasonable doubt.

When a person doubts reasonably, it is improbable that he/she will remain in a stage of doubt for too long. It is unnatural for a person to be in the state of pure doubt. When a person reasonably doubts something which has its opposite, it is natural to incline to the opposite. For example, if one reasonably doubts that the art piece is original, he/she actually inclines



to the opinion that the art piece is fake. There are situations when there is not one but many opposites. In such a case, it is improbable that the person would believe in all opposites that caused the reasonable doubt unless there is evidence that would lead him/her to be inclined to a particular opposite. However, the person will surely distance themselves or will fully abandon the thing that is uncertain about.

The standard that the *guilt* shall be proven *beyond reasonable doubt* already places the doubt in a position to benefit the defendant's innocence because the doubt is in the guilt. So, if there is a reasonable doubt in the guilt of the defendant, it is natural for one to incline towards the opposite, and that is defendant's innocence. Nonetheless, as afore mentioned, the principle of *in dubio pro reo* can also apply to the guilt. Namely, if at the end of the trial and after evaluating the evidence the judge doubts whether the facts that define the crime exist, the judge, in fact, doubts the defendant's guilt. Hence, even though the principle *in dubio pro reo* does not require acquittal *per se*, but requires a decision which is *more favourable* for the defendant, if the judge doubts the defendant's guilt, then it is logical for him to be inclined to the opposite, and that is the innocence.

Until 'recently', however, and throughout most parts of Europe, the investigative judge was the one who lead the investigation, and, in search of material truth, he/she collected and presented evidence both against and in favour of the defendant. The evidence was then presented before the trial judge, who also searched for material truth and had the authority to propose evidence in order to reach for the truth. So, the judge who had the authority and obligation to present all possible evidence in order to reach for the truth, all of a sudden and "just" because of the doubt, had to decide in favour of the defendant. These two issues hardly go along. Not so much because of the obligation of the court to search for the truth (because the truth to a certain extent can be identified with the word certainty, i.e. evidence that will eliminate any possibility of reasonable doubt), but because of the court's authority to introduce evidence which will aim for that truth. The latter did not really entitle the judge to doubt, meaning it restricted the judge's obligation to decide in favour of *the defendant*. If the judge would admit that he/she was in doubt, it would mean that he/she did not search for the truth at the right place (and failed to present the right evidence). It is superfluous to mention the possible feeling of guilt of the judge for acquitting the alleged perpetrator only because the judge had (certain) doubt. As mentioned afore, staying in a state of doubt is unnatural, and a person will either incline on the opposite or will find the doubt unreasonable and will accept as the truth what they originally doubted. Perhaps a person will not accept it as the ultimate truth but will accept it as a greater truth than the other truth. So, since the judge was the seeker after the truth, he/she should decide where to search for it.

Nowadays, the adversarial procedure releases the judge from the burden of seeking after the final truth, and, more importantly, they are released from the burden of presenting evidence in search for that truth. It is the parties that propose the evidence to prove facts, and the judge decides whether those facts are proven or not. Yet, the judge is the one who decides which evidence shall be presented. In case the judge disallows the defence to present its evidence on the twin brother during the trial, the judge will not be in a position to take into account this evidence when adjudicating. In other words, the judge will not have the possibility to corroborate the reasonable doubt in defendant's guilt with that evidence. In such a situation, one of the basic rights of the defendant, the right to fair/just procedure, can be put under question. Furthermore, it should be emphasised that even if this reasonable doubt does not arise from the evidence presented by the defence, it can arise from the insufficiency of evidence offered by the prosecution.

So, it can be that both of *beyond reasonable doubt* standard and *in dubio pro reo* principle in an adversarial procedure, which respects the equality of arms, the presumption of innocence, the burden of proof of the prosecution and the adequate defence, can have the same effect and can serve the same purpose when it comes to the ultimate question, and that is the guilt of the defendant.

The editor,

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## INTRODUCTION

Undoubtedly, the hardest and most responsible job of a judge in the criminal proceeding is to decide upon the facts. In order to be able to render a verdict on the criminal responsibility of the defendant and, possibly, pronounce a proper sentence, the judge must decide about facts that happened in the past. The facts upon which the court grounds its decision, or in other words, the facts which the court uses to corroborate the answer to the question whether crime was committed, who the perpetrator is and whether criminal sanctions of the substantive criminal law can be applied, have to be accurately and fully proven.

Nevertheless, due to the limitations of human knowledge and imperfections of the information, the judge has a difficult task to decide about facts. Often, despite the comprehensive evaluation of the results of the evidentiary proceedings, the judge can remain doubtful about the facts and cannot decide whether a fact has been proven or not. In such circumstances, the theory and practice of criminal procedure have found the solution - the principle of *in dubio pro reo* and the standard of proving the guilt by the prosecutor *beyond reasonable doubt*. These two are a reliable guideline for the judge on the tough and responsible path to decide on the facts. They show the judge the way out of any doubt, they help him/her to not enter any sphere out of reach and relieve him/her of the duty of examining the unknown at all cost, or, transforming it into the known forcefully. In this way, the judge is protected from possible errors, arbitrariness, and capriciousness.

Both the principle of *in dubio pro reo* and the standard that the guilt shall be proven by the prosecutor *beyond reasonable doubt* have evolved over the centuries and have been generally accepted in the contemporary criminal procedural law and practice. At the first glance, they do not look debatable at all. Nevertheless, a more in-depth analysis of their meaning and scope raises a number of questions that remain open, or, which have not been fully consented to by neither the theory nor practice. The history of both is as complex and controversial as their definition which continues to confound jurists, lawyers, and academicians, to put it mildly. The elaboration that follows will show many gaps and unknown loopholes about these two, seemingly simple, principle and standard.



# HISTORICAL ASPECTS OF THE PRINCIPLE OF *IN DUBIO PRO REO* & THE STANDARD OF PROOF BEYOND REASONABLE DOUBT

## CLASSICAL ANTIQUITY

The *in dubio pro reo* principle can be traced back to the work *Problemata*, which is attributed to Aristotle (384 – 322 BC).<sup>2</sup> The chapter titled “Problems connected with Justice and Injustice” provides:

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*; it is a serious matter to decide that a slave is free, yet it is much more serious to convict a freeman of being a slave.<sup>3</sup>

According to a number of scholars the initial formal formulation of *in dubio pro reo* principle from the Roman time, even though it had not been known under this term<sup>4</sup>, can be found in a rescript by the emperor Trajan

<sup>2</sup> Daniel Epps, *The Consequences of Error in Criminal Justice*, 128(4) Harv. L. Rev. 1065, 1077 (2015). The authorship of *Problemata* is disputed; the time frame in which it was probably written ranges from the third century BC to the sixth century AD. See Ann Blair, *Authorship in the Popular “Problemata Aristotelis”*, 4(3) Early Science and Medicine 189-227 (1999).

<sup>3</sup> Aristotle, *Problemata*, Bk. XXIX (emphasis added); translated in E.S. Forster, *The Works of Aristotle* Vol. VII *Problemata* 951b (J.A. Smith and W.D. Ross eds., Clarendon Press 1927).

<sup>4</sup> In theory there are also different opinions: „For how long the principle *in dubio pro reo* has been applied is still unclear. The once present belief about its application in the Roman criminal law and criminal reception procedure has with recent works been challenged.“ (Kern, E., und Roxin, C., *Strafverfahrensrecht*, 14. Auflage, Verlag C.H. Beck, München, 1976, p. 71).

(98-117 AD) addressed to a Adsidius Severus<sup>5</sup>. A rescript was a document issued by the Roman imperial court in response (in Latin *rescriptum* literally means written back) to a specific demand made by governors and other officials of the empire. The passage reads: “*Sed nec de suspicionibus debere aliquem damnarii divus Traianus Adsidio Severo rescipit: satius enim esse impunitum delinqui facinus nocentis quam innocentem condemnari*” (in case of mere suspicion it is preferable that a culprit should go unpunished, rather than an innocent be convicted).<sup>6</sup> This answer given by the emperor was most probably influenced by the humanitarian concepts preached by the Stoic philosophy which was the predominant line of thought during the Golden Age of the Antonines (98 A.D. – 180 A.D), when the Roman Empire reached the peak of its power and civilization, thanks to eighty years of uninterrupted enlightened government.

However, as it results from the wording of the rescript, the principle set forth by the emperor was considered applicable only in case of mere suspicion against the defendant, showing therefore that at the time the extent of the principle was rather limited. The reason was that the Roman law had a particular kind of *non liquet* (non clear) verdict, which was reached when criminal matter remained unresolved and when there was not enough evidence either for a conviction or for acquittal of the accused.<sup>7</sup> The consequence of such verdict was a repetition of the evidentiary procedure or its amendment, with the possibility of introducing new evidence, so, consequently such a verdict could be rendered several times in the same court proceeding. Such a verdict did not allow the application of the *in dubio pro reo*, as the courts, in situations of doubt, did not give preference to the accused neither would they be inclined to rule in his favour. The *non liquet* verdict only acknowledged that the guilt or innocence of the accused person was ‘unclear’ and that evidentiary procedure needed to be repeated, which did not benefit the accused in any way.

Still, even though the principle of *in dubio pro reo* was at an initial stage, the juridical ideas underlined in the above mentioned rescript were not isolated. On the contrary, there are several passages in the Digest<sup>8</sup> which reflect more or less, the same principle. As such, Juventius Celsus, jurist, gave a similar opinion, as put in the following excerpt of the Digest

<sup>5</sup> L. FERRAIOLI, *Diritto e ragione: teoria del garantismo penale*, Roma-Bari, 1997, p. 643, n. 12, p. 92, n. 25; M.A. DE DOMINICIS, *Ancora sulla -formula dubitativa//*, in *Archivio Penale*, 1965, I, pp 535-536. The rescript was reported by *Ulpianus*, one of the most prominent jurists of the imperial period, who lived between the II and the III century A.D. The quotation is contained in the Digest, also known as the *Pandects* (from the ancient Greek word *pandektes*, meaning “all-containing”), a compendium of fragments of works and opinions of the most influential Roman jurists, divided by topics and compiled upon order of the Byzantine emperor Justinian I, in the 6th century, as well as and part of the *Corpus Iuris Civilis*.

<sup>6</sup> Bissacco Cristina, *Il canone In dubio pro reo: tra concezione classica e moderna della prova*, Padova, 2008, p.11 citing Dig. 48, 12, § 5, Libro septimo de officio proconsulis.

<sup>7</sup> Zlatarić, B., Damaška, M., *Rečnik krivičnog prava i postupka*, Zagreb, 1966, p. 188.

<sup>8</sup> See supra n. 5.



*“Benignius leges interpretandae sunt”*, thus suggesting an interpretation of the law in a more benign way. Gaius, again a jurist, promoted the same concept and deemed it applicable to any doubtful case, thus considering it a general principle: *“Semper in dubiis benigniora praeferenda sunt”* (in case of doubt the more lenient solution is to be preferred). And it is again Gaius who, in another part of the Digest, stated: *“Favourabiliores rei potius quam actores habentur”* (the condition of the defendant is to be favoured rather than that of the plaintiff).<sup>9</sup> Another segment of the Digest mentioned the opinion on this topic of Ulpianus himself: *“In ambiguiis rebus humaniorem sententiam sequi oportet”* (in case of ambiguity, it is preferable to go for the more lenient solution). Ulpus Marcellus, a jurist contemporary with Ulpianus, in a segment reported in the Digest, asserted, more or less, the same: *“In re dubia benigniorem interpretationem sequi, non minus justus sed est quam tutius”* (It is not only fairer, but it is also safer, in case of doubt, to choose the more lenient solution).<sup>10</sup>

Such line of thought continued also throughout the III century A.D., an age of crises. The jurist Aurelius Hermogeniano, who was active under the emperor Diocletian, wrote: *“Interpretatione legum poenae molliendae sunt potius quam asperandae”*, suggesting that the interpretation of laws and punishments must make them softer instead of making them harder.<sup>11</sup> Furthermore, the Latin historian Ammianus reports on an anecdote which illustrates how deeply the principle was rooted in Roman law. Namely, Numerius, the governor of *Narbonensis*, a province of the vast Roman Empire, was on trial before the emperor and, contrary to the frequent practice in criminal cases, the trial was public. Numerius defended himself by denying his guilt and since there was not sufficient evidence against him, his adversary, Delphidius, realizing that the failure of the accusation was inevitable, could not restrain himself from exclaiming: *“Oh, illustrious Cæsar! If it is sufficient to deny, what hereafter will become of the guilty?”* The answer of Emperor Julian was equally famous: *“If it suffices to accuse, what will become of the innocent?”*<sup>12</sup>

<sup>9</sup> Bissacco Cristina, Il canone *In dubio pro reo*: tra concezione classica e moderna della prova, Padova, 2008, p. 12 citing Celsus, 29 *digestorum*, D. 1.3.18.

<sup>10</sup> Paolo Moro, Il diritto come Processo, 2012, p. 204 citing Dig., 34,5,10,1, Ulpianus. See also Sič, M., Trajne vrednosti Rimskog prava (Sector values of Roman Law), *Zbornik radova Pravnog fakulteta u Splitu*, year 43, no. 3-4/2006, p. 391; Bayer, V., *Jugoslovensko krivično procesno pravo (Yugoslavian criminal procedural law)*, Second edition, *Pravo o cinjenicama i njihovim utvrdzivanju u krivičnom postupku (Law on fact and its establishment in the criminal procedure)*, Second edition, Informer Zagreb 1978, p.37.

<sup>11</sup> Bissacco Cristina, Il canone *In dubio pro reo*: tra concezione classica e moderna della prova, Padova, 2008, p. 12 citing Hermogenianus, 1 ad *epitomarum*, D. 48.19.42.

<sup>12</sup> Ammianus Marcellinus, *Rerum Gestarum*, L. XVIII, c. 1.

## LATE ANTIQUITY AND EARLY MIDDLE AGES

The principle of *in dubio pro reo* notes an even greater development in post-classical age (IV and V century AD.), as a result of the influence of the Christian principle of “*favor miserorum*” (benevolence towards the poor) and humanism on the Roman law. Following the brutal persecutions which reached their peak under the reign of Diocletian, the emperors Galerius, Constantinus and Licinius in the edict of Nicomedia (311 A.D.) had already granted the Christians the freedom of worship; and just seventy years later, in 380 A.D., the emperor Theodosius declared the Christianity the official religion of the empire.

During the IV century the Christian Church started to influence life, as well as the socio-political organization of the state including the law. A citation of this evolution can be found in the Breviary of Alaric (*Breviarium Alaricianum* or *Lex Romana Visigothorum*)<sup>13</sup>. This collection includes a provision about manumission (liberation) of slaves: “*Communem servum unus ex sociis vincendo futurae libertati non nocebit; inter pares enim sententia clementior severiori praeferitur: prope et innocentes dicere, quos absolute nocentes pronuntiare non possunt*”. The case was as follows: one of the two owners chained their common servant, while the other owner decided to free him. The excerpts emphasize the prevalence of the will of the owner who wanted to free the servant. This shows that in the Alaric’s Code, the Roman law was evidently influenced and modified by the new principles preached by the Christianity, thus revising the rule in the classical Roman law, according to which the liberation of the slave would have required consent by all of the owners. This passage of the Breviary became the grounds for two other basic principles of crucial importance in most of the modern legal systems: the principle of *favor rei* (favour for the accused) and the principle of presumption of innocence.<sup>14</sup>

In the year 476 the barbarian king Flavius Odoacer ended the Western Roman Empire. The western part of Europe, including Italy, was conquered by barbaric people who imposed their customs and habits, while the power of the Roman Empire was redirected towards the East, ruling under the name of Byzantine Empire for the next 1000 years.

However, the Roman law in Western Europe did not eclipse with the fall of the Western Empire. The principle of personality of law was in force in the territories conquered by the barbarian population, meaning that the application of the law was governed not by the territory, but by the population

<sup>13</sup> Renzo Lambertini, I caratteri del Breviarum Alaricianum, Lecture held in Naples on 29.4.2008, p. 1. Breviary of Alaric was a collection of Roman law, compiled by order of Alaric II, King of the Visigoths. This compilation included his advice to his bishops and nobles and was promulgated on 2 February 506 A. D.

<sup>14</sup> Bissacco Cristina, Il canone *In dubio pro reo*: tra concezione classica e moderna della prova, Padova, 2008, p. 13 citing Brev. Pauli Sententiarum IV, 12, § 5 (which is later reported in Lex Romana Visigothorum); Polara Giovanni Lex Romana Visigothorum, CUEM, 2005 e Fabio Zunica LE REGULAE IURIS NELL’ESPERIENZA GIURIDICA ROMANA, Università Federico II, 2011, p. 101.

which the persons involved in the dispute belonged to. Therefore, the law which was applied to the former subjects of the Roman Empire was still the Roman law, whilst the barbaric population which had become dominant, used their own juridical system which was mostly customary law.

Around the VI century, as the rule of the barbarians strengthened and the contacts between the winners and the defeated intensified, the barbaric law began to influence and to modify the Roman laws in Western Europe. The courts of the former Western Roman Empire slowly but surely started to adopt the structure of the barbaric court procedure which was completely different from the Roman procedure.

The trials were reduced to evidentiary procedure which presented two types of evidence: the judgment of God and the purgatorial judgment or *purgatio*. The judgment of God, called *ordal* (ordeal), could include full submersion of the body in cold water, or the holding a red-hot iron for some time. In order to pass the test, not only did it suffice to endure the pain, but the wounds had to heal within an exact time. Evidently, such tests were an assumption of the invisible presence of God during the trial, which would never have let an innocent fail the test.<sup>15</sup> The scorched hand was bandaged and examined after three days, and if the burn healed, it would be taken as a sign of innocence and the person would be acquitted. The ordeal with the cold water involved the accused being thrown into the water: those who would sink were acquitted, and those who would float were deemed guilty and were punished. These tortures required the participation of the clergy. A priest was present during the procedure and would pray to God to bless the water or iron and to deliver his judgment.<sup>16</sup> Unlike this judgment, the purgatory was a system of giving oath about the veracity of the accusation and the good reputation of the accused. The oath was taken by the accused and by the members of his/her family and it had the value of evidence since it was assumed that God would punish the perjurer with death or severe illness.

According to certain theological interpretations, however, such tortures, as well as the so called blood punishments, which included mutilation or execution of the accused, were treacherous for the judges as they could pollute their souls. Christian scriptures were irreconcilable with the application of blood punishments, starting with the Sixth Commandment, “Thou shalt not kill,”<sup>17</sup> and the Gospel of Matthew, “[J]udge not, lest ye be judged.”<sup>18</sup>

<sup>15</sup> Bissacco Cristina, *Il canone In dubio pro reo: tra concezione classica e moderna della prova*, Padova, 2008, p. 17.

<sup>16</sup> J. H. Baker, *An Introduction to English Legal History* 73 (4th ed., Butterworths 2002) (hereinafter “Baker”), discussing the rise of the jury trial and describing the abolition of ordeals as the prominent event in criminal procedure, p. 5. For more on history of trial by ordeal, see Thomas P. Gallanis, *Ordeal: English Common Law*, in 4 *Oxford Encyclopedia of Legal History* (Stanley N. Katz ed., Oxford University Press 2009).

<sup>17</sup> Num. 31:19.

<sup>18</sup> Matthew 7:1.

Therefrom, in his seminal text *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, contemporary Professor James Q. Whitman argues that, although the reasonable doubt standard emerged in the course of the seventeenth and eighteenth centuries (as others conclude), its origins can be traced to the Middle Ages, where it was originally conceived not for the protection of the accused, but rather to protect the “souls of the jurors”: “*The reasonable doubt rule ... is the last vestige of a vanished premodern Christian world. At its origins, this familiar rule was not intended to perform the function we ask it to promote today: It was not primarily intended to protect the accused. Instead, it had a significantly different purpose. Strange as it may sound, the reasonable doubt formula was originally concerned with protecting the souls of the jurors against damnation*”.<sup>19</sup>

Other contemporary scholars, represented by Anthony A. Morano and Barbara J. Shapiro, share Whitman’s observations that early Christian theologians viewed any bloodshed as a pollution of the soul requiring purification.<sup>20</sup> However, they don’t share Whitman’s theological interpretation that reasonable doubt emerged in Middle Ages but see reasonable doubt as “a concept born of the secular Enlightenment and humanist philosophy of the XVIII century.” This is because, according to them, the *ordal* provided a transcendental truth which is indisputable by definition, so the case could hardly be considered doubtful.<sup>21</sup>

To protect judges, it has been also thought that it is the law that sheds the convicted criminal’s blood, not the judge. According to an early Christian theologian Saint Jerome (347 – 420): “To punish murderers, and those who commit sacrilege and poisoners, is not to shed blood. It is the ministry of the laws.”<sup>22</sup>

Latin philosopher and theologian, Saint Augustine of Hippo (354 – 430), similarly noted: “[W]hen a man is killed justly, it is the law that kills him, not you.” By placing the onus of taking the life or mutilating the body of a convicted criminal on the law, judges were mere conduits “[contributing] their efforts to killing criminals, without themselves suffering the loss of eternal life as ‘murderers.’”<sup>23</sup>

Centuries later Popes Clement III (1187 – 1191) and Innocent III (1198 – 1216) exhorted clergy to avoid the stain of bloodshed by following the *safer path*:

<sup>19</sup>James Q. Whitman, *The Origins of “Reasonable Doubt”* 2-3 (Yale University Press 2008) (hereinafter “Whitman”) p. 3.

<sup>20</sup>Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* 4 (University of California Press 1991) (hereinafter “Shapiro, Doubt”); Anthony Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B. U. L. Rev. 507 (1975) (hereinafter “Morano”), p. 51.

<sup>21</sup>Miller W. Shealy Jr., *A Reasonable Doubt About “Reasonable Doubt”*, 65 Okla. L. Rev. 225, 229 (2012-2013) (hereinafter “Shealy”).

<sup>22</sup>Whitman, p. 39, note 36, *citing* Commentaria In Hieremiam IV, 35. In S. Hieronymi Opera, pt. I, 3, Corpus Christianorum Series Latina, vol. 74 (Turnholt: Brepols 1960), 201: “Homicidas enim et sacrilegos en venenarios punier, non est effusion sanguinis, se legume ministerium.”.

<sup>23</sup>Whitman, p. 40.

in cases of doubt, “*in dubiis*,” one should act in such a way as to minimize the possibility of pollution.<sup>24</sup> In other words, in order to punish, the judge needed to be convinced in a person’s guilt, otherwise, he himself would be punished by God.

The Pope’s declarations parallel the rediscovery of the *Corpus Iuris Civilis* in the twelfth century, including the *Digesta*.<sup>25</sup> As such, Canon lawyers of the twelfth century applied the ideas of the antique Church Fathers in the campaign against the judicial ordeal and the Canon law, the law of the Christian Church, played a fundamental role in its abolition.<sup>26</sup>

As a consequence, in 1215, after several decades of agitation by church reformers, the Catholic Church (through the Fourth Lateran Council)<sup>27</sup> forbade clergy from participating in ordeals. This effectively abolished the ordeals, save for their use in some cases involving witchcraft.<sup>28</sup>

The ideas of Church Fathers were embraced and elaborated by the canon lawyers of the twelfth century (and afterwards), who were largely responsible for creating modern law, while scholars regard the abolition of ordeals as marking the beginning of Western legal traditions.<sup>29</sup>

The decline of the ordeal has been subject to different interpretations. Shapiro argues that the judicial ordeal was about factual proof and that its abolition involved a change in the nature of fact-finding.<sup>30</sup> Whitman disagrees with this line of interpretation. Whitman argues that “factual proof was not the issue at all... Primarily at stake was the moral responsibility for judgment.”<sup>31</sup> In his view, ordeals were abolished “precisely because they subjected those who participated in them to the taint of bloodshed.”<sup>32</sup> Both Shapiro and Whitman agree that the result of the abolition of ordeals caused a formative crisis in adjudication, influencing procedural rules.<sup>33</sup>

<sup>24</sup> Pope Clemens, Clemens III, *Patrologia Latina* vol. 204 [col. 1485D]. Pope Innocent III, the lawyer-Pope who presided over the Fourth Lateran Council, produced the classic formulation: “*In dubiis via eligenda est tutior*,” i.e., “When there are doubts, one must choose the safer path.” cited in Whitman, p. 117.

<sup>25</sup> James Gordley & Arthur Taylor Von Mehren, *An Introduction To The Comparative Study Of Private Law – Readings, Cases, Materials* 33 (Cambridge University Press 2006).

<sup>26</sup> Whitman, p. 55.

<sup>27</sup> The Lateran Councils were synods of the Catholic Church held in Rome at the Lateran Palace from the twelfth to the sixteenth centuries. The purpose of the Lateran Councils was to address various problems of the Catholic Church, church property, patriarchal precedence, judicial and church reforms, and other issues. See Whitman, p. 53-54.

<sup>28</sup> Whitman, p. 49, 55, citing Canon 18 of the Fourth Lateran Council.

<sup>29</sup> See generally Shapiro, *Doubt*, p. 3, explaining that in the twelfth century, “irrational proofs,” such as trial by ordeal were replaced on the Continent by the Romano-canon inquisition process and in England by the jury trial; Morano, p. 509, stating that trial by jury developed as a substitute for older methods, such as trial by ordeal; Baker is also discussing the rise of the jury trial and describing the abolition of ordeals as the prominent event in criminal procedure.

<sup>30</sup> Shapiro, *Doubt*, p. 3-4.

<sup>31</sup> Whitman, p. 56.

<sup>32</sup> Whitman, p. 56.

<sup>33</sup> Shapiro, *Doubt*, p. 4, Whitman, p. 56.

In Continental Europe and in England, there were two different responses to this crisis that explain how the civil and common law systems split off. On the Continent, where inquisitorial procedure had been developing over the course of the twelfth century, ordeals were replaced by the Romano-canon inquisition process. In England, where an early form of the jury had been introduced in the late twelfth century, ordeals were replaced by jury trials.

## RISE OF THE JURY TRIAL IN ENGLAND

The practice of swearing men to furnish true information is ancient, with roots in Scandinavia and the old Carolingian empire.<sup>34</sup> In England, an early form of the jury trial was used in the late eleventh and twelfth centuries.<sup>35</sup> During the Norman invasion<sup>36</sup> in the eleventh century, the Normans brought with them other forms of proof and trial, such as ordeals, wager of law,<sup>37</sup> or trial by combat<sup>38</sup>. During the Norman period, the “accusing jury” was also common.<sup>39</sup> The “accusing jury” was sworn to give a true answer, called *verdictum*, which is Latin for “verdict.”<sup>40</sup> After the “accusing jury” named suspected criminals, the accused were sent to be tried by ordeal.<sup>41</sup> The resulting verdicts of these procedures were essentially statements about the accused’s character, rather than his guilt or innocence.<sup>42</sup>

The prohibition in 1215 of the clergy’s participation in ordeals, resulting in the effective abolition of the ordeals, was a turning point. Although the older methods of proof were still part of the procedures applied in the earliest phase of the English courts, the use of a jury proved to be a better alternative and the older methods gradually fell out of use.<sup>43</sup>

<sup>34</sup> Baker, p. 72. The Carolingian empire (800-924) was the historical period in the medieval France and Germany, ruled by the Frankish Carolingian dynasty. For more, see John W. Burgess, *Sanctity of Law: In What Does It Consist? The Story of Man’s Attainment of Law and Order from Roman Times to the Present* (1928), chapter 3, *The Carolingian Empire and its Dependence of the Pope’s Authority*.

<sup>35</sup> Baker, p. 72-73.

<sup>36</sup> The Norman invasion of England was the eleventh century occupation of England by an army of Norman, Breton, and French soldiers led by Duke William I of Normandy, later referred to as William the Conqueror. See Norman Davies, *Europe: a history 336-339* (HarperPerennial 1998); see also Edward E. Freeman, *The History of the Norman Conquest of England, Its Causes and Its Results*, Volume 5, *The Effects of the Norman Conquest*, (Cambridge Univ. Press 2011) (first published in 1876).

<sup>37</sup> Wager of law was a medieval defence used when an accused could establish his innocence by taking an oath and finding a required number of persons, typically twelve, to swear they believed the accused’s oath. See Baker, p. 73.

<sup>38</sup> Trial by combat (or wager of battle) was a method used to settle accusations in the absence of witnesses or a confession, in which two parties in dispute fought in single combat. The winner of the fight was proclaimed to be right. Essentially, it was a judicially sanctioned duel. Trial by combat remained in use throughout the Middle Ages, gradually disappearing in the course of the sixteenth century. See Baker, p. 73.

<sup>39</sup> Shapiro, *Doubt*, p. 5; Baker, p. 73.

<sup>40</sup> Baker, p. 73.

<sup>41</sup> Baker, p. 73.

<sup>42</sup> Shapiro, *Doubt*, p. 3; Baker, p. 73.

<sup>43</sup> Baker, p. 72-73.



Baker suggests that “[t]he king’s judges did not start out in the twelfth century with an inspired vision of things to come; they simply took over and continued what had gone before, what must have seemed part of the natural order of things.”<sup>44</sup> In the thirteenth century, the judicial practice settled on using men from the vicinity of the offense to speak under oath – *juratores* (which is Latin for *persons who have been sworn*) – about the accused’s innocence or guilt. This procedure became known as the jury trial. Jurors were viewed as representatives of the community’s opinion.<sup>45</sup> English judges were less frequently residents of the locality. They sat in Westminster and travelled to the country, and when in need of local knowledge, they depended on jurors.<sup>46</sup>

Early on, there was some overlap in the jurors’ judicial function and their role as witnesses.<sup>47</sup> Jurors delivered their judgment based on what they themselves knew or gathered in the process of independent investigation.<sup>48</sup> In other words, they were not impartial fact-finders or judges of the facts.

According to Whitman, in the Middle Ages jurors: (a) were permitted to enter a “special” verdict, making “mere findings of fact while forcing the judge to pronounce the perilous judgment on ultimate liability;”<sup>49</sup> (b) were immune from the attain – a procedure to punish civil trial jurors for committing perjury, as perjury was not yet a crime;<sup>50</sup> and (c) “could avoid inflicting blood punishments in some instances by allowing the accused the benefit of clergy,” by which the accused could claim to be outside the jurisdiction of the secular courts and be tried instead under canon law, which did not have juries.<sup>51</sup> These factors shielded criminal jurors from moral pressure.<sup>52</sup>

## ROMANO-CANON INQUISITION IN CONTINENTAL EUROPE

While the jury trials developed in England inquisitorial procedure was in power on the Continent. The procedure known as the action *per inquisitionem* (Latin for “by inquiry”) received official recognition from the Fourth Lateran Council, which employed highly rationalized procedures to determine the guilt or innocence of clerics suspected of crimes against the Catholic Church.<sup>53</sup> During the thirteenth century, this

<sup>44</sup> Baker, p. 72.

<sup>45</sup> Morano, p. 509. See also FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 622-26 (Cambridge University Press 1898) (hereinafter “Pollock”).

<sup>46</sup> Whitman, p.147, ns. 81-82.

<sup>47</sup> Baker states that, occasionally, judges would examine jurors one by one to evaluate their answers and even reserve the decision of guilt or innocence for themselves. See Baker, p. 75.

<sup>48</sup> Morano, p. 509.

<sup>49</sup> Whitman, p. 154.

<sup>50</sup> Whitman, p. 154.

<sup>51</sup> Whitman, p. 156.

<sup>52</sup> Whitman, p. 157.

<sup>53</sup> Whitman, p. 99, citing Mathias Schmoeckel, *Humanität und Staatsraison* 187-294 (Böhlau 2000) (hereinafter “Schmoeckel”).

procedure expanded into criminal law.<sup>54</sup> It was designed to obtain “full proof,” meaning rigid standards as to the quality and quantity of evidence necessary for a conviction, believing that as such could be ensured the objectivity of the judge.<sup>55</sup> As Shapiro described, a judge in the Romano-canon inquisition process was “essentially an accountant of who totalled the proof fractions.”<sup>56</sup>

By following the correct procedure, judges avoided the stain of judicial bloodshed, while Canon lawyers, theologians, and jurists responded to the moral danger by distinguishing the role of the judge as a “minister of the law.”<sup>57</sup> For example, Christian theologian Raymond de Peñafort (ca.1175 – 1275) explained that the judge does not sin if the criminal is “justly condemned,” meaning, among other things, that the judge must “observe the procedures of the law.”<sup>58</sup>

Medieval canon law developed the principle that “the judge judges according to the evidence presented, not according to his ‘conscience.’”<sup>59</sup> “Conscience” referred both to judges’ moral convictions and to their knowledge of particular facts. Whitman explains that this prohibition of the use of “‘private knowledge’ was a *moral comfort* rule, a way for professional judges to assure themselves that they had maintained a safe distance from the bloody consequences of the case they were judging.”<sup>60</sup> Continental judges, commonly priests, would have frequently taken confessions related to the cases they were deciding. As a consequence, the judge-confessor was likely to have had “private knowledge” of the facts at issue in the case. As a solemn rule, the secret confession could not be violated, and, by refusing to use their private knowledge, judges could escape personal moral responsibility for entering judgment.<sup>61</sup>

When it comes to the proof, testimony of two good witnesses (unimpeachable and trustworthy eyewitnesses) or a confession would be considered to have sufficiently high evidentiary value to constitute

<sup>54</sup> Whitman, p. 99. See also Brundage, p. 147.

<sup>55</sup> Whitman, p. 115. See also Shapiro, Doubt, p. 3; Bayer, V., *Kazneno procesno pravo – odabrana poglavlja. Book II. Povijesni razvoj kazneno procesnog prava*. Krapac, D.(Ed.), Zagreb, 1995, p. 95, 114.; Škulić, M., *Krivično procesno pravo. Second revised and updated edition*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2010, p. 12. There were exceptions to the legal evaluation of evidence such as the institute of sending case file to a distinct group of experienced and educated lawyers in order to get advice, as prescribed in *Constitutio Criminalis Carolina* (Constitution Criminalis Carolina in XVI century is the first body of the German criminal law that aimed to unify the legal system of the “Holy Roman Empire” in Western Europe, laying a foundation for mass which trials and confessions by torture) see Bayer, V, *Jugoslovensko krivično procesno pravo, Second edition, Pravo o cinjenicama i njihovim utvrdzivanju u krivicnom postupku*, Second edition, Informer Zagreb 1978, p. 105.

<sup>56</sup> Shapiro, Doubt, p. 3.

<sup>57</sup> Whitman, p. 105.

<sup>58</sup> Knut W. Nörr, *Zur Stellung des Richters im Gelehrten Prozess der Frühzeit: Iudex Secundum Allegata non Secundum Cinscientum Iudicat* 66 (C. H. Beck 1967) (hereinafter “Nörr”), citing Raymond de Peñafort, *Summa de poenitentia*, (ed. Xaverio Ochoa and Aloisio Diaz), (Rome: Institutum iuridicum Claretianum, 1976).

<sup>59</sup> Whitman, p. 105, citing Nörr, p. 13. See also Jacques Delanglade, *Le Juge, Serviteur de la Loi ou Gardien de la Justice selon la Tradition Theologique*, 10 Rev. de Droit Canonique 141, 151-53 (1960).

<sup>60</sup> Whitman, p. 110 (emphasis added).

<sup>61</sup> Whitman, p. 110.



“full proof.”<sup>62</sup> The testimony of two witnesses was rarely available; thus, continental law sought a confession as a different means of “full proof.”<sup>63</sup> The confession became the “queen” of evidence (lat. *regina probationem*). But, to gain confession, judges could order torture. The torture and confession were also used because, from a certain Christian perspective, they had a cathartic function and were supposed to redeem the culprit. If the inquisitor believed that the witness lied or contradicted himself, the witness could be tortured as well; this option became compulsory in proceedings for the crime of treason or heresy, even when the witnesses were not false or recalcitrant.

However, judges were forbidden to order torture unless there was “*semiplena probatio*” or “half-full proof.”<sup>64</sup> Whitman explains that to determine whether there was “half-full proof,” judges were to follow the rigidly specified rules for weighing the evidence. The technical term for such evidence was “*indicium*” or “proof.” So, torture was used as the last resort, once all other means to get to the truth had been used. It could be repeated two or three times, only not on the same day. Prosecution record was taken, containing: the judge’s questions, the defendant’s answers, the screaming, the moaning, the length and the time of the torture, its quality and the scale of it, the reasons of its application, the person’s conditions before and after the torture; the purpose of this was to justify the legitimacy of the decision to apply torture, taking into consideration the type of the crime and the gravity of the indications. In addition, there was always a doctor to check the condition of the accused and to offer medical assistance as needed. Also, a practice was established to check the confession given under torture, in order to be considered as valid, this examination had to be performed in absence of any instruments of torture and it had to be done after a certain period passed since the statement had been issued.

The accused, subjected to repeated torture sessions and therefore weakened in body and in spirit, was forced to choose between confession, thus ending his suffering, and resistance, which would prolong his agony. Once the accused would confess, the proceeding would end, to be followed by, obviously, a conviction. If the accused would resist the torments, a possible outcome, although rare, could be his acquittal. It has to be highlighted that the suspect who had resisted the torture could be detained for a longer period of time, so that the judge could look for new evidence. Moreover, the court could reach a special verdict “absolving” the defendant from the court (lat. *absolutio ab instantia*).<sup>65</sup> The accused

<sup>62</sup> Whitman, p. 115. See also Shapiro, Doubt, p. 3.

<sup>63</sup> Shapiro, Doubt, p. 3.

<sup>64</sup> Persons of high social standing (members of the nobility and the like) could not be tortured at all. See Whitman, p. 115, referring to Schmoeckel, pp. 212-213, 219-228, 286-287.

<sup>65</sup> Sijerčić-Čolić, H., *Krivično procesno pravo*. Book I. *Krivičnoprocesni subjekti i krivičnoprocesne radnje*. Third revised and updated edition, Law fakulty Univerzity of Sarajevu, Sarajevo, 2012, p. 66.

was absolved due to the lack of evidence, but the process against him/her could be continued at any time.

Whitman argues that although the Continental criminal procedure was “highly rule-bound,” it still provided considerable discretion sufficient to create judicial dilemmas, such as the instruction to find “*indicia indubitata*” i.e. “proofs that did not permit of any doubt.”<sup>66</sup>

Namely, “If the ordeal threatened to involve a priest in bloodshed, the [inquisitorial] trial threatened to do exactly the same thing to the judge.”<sup>67</sup> Therefore, the blood punishments “could only be administered if there was perfect certainty about the guilt of the accused: as the canon lawyers put it, there could be no blood punishment unless there were proofs ... ‘clearer than the light of the midday sun.’”<sup>68</sup> According to Albertus Gandius, a thirteenth-century jurist, “When there are doubts and the evidence is uncertain it is better to leave the malefactor’s misdeed unpunished than to convict an innocent, since in cases of doubt punishments are better milder than harsher.”<sup>69</sup> As another example, the late twelfth-century canonist Huguccio (d.1210) analyzed the problems of criminal procedure, stating: a “‘doubtful matter’ was a matter not proven by witnesses, or documents, or evidence such as [a] confession.”<sup>70</sup>

Johannes Monachus, a French canonist who died in 1313, while glossing a decretal of Pope Boniface VIII, asked the question: *could the pope, on the basis of this decretal, proceed against a person if he had not cited him?*<sup>71</sup> The jurist concluded that the pope was indeed above positive law, but not above natural one and, since summonses had been established by natural law, the pope could not omit them. Monachus, therefore, stated that no judge, even the pope, could come to a fair decision without summoning the defendant. Even though the crime was evident, the judge could proceed in a summary way in some parts of the process, but sooner or later the summonses and the subsequent judgment had to be issued. He argued that a summons to court and a judgment were imposed by natural law according to what was written in the Bible, more precisely in Genesis 3.9-12: since God had felt obliged to summon Adam, judges had surely to do the same. Then he formulated an expression of a defendant’s right to a trial and to due process with the following words: *item quilibet presumitur innocens nisi probetur nocens* (anybody must be presumed innocent if that person is not proven guilty).

Similar example can be seen also in the following trial: in 1398, Salamon and his son Moyses, Jews living in Rimini, were accused by several Christian

<sup>66</sup> Whitman, p. 115.

<sup>67</sup> Whitman, p. 105.

<sup>68</sup> Whitman, p. 100, citing Giorgia Alessi Palazzolo, Provo Legale e Pena. La Crisi del Sistema Tra Evo Medio et Modern 3-5 (Naples 1979).

<sup>69</sup> Peter Holtappels, Die Entwicklung des Grundsatzes ‘in dubio pro reo’ (Cram de Gruyter 1965), cited in Whitman, n. 172.

<sup>70</sup> Whitman, p. 119.

<sup>71</sup> Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, The Jurist, 2004, p. 115.

women of having had sexual relations with them. The case fell under the jurisdiction of the Inquisition because it was reported that Salamon and Moyses had used heretical arguments to seduce the women and was dealt with by a Franciscan inquisitor, Johannes de Poggiali. De Poggiali called witnesses before him, examined them, and took their oaths, to tell the truth and, in the end, he did not find that the accusations against Salamon and Moyses were proven. It was rare that a judge in the Middle Ages would justify his decision, but Johannes de Poggiali did so. He examined the facts and concluded that “*it was better to leave a crime unpunished than to condemn an innocent person*”. These words are a reconnaissance to what would be stated by the English jurist William Blackstone three and a half centuries later in a sentence that will become famous in common law jurisprudence as Blackstone’s formulation: “*the law holds that it is better that ten guilty persons escape than one innocent person suffer*”.<sup>72</sup>

## EARLY MODERN PERIOD AND AGE OF ENLIGHTENMENT

Early modern and Enlightenment period philosophers (ca. 1500 – 1800), affirmed the importance of reason and science and its prevalence over superstition and religion. The Enlightenment thinkers adhered to the doctrine of natural law which granted person certain inalienable rights since they pre-existed the state and were a heritage which belongs to every individual.

The precise term “*in dubio pro reo*” appears for the first time in this period, in 1566, in Egidio Bossi’s treatise on criminal law doctrine.<sup>73</sup> He writes “[Q]uod in dubio pro reo iudicandum est,”<sup>74</sup> i.e. *doubt must be adjudicated in favor of the accused*.<sup>75</sup> Less than a century later, in 1631, Friedrich Spee von Langenfeld (1591 – 1635) authored the *Cautio Criminalis*,<sup>76</sup> a major critique of witch trials that led to their widespread abolition.<sup>77</sup> Spee was a Jesuit priest and university professor who argued that torture (an instrument widely used to obtain confessions in witch trials) did not produce the truth.<sup>78</sup> In this context, Spee repeatedly refers to the possible conviction of innocent people.

<sup>72</sup> Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, The Jurist, 2004, p. 117.

<sup>73</sup> Egidio Bossi & Francesco Bossi, *Tractatus Varii, Qui Omnem Fere Criminalem Materiam Excellenti Doctrina Complectuntur...* 458 (Apud Haeredes Jacobi Iunctae 1566) (hereinafter “Bossi”).

<sup>74</sup> Bossi, p. 458.

<sup>75</sup> Unofficial translation by author.

<sup>76</sup> Friedrich Spee von Langenfeld, *Cautio Criminalis Seu De Processibus Contra Sagas Liber* (Petrus Lucius Typog. Acad. 1631) (hereinafter “Spee”).

<sup>77</sup> Gottfried Wilhelm Freiherr von Leibniz et al., *Herrn Gottfried Wilhelms Freyherrn von Leibniz Theodicee...* 256 (Nicol. Försters und Sohns Erben 1744).

<sup>78</sup> Wolfgang Sellert, *Friedrich Spee von Langenfeld – Ein Streiter wider Hexenprozess und Folter*, NJW 1222, 1224-26 (1986).

Jan Zopfs lists all such passages in his contribution to the *Spee-Jahrbuch* 2009,<sup>79</sup> some of which are:

[That] only such men may become judges and inquisitors, who..., in doubtful cases, are rather of a mind favourable to the accused instead of unfavourable.<sup>80</sup>

[B]ecause one must rather go the safer path and release ten guilty men instead of exposing oneself to the danger of punishing even just one innocent man.<sup>81</sup>

The law demands that, in doubtful cases, one must rather be well-disposed towards the accused instead of the accuser.<sup>82</sup>

Furthermore, Cesare Beccaria, author of the well-known treatise *Dei delitti e delle pene* (Of crimes and punishments), stated that a person could not be considered responsible before the judge's decision had been issued. The logical consequence of that statement was that during the proceedings the accused could not be treated as if he was responsible for the crime and therefore detention on remand had to be utilized only if strictly necessary; furthermore, if criminal responsibility was not certain, unlike what happened during the age of absolutism, the defendant had to be acquitted: "*Either he is guilty, or not guilty. If guilty, he should only suffer the punishment ordained by the laws, and torture becomes useless, as his confession is unnecessary. If he be not guilty, you torture the innocent; for, in the eye of the law, every man is innocent, whose crime has not been proved.*" According to Beccaria, one witness was not sufficient for a conviction to be issued, because if the accused denies what only one person affirms, truth remains uncertain and the right of everyone to be believed innocent, weighs the scale in his favour: "*One witness is not sufficient; for whilst the accused denies what the other affirms, truth remains suspended, and the right that every one has to be believed innocent, turns the balance in his favour.*"<sup>83</sup>

Similar, the English philosopher and jurist, Jeremy Bentham (1748-1832, UK), in *Principles of Judicial Procedure* openly admits the more negative effects of cases, where innocent people are convicted, but warns that one mustn't exaggerate this argument:

<sup>79</sup> Jan Zopfs, *Unschuldsvermutung und "in dubio pro reo" in der Cautio Criminalis*, in *Spee-Jahrbuch* 2009 79, 86-88 (Arbeitsgemeinschaft der Friedrich-Spee-Gesellschaften Düsseldorf und Trier ed. 2009).

<sup>80</sup> "[Dass] nur solche Männer Richter und Inquisitoren werden, die ... in zweifelhaften Fällen dem Angeklagten eher günstig als ungünstig gesonnen sind." Spee, p. 52 (unofficial translation by author).

<sup>81</sup> "[W]eil man den sichreren Weg gehen und lieber zehn Schuldige loslassen musste, als sich der Gefahr auszusetzen, auch nur einen Unschuldigen zu bestrafen." Spee, p. 193 (unofficial translation by author).

<sup>82</sup> "Das Recht verlangt, dass man in zweifelhaften Fällen eher dem Angeklagten als dem Ankläger geneigt sein soll." Spee, p. 276 (unofficial translation by author).

<sup>83</sup> Cesare Beccaria, *Dei delitti e delle pene* (Of crimes and punishments), Tuscan 1764, Chapter 13, Of the credibility of witnesses, Chapter 16 of Torture; <http://www.thefederalistpapers.org/wp-content/uploads/2013/01/Cesare-Beccaria-On-Crimes-and-Punishment.pdf> (last accessed 07 November 2016).

Thus, then, although a judge should have an internal presumption against the accused, he should not hesitate to act on the presumption of his innocence, and, in doubtful cases, to consider the error which acquits as more justifiable, or less injurious to the good of society, than the error which condemns. In listening to the voice of humanity, he will only be following that of reason.

But we must be on our guard against those sentimental exaggerations which tend to give crime impunity, under the pretext of ensuring the safety of innocence. Public applause has been, so to speak, set up to auction. At first, it was said to be better to save several guilty men than to condemn a single innocent man; others, to make the maxim more striking, fixed on the number ten; a third made his ten a hundred, and a fourth made it a thousand. All these candidates for the prize of humanity have been outstripped by I know not how many writers, who hold, that, in no case, ought an accused person to be condemned unless the evidence amount to mathematical or absolute certainty. According to this maxim, nobody ought to be punished, lest an innocent man be punished.<sup>84</sup>

Whitman also notes that the jurists who shaped the *in dubio pro reo* principle understood the conflict between a rule that counselled mildness and the public interest that crimes should not go unpunished. This conflict concerning judicial discretion and the judge's role as a "public person" would be fought repeatedly in the subsequent centuries.<sup>85</sup>

From the philosophers of the Age of Reason came as well new ideas about certainty and probability.<sup>86</sup> Therefore, systematizing the levels of probability, English philosopher John Locke (1632 – 1704) reasoned:

The first, therefore, and highest degree of probability, is, when the general consent of all men, in all ages, as far as it can be known, concurs with a man's constant and never-failing experience in like cases, to confirm the truth of any particular matter of fact attested by fair witnesses: such are all the stated constitutions and properties of bodies and the regular proceedings of causes and effects in the ordinary course of nature.... These probabilities rise so near to certainty, that they govern our thoughts as absolutely ... as the most evident demonstration.... We make little or no difference between them and certain knowledge...

The next degree of probability is when I find by my own experience, and the agreement of all others that mention it, a thing to be for the most part so, and that the particular instance of it is attested by many and undoubted witnesses: v.g. history giving us such an account of men in all ages, and my own experience, as far as I had an opportunity to observe, confirming it, that most men prefer

<sup>84</sup> See J. Bentham, *A Treatise on Judicial Evidence* (M. Dumont Ed.) London, 1825, p.198.

<sup>85</sup> See Richard M. Fraher, *Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof*, 7 *Law & Hist. Rev.* 23, 88 (1989).

<sup>86</sup> Shapiro, *Doubt*, p. 2, 6-7.

their private advantage to the public: if all historians that write of Tiberius, say that Tiberius did so, it is extremely probable. And in this case, our assent has a sufficient foundation to raise itself to a degree which we may call confidence...<sup>87</sup>

According to Locke, the highest level of probability was “so near to certainty” and commanded universal assent. The lower levels of probability were “confidence,” “confident belief,” and “mere opinion.”<sup>88</sup> The level of assent was to be determined according to “the different evidence and probability of the thing: which rises and falls, according as those two foundations of credibility, viz. common observation in like cases, and particular testimonies in that particular instance, favor or contradict it.”<sup>89</sup> Locke’s systematization became so influential that the first treatises on legal evidence built on Locke’s ideas.<sup>90</sup>

Another influential philosopher of the Age of Reason, who classified levels of certainty, was Bishop John Wilkins (1614 – 1672). In his treatise *Of the Principles and Duties of Natural Religion* (1675), Wilkins distinguished between “*Knowledge or Certainty*,” and “*Opinion or Probability*.”<sup>91</sup> “*Knowledge or Certainty*” was “[t]hat kind of Assent which doth arise from such plain and clear Evidence as doth not admit of any reasonable Cause of doubting.”<sup>92</sup> According to Wilkins, there were three kinds of certainty: physical, mathematical, and moral.<sup>93</sup> Physical knowledge or certainty depended on the “Evidence of *Sense*, which is the first and *highest Kind of Evidence* of which human Nature is capable.”<sup>94</sup> Mathematical certainty could be established by logical demonstration, such as geometry proofs.<sup>95</sup>

Moral certainty:

[Has] its Object such Beings as are *less simple*, and do more depend upon mixed Circumstances. Which though they are not capable of the same kind of Evidence ... so as to necessitate every Man’s Assent, though his Judgment be never so much prejudiced against them; yet may they be so plain, that every Man whose Judgment is free from prejudice will consent unto them. And though there be no natural Necessity, that such things must be so, and that they

<sup>87</sup> John Locke, Of the Degrees of Assent in *An Essay Concerning Human Understanding*, Bk. IV, Ch. XVI, section 6, 7(II) (1690) (hereinafter “Locke”), available at <http://enlightenment.supersaturated.com/johnlocke/BOOKIVChapterXVI.html> (last accessed 14 April 2016).

<sup>88</sup> Locke, sections 6, 7(II), 9.

<sup>89</sup> Locke, section 9.

<sup>90</sup> Shapiro, Doubt, p. 8, suggesting that Locke’s highest level of probability was what others later called “moral certainty,” and that it was determined by the weight of the evidence. See also *infra* subsection *Reasonable Doubt in Treatises*.

<sup>91</sup> John Wilkins, *Of the Principles and Duties of Natural Religion* 5 (London: J. Walthoe, J. Knapton 1734) (hereinafter “Wilkins”) (emphasis in original). available at <https://archive.org/details/ofprinciplesduti00wilk> (last accessed 14 April 2016). The first edition was published in 1675 after the author’s death.

<sup>92</sup> Wilkins, p. 5 (emphasis in original).

<sup>93</sup> Wilkins, p. 5 (emphasis in original).

<sup>94</sup> Wilkins, p. 5 (emphasis in original).

<sup>95</sup> Wilkins, p. 6.



cannot possibly be otherwise, without implying a Contradiction; yet may they be so certain as not to admit of any reasonable Doubt concerning them.<sup>96</sup>

As Steve Sheppard interprets Wilkins' classification of certainty, "when evidence for a point is less than that which would necessitate every unprejudiced person's assent, the point was, as he put it, a matter of reasonable doubt."<sup>97</sup> Thus, moral certainty depended upon mixed circumstances and evidence that are so certain that there can be no reasonable doubt about it.

Gratian, a canon lawyer from Bologna, in his *Decretum*, introduced the doctrine of "doubt" into canon criminal law:

C.LXXIV. A decision that purports to be certain does not resolve a doubtful matter. It is a serious and unseemly business to go giving certain judgments in doubtful cases.

C.LXXV. Things that are not proved through certain evidence are not to be believed. Even though certain things may be true, nevertheless they are not to be believed by the judge, unless they are proved by certain evidence.<sup>98</sup>

## FURTHER DEVELOPMENT OF JURY TRIALS AND THE REASONABLE DOUBT STANDARD IN THE ANGLO-SAXON WORLD

The development and increasing mobility of society modified the character of the jury trial, so the pressure over jury intensified in the XVI and XVII century. The role of the jury was gradually limited to considering sworn evidence in court.<sup>99</sup> Jurors were no longer self-informing, but listened to and assessed the evidence advanced by the parties.<sup>100</sup> Residential requirements became less important and the selection of jurors was based more on status and administrative experience, rather than geography.<sup>101</sup>

<sup>96</sup> Wilkins, p. 7.

<sup>97</sup> Stephen M. Sheppard, *The Metamorphosis of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 Notre Dame L. Rev. 1165 (2003) (hereinafter "Sheppard"), p. 1180.

<sup>98</sup> *Decreti Pars Secunda*, C.11, q. 3 c. 74, available at [http://geschichte.digitale-sammlungen.de/decretum-gratiani/kapitel/dc\\_chapter\\_1\\_1077](http://geschichte.digitale-sammlungen.de/decretum-gratiani/kapitel/dc_chapter_1_1077) (last accessed 14 April 2016), cited and translated in Whitman, p. 118.

<sup>99</sup> Baker, p. 75. See also Shapiro, Doubt, p. 5, citing Kevin M. Teeven, *Seventeenth-Century Evidentiary Concerns and the Statute of Frauds*, 9 Adelaide L. Rev. 225 (1983).

<sup>100</sup> Baker, p. 75-76, citing *Anonymous Case (1577)* Dyer's circuit notes, 110 SS 410, pl. 37, *Graves v. Short* (1598) Cro. Eliz. 616. See also Shapiro, Doubt, p. 5-6, 72, citing John M. Mitnick, *From Neighbor Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 Am. J. Legal Hist. 203, 204 (1988); THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 (University of Chicago Press 1988) (hereinafter "Green"); GUIDE TO ENGLISH JURIES, SETTING FORTH THEIR ANTIQUITY, POWER, AND DUTY, FROM THE COMMON-LAW AND STATUTES. BY A PERSON OF QUALITY, 71, 73, 76 (London 1682).

<sup>101</sup> Shapiro, Doubt, p. 5, 52, 71. See also P. G. Lawson, *Lawless Juries? The Composition and Behavior of Hertfordshire Juries, 1573-1624*, in *Twelve Good Men and True* 117, 123-24 (Cockburn & Green eds., 1988); Baron John Somers, *The Security of Englishmen's Lives or the Trust, Power, and Duty of the Grand Juries of England, Explained According to the Fundamentals of the English Government, and the Declarations of the Same Made in Parliament by Many Statutes*, 82, 119, 122, 145, 147-148, 151 (W. Dyde 1798).

By the XVI century, the distinction between jurors and witnesses became clear. In the mid-sixteenth century, legislation provided for means to compel witnesses to testify and made them liable in case of perjury.<sup>102</sup> Witnesses became more important and discussions of witness credibility and the evaluation process entered the legal literature and continued throughout the next centuries. Jurors gradually became “third parties who now had to evaluate and analyze facts and events they had not personally witnessed or previously known....”<sup>103</sup>

In the late XVI and XVII centuries, the Tudor and Stuart monarchies used disciplinary measures, such as fines and imprisonment until payment, for criminal juries that refused to enter guilty verdicts in prosecutions related to religious and political sedition.<sup>104</sup> By 1516, and for the next century and a quarter, criminal trial juries were subjected to punishment by the Star Chamber,<sup>105</sup> and fines and imprisonment were imposed by the judges of the English Courts of Common Law.<sup>106</sup>

The turning point in the status of juries occurred in the mid-seventeenth century and was related to the prosecution of Quakers (members of a Protestant religious movement, known among other things for their pacifism.)<sup>107</sup> After the Stuart Revolution in 1660, the Conventicles Act of 1664<sup>108</sup> prohibited gatherings that might foster political or religious sedition, providing imprisonment, fines, or transportation<sup>109</sup> as

<sup>102</sup> Shapiro, Doubt, p. 6.

<sup>103</sup> Shapiro, Doubt, p. 6.

<sup>104</sup> Whitman, p. 162.

<sup>105</sup> When first introduced in the fourteenth century, the Star Chamber was the King's Council, which met to deal with State affairs and petitions of justice. After 1540, a smaller body named the Privy Council split from the Star Chamber, becoming a secret meeting in which to discuss government policy and administration, while the Star Chamber's formal jurisdiction extended to civil and criminal matters, such as riots, unlawful assembly, perjury, and forgery. In the seventeenth century, during the Stuart era, the criminal jurisdiction of the Star Chamber increased because the law officers of the Crown began to use the Star Chamber to bring prosecutions. The advantage to the prosecution was that cases were tried summarily without the jury. Such trials were convenient for the prosecution of cases related to rebellions and other offenses undermining the authority of the State, where there were risks that the jury might not cooperate. Also, the Star Chamber disciplined juries that refused to enter convictions. The Star Chamber gained an infamous reputation because of its humiliating punishments and irregular methods of examination and procedure. It was abolished by the British Parliament in 1641. See Baker, p. 118-119. See also Edward P. Cheyney, *The Court of Star Chamber*, 18 Am. Hist. Rev. 727-50 (1913), providing a detailed history of the Star Chamber and explaining how it became a synonym for secrecy, severity, and injustice.

<sup>106</sup> There were three English Courts of Common Law: the Court of Common Pleas (dealing with civil matters), the Exchequer (dealing with money and administrative matters) and the King's Bench (criminal jurisdiction). In the fifteenth century, the Court of Chancery was established, with jurisdiction over matters of equity, including trusts, land law, and the administration of certain kinds of estates. See Jim Corkery, *The English Courts and the Rise of Equity*, 7(2) Nat'l Legal Eagle Art. 6, (2001), available at <http://epublications.bond.edu.au/nle/vol7/iss2/6> (last accessed 14 April 2016).

<sup>107</sup> Whitman, p. 173, citing Green, p. 200-264.

<sup>108</sup> Whitman, p. 173, citing Stat. 16 Chas. 2, c.4 (1664), online version available at <http://www.british-history.ac.uk/statutes-realm/vol5/pp648-651> (last accessed 14 April 2016). The Conventicles Act was an act of the Parliament of England titled “An Act to prevent and suppress Seditious Conventicles.” The Act imposed a fine on any person who attended a conventicle (any religious assembly other than the Church of England) of five shillings for the first offence and ten shillings for a second offence. Any preacher or person who allowed their house to be used as a meeting house for such an assembly could be fined 20 shillings and 40 shillings for a second offence.

<sup>109</sup> The term “transportation” refers to being exiled.



punishments. Quakers resisted this prohibition and continued to gather, which led to their prosecution. When jurors delivered not guilty verdicts despite incriminating evidence, it called into question whether judges had the disciplinary powers to fine and imprison juries that refused to convict as directed.<sup>110</sup>

*The King v. Wagstaffe and Others* (1664) settled the matter, at least temporarily. The King's Bench decided that it was well-established authority to fine jurors who refused to enter guilty verdicts as directed.

Wagstaffe and other London citizens were sworn in as jurors at the Old Bailey<sup>111</sup> to try Quakers indicted under the Statute of Conformity (part of the Conventicles Act).<sup>112</sup> Wagstaffe and the other jurors refused to find the accused guilty, despite the judge's opinion that a not guilty verdict was contrary to the evidence.<sup>113</sup> The jurors were fined and put in prison until the payment of the fine. Wagstaffe and other jurors brought a *habeas corpus* writ (a claim of unlawful detention).<sup>114</sup> The King's Bench rejected the petition and sent them back to prison. The King's Bench reasoned that "the jurors are not judges of fact, so as to go clearly against it."<sup>115</sup> It further reasoned that "also in civil causes, if the jury misbehave themselves, they may be fined ... if the Court cannot fine, the law would be very defective."<sup>116</sup> With its decision, the King's Bench confirmed that judges could fine and imprison jurors until payment of the fine if the jurors refused to enter guilty verdicts as directed.

In response to this case, Matthew Hale (1609 – 1679), an influential English barrister and a famous critic of the practice of fining and imprisoning jurors, laid out his views on the moral responsibility of judges in *The History of the Pleas of the Crown* (1736).<sup>117</sup> Relying on the continental law of conscience of the *safer path* doctrine "when you are in doubt, do not act, especially in Cases of Life),"<sup>118</sup> Hale emphasized:

[T]he jury are judges as well of the credibility of the witnesses, as of the truth of the fact, for possibly they might know somewhat of their own knowledge, that what was sworn was untrue, and possibly they might know the witnesses to be such as they could not believe, and it is the conscience of the jury, that must pronounce the prisoner guilty or not guilty.<sup>119</sup>

<sup>110</sup> Whitman, p. 173.

<sup>111</sup> The Central Criminal Court of England and Wales in London.

<sup>112</sup> *The King v. Wagstaffe and Others*, (1664) 83 E.R. 1328 (hereinafter "*Wagstaffe*").

<sup>113</sup> *Wagstaffe*, at 1328.

<sup>114</sup> *Wagstaffe*, at 1331.

<sup>115</sup> *Wagstaffe*, at 1331.

<sup>116</sup> *Wagstaffe*, at 1331.

<sup>117</sup> Matthew Hale, George Wilson, Thomas Dogherty Payne, the History of the Pleas of the Crown, in two volumes, (1800) (hereinafter "*Hale*"). See *infra* subsection *Reasonable Doubt in Treatises*.

<sup>118</sup> Whitman, p.174, n. 9,10, citing Hale, 1 P.C. 300.

<sup>119</sup> Whitman, p.174, n.14, citing Hale, 2 P.C. 313.

Opposition to the practice of coercing jurors was growing. The English government's policy shifted in the late XVII and XVIII centuries.

In 1670, *Bushel's case* established the principle of juror independence, holding that a juror could not be fined or imprisoned for a verdict given according to the juror's conscience.<sup>120</sup> Chief Justice John Vaughan reasoned:

The Judge cannot know the fact but by the evidence which the jury ha[s], and all their evidence he cannot know, for they may have other evidence that is deposed in open Court; for they may have evidence from their own personal knowledge, which may be directly contrary to the evidence deposed; they may also know the witnesses to be infamous; also evidence may arise on their view; in all these cases the jury cannot be coercively directed by the Court.<sup>121</sup>

In holding that jurors could not be punished for a verdict given according to their conscience, the King's Bench confirmed that jurors could use their personal knowledge of the case in reaching a verdict.

Whitman interprets *Bushel's case* as a major watershed for jury independence,<sup>122</sup> protecting the jury from the influence of the judge and the sovereign.<sup>123</sup> Conversely, John Langbein argues that *Bushel's case* had no real significance until about a century later.<sup>124</sup> Regardless of whether or not *Bushel's case* had an immediate effect on criminal trial practice, it nonetheless paved the way for jury independence and in jury verdicts reflecting the sum total of the individual conscience of the jurors.<sup>125</sup>

Once it became clear that a verdict depended on a juror's conscience, the question that begged an answer was: *what should guide the jurors' decision-making?* It is not clear whether the jury charges in the cases that have survived articulate *the* standard of proof.<sup>126</sup> Jury charges in cases from the 1660s contain phrases such as: "if you believe," "if you are satisfied with the evidence,"<sup>127</sup> "belief," and "satisfied conscience."<sup>128</sup>

<sup>120</sup> *Bushel's case*, on Habeas Corpus, (1670) 84 E.R. 1123 (hereinafter "*Bushel's case*"). See also Whitman, p. 179.

<sup>121</sup> *Bushel's case*, at 1125.

<sup>122</sup> Whitman, p. 178.

<sup>123</sup> Whitman, p. 173.

<sup>124</sup> John H. Langbein, *The Origins of Adversary Criminal Trial* 33 (Oxford University Press 2003) (hereinafter "Langbein, *Adversary Criminal Trial*"), p. 324, n. 429, quoting Old Bailey Session Paper (May 1680), 1-2.

<sup>125</sup> It should be however noted that the criminal prosecution in England remained "private" for a long time in a sense that the parties were responsible for pre-trial investigations. In most criminal cases (excluding some cases of national importance, such as treason cases) the victim of a crime or their relatives would initiate prosecution, hire private counsel, bring witnesses etc. Public prosecution would only emerge in late 18th century; an official prosecutorial office was not established until in 19th century.

<sup>126</sup> Langbein, *Adversary Criminal Trial*, p. 264.

<sup>127</sup> 6 *State Trials*, 67, 82; 6 *State Trials*, 530, 559.

<sup>128</sup> 6 *State Trials*, 566, 614, 615.

Some scholars, such as Morano and Shapiro, refer to the standard of proof at that time as the *satisfied conscience* standard.<sup>129</sup> Scholars (Morano, Langbein, Shapiro, and Sheppard) advance different viewpoints as to whether the early standard of proof was higher or lower compared to the later reasonable doubt standard.

Morano argues that, when the degree of proof was determined by the juror's own conscience, the result was that the jury "controlled the kind, quality and quantity of evidence needed to satisfy themselves in performing their duty...."<sup>130</sup> He explains that jury deliberations were influenced by Christian religious beliefs.<sup>131</sup> For instance, in the oath taken by jurors in criminal cases, they swore to God that they would determine the truth of the matter. Morano refers to *Britton*, the thirteenth century French summary of the law of England (purportedly written by command of King Edward I), which stated that jurors had to acquit if they were in doubt because they had taken an oath.<sup>132</sup> Morano argues that *Britton* reflects a high burden of proof, close to absolute certainty: jurors had to acquit if they had "any doubt."<sup>133</sup> He further surmises that since *Britton* did not explicitly qualify the standard of persuasion, a jury could have acquitted based on irrational or frivolous doubts.<sup>134</sup>

By the XVII century, according to Morano, English criminal procedure and the means of proof had gradually evolved to the point where jurors were required to reach their verdicts based on the evidence presented in court.<sup>135</sup> Courts required jurors who had personal knowledge of the facts related to the alleged crimes to declare their knowledge as sworn witnesses and to limit their deliberations to evidence produced in court.<sup>136</sup> Morano argues that these limitations facilitated the development of a more "uniform standard of persuasion" – the *satisfied conscience* standard.<sup>137</sup>

The *satisfied conscience* standard, according to Morano, appears most frequently in the documented charges given to jurors in the XVII century.<sup>138</sup>

<sup>129</sup> Shapiro, Doubt, p. 14; Morano, p. 511; Whitman, p. 166. Whitman argues that Shapiro read the cases in a limited way, focusing on the epistemology and proof as the law of *satisfied conscience*, while the correct approach would be to focus on the moral responsibility of judge and the law of safe conscience. See also Langbein, Adversary Criminal Trial, p. 264, n. 52, referring to Shapiro to argue that early jury instructions required jurors to achieve a *satisfied conscience*, as opposed to absolute certainty.

<sup>130</sup> Morano, p. 510, citing William S. Holdsworth, A History of English Law 317-18, 341 (Methuen & Co. Ltd. 1956) (hereinafter "Holdsworth"); Theodore F. T. Plucknett, A Concise History of the Common Law 125 (Little, Brown and Co. 1956); Pollock, p. 657.

<sup>131</sup> Morano, p. 510.

<sup>132</sup> Morano, p. 510, citing Francis M. Nichols, Britton – an English translation and Notes 26-27 (John Byrne & Co. 1901).

<sup>133</sup> Morano, p. 511.

<sup>134</sup> Morano, p. 511.

<sup>135</sup> Morano, p. 511, citing Holdsworth, p. 334-36; James B. Thayer, A Preliminary Treatise on Evidence at the Common Law 166-70 (Little, Brown and Co. 1898) (hereinafter "Thayer").

<sup>136</sup> Morano, p. 511, citing Thayer, p. 173-74.

<sup>137</sup> Morano, p. 511, relying on Brommich's Case, 7 How. St. Tr. 715, 726 (1679); Wakeman's Case, 7 How. St. Tr. 591, 682 (1679); Green's Case, 7 How. St. Tr. 159, 220 (1679); Ireland's Case, 7 How. St. Tr. 79, 135 (1678); Dover's Case, 6 How. St. Tr. 539, 559 (1663); Moder's Case, 6 How. St. Tr. 274, 282 (1663); James' Case, 6 How. St. Tr. 67, 82-84 (1661).

<sup>138</sup> Morano, p. 511.

Under this test, “jurors were to convict the accused only if they were satisfied in their consciences that he was guilty.”<sup>139</sup> Morano suggests that this test implied that “unless [jurors] were morally certain of the correctness of a guilty verdict, they would violate their oath if they failed to acquit.”<sup>140</sup> He concludes that the *satisfied conscience* standard of the XVII century reaffirmed the *any doubt* standard that appeared in *Britton* in the thirteenth century.<sup>141</sup>

Morano explains that Sir Edward Coke’s<sup>142</sup> writings support the argument that the *any doubt* standard applied. Specifically, he refers to Coke’s statement “that the defendant was adequately protected because the prosecution’s evidence had to be so persuasive that there could be no defence against it.”<sup>143</sup> Morano interprets this statement as a demonstration of the standard of persuasion approximating absolute certainty.<sup>144</sup> He observes that, although the jury charges of the eighteenth century lacked uniformity, the most frequently used standard required the jury to acquit upon the existence of *any* doubt. For instance, in *Maha Rajah Nundocomar’s Case*, jurors were instructed to acquit “unless your consciences are fully satisfied beyond all doubt of his guilt.”<sup>145</sup> Interestingly, this standard of proof remarkably approximates the essence of the civil law concept of *intimate conviction*.<sup>146</sup>

However, Langbein is uncertain that the standard of proof before the eighteenth century can be gleaned from the Old Bailey cases of the 1680s and 1720s.<sup>147</sup> He disagrees with Morano’s interpretation that the early degree of proof was determined by the *any doubt* standard and approximated absolute certainty.<sup>148</sup> Namely, Langbein observes that some of the convictions in the

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<sup>139</sup> Morano, p. 511-12.

<sup>140</sup> Morano, p. 512.

<sup>141</sup> Morano, p. 512.

<sup>142</sup> Sir Edward Coke (1552-1624) was an English barrister, judge and politician, considered to be one of the greatest of the seventeenth century. See also William L. Snyder, *Great Opinions by Great Judges. A Collection of Important Judicial Opinions by Eminent Judges with an Introduction, Notes, Analyses, etc.* (New York: Baker, Voorhis 1883).

<sup>143</sup> Morano, p. 512, referring to Edward Coke, *The Third Part of the Institutes of the Laws of England*, 29, 137 (E. & R. Brooke 1797), justifying the rule prohibiting criminal defendants from presenting witnesses in their own defence.

<sup>144</sup> Morano, p. 512.

<sup>145</sup> See Morano, p. 512, quoting *Maha Rajah Nundocomar’s Case*, 20 How. St. Tr. 923 (India 1775).

<sup>146</sup> French Code of Criminal Procedure, (as amended of 2005), Art. 427: “Except where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his innermost conviction.” unofficial English translation is *available at* <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> (last accessed 14 April 2016); German Code of Criminal Procedure, (as amended of 2014) Section 261: “[t]he court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole.” official English translation is *available at* [https://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p1737](https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1737) (last accessed 14 April 2016); Dutch Code of Criminal Procedure, (as amended of 2012), Section 338: “[the court may convict] only when the court through the hearing has become convinced...from legal means of evidence.” Unofficial English translation; [http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering\\_ENG\\_PV.pdf](http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf) (last accessed 14 April 2016).

<sup>147</sup> Langbein, *Adversary Criminal Trial*, p. 262-63.

<sup>148</sup> Langbein, *Adversary Criminal Trial*, p. 264, n. 52.

Old Bailey seem “impossible to square with a high standard of proof.”<sup>149</sup> He argues that “a case that would in later times have been dismissed at the end of the prosecution evidence resulted in a conviction, apparently on account of character evidence that would have later been excluded ... and because the defendant mishandled her defence.”<sup>150</sup>

Langbein argues that “the jury standard of proof made it unnecessary to provide for extensive and refined evidence-gathering. An English jury could convict on whatever evidence persuaded it, it could still convict on less evidence than was required as a precondition for investigation under torture on the Continent.”<sup>151</sup> He concludes that jurors in the seventeenth century would convict when persuaded by the prosecution that the accused was guilty, and the question for the jurors to decide was “whether the accused had adequately explained away the evidence.”<sup>152</sup>

Shapiro also disagrees with Morano that the early standard of proof was the *any doubt* standard and that this standard approximated absolute certainty.<sup>153</sup> She observes that by the 1660s jury verdicts were based on *belief* and *satisfied conscience*, and were determined upon the evaluation of the evidence.<sup>154</sup> In her view, the *satisfied conscience* standard was influenced by new methods of evaluating facts which “gradually became synonymous with rational belief, that is, belief beyond reasonable doubt.”<sup>155</sup> She explains that these new standards were borrowed from religious and philosophical foundations which encompassed notions of moral certainty and the four degrees of probability. And as such, the evolution of the formulation of the standard of proof depended on and reflected contemporaneous epistemological formulations.<sup>156</sup>

Shapiro analyzed the language of the early XVIII century jury instructions. She observes that the language in the jury instructions remains consistent, although there were fewer references to “conscience.” Rather, references were made to “mind” and “judgment.”<sup>157</sup> The terms “satisfaction” and “belief” formed by evaluating evidence were common in this period.<sup>158</sup> According to Shapiro, during the second half of the XVIII century the “if you *think* the evidence” phrase gradually replaced the “if you *believe* the evidence” phrase in the jury instructions.<sup>159</sup>

Shapiro concludes that by the late XVIII century when the concepts of probability, degrees of certainty, and moral certainty were widely

<sup>149</sup> Langbein, *Adversary Criminal Trial*, p. 262.

<sup>150</sup> Langbein, *Adversary Criminal Trial*, p. 263.

<sup>151</sup> Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* 138 (University of Chicago Press 1976).

<sup>152</sup> Langbein, *Adversary Criminal Trial*, p. 14.

<sup>153</sup> Shapiro, *Doubt*, p. 23.

<sup>154</sup> Shapiro, *Doubt*, p. 14, *citing* *State Trials* past 1668.

<sup>155</sup> Shapiro, *Doubt*, p. 13.

<sup>156</sup> Shapiro, *Doubt*, p. 13.

<sup>157</sup> Shapiro, *Doubt*, p. 20.

<sup>158</sup> Shapiro, *Doubt*, p. 20.

<sup>159</sup> Shapiro, *Doubt*, p. 19-20 (emphasis added).

circulated in the moral and philosophical literature, they “were poured into the old formulas so that they emerged at the end of the century as the secular moral standard of ‘beyond reasonable doubt.’”<sup>160</sup> Shapiro concludes that reasonable doubt was “simply a better explanation of the satisfied conscience standard that resulted from increasing familiarity with the ‘moral certainty’ concept.”<sup>161</sup>

Similarly, Sheppard links the early standard for convictions with certainty, rather than persuasion. He argues that the juror’s “obligation of an oath before God suggests that the jurors believed in an independent conviction of the guilt of the accused. Such an obligation would be unlikely to be met by persuasion to a lesser degree than certainty.”<sup>162</sup>

Sheppard explains that from the XVII to XIX centuries European philosophical debates turned on ideas of knowledge, understandings of probability, and levels of certainty. He concludes that as these divisions between different forms of certainty – including moral certainty – became widely accepted, they were applied in the common law.<sup>163</sup> Sheppard concludes that the “moral element” of certainty can be seen as both “a neutral concept related to practical action,” as well as “an ethical concept related to judgments of right and wrong.”<sup>164</sup> He argues that “there is no evidence that requirements of moral certainty would have been meant to alter the way in which jurors reached their beliefs.”<sup>165</sup> Rather, moral certainty was “merely an addition by the educated to their description of what jurors would do, and had in fact been doing.”<sup>166</sup>

Not all records of the English cases prior to the XVII and early XVIII centuries survived. Because few other reports contain jury charges (instructions), scholars mostly rely on the *State Trials*<sup>167</sup> and *The Old Bailey Sessions Papers*.<sup>168</sup> The *State Trials* were cases brought under English law on offenses against the State. *The Old Bailey Session Papers* are transcripts of ordinary criminal trials in the Old Bailey Criminal Court in London.<sup>169</sup>

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<sup>160</sup> Shapiro, *Moral Certainty*, p. 171.

<sup>161</sup> Shapiro, *Moral Certainty*, p. 171.

<sup>162</sup> Sheppard, p. 1174.

<sup>163</sup> Sheppard, p. 1177-78.

<sup>164</sup> Sheppard, p. 1180.

<sup>165</sup> Sheppard, p. 1181.

<sup>166</sup> Sheppard, p. 1181.

<sup>167</sup> William Cobbett, Thomas Bayly Howell & Thomas Jones Howell, *Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors From the Earliest Period to the Present time* (T.C. Hansard & R. Bagshaw 1816) (hereinafter “*State Trials*”), available at <https://archive.org/details/acompletcollec03cobbgoog> (last accessed 14 April 2016).

<sup>168</sup> Green, p. 251-52. Shapiro, *Doubt*, p. 22.

<sup>169</sup> The transcripts and summaries of the cases are available at <http://www.oldbaileyonline.org>.



## State Trials of High Treason

In the last decades of the XVII century, public interest in the so-called “treason trials” (criminal trials involving State interests) piqued. Reports of these trials were often printed in pamphlets and discussed by the general public.<sup>170</sup> A series of major trials occurred before the outbreak of the Revolution of 1688<sup>171</sup> that contributed to the perception of innocent people being convicted in political prosecutions.<sup>172</sup> Treason trials raised many questions as to witness credibility and the standards for conviction.<sup>173</sup> The treason trials were related to political instability in England in the 1670s and 1680s when the monarchy had recently been restored after the Interregnum (1649 – 1660). The Interregnum was a republican “gap” period between the execution of King Charles I and the restoration of King Charles II when the government was controlled by the Commonwealth and the Protectorate of Oliver Cromwell.<sup>174</sup> The Anglican Church was concerned that King Charles II would be succeeded by his Roman Catholic brother James, the Duke of York.<sup>175</sup>

This political situation led to religious prosecutions, a prime example of which was the Popish Plot of 1678.<sup>176</sup> There were numerous cases connected with the Popish Plot. The Trial of William Viscount Stafford for High Treason provides a general overview of the proof upon which the crime of conspiracy was established.<sup>177</sup>

In November 1680, the House of Commons presented the House of Lords with an Impeachment (indictment) for High Treason. As a Peer, Stafford invoked his privilege to be tried by the House of Lords (Peers).<sup>178</sup> The trial

<sup>170</sup> Shapiro, p. 19. See also Langbein, *Adversary Criminal Trial*, p. 69-73.

<sup>171</sup> The Revolution of 1688 involved the overthrow of King James II of England by a union of English Parliamentarians acting together with Dutch stadtholder (head of state) William III of Orange-Nassau (William of Orange). See Langbein, *Adversary Criminal Trial*, p. 69.

<sup>172</sup> Langbein, *Adversary Criminal Trial*, p. 69.

<sup>173</sup> Shapiro, p. 19-20.

<sup>174</sup> Langbein, *Adversary Criminal Trial*, p. 69.

<sup>175</sup> Langbein, *Adversary Criminal Trial*, p. 69.

<sup>176</sup> The Popish Plot was an alleged conspiracy concocted by Titus Oates that there was an extensive Catholic conspiracy to assassinate King Charles II. Oates' accusations led to the execution of at least 22 men. Eventually, Oates' web of accusations fell apart, leading to his arrest and conviction for perjury. Other major prosecutions were related to the Rye House Plot (1683) and Monmouth's Rebellion (1685). The Rye House Plot alleged the opposition Whig conspired to assassinate or mount an insurrection against King Charles II of England because of his pro-Roman Catholic policies. The Duke of Monmouth's armed rebellion was an attempt to overthrow James II, who had become King upon the death of his elder brother King Charles II on 6 February 1685. See Langbein, *Adversary Criminal Trial*, at 69-77. See also John Pollock, *The Popish Plot: A Study in the History in the Reign of Charles II 3* (Duckworth and Co. 1903), available at <https://archive.org/stream/popishplotstudyi00poll#page/n13/mode/2up> (last accessed 14 April 2016).

<sup>177</sup> John Bill, Thomas Newcomb, & Henry Hills, *The Trial of William Viscount Stafford for High Treason* (Jos. Ray 1680) (hereinafter “Bill”), available online at <http://quod.lib.umich.edu/e/eebo/A63208.0001.001?rgn=main;view=fulltext> (last accessed 14 April 2016).

<sup>178</sup> The British Parliament is formed by the House of Commons and House of Lords. The members of the House of Commons are voted by the public, while the members of the House of Lords inherit their status. For more on the history of the Parliament see *The History of Parliament*, available at <http://www.parliament.uk/education/about-your-parliament/history-of-parliament/> (last accessed 14 April 2016).

by Peers was presided over by the Lord High Steward, Lord Finch (1621 – 1682).<sup>179</sup>

Stafford was implicated by Titus Oates, who stated that he saw a document naming Stafford as a conspirator against King Charles II.<sup>180</sup> Two other witnesses testified that Stafford had tried to persuade and bribe them to kill the King.<sup>181</sup>

In addressing the Lords, who acted as the jury in the proceedings, the prosecution argued:

But this indeed is but *presumptive* Evidence which will induce a *moral* persuasion.

We shall now produce such *positive* Evidence as will make a *judicial certainty*, and will abundantly suffice to *convince* your Lordships and *convict* this Lord.<sup>182</sup>

After hearing the evidence, the Lord High Steward directed the prosecution, to sum up the evidence, i.e. “to state the Fact”:<sup>183</sup>

My Lords, The Evidence is so strong, that I think it admits of no doubt, and the Offences proved against my Lord and the rest of his Party are so foul that they need no aggravation.

....

If the matter be fully proved (as I see no reason to doubt but that it is) I am sure your Lordships will do that Justice to Your King and Countrey [sic] as to give Judgment against these Offenders, which will not only be a Security to us against them, but a Terror to all others against committing the like Offences.<sup>184</sup>

Another member of the prosecution proceeded further in summing up the “Points in Law”:<sup>185</sup>

We very well know your Lordships sit now in the Seat of Justice, and whatsoever credit or regard your Lordships please to give to the Protestations of a Peer in another Case, your Lordships will proceed here only according to your Proofs and your Evidence (*secundum allegata & probata*) and therefore all we shall say to this, is, that we hope our Proofs are so clear and evident, as will leave no room to your Lordships to believe this Noble Lords[sic] Protestations.<sup>186</sup>

The language in these early cases is not necessarily used with precision and consistency. Sheppard argues that the Stafford case demonstrates that “[m]oral certainty and its correlative forms of doubt were already accepted

<sup>179</sup> Bill, p. 6. Lord Finch was the Lord Chancellor of England, a senior functionary in the government with judicial functions. See also J.P. Kenyon, *The Popish Plot* 86 (Phoenix Press Reissue 2000).

<sup>180</sup> Bill, p. 36-41.

<sup>181</sup> Bill, p. 30-35 (testimony of Dugdale) and p. 144-46 (testimony of Turberville).

<sup>182</sup> Bill, p. 55 (italics in original).

<sup>183</sup> Bill, p. 217(italics in original).

<sup>184</sup> Bill, p. 238-239 (italics in original).

<sup>185</sup> Bill, p. 239 (italics in original).

<sup>186</sup> Bill, p. 240 (italics in original).



forms of discourse in the religious treason trials” in the late seventeenth century.<sup>187</sup> Regarding the prosecution’s argument, Sheppard interprets this argument as equating “moral persuasion” to “judicial certainty,” and suggests that either could be sufficient for moral certainty.<sup>188</sup> Sheppard concludes that this equation reflects Wilkins’ requirements for “moral certainty – an amount of testimony, in the light of personal knowledge and experience, that could persuade a person who must judge that the basis for the judgment was beyond doubt.”<sup>189</sup>

The language of the eighteenth century cases does not differ substantially from the late seventeenth century cases. Shapiro observes that, in cases from 1700 – 1750, the use of the terms “mind” and “judgment” increased and references to “conscience” decreased.<sup>190</sup> Judges’ use of the terms “satisfaction” and “belief” became more common when discussing the evaluation of evidence.<sup>191</sup>

Although in the early eighteenth century cases the terms “judgment” and “understanding” appear more frequently than “belief” or “conscience,” Shapiro warns that this increased frequency should not be interpreted as reflecting the loss of religious authority and secularization of society, since terms such as “judgment” and “belief” often appeared together.<sup>192</sup> Instead, Shapiro suggests that these changes in terminology demonstrate a greater concern for situations in which juries might have doubts about the evidence and their verdicts.<sup>193</sup>

### The Boston Massacre Trials of 1770 in the American Colonies

The reasonable doubt standard first appears in the American colonies in *Rex v. Preston* (“*Preston*”) and *Rex v. Wemms* (“*Wemms*”). These two cases also were known as the Boston Massacre Trials of 1770.<sup>194</sup> The parties’ closing arguments and the judge’s instructions to the jury in *Preston* were not reported so there is no confirmation whether the reasonable doubt standard was actually applied in this case. Supposedly, *Wemms* was the first case to specifically distinguish between the *any doubt* and *reasonable doubt* standards of proof. Before further discussing the cases, a short introduction to the events leading to the Boston Massacre trials is necessary.

<sup>187</sup> Sheppard, p. 1181.

<sup>188</sup> Sheppard, p. 1181.

<sup>189</sup> Sheppard, p. 1181.

<sup>190</sup> Shapiro, *Doubt*, p. 20.

<sup>191</sup> Shapiro, *Doubt*, p. 20.

<sup>192</sup> Shapiro, *Doubt*, p. 20. See also, Shapiro, *Moral Certainty*, p. 171.

<sup>193</sup> Shapiro, *Doubt*, p. 20-22.

<sup>194</sup> A comprehensive account of the Boston Massacre Trials can be found in *Legal Papers of John Adams*, L. Kinvin Wroth and Hiller B. Zobel, eds. (Cambridge, Mass.: The Belknap Press of Harvard University Press 1965), Vol. 3, p. 46-98 (hereinafter “*Legal papers of John Adams*”). See also Morano, p. 516; Whitman, pp. 193-194; Shapiro, *Doubt*, p. 22; Sheppard, p. 1190.

On 5 March 1770 in Boston, Massachusetts, a patrol of British soldiers was confronted by a crowd of Bostonians. The soldiers of the patrol were provoked by the crowd and fired at it, killing five people. This incident resulted in the indictment of the patrol's leader – Captain Preston – and eight soldiers for murder. John Adams (who would go on to become the second US President) appeared for the defence in both cases. Robert Treat Paine argued for the prosecution. In *Preston*, the patrol's leader was acquitted. In *Wemms*, six of the eight soldiers were acquitted, but the remaining two soldiers were convicted of the lesser charge of manslaughter.<sup>195</sup>

Adams, defending the British soldiers, argued in his closing arguments 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...”<sup>196</sup> Paine agreed that jurors had to acquit if they had doubts; however, he argued that their doubts must be reasonable:

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...<sup>197</sup>

The judges' charges to the jury were only partially preserved so it is not clear if they used the reasonable doubt language.<sup>198</sup> 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.”<sup>199</sup> 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.”<sup>200</sup>

Scholars suggest different interpretations of the use of the reasonable doubt language in the jury instructions in the Boston Massacre trials. In Morano's view, to employ the reasonable doubt terminology was “to break with tradition.”<sup>201</sup> To the contrary, Shapiro notes that the “Boston cases do not suggest that the standard was considered innovative, for both the prosecution and the bench emphasized that the accused were being tried according to traditional English usage.”<sup>202</sup> For Whitman, the “Boston massacre trial arguments ... were framed in the language

<sup>195</sup> Legal Papers of John Adams, Vol. 3, p. 46-98.

<sup>196</sup> Legal Papers of John Adams, Vol. 3, p. 243.

<sup>197</sup> Legal Papers of John Adams, Vol. 3, p. 271.

<sup>198</sup> Morano, p. 517.

<sup>199</sup> Legal Papers of John Adams, Vol. 3, p. 243.

<sup>200</sup> Legal Papers of John Adams, Vol. 3, p. 309.

<sup>201</sup> Morano, p. 518.

<sup>202</sup> Shapiro, *Doubt*, p. 22.

of safer path theology.”<sup>203</sup> He explains that Paine’s arguments should be understood in the context of the moral theological literature, resisting excessive radicalism such “that qualms of conscience must not be allowed to prevent the satisfactory workings of public justice.”<sup>204</sup>

Morano and Shapiro disagree as to the significance and the effect of the jury instructions in this case. Morano argues that the requirement of reasonableness was advanced by the prosecution to lower the degree of proof and make convictions easier.<sup>205</sup> In contrast, Shapiro argues that the reasonable doubt qualification of the standard of proof was no real departure from the earlier standard of conscience or doubt, but rather a natural consequence of the application of contemporaneous thinking.<sup>206</sup> Sheppard attempts to reconcile Morano’s and Shapiro’s points of view, concluding that both of them might be correct: “The instruction both accords with the new language of the times and contrasts with the language of the defence, to the benefit of the state in jury deliberations.”<sup>207</sup> Thus, “the prosecutor’s use of the argument both was designed subtly to help the prosecution’s case but accorded with contemporary views about the nature of judgment.”<sup>208</sup>

### The Old Bailey Cases

The next series of reasonable doubt cases discussed by scholars are the cases from the Old Bailey in the mid-1780s. The transcripts are published in *The Old Bailey Sessions Papers*. Langbein refers to *The Old Bailey Sessions Papers* as “probably the best accounts we shall ever have of what transpired in ordinary English criminal courts before the later eighteenth century.”<sup>209</sup> However, *The Old Bailey Sessions Papers* are not complete transcripts of everything that was said in court. The details of defence cases and legal arguments were regularly omitted.<sup>210</sup> The first published collection of trials dates back to 1674; early editions were just short summaries of the trials that were most interesting to the general public.<sup>211</sup> The reports of the eighteenth century trials are more detailed and include judges’ comments summing up the evidence. These comments are the most important for analyzing the standard of proof because judges would occasionally provide guidance for the jurors to follow during their deliberations.

<sup>203</sup> Whitman, p. 194.

<sup>204</sup> Whitman, p. 193.

<sup>205</sup> Morano, p. 514.

<sup>206</sup> Shapiro, Doubt, p. 20-22.

<sup>207</sup> Sheppard, p. 1192.

<sup>208</sup> Sheppard, p. 1192.

<sup>209</sup> Langbein, Adversary Criminal Trial, p. 271.

<sup>210</sup> See online edition of *The Old Bailey Sessions Papers* 1674-1913, available at <http://www.oldbaileyonline.org> (last accessed 14 April 2016).

<sup>211</sup> See *The Proceedings of The Old Bailey*, The Value of the Proceedings as a Historical Source, available at <http://www.oldbaileyonline.org/static/Value.jsp#reading> (last accessed 14 April 2016).

For instance, regarding the 1783 trial of John Clarke, who was charged with murder, *The Old Bailey Sessions Papers* provide a short summary of the indictment and transcripts of the testimony of several witnesses. At the end of the trial, the judge summed up the evidence and advised the jury:

It is there four[sic] for you to consider gentlemen, first whether, you are *clearly satisfied* with the truth of the evidence, and the result of the whole evidence taken together, the prisoner is the man the deceased that wound; ... unless you are *satisfied clearly* from the evidence, that he has the actual occasion of the man's death, he is not guilty of murder....

If from all these circumstances you are *clearly satisfied* that the wound was the cause of his death, and are also *clearly satisfied* with the truth of the rest of the evidence and that the result of that evidence is proved clearly to your satisfaction, that the prisoner is the man that gave the wound ... in that case be your duty to find the prisoner guilty of this indictment: If on the other hand you think there is *any room to doubt* the truth of the evidence, or that believing the truth of the evidence is not sufficient proof... in that case, it is your duty to acquit the prisoner wholly... Therefore, give your verdict according to your own *consciences*, you must be clearly satisfied... If on the other [hand] you think there is any *reasonable cause for doubt*, either upon the fact of his warning the man or of the wound being the cause of his death, you will acquit him.<sup>212</sup>

The language of this jury instruction does not make it clear whether the reasonable doubt standard had become the rule of law. The terms “clearly satisfied” and the reference to “consciences” resemble what scholars labeled as the early *satisfied conscience* standard. Regarding the truth of the evidence, the judge warns of “any room to doubt.” Regarding the finding of guilt or innocence, the judge speaks of “reasonable cause for doubt,” which doubtfully is a synonym for proof beyond a reasonable doubt.

In the 1783 trial of John Higginson, who was charged with theft and embezzlement, the judge summed up the evidence and advised the jury:

In almost every case that comes before you, there is a strict possibility where the positive fact itself is not proved by witnesses, who saw the fact, there is a strict possibility, that somebody else might have committed it: But that the nature of evidence requires, that Juries should not govern themselves, in questions of evidence, that come before them, by that strictness, is most evident, for if it were not so, it is not possible that offenders of any kind should be brought to Justice. Where there is *reasonable probability*, that notwithstanding the appearances a man may be innocent, it is very fair to make use of them: But if it goes further, and if there

<sup>212</sup> *Trial of John Clarke*, The Proceedings of the Old Bailey, Ref: T17831210-4 (emphasis added).

is nothing but *absolute possibility*, where all the *moral probabilities* of evidence are against the prisoner, where nothing can save but *absolute possibility* that he may be innocent, it would be going too far to conclude him innocent from that, that would make it impossible that public Justice should take its course. Therefore, the true question for your consideration is, whether judging of this fact, as you judge of all other facts, that happen in the course of your dealings with mankind, and your correspondence with one another, it appears to you be proved satisfactorily, and to moral demonstration, that this prisoner must have been the person that secreted this letter, and took these notes out of it, if that be the fair result of this evidence, then the prisoner is guilty, and it will be your duty to find him so. If on viewing the evidence *any reasonable doubt* remains on your minds, that he is a person that secreted this letter, and took the notes out of it, he will be entitled to your acquittal.<sup>213</sup>

In this case, the judge distinguished between “absolute possibility” and “moral probability,” suggesting that an absolute possibility of innocence would not be sufficient to acquit the accused. The judge states that if the evidence “proved satisfactorily” the guilt of the accused, it is jurors’ “duty to find him [guilty].” Where there is “reasonable doubt,” the accused is “entitled to ... acquittal.”

The reasonable doubt language was repeated in other cases thereafter. In 1784, in the case against Richard Corbett, who was charged with arson (setting fire to buildings), the judge advised the jury in his summation of the evidence:

But you gentlemen will weigh all these circumstances in your minds, in such a case you certainly will not convict the prisoner on a mere suspicion; but if you think his conduct such as can by no possibility be accounted for consistent with his innocence, you will be obliged to find him guilty; I do not mean to say that you are to strain against all evidence, or that if you are clearly and truly convinced of his guilt in your own minds you ought to acquit him, but I say if there *is a reasonable doubt*, in that case, that doubt *ought to decide in favor* of the prisoner.<sup>214</sup>

This case shows that the jurors were “obliged” to find the accused guilty if there is no “possibility ... consistent with his innocence,” however, it appears to be left to the jurors’ discretion to acquit in case of “reasonable doubt.”

In the 1786 trial of Joseph Rickards, who was charged with murder, there is no discretionary formulation: “If you are satisfied, Gentlemen, upon the whole, that he is guilty, you will find him so; if you see *any reasonable*

<sup>213</sup> *Trial of John Higginson*, The Proceedings of the Old Bailey, Ref: T17830430-67 (emphasis added).

<sup>214</sup> *Trial of Richard Corbett*, The Proceedings of the Old Bailey, Ref: T17840707-10 (emphasis added).

*doubt, you will acquit him.*"<sup>215</sup> Moreover, when the verdict was read out, it stated that the accused "ha[d] been convicted, *upon evidence which excludes all possibility of doubt....*"<sup>216</sup>

These cases illustrate that it is difficult to discern any consistently applied or defined standard of proof. Not all of *The Old Bailey Sessions Papers* contain the full verbatim transcripts.<sup>217</sup> Different judges seemed to formulate the degree of proof differently. Although judges used reasonable doubt language in the jury instructions, the various formulations are used inconsistently. The reasonable doubt standard of proof does not appear to have crystallized as a standard by the late eighteenth century.

### Reasonable Doubt in Treatises

In the Anglo-Saxon world, the reasonable doubt language appeared not only in jury instructions but also in treatises. In the eighteenth century, legal treatises were so influential that they "had replaced justice of the peace manuals as authoritative texts."<sup>218</sup> The eighteenth and nineteenth centuries' common law treatises on evidence built upon the foundations of the Age of Reason philosophers.<sup>219</sup>

For instance, one of the first treatises on evidence, *The Law of Evidence*<sup>220</sup> (first published in 1754) by Sir Geoffrey Gilbert (1674 – 1726) was influenced by Locke's ideas of degrees of probability.<sup>221</sup> Sir Gilbert also refers to Wilkins' levels of certainty.<sup>222</sup> According to Sir Gilbert, assessment of probability required careful consideration of the witness's credibility. If the witness was credible, there was no reason to doubt his statements.<sup>223</sup> He explains that verdicts do not possess absolute certainty, but trials based upon credible witnesses proceed to verdicts that the jury has no reason to doubt.<sup>224</sup>

Shapiro argues that Gilbert's use of Locke's formulation, as well as the language used in the trials of the eighteenth century, suggests that the "beyond reasonable doubt rule was first applied only to direct testimony and was not initially applied to circumstantial evidence."<sup>225</sup>

<sup>215</sup> Trial of Joseph Rickards, The Proceedings of the Old Bailey, Ref: T17860222-1 (emphasis added).

<sup>216</sup> *Trial of Joseph Rickards*, The Proceedings of the Old Bailey, Ref: T17860222-1 (emphasis added).

<sup>217</sup> See Langbein, *Adversary Criminal Trial*, p. 264-65, discussing the inconsistencies in the jury instructions of this period.

<sup>218</sup> Shapiro, *Doubt*, p. 140.

<sup>219</sup> Shapiro, *Doubt*, p. 26.

<sup>220</sup> Geoffrey Gilbert, *The Law of Evidence* (Joseph Cruikshank, 1805) (hereinafter "Gilbert"). His treatise was composed before 1726, the year of his death. Editions appeared in 1756, 1760, 1761, 1764, 1769, 1777, 1788, 1790, 1791-1794, 1795-1797, 1801. Volume 2 of the 1791 edition is available at <https://archive.org/details/lawevidence00gilgoog> (last accessed 14 April 2016).

<sup>221</sup> Gilbert, p. 1-2.

<sup>222</sup> Gilbert, p. 1-3.

<sup>223</sup> Gilbert, p. 1-4.

<sup>224</sup> Gilbert, p. 2-4.

<sup>225</sup> Shapiro, *Doubt*, p. 26.

Another influential treatise was authored by James Wilson, Associate Justice of the US Supreme Court and Professor of Law.<sup>226</sup> Wilson relied on a different philosophical school, the Scottish common sense school. The common sense school developed a philosophy that modified Locke's principles, rejecting the old philosophical tradition that certainty could be reached by demonstration only. Philosophers of the common sense school insisted that such a position had no meaning in ordinary life, as it would classify any testimony as merely probable.<sup>227</sup> For the common sense philosophers, well-attested facts were classified as knowledge, as opposed to opinion or probability.<sup>228</sup>

Wilson distinguished between two varieties of reasoning: demonstrative and moral. Demonstrative reasoning yielded abstract truths, while moral reasoning was about "real but contingent truths and connections which take place among things actually existing."<sup>229</sup> According to Wilson, testimony was one of the most important sources of moral evidence.<sup>230</sup> He discussed the reasons for doubting the credibility of witness testimony, such as the competence of the witness, prior false testimony by the witness, the witness's reputation, and the manner in which the witness testified.<sup>231</sup> Also, in capital (death penalty) cases, according to Wilson, the evidence must be so strong as to "force belief."<sup>232</sup> Wilson raised the issue of jurors' doubt while considering the problem of unanimous verdicts. For instance, if a "single doubt" remains in the mind of any juror, he must dissent. If other jurors believe that dissent, they must agree to an acquittal.<sup>233</sup>

The growing importance of the term "reasonable doubt" can be seen in nineteenth century treatises. For instance, the *Rules of Evidence on Pleas of the Crown* by Leonard Macnally "played a crucial role in enunciating and publicizing the beyond reasonable doubt standard."<sup>234</sup> Macnally observed that it is a rule of law that "if a jury entertain[s] a reasonable doubt upon the truth of the witness's testimony," it must acquit.<sup>235</sup> He further suggests that "unless [a witness's] testimony be supported by clear and unsuspecting collateral proof of the facts charged on the prisoner by the indictment, *doubt* must arise in the minds of jurors; and, by the humanity of the law, where doubt is created, an acquittal ought to be the consequence."<sup>236</sup>

<sup>226</sup> The Works of James Wilson, in 2 vols., (James DeWitt Andrews ed., 1896) (hereinafter "Wilson"). Online version is available at <http://www.constitution.org/jwilson/jwilson.htm> (last accessed 14 April 2016).

<sup>227</sup> For a discussion of the Scottish common sense school see Selwyn A. Grave, *The Scottish Philosophy of Common Sense*, (Oxford 1960).

<sup>228</sup> Shapiro, *Doubt*, p. 29.

<sup>229</sup> Wilson, vol. 1, p. 518-19.

<sup>230</sup> Wilson, vol. 1, p. 508, 510.

<sup>231</sup> Wilson, vol. 1, p. 508.

<sup>232</sup> Wilson, vol. 1, p. 503-04, vol. 2, p. 232.

<sup>233</sup> Wilson, vol. 2, p. 235.

<sup>234</sup> Shapiro, *Doubt*, p. 29.

<sup>235</sup> Leonard Macnally, *The Rules of Evidence on Pleas of the Crown: Illustrated from Printed and Manuscript Trials and Cases 2* (J. Butterworth and J. Cooke 1802) (hereinafter "Macnally"), available at <http://catalog.hathitrust.org/Record/008620484>.

<sup>236</sup> Macnally, p. 3 (italics in original).



It was the judges' duty:

[I]n charging the jury, to remind them, that as they are intrusted with the administration of public justice on the one hand, and with the life, the honour and the property of the prisoner on the other, their duty calls on them, before they pronounce a verdict of condemnation, *to ask themselves whether they are satisfied, beyond the probability of doubt, that he is guilty....*<sup>237</sup>

Another influential treatise, *Practical Treatise on the Law of Evidence* by Thomas Starkie noted:

Evidence which satisfies the minds of the jury of the truth of the fact in dispute, *to the entire exclusion of every reasonable doubt, constitutes full proof of the fact*; absolute mathematical or metaphysical certainty is not essential...<sup>238</sup>

Starkie further explained that:

To acquit upon light, trivial and fanciful suppositions and remote conjectures is a virtual violation of the juror's oath... On the other hand, a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and ... unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest.<sup>239</sup>

In Simon Greenleaf's *Treatise on the Law of Evidence*, the amount of proof required in a criminal case is described as "that amount of proof, which ordinarily satisfies an unprejudiced mind *beyond reasonable doubt*."<sup>240</sup>

Finally, there is American preeminent and highly influential expert on the law of evidence, Dean John Wigmore's famous *Treatise on Evidence*, stating that:

In *criminal cases*, a rule has grown up that the persuasion must be *beyond a reasonable doubt*. This precise distinction seems to have had its origin no earlier than the end of the 1700s and to have been applied at first only in capital cases, and by no means is a fixed phrase but in various tentative forms. "A clear impression," "upon clear grounds," "satisfied," are the earlier phrases; and then "rational doubt," "rational and well-grounded doubt," "beyond the probability of doubt," and "reasonable doubt" come into use.<sup>241</sup>

<sup>237</sup> Macnally, p. 3 (emphasis added).

<sup>238</sup> Thomas Starkie, *Practical Treatise on the Law of Evidence* 724 (T & J. W. Johnson & Co. 1860) (hereinafter "Starkie") available at <https://archive.org/details/cu31924020112888> (last accessed 14 April 2016) (emphasis added).

<sup>239</sup> Starkie, p. 761.

<sup>240</sup> Simon Greenleaf, *A Treatise on the Law of Evidence*, Vol. 1, § 2, at 4 (Little, Brown & Co., 13th ed., 1876) available at <https://archive.org/details/cu31924020130112> (last accessed 14 April 2016) (emphasis added).

<sup>241</sup> John Wigmore, *A Treatise on the System of Evidence in trials at Common Law*, § 2497 (Toronto: Canada Law Book 1905) (hereinafter "Wigmore") (italics in original) available at [https://archive.org/details/details/cihm\\_73414](https://archive.org/details/details/cihm_73414) (last accessed 14 April 2016).



Interestingly, regarding the definition of reasonable doubt, Wigmore observes that:

[W]hen anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is rather confusion, or, at the least, a continued incomprehension. In practice, these detailed amplifications of the [reasonable doubt] doctrine have usually degenerated into a mere tool for counsel who desire to entrap an unwary judge into forgetfulness of some obscure precedent, or to save a cause for a new trial by quibbling, on appeal, over the verbal propriety of a form of words uttered or declined to be uttered by the judge.... The effort to perpetuate and develop these unserviceable definitions is a useless one and serves to-day chiefly to aid the purposes of the tactician. It should be wholly abandoned.<sup>242</sup>

## NAPOLEONIC PERIOD

The progressive ideas of the Enlightenment period could finally find a practical implementation on the Continent as well, through the French Revolution in 1789. During the revolutionary period the inquisitorial process, based on the presumption of guilt, was abolished and replaced by an accusatorial system modeled after the English procedure. The Anglo-Saxon legal system was so different from the one of the *Ancien Regime* that it naturally attracted the attention of the Enlightenment thinkers on the Continent, determined to find an alternative model of trial. Therefore, it was obvious for the French jurists to look towards Great Britain in search of a different model of criminal proceedings and that the choice was for an accusatorial system.

Although, as it has been shown above, the principle of presumption of innocence, which is strictly linked to the principle of *in dubio pro reo*, had been affirmed for the first time by the Roman jurisprudence, it was only with the *Déclaration des droits de l'homme et du citoyen* (Declaration of the rights of man and citizen), which derived from the revolution, that it became a rule of positive law. Article 9 of the Declaration stated the following: “*Any man being presumed innocent until he is declared culpable, if it is judged indispensable to arrest him, any rigor which would not be necessary for the securing of his person must be severely reprimanded by the law*”.

By that, the Enlightenment condemned the practice of utilizing torture in the criminal proceedings, since it would be unfair to torment a citizen who could be innocent and since the accused had to be considered innocent unless the crime was proven with certainty.

<sup>242</sup> Wigmore, § 2497.

Unfortunately, this phase did not last long. In fact, in the year 1808, at the time of Napoleon, the *Code d'instruction criminelle* (Code of Criminal Procedure) entered into force in France, giving birth to a form of proceedings, the so called "mixed proceedings" that some legal scholars consider a sort of juridical monster. It resulted from the combination of the accusatorial and the adversarial system. The criminal proceeding was characterized by two distinct phases: the first one predominantly inquisitorial, written, secret, dominated by the prosecution, without participation of the accused and conducted before a judge; and the second one, basically oral and adversarial, due to the presence of both the prosecution and the defence, but destined to become a mere repetition of the investigative stage. The critical point of the entire system was the investigating judge, who not only did adjudicate the case but was conducting the investigation aimed at finding evidence, which compromised the independence of his judgment.

However, some jurists of that time believed that the new form of procedure did not rule out the principle of *in dubio pro reo* and the reference of the principle of presumption of innocence, since the judge had to look for both incriminatory and exculpatory evidence. Assigning this dual task to the judge was aimed at finding balance between the two extremes – the protection/defence of the state versus the freedom of the individual; however, due to the renewed authoritarianism of the political regime, the balance ended inexorably tipped in favour of the state. Furthermore the system was such that, while the prosecution had to present full evidence to get the conviction, the defence had only to demonstrate that the guilt of the defendant was not fully proven so as to obtain the acquittal; as a consequence, the institute of provisional acquittal could no longer be sustainable, showing that the principle of *in dubio pro reo*, although weakened by the double role of the investigative judge, was still in application in the period which followed the French revolution.

This understanding, although present to a certain extent in the legal theory and practice in some parts of the Continent, was not a part of a law. In his commentary to the LCP of the former Socialist Federal Republic of Yugoslavia (hereinafter: SFRY), therefore, lawyer Branko Petric<sup>243</sup> has stated the following:

Without any hesitation, or doubt, one can with certainty claim that our law does not acknowledge that so-called "principle", and likewise it cannot be deduced from any legal provision. (...) The evaluation of the evidence is a complicated process, which in any case must move in the area of the real, actual world and changes in it, and not in unreal combinations, regarding what is more favourable and for

<sup>243</sup> Branko Petric, Commentary of the Law on Criminal Procedure 1986, 2-nd edition, Official Gazette of the SFRY 26/86, Belgrade, Article 2, (quotation taken from available translation of the Commentary in English language).

whom. A certain fact, which is relevant for rendering a decision, must be established in an appropriate way, free of admixtures of arbitrariness. The facts in the criminal procedure are either proven or unproven and the options are and must be within the domain: proven – unproven, and it is unacceptable to refer to the so-called principle *in dubio pro reo*, which our law does not even know, and which, objectively, is a line of least resistance and escaping from difficulties of argumentation when they arise.

During the XIX century, the Napoleonic model spread throughout Europe, and somewhat survived until mid XX and early XXI century. It, for example, stayed in Italy until 1988, when the new Law on Criminal Procedure<sup>244</sup> adopted a system which was mostly adversarial. The same reform towards more adversarial criminal procedure took place later in Germany, most of the Balkan countries and wider.

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<sup>244</sup> Gazzetta Ufficiale n.250 del 24-10-1988 - Suppl. Ordinario n. 92, <http://www.gazzettaufficiale.it/anteprema/codici/penale> (last accessed 21 December 2016). The text published online is the current consolidated version, including all the modifications from the amendments published to date).



## CONTEMPORARY APPLICATION OF THE PRINCIPLE *IN DUBIO PRO REO* & THE STANDARD OF PROOF BEYOND REASONABLE DOUBT

### MORAL VALUES BUILDING THE FOUNDATION OF MODERN CRIMINAL PROCEDURE

An issue of general consent nowadays is that one of the main goals of the criminal justice is to avoid conviction of innocent persons. Convicting an innocent person would undermine the legitimacy of the criminal law itself, as it is morally unacceptable for the law to allow the innocent to suffer. Observing the system as a whole, this indeed makes sense. One need not elaborate in detail that criminal law encompasses grave limitations to human rights and liberties - not only as sanctions but also in the procedure itself. Therefore, the rhetoric of modern criminal law prioritises the protection of the innocent from wrongful conviction before the conviction of the guilty.

However, nobody is actually claiming that it is better to have a hundred or a thousand guilty people set free, in order to avoid any possibility of convicting the innocent. Protecting the innocent from conviction is not, and cannot be, the only concern. Modern criminal procedure aims to reduce the risk of convicting the innocent, but, at the same time, is fully aware that public interest would not be served if only rules that impede efficient law enforcement are developed.<sup>245</sup> Surely, a procedure that would eliminate all errors would satisfy both interests of protecting the innocent and punishing the guilty, without generating conflict between the two. But is there really such a procedure?

<sup>245</sup> See A. Sanders/ R. Young, *Criminal Justice*, 2nd edition, Butterworths, London, 2000, 10.

Although for a long period of time the continental system was based on the assurance that a pro-active court, with strong investigative authorities, and not burdened by strict rules of evidence, will easily determine what really happened, i.e. the truth, the obvious deficiencies of judicial procedures resulted in the conclusion that they can be considered structurally dysfunctional for establishing the truth.

Many factors can contribute to wrongful convictions. For example, witnesses to disturbing events often remember the details of those events incorrectly. Similarly, confessions given by suspects while in police custody are always questionable, because of common psychological pressures, and not infrequently, even open coercion.

Recognising that there is a certain degree of distrust in the determination of facts by people, since criminal justice is based on decisions made by people, and people make mistakes<sup>246</sup>, it would be honest to proceed in a manner, in which one could be sure, as much as a human being can be sure, that the innocent would not be convicted. An author, who has received much attention lately with his theory of justice as fairness, is John Rawls. The problem he focuses on is that there is no criminal procedure that will always objectively and impartially lead to the correct conclusion:

Imperfect procedural justice is exemplified by a criminal trial. The desired outcome is that the defendant should be declared guilty if and only if he has committed the offense with which he is charged. The trial procedure is framed to search for and to establish the truth in this regard. But it seems impossible to design the legal rules so that they always lead to the correct result. The theory of trials examines which procedures and rules of evidence, and the like, are best calculated to advance this purpose consistent with the other ends of the law. Different arrangements for hearing cases may reasonably be expected in different circumstances to yield the right results, not always but at least most of the time. A trial, then, is an instance of imperfect procedural justice. Even though the law is carefully followed, and the proceedings fairly and properly conducted, it may reach the wrong outcome. An innocent man may be found guilty, a guilty man may be set free. In such cases, we speak of a miscarriage of justice...<sup>247</sup>

As such, the focus is shifted from the truthfulness to the fairness of the procedure. The common idea is quite simple: a fair procedure is an appropriate tool and an acceptable method for determining the truth. A fair procedure demands that the procedure for determining the outcome must be carried out consistently, and the procedure itself must contain certain main features. It represents a procedure that justifies the

<sup>246</sup> See J. B. Weinstein, Some Difficulties in Devising Rules for Determining Truth in Judicial Trials, 66 *Columbia Law Review*, 1966, 223, 229-41.

<sup>247</sup> See J. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge 1971, Fourth printing, 1972, p. 85-86.

outcome. Ideally, it provides a high degree of assurance, which should not be underestimated:

A conscientious effort must be made to determine whether an infraction has taken place and to impose the correct penalty. Thus a legal system must make provisions for conducting orderly trials and hearings; it must contain rules of evidence that guarantee rational procedures of inquiry. While there are variations in these procedures, the rule of law requires some form of due process: that is, a process reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances.<sup>248</sup>

If an inadequate procedure results in injustice, such a procedure cannot be justified. The relationship between procedures and rights can be expressed in the following manner: if procedures are the essential tools for guaranteeing rights, the problem that remains is how to reconcile this with the fact that procedures are often inadequate.

It is quite logical that judgements will be better, and the number of errors and abuses will decrease if procedures are more demanding, but they are also more expensive. Therefore, even though the risk of erring will obviously be reduced thanks to improved procedures, there are limits as to how much can be spent. It is becoming apparent that a certain level of risk of wrong decisions must be tolerated; but, the question how to calculate this is not an easy one. This balancing process is more than complex and, roughly put, confronts against one another the interest of society for an efficient fight against crime and the rights of the victims, on one side, and the rights and freedoms of the defendants, on the other. While the possibility of errors due to the imperfection of procedures will always exist, the risk can undoubtedly always be partially reduced. Surely, with well framed procedures, good organisation and quality training, a higher degree of correctness and fairness can be reached. If the society truly put the best efforts within the existing objective limitations of guaranteeing fair procedures, incidental failures could be accepted as unavoidable.

Below are elaborated some of the basic principles of the contemporary fair procedure.

### Presumption of innocence

The key guarantee granted to the accused persons as part of the concept of fair procedure (fair trial) these days is the presumption of innocence:

*Good men everywhere praise the presumption of innocence. And be they Frenchmen, Germans, or Americans, they agree on the demand of the presumption in practice. Both here and abroad, the state's invocation of criminal sanctions demands a high degree of proof that the accused has*

<sup>248</sup> See J. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge 1971, Fourth printing, 1972, 60.

*committed the offense charged. To express the requisite standard of proof, common lawyers speak of the prosecutor's duty to prove his case beyond a reasonable doubt. And Continental lawyers invoke the maxim in dubio pro reo – a precept requiring triers of fact to acquit in cases of doubt.*<sup>249</sup>

The legislative provisions stipulating presumption of innocence are numerous and can be found in different juridical systems.

For instance, the Charter of Rights and Freedoms of Canada states: “*Any person charged with an offence has the right (...) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal*”.<sup>250</sup>

The Constitution of Colombia states that “*Every person is presumed innocent until proven guilty according to the law*”.<sup>251</sup>

In France, Article 9 of the Declaration of the Rights of Man and Citizen of 1789, which foresees the principle of presumption of innocence, is still in force as constitutional law.

In Iran, the Constitution states: “*Innocence is to be presumed, and no one is to be held guilty of a charge unless his or her guilt has been established by a competent court*”.<sup>252</sup>

In Italy, the Constitution states: “*A defendant shall be considered not guilty until a final verdict has been issued*”.<sup>253</sup>

In Romania, the Constitution states that “*any person shall be presumed innocent until found guilty with a final decision of the court*”.<sup>254</sup>

The LPC of Serbia states that “*Everyone is considered innocent until proven guilty with a final decision of the court*”.<sup>255</sup>

The LCP of Bosnia and Hercegovina reads: “*A person shall be considered innocent of a crime until guilt has been established with a final verdict*”.<sup>256</sup>

<sup>249</sup> See George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L. J. 880, 916-917 (1967-1968) p. 880 (internal citations omitted) (hereinafter “Fletcher”). In his comparative study of the US and Germany, Fletcher analyzed the German system of criminal liability, explaining that defensive issues, such as self-defence or insanity, are considered as “unavoidable steps in the process of determining guilt.” He concluded that all claims which have a bearing on the accused's guilt or innocence are an integral consideration in the overall evaluation of the case. As a result, the prosecutor bears the risk of residual doubt on all of the issues.

<sup>250</sup> Charter of Rights and Freedoms of Canada, Section 11(d), <http://laws-lois.justice.gc.ca/eng/Const/page-15.html> (last accessed 23 November 2016).

<sup>251</sup> Constitution of Colombia, Title II, Chapter 1, Article 29, [http://confinder.richmond.edu/admin/docs/colombia\\_const2.pdf](http://confinder.richmond.edu/admin/docs/colombia_const2.pdf) (last accessed 23 November 2016).

<sup>252</sup> Constitution of Iran, Article 37, <http://www.iranonline.com/iran/iran-info/government/constitution-3.html> (last accessed 23 November 2016).

<sup>253</sup> Constitution of Italy, Article 27, paragraph 2, [http://www.quirinale.it/qnrw/costituzione/pdf/costituzione\\_inglese.pdf](http://www.quirinale.it/qnrw/costituzione/pdf/costituzione_inglese.pdf) (last accessed 23 November 2016).

<sup>254</sup> Constitution of Romania, Article 23, <http://www.wipo.int/edocs/lexdocs/laws/en/ro/ro021en.pdf> (last accessed 23 November 2016).

<sup>255</sup> LCP of Serbia, Article 3, Official Gazette 72/11, 101/11.

<sup>256</sup> LCP of Bosnia and Hercegovina, Official Gazette no. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 12/09, 16/09, 93/09, 72/13; LCP of Federation of Bosnia and Hercegovina, Official Gazette 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 53/07, 9/09, 12/10, 8/13, 59/14; LCP of Brčko District, Official Gazette 10/03, 48/04, 6/05, 12/07, 14/07, 21/07, 2/08, 17/09, consolidated text 33/13, 27/14; LCP of Republika Srpska, Official Gazette 50/03, 111/04, 115/04, 29/07, 68/07, 119/08, 55/09, 80/09, 88/09, 92/09, 100/09, consolidated text 53/12; Article 3.



The domestic LCP states that: *“The person charged with a crime shall be considered innocent until his/her guilt is determined with a final court decision.”*<sup>257</sup>

United Nations incorporated the maxim in its Declaration of Human Rights in 1948 under article 11, section one: *“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”*. The maxim also found a place in the European Convention for the Protection of Human Rights of 1953, in Article 6, par. 2: *“Everyone charged with a penal offence shall have the right to be presumed innocent until proved guilty according to law”*.

As to the American system, the maxim formally entered the American law through a Supreme Court decision of 1895, *Coffin vs. U.S* which overturned a decision of a lower court finding that: *“A charge that there cannot be a conviction unless the proof shows guilt beyond a reasonable doubt does not so entirely embody the statement of presumption of innocence as to justify the court in refusing, when requested, to instruct the jury concerning such presumption, which is a conclusion drawn by the law in favor of the citizen by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted unless he is proven to be guilty”*.<sup>258</sup>

A significant number of theoreticians still claim that the presumption of innocence is illogical and does not correspond to the reality of the criminal justice system, in which the defendant is subjected to a serious procedure with many negative consequences against him/her. How can it be possible, they ask, to conduct searches of homes of innocent people, put them in pre-trial detention, follow their movement and wiretap their conversations, freeze their assets, measures that constitute serious intrusions in their dignity and integrity, and limit their fundamental rights and freedoms. Are these not violations of the presumption of innocence? Therefore, they claim that the positive definition of the presumption of innocence stipulated in international human rights agreements and in most modern constitutions does not correspond with reality. Professor Vasiljević<sup>259</sup> finds that there is an essential difference between the wording “not found to be guilty” and the wording “found innocent”. The second formulation is, in his view, meaningless, because it negates the true position of the defendant, who is obliged to suffer limitations, which may not be imposed on an innocent person. The defendant cannot be considered innocent because he is suspicious.

Apart from these terminological issues and comments, the right to be presumed innocent is today a fundamental human right that shapes contemporary criminal procedure. But, for the presumption of innocence to

<sup>257</sup> Domestic LCP, Article 2, *See supra* n.1.

<sup>258</sup> *Coffin v. United States*, 156 U.S. 432, 453 (1895).

<sup>259</sup> T. Vasiljević - M. Grubac, *Komentar Zakona o Krivičnom Postupku (Commentary to the Law on Criminal Procedure)*, III edition, Belgrade, 1987. p. 7- 8.

be effective, of course to an extent that will not jeopardize the investigation, limitations to state authority in contemporary law are expressed in a set of defendant's rights (right to life, and the prohibition of torture and inhuman and degrading treatment and punishment, right to a fair trial, right to respect for private and family life, home and correspondence, etc.) and procedural guarantees. Those procedural guarantees include principles, such as the principle of legality and proportionality, principle of *in dubio pro reo*, principle *ne bis in idem*, principle no crime-no punishment, standard of proof *beyond reasonable doubt* (or high level of certainty) and the prosecutorial burden of proof, principle of unfettered consideration of evidence, principle of objectivity/equality of arms, reformation in peius, contradictory principle, etc.

Defence's rights and procedural guarantees are not the obstacles in the procedure. To the contrary, they serve to improve the credibility of the process of establishing the 'truth' or certainty, and fairness.<sup>260</sup> All the above rights and guarantees are strictly interconnected and must work together in order to be fully effective and ensure fair trial and a just decision.

### Burden of proof

There are two basic procedural aspects of the presumption of innocence, namely, placing the burden of proof on the prosecution on one hand, and demanding a high standard of proof that the defendant has committed the crime on the other.

As established in the Roman jurisprudence, the presumption of innocence shifts the burden of proof onto the prosecution and therefore it is the prosecutor's responsibility to prove the guilt and to refute the presumption that the defendant is innocent: *ei incumbit probatio qui dicit, non qui negat* – the burden of proof is on the one who declares, not on the one who denies.<sup>261</sup>

Or, as stated by the European Court of Human Rights (hereinafter ECtHR): *"In any prosecution, the presumption of innocence puts the burden of proof on the prosecution and this means that an accused cannot be compelled to incriminate him or herself and that there must be evidence to substantiate a conviction."*<sup>262</sup>

It is questionable whether in the European countries which had accepted the Napoleon code the burden of proof falls on the prosecution, considering that the court was obliged to do all in its power to determine the truth *ex officio*, including presenting evidence in search for that truth.

<sup>260</sup> See: N. Matovski, G. Buzharovska, G. Kalajdjiev, *Казнено процесно право (Criminal Procedural Law)*, Second edition, Akademik, Skopje, 2011.

<sup>261</sup> Declarations and covenants on fundamental human rights provide for the right to be presumed innocent until proved guilty. International Covenant on Civil and Political Rights ("ICCPR"), Art. 14(2); European Convention on Human Rights ("ECHR"), Art. 6(2); American Convention on Human Rights ("ACHR"), Art. 8(2).

<sup>262</sup> Jeremy McBride, *Human rights and criminal procedure-The Case law of the European Court of human rights*, Council of Europe Publishing 2009, p.15

However, most of the European countries today, just like the common law ones, even explicitly state that the burden of proof is on the prosecution and have abandoned such position of the court to propose evidence, or at least such role is diminished to the benefit of court's impartiality. Judges tend to be overly cautious not to give any appearance of favouring one party over the other. Any attempts by the judges to seek the truth – be it by investigating for evidence or excessively questioning witnesses during the trial (beyond asking the occasional question for clarification purposes) – would, at a minimum, give rise to an appearance of bias or lack of judicial independence. As a result, it is completely inappropriate for the Court to insist on further discussion about the evidence when the evidence presented by the prosecution is obviously leading to acquittal.

Therefore, judges are *generally* restricted to the evidence presented to them by the parties since trials are party-driven. *“The adversarial system trusts the parties to properly and honestly present their side of the argument, and expects that the truth will emerge from a robust presentation of each side’s case.”*<sup>263</sup> This system requires the parties (prosecution and defence lawyers) to be active: to investigate and gather evidence and to select the witnesses and documents they believe are relevant to their respective cases, subject to judicial scrutiny and approval. Defence lawyers are responsible for consulting with their client, developing a theory of the case, deciding whether to question prosecution witnesses at trial, selecting any witnesses from whom they may wish to adduce evidence, examining witnesses and presenting arguments at trial. The court is required to give the defendant an opportunity to comment on any evidence against him/her, even when the defendant used the right to not present his/her defence or answer questions: *“... As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings.”*<sup>264</sup> Namely, if the court does not allow the defendant to present a defence and refute the evidence of the prosecution, it shall basically infringe the defendant's right to presumption of innocence, by restricting the possibility of doubt that such defence can raise with the judge on the prosecutorial charges.

Actually, defence lawyers are ethically bound to represent zealously their clients<sup>265</sup> by, *inter alia*, raising every conceivable doubt by every conceivable acceptable means. Cynical as it may seem from Judge John W.

<sup>263</sup> Felicity Nagorcka, Michael Stanton & Michael Wilson, *Stranded between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 *Melb. U. L. Rev.* 448, 465-66 (2005).

<sup>264</sup> *Saidi v France*, 14647/89, paragraph 43, ECHR.

<sup>265</sup> This duty is universally recognized in virtually all national and international codes of professional ethics: The United States (“US”), American Bar Association Model Rules, Rule 1.3: “act with reasonable diligence and promptness in representing a client”; The United Kingdom (“UK”), Board Standard Bar Handbook, CD7: “to provide a competent standard of work and service to each client.”

May's observation, raising reasonable doubt during the presentation of the evidence is an essential obligation for the defence:

*Now, we all know, that, when a criminal lawyer has to defend a case where the facts are all against him, his uniform and too often unfailing resource is the law. Upon this he falls back. The doctrine of "reasonable doubt" is kept always in the front. The reports are ransacked for loose definitions by careless judges in insignificant cases. The extravagant and unsupported dicta of text-writers made perhaps in support of a theory of what the law ought to be, rather than as proof of what it has been authoritatively declared to be, are hunted up with untiring zeal. These are reinforced by a series of cases – fabulous and authentic – scattered through the musty annals of crime, in which, it is said that innocent persons have been convicted. The whole mass of bewildering definitions, extravagant dicta, astounding facts, or fictions, as the case may be, is then arrayed with greater or less skill, according to the ability of counsel, and paraded before the jury with pathetic solemnity. Of course, the object of all this is to confound and befog; to bring the jury into that state of amazement, apprehension, and uncertainty, which will disqualify them to deal calmly and rationally with the facts of the case before them...<sup>266</sup>*

While judges control the flow of the proceedings and in some instances may question witnesses (primarily for clarification purposes), they are not engaged in a truth-seeking mission. "The court is not required actively to seek the truth but simply to decide whether the evidence produced in court is sufficient to substantiate the charges and prove beyond a reasonable doubt that the defendant is guilty."<sup>267</sup> It is not their task to search for evidence or witnesses believed to be essential for establishing the truth, even though in some common law jurisdictions, judges are permitted to call witnesses,<sup>268</sup> including expert witnesses,<sup>269</sup> raise defences on behalf of the accused and to instruct the jury to consider the defence as an **alternative to any other defences raised by the accused**,<sup>270</sup> and sum up or

<sup>266</sup> May, *Some Rules of Evidence*.

<sup>267</sup> Antonio Cassese, *International Criminal Law* 362, Oxford University Press 2008.

<sup>268</sup> In the US, FRE Rule 614(a): "The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness." In the UK, a judge may call a witness who has not been called by either party, but as Lord Chief Justice Parker noted in *Regina v. Cleghorn*, (1967) 2 Q.B. 584, this discretion should be used sparingly and with the sole purpose of ensuring that justice be served, so as not to interfere with the discretion of counsel to mount its case. For an excellent discussion on these and other allowances made to judges during the course of a trial, such as summing up and commenting on the evidence, which many scholars, judges and practitioners have disparate views on whether such allowances are in keeping with the fundamental tenants of the common law / adversarial system, see Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64(1) *Virginia L. Rev.*, 1-81 (1978).

<sup>269</sup> In the US, FRE Rule 706: "The court may appoint any expert that the parties agree on and any of its own choosing."

<sup>270</sup> In *Regina v. Johnson*, [1989] 1 W.L.R. 740, the Court of Appeal found that the judge had a duty to instruct the jury on provocation, even though the accused had maintained a claim of self-defence throughout the trial, while the evidence was not "powerfully suggestive" it was "more than tenuous" and so should have been left to the jury. The operation of this duty was discussed again in *Regina v. Newell*, [1989] Crim. L.R. 906, holding that the judge must even instruct the jury on alternative defences which conflict with the accused's theory of the case. See also Sean Doran, *Alternative defences: the "invisible burden" on the trial judge*, Crim. L.R. 878 (1991), describing the duty on the judge as an "invisible burden" to put before the jury a possible defence which has not been raised by either party.

comment on the evidence for the jury's consideration in its deliberation.<sup>271</sup> Thus, even in common law systems, there is an element of *truth-seeking*. Judges have expressed mixed views on these discretionary powers being entrusted to judges, as seen by US Federal Judge, Jack B. Weinstein, and US Supreme Court Justice, Felix Frankfurter.

Judge Weinstein:

A great deal of the dispute about the matter is caused by differences between rhetoric affirming the court's power and the practice where the judge tends to act as an impartial arbiter in our adversarial system. Much difficulty would be avoided if it were clearly understood that the court trying a case should have, and does have, no views as to which side ought to win, or how much plaintiff in a civil case should recover, or whether a defendant in a criminal case – unless and until he is convicted – should be punished.

If a reasonable juror could find, either way, the juror is entitled not to have the court throw its enormous prestige in to the scale on the side of one litigant or the other.<sup>272</sup>

Justice Frankfurter has a different opinion:

Federal judges are not referees at prize fights, but functionaries of justice ... As such, they have a duty of initiative to see that the issues are determined within the scope of the pleadings, not left to counsel's chosen argument ... [A] Federal judge ... has the power to call and examine witnesses to elicit the truth ... He surely has the duty to do so before resorting to guesswork in establishing liability for fault.<sup>273</sup>

The judges in the region no longer seek for the objective, material truth, either. For example, judges in BiH are no longer obliged to fully and truthfully establish the facts which are important for rendering a legal verdict. Instead, it kept the provision according to which "*the Court, the prosecutor and other bodies participating in the proceedings are bound to objectively study and establish with equal attention facts that are exculpatory as well as inculpatory for the suspect or the accused*".<sup>274</sup>

<sup>271</sup> In the UK, the judge usually sums up the evidence for the jury. In *Regina v. Brower*, [1995] Crim. L.R. 746, the Court of Appeal stated that in the majority of cases the judge should sum up the evidence to the jury in order to assist the jury and to ensure a fair trial. In *Regina v. Evans*, (1990) 91 Cr.App.R. 173, the Court of Appeal held that the judge is not limited to the points made by the parties, but is entitled to comment on all the matters given in evidence. Of course, the judge's comments must be kept within proper bounds, but in *Regina v. Sparrow*, [1973] 1 W.L.R. 488, 495, Justice Lawton noted the judge's duty to assist the jury and stated: "...in our experience a jury is not helped by a colourless reading out of the evidence as recorded by the judge in his notebook. The judge is more than a referee who takes no part in the trial save to intervene when a rule of procedure is broken. He and the jury try the case together and it is his duty to give them the benefit of his knowledge of the law and to advise them in the light of his experience as to the significance of the evidence." See generally Saltzburg, disagreeing with the judge's authority to sum up and to comment upon evidence and urging that trial judges be granted only the most limited authority to call and to interrogate witnesses.

<sup>272</sup> Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence: Commentary on Rules of Evidence for the United States Courts and State Courts, § 107[1], at 8, as cited in Saltzburg, p. 41.

<sup>273</sup> *Johnson v. United States*, 333 U.S. 46, 54 (1948), Frankfurter J. dissenting. (internal citations omitted).

<sup>274</sup> Article 14.

According to the Serbian LCP, the court has only the exceptional opportunity to introduce ex-officio evidence.<sup>275</sup> However, throughout the proceedings, judges must preserve their dignity, act completely independently and impartially, and not allow even a semblance of biased treatment in favour of one of the parties.

The domestic LCP enshrines that the trial is adversarial and is based on the activity of the parties, who present evidence and confront their positions in order to prove facts, for which the court decides whether are proven or not. The court no longer proposes evidence on its own initiative, except for the so called super expertize, which is also questionable as it will be seen later on.<sup>276</sup>

### Standard of proof of guilt

So, if the burden of proof is on the prosecution, the logical question is to what degree of certainty this shall be proven. This question leads to the issue of the degree of proof as presented both in the standard of the prosecution having to prove the defendant's guilt *beyond reasonable doubt*, and the principle of any reasonable doubt favouring the defendant-*in dubio pro reo*. This standard/principle means that the probability of the defendant's guilt is so high that it eliminates all (reasonable) doubt, because, if there is (reasonable) doubt in the defendant's guilt, he/she must be acquitted:

(...) Proof beyond reasonable doubt is the highest standard of proof, which must be reached in any criminal case. Reasonable doubt is defined as the real doubt based on common sense and logical judgement after conscientious, full, and impartial evaluation of all evidence, or the lack thereof, in the case under trial. Consequently, proof beyond reasonable doubt is proof of such a convincing nature that any person can rely on it and act upon it without dilemmas in their most significant personal affairs. It does not, however, mean absolute certainty.(...) <sup>277</sup>

As it was presented before and will be presented further, it can be seen that the *reasonable doubt* standard of proof has evolved and matured ever since it first came into existence in the common law systems several centuries ago.

<sup>275</sup> Article 15: "(1) Evidence is collected and examined in accordance with this Code. (2) The burden of proof is on the prosecutor. (3) The court examines evidence upon motions by the parties.(4) 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.

<sup>276</sup> Article 408(6): "In the rationale of the judgment, the court shall present the reasons for each item in the verdict, and especially the facts that are deemed proven or unsubstantiated, the evidence that was considered to establish those facts, (...)".

<sup>277</sup> Handbook for defence counsel in international criminal law -Association of Defence Counsel practising before the ICTY, p. 10.



The US Supreme Court read this right into the US Constitution in the *Winship*<sup>278</sup> case, holding the State (prosecuting authorities) to the standard of proof beyond a reasonable doubt. Quoting from *Coffin v. United States*<sup>279</sup> (1895), the US Supreme Court in *Winship* noted:

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual errors. *The standard provides concrete substance for the presumption of innocence – that bedrock “axiomatic and elementary” principle whose “enforcement lies at the foundation of the administration of our criminal law.”*<sup>280</sup>

In the common law systems the trial judge instructs and gives guidance to the jurors throughout the trial. The judge must make it explicitly clear in these instructions that the jurors should give the benefit of the doubt to the accused. If there is any reasonable doubt from the totality of the evidence, the jury must acquit the accused. The process of instructing the jury throughout the trial and how the reasonable doubt instruction at the end of the trial is to be appreciated is cogently described by Richard Uviller:

Jurors are invariably instructed by the judge – usually several times – that they have the exclusive responsibility to find the facts; they are then told at length just how they are to go about finding those facts. Addressing the raw data accumulated during the trial (actually, the evidence is hardly raw, having been refined by evidentiary and constitutional filtration), the judge will enjoin the jury to use their ordinary faculties of judgment and common sense. Jurors are told how to weigh credibility, taking into account the demeanour of witnesses on the stand, tone of voice, eye movements, body language, attitude – all the various sorts of unconscious communications that often betray the liar and confirm the account of the truthful. The jury is told that the credibility of a witness may be attacked (“impeached”) by evidence of bias, by contradiction of evidence from another source, or by inconsistency between the witness’s trial testimony and some statement on the same matter previously made by the same witness. They are instructed that the defendant (if he testifies in his own behalf) and, in some instances, co-conspirators are biased as a matter of law because of their inherent stake in the outcome. Jurors are also instructed that other witnesses may be biased in fact for any one of a number of reasons, among them a personal or professional relationship to the defendant or victim or some personal interest in the outcome. At the same time, the jurors are reminded that even a biased witness may tell the truth. In general, they are advised they may either discard the discredited portions of an impeached

<sup>278</sup> *In re Winship*, 397 US 358 (1970) (hereinafter “*Winship*”).

<sup>279</sup> *Coffin v. United States*, 156 U.S. 432, 453 (1895).

<sup>280</sup> *Winship*, at 362-63, (emphasis added).

witness's testimony or retain the rest, or they may disregard it all as the suspect product of an incredible source. Although they are enjoined to use their own "judgment" on these matters, they are warned not to "speculate." They should find the facts on the basis of the supporting evidence, they are instructed, but they are also told that they may consider the lack of evidence along with the evidence on a point.<sup>281</sup>

But the jury is not merely charged at the end of the trial with the reasonable doubt instruction (however defined). The trial judge cautions the jury throughout the trial on how to consider the evidence presented under the appropriate standard. At the end of the trial, the jury is reminded that it has the exclusive responsibility of assessing the evidence. It is for the jury to determine whether, and to what extent, all elements of all charged crimes have been proven to the standard of proof beyond a reasonable doubt – a standard that for all intents and purposes amounts to near certainty (since few things in life can be proved with absolute certainty).<sup>282</sup> Yet when the jury is told to apply the reasonable doubt standard in evaluating the evidence, they are told nothing about whether they must apply some objective, majoritarian perspective in evaluating doubt or to apply their own individualistic, subjective evaluations. Uviller has insightfully described the tension between the "objective" and "subjective" interpretations of the reasonable doubt standard. He explains that the "objective" and "subjective" are two possible ways of understanding the reasonable doubt standard:

Under the objective understanding, if juror A concedes that juror B has a persistent, good faith doubt based on the evidence, then juror A must vote "not guilty" even though she does not share juror B's doubt. Even if jurors conclude only that some imaginary, conscientious juror might entertain some doubt concerning the defendant's guilt, the objective view would acknowledge a reasonable doubt in the case and require the jury to acquit though none of them actually doubts the defendant's guilt.

Under the subjective interpretation, the question is first whether an individual juror, carefully weighing all the evidence and giving due consideration to the views of fellow jurors, personally doubts the guilt of the defendant. If this step produces a subjective sense of doubt in a juror's mind, the juror must ask himself the next question: whether the doubt is reasonable. Under this subjective reading, if a juror personally has no reasonable doubt, then notwithstanding the imperfections in the proof that might give others reason for doubt, the juror should vote "guilty."<sup>283</sup>

<sup>281</sup> H. Richard Uviller, *Acquitting the Guilty: Two Case Studies on Jury Misgivings and the Misunderstood Standard of Proof*, 2 Crim. L. F. 1, 39-40 (1990) (hereinafter "Uviller"), p. 18-19.

<sup>282</sup> Fletcher, p. 933.

<sup>283</sup> Uviller, p. 30.



Uviller correctly argues that the subjective understanding is the right one: doubt is an individual matter; jurors must not abandon their personal conclusions or vote against their judgment.<sup>284</sup>

Relying on observations by US Federal Circuit Court Judges, Patricia Wald, and Jerome Frank, Robert C. Power argues:

Experience with the reasonable doubt standard, as well as common sense, support the realist criticism that judges and academics overstate the importance of legal doctrine. Our modern and somewhat jaded “realistic” view is that jurors generally disregard the judge’s instructions and just do what they want to do. Judge Wald writes that “the reasonable doubt standard is essentially irrelevant to the everyday workings of the criminal justice system.” This irrelevance results not only from the use of guilty pleas and prosecutorial discretion but also because juries do not apply the standard. For example, “few judges ... believe that every jury slavishly and precisely follows the beyond-a-reasonable-doubt standard in deciding guilt or innocence.” Judge Wald’s connection to the realist view is cemented by her affirmation of Judge Frank’s comment that “were the full truth declared [sic] [as to what goes on in the jury room] it is doubtful whether more than one percent of verdicts could stand.”<sup>285</sup>

Today, the *reasonable doubt* standard of proof is widely spread on the Continent as well, in the so called hybrid systems<sup>286</sup>. As such, many criminal justice systems throughout Europe require from the prosecution to prove the guilt of the defendant beyond reasonable doubt or with high certainty, otherwise, the defendant shall be acquitted.

<sup>284</sup> Uviller, p. 32.

<sup>285</sup> Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 *Tenn. L. Rev.* 45, 57 (1999-2000) (hereinafter “Power”), p. 48, relying on Patricia M. Wald *Guilty Beyond a Reasonable Doubt: A Norm Gives Way to the Numbers*, *U. Chi. Legal F.* 101, 101 (1993), stating “My opening gambit is that the reasonable doubt standard is essentially irrelevant to the everyday workings of the criminal justice system. The criminal justice system is a well-tempered clavichord encompassing many different standards of proof governing different responses by police, prosecutors, and courts to different kinds of levels of evidence. ‘Beyond a reasonable doubt’ is but one of these standards.”

<sup>286</sup> An example of a hybrid system can be seen at the Extraordinary Chambers in the Courts of Cambodia (“ECCC”). The ECCC, which is primarily civil-law based as modelled after France, with some adversarial modalities, including applying the reasonable doubt standard of proof. For more on the criminal procedures characterized as hybrid see Kai Ambos, *International Criminal Procedure: ‘Adversarial’, ‘Inquisitorial’ or ‘Mixed’*, 3 *Int. Crim. L. Rev.* 1, (2003); Patrick L. Robinson, *Ensuring Fair and Expedient trials at the ICTY*, 11 *E.J.L.L.* 569 (2000), Alphonse Orié, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings in The Rome Statute of the International Criminal Court: A Commentary*, vol. 3, 1439-1459 (Judge A. Cassese et al. eds., Oxford University Press 2002). The Italian criminal procedure is another example of a hybrid system. In reforming the Italian criminal procedure, legislators introduced some adversarial modalities, tools for cross-examination, and investigation by the parties. The reformed Italian criminal procedure also adopts the common law standard of proof beyond a reasonable doubt. See Italian Code of Criminal Procedure, (as amended of 2011), Art. 533. See also David M. Siegel, *Training the Hybrid Lawyer and Implementing the Hybrid System: Two Tasks for Italian Legal Education*, 33(2) *Syracuse J. Int’l L. & Com.* 445, 466 (2006).

For instance, in Germany the judge's conviction of the defendant's guilt "*must be subjective and must be based on persuasive factors, which leave no room for reasonable doubt.*"<sup>287</sup>

In Italy, when referring to convicting judgment the LCP states that: "*The judge shall convict the defendant only if the defendant is found guilty beyond reasonable doubt of the crime he is charged with.*"<sup>288</sup>

In the LCP of Serbia, accused individuals may not be convicted unless the prosecution proves their guilt with certainty.<sup>289</sup>

The domestic LCP, when referring to acquitting decision, states that the court shall acquit whenever *the prosecution fails to prove beyond reasonable doubt that the defendant is guilty.*<sup>290</sup>

An interesting proposition about how the judges/jurors should use the maxim beyond reasonable doubt in order to minimize the possibility of mistakes has been made by the distinguished philosopher of science Larry Laudan, the objective of which is to not only reduce the number of false convictions, but also the number of false acquittals. He claims that there should be just one simple rule that the jurors should use in the context of the required standard of proof, and that rule being: "*Figure out whether the facts established by the prosecution rule out every reasonable hypothesis you can think of that would leave the defendant innocent. If they do, convict; otherwise, acquit.*"<sup>291</sup>

## Two meanings of the burden of proof in the common law systems

Going back to the burden of proof of guilt, in common law systems, the term "burden of proof" can have two different meanings. 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 jury trial, known as a *bench trial*).<sup>292</sup> It is within this division of labor between the judge (as the law-giver) and the jury (as the fact-finder) that the judge throughout the trial proceedings will instruct the jury on its obligations and the various rights afforded to the accused as stated above.

<sup>287</sup> Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18(2) B. C. Int'l & Comp. L. Rev. 317, 343-44 (1995) (hereinafter "Frase & Weigend"), p. 344. See generally Section III, *Reasonable Doubt Standard in Other Jurisdictions*.

<sup>288</sup> LCP of Italy, Article 533 (1).

<sup>289</sup> LCP of Serbia, Article 18.

<sup>290</sup> Domestic LCP, Article 403 (3).

<sup>291</sup> Youngjae Lee, *Journal of Criminal Law and Criminology*, Volume 105, Reasonable Doubt and Moral Elements, 2015, p. 14 footnote 49, referring to LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW 82 (2006).

<sup>292</sup> Under US law, trial by jury in criminal cases is a constitutional right under the Sixth Amendment to the US Constitution and is usually a matter of course for most criminal cases. However, under certain circumstances, there is a possibility for a bench trial (trial by judge). Rule 23 of the Federal Rules of Criminal Procedure provides: "If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves." In a criminal case tried without a jury, the judge plays the role of the jury as trier of fact.

The judge gives instructions on the duty of the jurors to find the facts using their own judgement and common sense. The judge reminds the jurors that it is their duty to find the facts and follow the law as instructed without being influenced by any personal likes or dislikes, prejudices, or sympathies. The judge also reminds the jury of the accused's right to remain silent and that the accused is presumed to be innocent unless and until his or her guilt is established beyond a reasonable doubt. 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.<sup>293</sup>

The standard of proof that the trier of fact will apply in determining whether the prosecution has proved all the elements of the charges is the reasonable doubt standard. Any evidence adduced during the questioning of witnesses by the defence should be considered as any other evidence. Presumed innocent throughout the trial, the accused is under no obligation to present any evidence, and no adverse inferences can be drawn from a failure to advance any evidence contrary to what is presented by the prosecution or from remaining silent.<sup>294</sup> The defence is not required to present any evidence, save for when raising a defence, and, even then, the evidence need not rise to the reasonable doubt standard. The defence can remain silent during the trial proceedings yet still argue that the prosecution failed to prove the charges beyond a reasonable doubt. In other words, an accused's silence or lack of presentation of evidence does not factor into the equation as to whether the prosecution has proved its case beyond a reasonable doubt.

So, the primary meaning of the term "burden of proof" refers to the duty of a party to persuade the trier of fact by the end of the case of the truth of certain allegations as presented by the parties.<sup>295</sup> This is also called the "burden of persuasion" or "the risk of non-persuasion."<sup>296</sup> The prosecution always bears the burden of persuasion in establishing the guilt of the accused by proving the charges beyond a reasonable doubt. This burden of proof remains on the prosecution throughout the trial.

<sup>293</sup> See sub-section "Standard of proof of guilt" above.

<sup>294</sup> "The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence....' It is the task of the prosecution to prove the guilt of the accused. The latter thus does not have to establish his or her innocence. *A fortiori* there is not the slightest duty on the defence to contribute to a conviction of, for that matter, to contribute in any way to the proceedings." Stefan Trechsel, *Human Rights in Criminal Proceedings* 348 (Oxford University Press, 2006), quoting and interpreting *Saunders v. United Kingdom* (1996) ECHR, para. 68.

<sup>295</sup> Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* 22 (Martinus Nijhoff Publishers 1996) (hereinafter "Kazazi"), providing general comparative observations regarding the burden and standard of proof in common and civil law systems.

<sup>296</sup> Kazazi, p. 22. See also Kokott, clarifying the terminology and comparing the German and American systems with regard to the issue of burden of proof.

The secondary meaning of the term “burden of proof” relates to the duty of going forward in producing evidence to support an allegation of fact, also referred to as the “burden of production,”<sup>297</sup> or “evidential burden.”<sup>298</sup> This burden applies to the prosecution as well as the accused when advancing a defence, such as the affirmative defence of self-defence.<sup>299</sup> In such instances, the prosecution will need to prove beyond a reasonable doubt that the accused did not act in self-defence, or that he or she exceeded the limits of self-defence.

The accused, however, will first need to present the requisite amount of evidence for advancing self-defence, (which could vary from a mere “scintilla” of evidence to the proof by a preponderance of evidence). Once the accused has produced the requisite amount of evidence for advancing self-defence, thus discharging its burden of production, the judge *must* instruct the jury to consider this defence and find in favour of the accused if the prosecution fails to disprove self-defence beyond a reasonable doubt. The amount of evidence that the accused must adduce to discharge the burden of production in relation to raising a defence varies significantly among jurisdictions.<sup>300</sup> In some states in the US, to advance mental disability as a defence, the accused must submit some evidence, which could mean “more than a scintilla, yet, of course, the amount need not be so substantial as to require, if uncontroverted, a directed verdict of acquittal.”<sup>301</sup> In advancing self-defence, some US jurisdictions require evidence which “when viewed in the light most favourable to the accused, might arguably lead a juror to entertain a reasonable doubt as to the defendant’s guilt.”<sup>302</sup> Other US state jurisdictions require the accused to establish self-

<sup>297</sup> Kazazi, p. 22.

<sup>298</sup> Colin Tapper, *Cross and Tapper on Evidence* 121-23 (Butterworth, 8th ed. 1995), discussing the “evidential burden,” as a party’s obligation to show that there is sufficient evidence to establish the existence or non-existence of a fact in issue.

<sup>299</sup> Affirmative defences are generally defined as “an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.” See Model Penal Code of the American Law Institute (1985), § 1.12(3)(c). An affirmative defence is sometimes also described as one saying: “Yes, I did it, but I had a good reason.” See *State v. Cohen*, 568 So 2d 49, 51-52 (Fla. 1990). Examples of affirmative defences include self-defence, insanity, and defence of others. See also Stephen M. Everhart, *Putting a Burden of Production on the Defendant before Admitting Evidence that Someone Else Committed the Crime Charged: Is It Constitutional?* 76(2) Neb. L. Rev. 272, 288-292 (1997), analyzing various affirmative defences and alibi.

<sup>300</sup> For an excellent, albeit dated research and analysis of US jurisprudence in relation to the burden of proof practices and the differing standards for raising defences, see Fletcher.

<sup>301</sup> See *McDonald v. United States*, 312 F.2d 847, 849 (D. C. Cir. 1962), in relation to the accused’s claim of mental disability as a defence, the US Court of Appeals District of Columbia Circuit stated: “[I]f there is ‘some evidence’ supporting the defendant’s claim of mental disability, he is entitled to have that the issue submitted to the jury...[T]here can be no sharp quantitative or qualitative definition of ‘some evidence.’ Certainly it means more than a scintilla, yet, of course, the amount need not be so substantial as to require, if uncontroverted, a directed verdict of acquittal.” (internal citations omitted.)

<sup>302</sup> See generally *Lamont v. State*, 934 P.2d 774, 777 (1997), where in relation to self-defence, the Court of Appeals of Alaska stated: “It is well recognized that the burden is on the defendant to produce some evidence in support of a claim of self-defence before he will be entitled to a jury instruction. The burden to produce some evidence of self-defence is not, however, a heavy one; this standard is satisfied when self-defence has been fairly called into issue. In each case, the relevant inquiry is, ‘did the evidence, viewed in the light most favourable to the defendant, generate the issue of self-defence for jury consideration?’ A jury question will be presented and an instruction required if the evidence, when viewed in the light most favourable to the accused, might arguably lead a juror to entertain a reasonable doubt as to the defendant’s guilt.” See also *Frazier v. Weatherholtz*, 572 F.2d 994, 995 (4th Cir, 1978), holding that the burden of proving self-defence is on the accused, “but only to the extent of raising in the minds of the jury a reasonable doubt.”

defence and other defences by a “preponderance of evidence.”<sup>303</sup> This standard also referred to as the “balance of probabilities,” is satisfied if there is a greater than fifty percent chance that the proposition is true.<sup>304</sup> In raising an insanity defence, the US Supreme Court has held that it is not a violation of due process rights for a state to require the accused to establish the insanity defence beyond a reasonable doubt.<sup>305</sup> However, notwithstanding the constitutionality of imposing such a high burden on the accused in raising an insanity defence, the majority of states in the US require a much lower evidentiary threshold.<sup>306</sup>

Similarly, in the UK, judges are not required to leave to the jury “every facile mouthing of some easy phrase of excuse” submitted by the accused,<sup>307</sup> nor claims for which there is no “scintilla of evidence.”<sup>308</sup> For instance, when raising a defence of insanity, the accused has to establish it by a preponderance of evidence.<sup>309</sup>

Put differently, whether the accused has discharged its burden of production in putting forward a defence is not an issue of fact for the jury. It is an issue of law. The judge decides the legal issue as to whether there is sufficient evidence to instruct the jury to consider the factual issue and make a finding of fact. If the accused adduces the requisite amount of

<sup>303</sup> See generally *Martin v. Ohio*, 480 US 228 (1987), requiring the proof by a preponderance of evidence for self-defence; *Patterson v. New York*, 432 U.S. 197 (1977), requiring the proof by a preponderance of evidence for the affirmative defence of extreme emotional distress.

<sup>304</sup> *Miller v. Minister of Pensions* [1947] 2 All ER 372. For further discussion on the standards and burdens of proof see generally James P. McBaine, *Burden of Proof: Degrees of Belief*, 32(3) Cal. L. Rev. 242 (1944); William Trickett, Preponderance of Evidence and Reasonable Doubt, 10 Forum 75, 86 (1905-1906) (hereinafter “Trickett”); Jefferson Ingram, *Criminal Evidence* 73 (Routledge, 2014); Ronald Bacigal, *Criminal Law and Procedure: An Overview* 13 (Cengage Learning, 2008).

<sup>305</sup> See *Leland v. Oregon*, 343 U.S. 790, 791 (1952), where the US Supreme Court held that the state’s requirement to establish the defence of insanity beyond a reasonable doubt was not a violation of due process rights. The US Supreme Court cited Henry Weihofen, *Insanity as a Defence in Criminal Law* 148-151, 172-200 (1933), listing twelve states as requiring proof by a preponderance of the evidence, four as requiring proof “to the satisfaction of the jury,” two which combine these formula, one where by statute the defence must be “clearly proved to the reasonable satisfaction of the jury,” one where it has been held that the jury must “believe” the defendant insane, and one where the quantum of proof has not been stated by the court of last resort, but which appears to follow the preponderance rule. Twenty-two states, including Oregon, are mentioned as holding that the accused has the burden of proving insanity, at least by a preponderance of evidence.

<sup>306</sup> Requiring preponderance of evidence, see *Lackey v. State*, 615 So. 2d 145, 151-152 (Ala. Crim. App. 1992); *McCarlo v. State*, 677 P.2d 1268, 1272 (Alaska App. 1984); *Diaz v. State*, 508 A.2d 861, 863 (Del. 1986); *Flowers v. State*, 353 So. 2d 1259, 1270 (Fla. App. 1978); *Johnson v. State*, 209 Ga. App. 514, 516, 433 S.E.2d 717, 719 (1993); Requiring “clear and convincing evidence,” see *Mitchell v. State*, 323 Ark. 116, 120, 913 S.W.2d 264, 266 (1996); Ariz. Rule Crim. Proc. 11.5 (1987 and Supp. 1995). As the US Supreme Court reasoned: “Today, Oregon is the only state that requires the accused, on a plea of insanity, to establish that defence beyond a reasonable doubt. Some twenty states, however, place the burden on the accused to establish his insanity by a preponderance of evidence or some similar, measure of persuasion. While there is an evident distinction between these two rules as to the quantum of proof required, we see no practical difference of such magnitude as to be significant in determining the constitutional question.” *Leland v. Oregon*, 343 U.S. 790, 798 (1952).

<sup>307</sup> *Bratty v. Attorney-General for Northern Ireland*, [1963] AC 386, 416-417.

<sup>308</sup> *DPP v. Walker*, [1974] 1 W.L.R. 1090, 1094. See, generally, Richard May, *Criminal Evidence* mn. 4-08 – 4-46 (Sweet & Maxwell, 3rd ed. 1995).

<sup>309</sup> *Sodeman v. Regem*, [1936] W. N. 190, requiring the proof on the balance of probabilities (preponderance of evidence) to establish the defence of insanity. See also Timothy H. Jones, *Insanity, Automatism, and the Burden of Proof on the Accused* 11 L. Q. Rev. 475 (1995), criticizing this standard as applied to the defence of insanity as conflicting with the presumption of innocence.

evidence in advancing a claimed defence, the judge *must* instruct the jury to consider whether the prosecution has disproved beyond a reasonable doubt the claimed defence before finding a guilty verdict.

Namely, the burden of production is distinct from and should not be confused with the burden of persuasion imposed upon the prosecution. Once the accused has provided sufficient evidence on a specific defence it raised, the burden of proof is on the prosecution to disprove that defence beyond a reasonable doubt.

### *In dubio pro reo*

Talking about the *in dubio pro reo* principle, it should be mentioned that it is not explicitly cited in the Anglo-Saxon world. It primarily exists on the Continent, often implied in the legal codes and constitutions.

For instance, in France, the *in dubio pro reo* principle is derived directly from the presumption of innocence,<sup>310</sup> while in Germany it was applied well before the presumption of innocence had been recognized.<sup>311</sup> *“In German criminal proceedings, the in dubio pro reo principle is now in wide use. It is applied to the facts composing essential characteristics of a criminal offense or criminal responsibility, facts that preclude crime or criminal responsibility, facts that make a crime privileged or qualified, facts that are criminal procedure prerequisites. France has a similar situation with respect to the frequency of application of this principle. Italian theory and practice also knows of it and the application of it is, on a smaller scale, similar to the German and French criminal procedure.”*<sup>312</sup>

In the LCP of Italy<sup>313</sup>, although not specifically stated, the principle of *in dubio pro reo* emerges from the Law, which requires that the judge shall acquit the defendant in case of lacking, insufficient or contradictory evidence, due to which it would be impossible to establish the crime or that it was committed by the defendant; the judge shall also acquit the defendant in case of lacking, insufficient or contradictory evidence due to which it cannot be established that the defendant had the will (*mens rea*) to commit the crime or that the crime was committed due to negligence, imprudence or malpractice. Furthermore, the Article states that in case of lacking, insufficient or contradictory evidence pertaining to the fact that the defendant is older than fourteen years of age or that he is mentally

<sup>310</sup> The French *présomption d'innocence* derives from Article 9 of the 1789 Declaration of the Rights of Man, which has force of the constitutional law and begins with: “Tout homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable...(As all persons are presumed innocent until proven guilty...)” Fletcher, p. 881 note 41, citing L. Duguit, H. Monnier & R. Bonnard, *Les Constitutions De La France Depuis 1789*, at 2 (7th ed. 1952). See also P. Campbell & B. Chapman, *The Constitution Of The Fifth Republic: Translation and Commentary* 11 (2d ed. Oxford 1959).

<sup>311</sup> In 1952, the presumption of innocence established by Article 6(2) of the ECHR has had the status of domestic law in the German Republic. See Ratifying law of August 7, 1952, [1952] *Bundesgesetzblatt [BGBl.]* II 685, 953.

<sup>312</sup> Pavlović, Š., *Tri načela kaznenog prava (pravičan postupak, non bis in idem, in dubio pro reo)*, Libertin naklada, 2012, p. 490.

<sup>313</sup> LCP of Italy, Article 530(2)(3).



fit, the defendant shall be acquitted. Finally, the article stipulates that the judge shall acquit the defendant in cases when criminal responsibility has not been ruled out, but it has not been proven with certainty.

In the LCP of Serbia, the *in dubio pro reo* principle, although not expressed in this terminology, is also one of the fundamental principles: “*In case there is any doubt in the facts which govern the manner of the criminal proceeding, the existence of elements of a crime, or in the implementation of a different provision from the criminal law, in its judgment, or the ruling with the status of a judgment, the court shall adjudicate in favour of the defendant.*”<sup>314</sup>

LCP of Bosnia and Hercegovina also regulates the *in dubio pro reo* principle, and it is, together with the presumption of innocence, considered as one of the basic principles of the national criminal proceedings. The principle of *in dubio pro reo* reads as follows: “*If there is a doubt about the existence of the adjudicating facts of the crime which the implementation of the appropriate criminal provisions shall depend on, the court shall reach a decision in a manner which will be more favourable to the accused.*”<sup>315</sup>

This principle is also existent in the domestic LCP<sup>316</sup> requiring that: “*The Court shall decide in favour of the defendant whenever there is doubt regarding the existence or non-existence of facts comprising the elements of crime, or facts which lead to the application of a certain provision of the Criminal Code*”.

In addition to the national legislation, the ECtHR also clearly explains that the *in dubio pro reo* principle is fused within the meaning of Article 6 (2) of the Convention: “*Paragraph 2 embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence for which he is charged; the burden of proof is on the prosecution and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly and to adduce evidence sufficient to convict him*”.<sup>317</sup>

Furthermore, in its General Comment to Article 14 of the Covenant on Civil and Political Rights, the UN Human Rights Committee mentions the principle *in dubio pro reo* when claiming that the burden of proof falls on the prosecution, and any doubt must benefit the defendant.<sup>318</sup>

Just like the standard that the guilt shall be proven beyond reasonable doubt, the *in dubio pro reo* principle gives the defendant the benefit of the presumption of innocence. The judge (trier of fact) must be convinced

<sup>314</sup> LCP of Serbia, Article 16 (5).

<sup>315</sup> LCP of Bosnia and Hercegovina, Article 3 (2).

<sup>316</sup> Domestic LCP, Article 4.

<sup>317</sup> Barbera, Messegué and Jabardo v. Spain, no. 10590/83, § 77, ECHR, 06.12.1988

<sup>318</sup> General Comment No.32, Article 14: Right to equality before courts and tribunals and to a fair trial, Human Rights Committee, 2007, para.30.

of the facts establishing the accused's guilt before he or she can find the accused guilty, by the evidence viewed in the way most favourable to the accused.<sup>319</sup>

In other words, and when it comes to the acquittal, the right to presumption of innocence would be emptied of all its significance without this principle, since any doubtful situation would not be solved any more in favour of the defendant. The legal presumption that the defendant is innocent would be easily overcome by contradictory and infirm evidence presented by the prosecutor who could rely on doubtful factual reconstruction and not solid evidence to obtain a conviction. The defendant would still be presumed innocent, but such presumption would be practically ineffective. And vice versa, without the right to presumption of innocence, the principle of *in dubio pro reo* would be of hardly any benefit to the defendant, since the suspect should bear the burden of proving their innocence.

It is, therefore, evident how the principle of presumption of innocence and the principle *in dubio pro reo*, i.e. the standard that the guilt shall be proven beyond reasonable doubt, are actually entwined and must work together in order to ensure full fairness of the proceedings. This principle is applied with other constitutional rights fundamental to the guaranteed due process rights – rights that are explicitly set out in the International Covenant on Civil and Political Rights (“ICCPR”), and other regional conventions, such as the ECHR.<sup>320</sup>

### Numeric presentation of the standard of proof

People, including jurors, and frequently also lawyers, tend to represent probability mathematically, by representing it as a number on a scale from 1 to 100, or as a degree of probability from 0 to 1.<sup>321</sup> Taking into consideration that there are startling discrepancies in such representations, many surveys have been carried out in USA and in the United Kingdom in order to measure the quantitative expression of reasonable doubt.<sup>322</sup> While the position most commonly expressed in jurisprudence is that the standard of proof beyond reasonable doubt requires proof higher than 90%, the research mentioned above shows that the degree of proof required by respondents is sometimes much lower.

<sup>319</sup> Frase & Weigend, The German Criminal Procedure Code section 261 requires the court to adjudicate each case on the basis of its “free conviction derived from the totality of the trial”.

<sup>320</sup> The fundamental rights of the accused include the right to a fair and public hearing, ICCPR, Art. 14(1), ECHR, Art. 6(1). “If burdens and standards of proof reflect fundamental societal value determinations, as Justice Harlan [*Winship*, 368-375, Harlan J. concurring] has so convincingly espoused, then constitutional value, such as are embodied in the United States’ Bill of Rights and in solemnly proclaimed international treaties must have some impact.” See also Juliane Kokott, The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches With Special Reference to the American and German Legal Systems 2-9 (Martinus Nijhoff Publishers 1998) (hereinafter “Kokott”), p. 27.

<sup>321</sup> See: M. K., Dhama, On Measuring Quantitative Interpretation of Reasonable Doubt, 14 *Journal of Experimental Psychology: Applied*, 2008, 353-363, available at: [www.psychwiki.com](http://www.psychwiki.com)

<sup>322</sup> See D. K. Kagehiro, W. C. Stanton, Legal vs. quantified definitions of standards of proof, 9 *Law and Human Behavior*, 1985, 159-178.



It must be noted that the research papers mentioned above use different methods to measure the quantitative interpretation of reasonable doubt in different groups of citizens. Two methods (or, more precisely, two groups of methods) are most commonly used for these types of measurements. With the application of the so-called “direct methods” of assessment, one measures the abstract attitude of respondents on the minimum degree of proof that they believe is required for conviction. These are called “self-report” methods.<sup>323</sup> These are simpler methods that generally yield higher results, namely around 0.9 on a probability scale of 0 to 1 or 90% on a scale of 0 to 100%, and are in this regard closer to the moral and theoretical discussions.<sup>324</sup> On the other hand, methods called indirect methods appear to be closer to the real situation of making decisions in practice, because, in addition to the interests of suspects, they include a more complex evaluation of the interests of society and of the victim, and thus comprise a process of finding the appropriate balance between the favourable and detrimental effects of conviction and acquittal.<sup>325</sup> In this regard, the decision-making criteria include more complex formulae that measure the use (detriment) of 4 values or situations: 1) acquitting the innocent; 2) convicting the innocent; 3) convicting the guilty, and 4) acquitting the guilty.<sup>326</sup> It appears that these “indirect methods” are closer to real life situations, because, in addition to abstract liberal values, they also reflect real concerns about fighting crime, victims’ interests etc.

It is more than understandable that, in addition to the difference of results depending on the method applied, results also differ depending on the population sample of the specific survey, with the value of the standard of proof beyond reasonable doubt varying from 50 to 100% probability. Most research shows that the degree of probability expressed by judges is approximately 90%,<sup>327</sup> with the highest values measured among university students (91-99%).<sup>328</sup> The modest domestic research on the standard of proof conducted amongst legal practitioners (judges, prosecutors, attorneys and civil society observers) and law students did not give at substantially different results than those expressed in corresponding surveys in the USA when it comes to the application of the direct method. The standard was evaluated with highest values by judges and university students as proof of approx. 90% probability.<sup>329</sup>

<sup>323</sup> See R. Hastie (Ed.), *Inside the juror: The psychology of juror decision making*, Cambridge: Cambridge University Press, 1993, pp. 84-115; Kagehiro, D. K., Defining the standard of proof in jury instructions, *1Psychological Science*, 1990, 194-200.

<sup>324</sup> See Dhami, *supra*.

<sup>325</sup> See S. S. Nagel, Bringing the values of jurors in line with the law, *63 Judicature*, 1979, 189-195; S. S. Nagel, M. G. Neef, *Decision theory and the legal process*, Lexington Books, 1979.

<sup>326</sup> See Dhami, *supra*.

<sup>327</sup> See R. J. Simon, Judges’ translations of burdens of proof into statements of probability, *13 Trial Lawyer’s Guide*, 1969, 103-114; R. J. Simon, L. Mahan, Quantifying burdens of proof. A view from the bench, the jury, and the classroom. *Law and Society Review*, 1971, 319-330.

<sup>328</sup> See McCauliff, *supra*; Dhami, *supra*.

<sup>329</sup> For the purposes of this study conducted was the first modest attempt to quantify the degree of probability by surveying a100 number of domestic legal practitioners, law students and observers from civil society organisations monitoring court proceedings.

## FACTS PERTAINING TO THE IMPLEMENTATION OF THE PRINCIPLE OF *IN DUBIO PRO REO*

### Scope and time of application

When analysing the principle of *in dubio pro reo*, as defined in the legal systems on the Continent, it can be concluded that it is basically consisted of two segments. The first segment contains the prerequisite for existence of doubt and specifies on to what it can refer, while the second prerequisite is that the court shall reach a decision which is more favourable for the defendant.

Depending on the jurisdiction, the doubt can refer to whether facts that define the crime and are relevant for the application of other provisions from the material criminal law exist or not, but also to the question whether facts relevant for the application of the criminal procedural law exist or not.

When it comes to the facts that define the crime, those are the elements of crime known as *mens rea*-guilty mind and *actus reus*-guilty acts, but we will include here also the general provisions about the criminal responsibility and ways of conducting the crime. When it comes to the facts that are relevant for the application of other provisions from the material criminal law, those are the facts based on which the act shall not be considered a crime, or those facts that exclude criminal liability, such as: act of minor significance, self-defence, extreme necessity, factual and legal misconception and mental competence (facts that are in favour of the defendant and are basis for acquittal).

This would mean that, in case of doubt whether it exists or it does not exist the fact that the defendant was at the crime scene (*actus reus*), the court shall apply the principle of *in dubio pro reo* by deciding that this fact does not exist and by bringing an acquittal.

Alike, in case of doubt whether the defendant before committing the theft, broke down the door of the flat by using the correct tool or whether the door had already been open (*actus reus*), the court shall determine that there was no burglary, and convict the defendant of theft and not of severe theft. Similar situation may be when the court needs to distinguish wilful negligence from conditional intent as types of guilt (*mens rea*), since in both cases the perpetrator is aware of the possibility that a prohibited consequence may arise, with the difference being that, in the case of conditional intent, the perpetrator agrees to the occurrence of the harmful consequence, while in the case of wilful negligence, the perpetrator gullibly believes that he/she can prevent the prohibited consequence or that the consequence will not arise. This means that the line between wilful negligence and conditional intent is, in fact, the line between consent and gullibility in relation to the

prohibited consequence. Having in mind that these are degrees of will, i.e. psychological phenomena, it is obvious that this line cannot be strict, but flexible. Therefore, the conclusion is that the upper limit of reckless action in some way overlaps with or moves very close to the lower limit of agreeing to the consequence. In such cases, the court can obviously find itself in doubt on whether the specific case is a case of wilful negligence or conditional intent, and can, by applying the principle of *in dubio pro reo*, rule more favourably for the defendant - in this case, determine that there was wilful negligence.

Also, in case of doubt whether the fact based on which the act shall not be considered a crime, or a fact that exclude criminal liability (for example: that the crime was performed in self-defense or the defendant was in factual misconception), exists or not, the court shall again apply this principle in favour of the defendant and shall bring an acquittal. Still, in this case it is up to the court to decide if this fact exists (is proven) or to decide that, based on evidence that goes towards proving such fact, the court is doubtful about facts that define the crime and therefore shall decide that those facts are not existent (not proven).

Since the court decides on facts based on evidence presented at trial, it means that the court applies this principle after the trial and in the phase of decision making.

When it comes to procedurally relevant facts those are facts in relation to the application of procedural criminal law. For example, if there is a doubt about the statute of limitations or immunity from criminal prosecution etc. the application of the principle of *in dubio pro reo* by the court shall lead to dismissal of charges.

On the other hand, *in dubio pro reo*, generally, does not apply to auxiliary facts. Auxiliary facts enable the authentication of sources of the legally relevant facts. Considering their function, the auxiliary facts are only used to audit other facts. For example, an auxiliary fact is a fact that the letter, in which the suspect allegedly confesses to a criminal offense, was forged by a third person, so the fact whether the letter is forged or not is an “auxiliary fact”, because it is used to determine the credibility of the source of this legally relevant fact.<sup>330</sup> Hence, the auxiliary facts are used to decide on the opposites (yes or no) as a positive or negative fact; there is not a third option.

The principle of *in dubio pro reo* also does not apply to interpretation of provisions of criminal legislation. It is a question of achieving the *ratio legis* of the laws. Having decided about the facts, the court must apply the legal solution which best serves the meaning of the laws, regardless of whether that solution is more favourable to the accused.<sup>331</sup> In fact, this is not about the doubt in the genuine sense, but about the correct application

<sup>330</sup> Tomašević, *op. cit.*, p. 277-278.

<sup>331</sup> Pavišić, B., *op. cit.*, p. 68-69.

of criminal legislation. For example, the jurisprudence considers that ambush homicide is not a homicide committed in a sly manner, which would be an aggravating feature of the offense. Even though such a perception is in favour of the defendant, it is not the result of the court's application of the *in dubio pro reo* principle, but the interpretation of the term "in the sly manner" as the feature of the offense.

If the court uses circumstantial (indirect) evidence to substantiate decisive facts then *in dubio pro reo* can apply in cases where there is either insufficient number of indications (deficiency of indications) or when the probative value of indications does not allow for a reliable conclusion (the unreliability of indications). Both situations are elaborated by the Supreme Court of Croatia below:

However, all of the prosecutor's statements don't cast a doubt on the correctness of the decision of the Court of first instance according to which it was not proven that the accused committed the crime he is charged with because the presented evidence still leave doubt as to the possibility that someone other than the accused found cocaine held in gutter of the house. Prosecutor's claims in the appeal are indications that indeed point to the accused as the most suspicious person, but still he was not the only person who possibly could have left the drugs in that gutter. Therefore, since these indications together with the other evidence presented still leave open the possibility that another person held the seized cocaine in the gutter of the house, which the First instance court took into consideration, the accused should indeed have been acquitted, applying the *in dubio pro reo* principle.<sup>332</sup>

and:

In conclusion, it should be noted that, given the absence of necessary evidence which would undoubtedly point to the participation of the accused in this otherwise utterly abhorrent crime, the results of the procedure in fact are reduced to the existence of certain clues, which don't have the necessary quality to be considered solid grounds for a guilty verdict, so in respect of the *in dubio pro reo* principle the accused should be acquitted from charges for the crime, as was done by the Court of first instance<sup>333</sup>.

Regarding the application of the rule *in dubio pro reo* in connection with indications, it is worth to mention the research done by Davor Krapac on direct and indirect evidence in criminal proceedings, which comes to the conclusion that courts were more frequently in doubt and applied the rule *in dubio pro reo* in those criminal cases in which the indictment was based on indications than in cases where the indictment was based on direct evidence.<sup>334</sup>

<sup>332</sup> Supreme Court of Croatia, Judgment no. I Kž-38/99-3 23.11.2000.

<sup>333</sup> Supreme Court of Croatia, Judgment I Kž-479/97, 01.06.2000.

<sup>334</sup> Davor Krapac, *Neposredni I posredni dokazi u krivičnom postupku* (Direct and indirect evidence in criminal proceedings), Informator, Zagreb, 1982, p. 122

The understanding that, in order to decide about the existence of certain facts on the basis of indications, a larger number of logically related indications are required, was accepted in the case law of the courts of former SFRY. For example, the Supreme Court of former SFRY in its judgement from 1970 found that, *“where there is no direct evidence that the defendant perpetrated the criminal offence he/she is charged with, but the facts of the case are determined on the basis of circumstantial evidence, the defendant can only be found guilty on the basis of a series of facts established on the basis of circumstantial evidence, which were undoubtedly established and are strongly and logically interrelated, so that they present a closed circle and lead, with complete certainty, to the only possible conclusion that the defendant perpetrated the criminal offence that is subject of the indictment, and that the presented evidence exclude any other possibility”*.<sup>335</sup>

The Supreme Court of Croatia expressed a similar opinion in an older decision, from 1969, in which it assessed that *“even in the absence of direct evidence, the defendant shall be found guilty if the interrelation of the circumstantial evidence is such that it represents the links of a chain in full harmony, and if they, in their entirety, exclude any other possibility”*<sup>336</sup>.

### Internal and external doubt

The principle of *in dubio pro reo* is certainly applicable to the proof of an uncertain decisive fact. For instance let us assume that, in murder case, evidence presented by the defendant casts doubt about his presence on the crime scene. It is possible that things took place as follows: the prosecutor proved that the defendant had a good motive to kill, that he was on the crime scene and close enough to stab the victim and that he had a knife, but eyewitnesses saw another man on the crime scene who had a knife too, was close enough to stab the victim and after the murder fled the crime scene; therefore it could be possible that this other man and not the suspect was the murderer.

In a different case, the evidence presented by the prosecutor may not be sufficient to establish with certainty whether or not the defendant actually perpetrated the crime. For instance, the defendant was seen on the crime scene of the murder, but he was too far to stab the victim who was stabbed to death. Or, the hypothesis of the prosecution explains certain facts, but not all of the facts necessary for a guilty verdict: the prosecutor proved that the defendant had a good motive to kill, that he was on the crime scene and close enough to stab the victim, but, since the suspect was blocked by the police immediately after the murder, the prosecutor should have explained also how it was possible that no knife was found on the crime scene or in the possession of the defendant. The failure to explain such a circumstance may leave a reasonable doubt that somebody else was the killer.

<sup>335</sup> Supreme Court of former SFRY, Judgment KZh. no. 38/70, 22.12.1970.

<sup>336</sup> Supreme Court of Croatia, Judgment KZh. no. 1744/68-6, 29.10.1969.

From the above two perspectives, the doubt can be external and internal. The external doubt is the one that opposes the hypothesis of the prosecutor with an alternative view which does not have the characteristic of a mere logical possibility or *ad hoc* hypothesis, but the character of practical rationality and feasibility. On the other hand, the internal doubt is related to the case of self-contradictoriness of the hypothesis of the prosecutor or to its inability (or failure) to demonstrate the defendant's responsibility. In other words, even if the defendant did not present any piece of evidence in his favour and remained silent throughout the entire proceedings, the principle of *in dubio pro reo* imposes the decision maker to resolve the doubtful situation in favour of the defendant.

An example of internal doubt is elaborated below by the Appellate Court Stip deciding upon an appeal raised by the prosecution: *The discovered narcotics in the house of the defendant is not a reliable evidence to determine the criminal responsibility of the defendant for the crime 'Unauthorized manufacture and sale of narcotic drugs, psychotropic substances and precursors' (...)*.<sup>337</sup>

In this case the Appellate Court confirmed the first instance judgement which released the defendant from charges, finding that:

(...) less than 50 grams of marijuana found during the search in the defendant's home does not represent sufficiently reliable evidence on the basis of which the criminal responsibility of the defendant for the criminal offense he is charged for cannot be determined. None of the evidences presented at the main hearing could establish with certainty that the found narcotic drug was intended for sale, especially when facts were established that the defendant was a long-time registered drug addict and that in the respective period he was undergoing methadone therapy. The statement of the medical expert witness confirmed that the relevant narcotic drug was for personal use, given the fact that in the respective period the defendant had his methadone therapy reduced, and he really needed to consume marijuana; according to the expert, it was normal for him to smoke 5 cigarettes a day. The defence that the relevant narcotic drug - marijuana was purchased for personal use was corroborated with the determined facts and circumstances at the main hearing, that during the search, the drug - marijuana was found in a prominent place - over the washing machine in the bathroom and the fact that several butts from handmade cigarettes were found in the defendant's home; they were a mixture of tobacco and dried, crushed tips and leaves of cannabis plant, but also the fact that during the analysis of the defendant's urine sample presence of metabolites and tetra-hydrocannabinol - a psychoactive substance contained in the plant cannabis, was detected.. In such a situation of established facts, as well as in case of absence of evidence proving that the defendant kept the subject

<sup>337</sup> Court of Appeal – Stip, Judgment No. KZH – 457/2013.



narcotics for sale, the intention of the defendant to use the seeds for production of narcotic drugs cannot be established.<sup>338</sup>

### Degree of doubt

The question whether any degree of doubt or only a higher degree of doubt is necessary for the principle of *in dubio pro reo* to apply, becomes a relevant issue that requires more precise determination.

Namely, although the court has to find that all facts that define the crime are proven (exist) with certainty based on evidence, often this certainty cannot reach 100 per cent, leaving always a possibility for doubt. Nevertheless, when there is certainty, the doubt, even if there, becomes irrelevant, unjustifiable, and as such it will not be taken into consideration. However, when the doubt is reasonable, it shall mean that the certainty about the existence of facts that define the crime is not reached (they are not proven), which results in the application of the principle of *in dubio pro reo* in favour of the defendant and his/her acquittal. Therefore, the doubt whether facts that define the crime exist or not, which is the prerequisite for application of the principle of *in dubio pro reo*, must be reasonable.

But, it is a justifiable question whether the degree of doubt for the existence/non-existence of facts based on which the act shall not be considered a crime and facts that exclude criminal liability, act of minor significance, self-defence, extreme necessity, factual and legal misconception and mental competence (facts in favour of the defendant), need to be equal with the degree of doubt about facts against the defendant? Namely, unlike the facts against the defendant, where *in dubio pro reo* can apply only if there is a reasonable doubt, for facts in favour of the defendant the lesser the doubt the better, because the fact, which is already in defendant's favour will be less contested if there is less doubt in it.

In that same direction is the opinion of the Supreme Court of Croatia given in 2014:

(...) This procedural rule, known as the principle *in dubio pro reo* lays down the standard of proof, according to which facts to the detriment of the defendant must be established with certainty, meaning that their existence must be proven beyond reasonable doubt. As long as there is doubt in these facts, they may not be considered established. From this legal provision one can draw the rule on the standard of proof regarding decisive facts in favour of the defendant - these facts should be accepted as proven, even if they are only likely, i.e. if there is still doubt about their existence, and even if the existence of the fact to the detriment of the defendant is more likely than the existence of the fact in favour of the defendant (...)<sup>339</sup>.

<sup>338</sup> *Ibid.*

<sup>339</sup> Supreme Court of Croatia, Judgement Kž. no. 1014/02-8.

Similar explanation was given by the Appellate Court Belgrade in 2012:

(...)All facts that the accused is charged with must be determined – proven with certainty in the criminal proceedings, and if not proven (if there is doubt in their existence) it shall be considered that they do not exist. Contrary to this, if doubt arises about the existence of the facts that are in favour of accused, and that evidence does not exclude such doubt, it shall be considered that such facts exist.(...)<sup>340</sup>

Although the domestic LCP<sup>341</sup> obliges the court to determine whether facts in favour of the defendant exist (are proven) or not, this can be observed also from a different angle.

Namely, if there is evidence presented by the defence that is proving a fact based on which the act shall not be considered a crime, or that can exclude criminal liability, (for example, evidence of self-defence or factual misconception), those evidence may raise reasonable doubt in the prosecutor's case (i.e. in the facts that define the crime).

If the prosecutor does not manage to refute those beyond reasonable doubt, the court shall apply the principle of *in dubio pro reo* not because there is a reasonable doubt whether facts in favour of the defendant exist or not, but because there is a reasonable doubt that facts that define the crime exist. As such, the court shall decide that facts that define the crime are not proven with certainty, i.e. they do not exist, because the evidence presented by the defense (that goes in favour of the exclusion of criminal liability for example) raised reasonable doubt in their existence.

This is because, although the defendant needs to make allegations that exclude him/her from criminal liability probable, that is to prove it to a degree which does not mean certainty or truthfulness, he/she does not have the obligation to prove his/her innocence.: „*The Court finds that the results of the evidence presented at the first instance trial, and the trial before the court of second instance, did not provide a reliable basis for the conclusion that the accused committed the criminal offense in the manner described in the indictment, and the second instance court acted correctly when it acquitted the accused of charges.*”<sup>342</sup>

### Principle of unfettered consideration of evidence and in dubio pro reo

An important achievement of the modern criminal proceedings in respect of fact-finding is the application of the principle of unfettered consideration of evidence. In accordance with this principle, the court evaluates the presented evidence by using logical and psychological analysis and is not bound by other legal rules.

<sup>340</sup> Court of Appeal Belgrade, Judgment no. 108/12.

<sup>341</sup> Article 15: “*The court and the state authorities shall be obliged to pay equal attention to the investigation and determination of both facts against and facts in favour of the defendant.*”

<sup>342</sup> Supreme Court of Republic Srpska, Judgment 84 0 K 009669 10 kž, 15.02.2011



When discussing the relationship between the principle of unfettered consideration of evidence and *in dubio pro reo*, the question arises whether these principles are in collision. In theory, there are two different standpoints. According to one, mainly present in older literature, the *in dubio pro reo* principle is a formal evidentiary rule which limits the unfettered consideration of evidence because it instructs the court on how to resolve the doubt it might find itself in when deciding about facts. „If the *in dubio pro reo* rule is regarded as the method for assessment of evidence or instruction to the Court that any doubt in the existence of facts should be resolved to the benefit of the accused, then this rule is contrary to the principle of unfettered consideration of evidence.“<sup>543</sup>

Such an opinion is not acceptable as it does not take into account the fact that *in dubio pro reo* principle applies only when the court has finished assessing the evidence according to its free consideration, and has not established with certainty the existence of a decisive fact, but has remained in doubt. *In dubio pro reo* principle, which, in such a situation, requires from the court to decide in favour of the accused is hence not a rule for evaluating the evidence, but a method for resolving the doubt which occurs once the evidence has been evaluated. The German Federal court was right when it warned about the frequent incorrect practice where *in dubio pro reo* principle was considered as a rule of evidence rather than a principle applied in the process of making a judgment.<sup>544</sup>

The same position was shared by the Supreme Court of Croatia in few consecutive decisions, as stated below:

In this regard, it should be noted that the notions contained in the appeal of the accused are not legally feasible, since it required that the court, in line with the *in dubio pro reo* principle, should have accepted the alternative presented by the defence that is more favourable for the accused. Namely, this case is not about the doubt in the facts that is resolved during the criminal proceedings in a manner that shall be more beneficial for the accused, but simply about evaluating the credibility of the defendant's testimony as an evidentiary instrument, which has been approved by the Appellate and Supreme Court, to which the appellant was referred to. The opposite understanding of the meaning and application of the *in dubio pro reo* principle, on which the appeal insists, would lead to absurd situations where the court should accept any, even the most illogical version of the accused's defence, only if that version is more favourable for him.<sup>545</sup>

and

<sup>543</sup> Zlatarić, B., *Krivično pravo*. Opći dio, Zagreb, 1977, p. 89.

<sup>544</sup> Safferling, C., *Terror and Law – Is the German legal System able to deal with Terrorism?* (The Federal Court of Justice decision in the case against El Motassadeq), *German Law Journal*, no. 5, 2004, p. 524.

<sup>545</sup> Supreme Court of Republic of Croatia, Judgment I Kž-349/1990-3, 04.09.1990.

*In dubio pro reo* is not an evidentiary rule. It only implies that in criminal proceedings the Court shall decide by reaching a verdict in a manner that is more favourable for the accused, only if the court, having thoroughly assessed the individual pieces of evidence and their relevance with other evidence, still has doubts that cannot be resolved regarding the existence or nonexistence of facts that define the crime, or which determine the implementation of certain provisions of criminal legislation, and it does not contain criteria which the Court of first instance would be obliged to consider in the adjudicating process, if certain facts are proven to a certain degree of probability compared with the others.(...)<sup>346</sup>

The same approach is shared by the Federal Supreme Court of Bosnia and Hercegovina and Supreme Court of Republika Srpska:

When even after complete and meticulous evaluation of every piece of evidence and their relevance to other evidence, the court could not exclude the possibility that the deficit which incurred in the business transactions of the company, could have been caused by other reasons other than the accused appropriating the money, the court was right to resolve the doubt about the existence of that adjudicating fact, the defendant's appropriation of the money she was entrusted with, by deciding in a way that is more favourable for the accused.<sup>347</sup>

The *in dubio pro reo* principle does not mean that the existence of contradictory evidence by itself excludes the possibility of reliably determining the relevant facts and that it imposes an obligation on the court to conclude about the existence or nonexistence of such facts in the way which is more favourable for the accused. This principle implies the obligation of the court to conscientiously evaluate every piece of evidence and its relevance with the rest of the evidence, especially an assessment of the credibility of contradictory evidence, and in accordance with such an assessment to conclude whether certain adjudicating facts can be considered proven or not proven. If the court, despite of this, remains in doubt with regard to certain adjudicating facts that define the essential elements of the criminal offense and on which the application of a criminal law depends on, that doubt must be resolved in a manner that is more favourable for the accused.<sup>348</sup>

Therefore, the *in dubio pro reo* principle does not present a limitation or derogation from the principle of free evaluation of evidence but, on contrary, it practically emanates from it.<sup>349</sup> When the court is convinced of the existence of the decisive facts, based on the unfettered consideration of evidence, the court expresses a belief by rendering a decision resolving

<sup>346</sup> Supreme Court of Republic of Croatia, Judgement U-III/80/2010, 06.04.2011.

<sup>347</sup> Supreme Court of Federation Bosnia and Hercegovina, Judgment 09 O K 014393 13 Kž, 14.01.2014.

<sup>348</sup> Supreme Court of Federation Bosnia and Hercegovina, Judgement Kž-610/06, 06.02.2006.

<sup>349</sup> Škulić, M., op. cit., p. 68.

the case. However, it is possible that the court, after the assessment of all evidence, remains in doubt, or does not get convinced of the existence of decisive facts. In this case, the facts about which the court is in reasonable doubt are to be interpreted in favour of the defendant. Otherwise, if the principle of free evaluation of evidence was not part of the criminal proceedings, and there was a legal value of evidence instead (the law stipulating explicitly the quantity and quality of evidence required for conviction as it was the case in the inquisitorial criminal procedure), then the court would not be able to determine that there is doubt regarding the existence of decisive facts.

### Court reasoning

It is of course worth noting that the free evaluation of evidence by the court, as a prerequisite for application of the principle of *in dubio pro reo* when deciding about decisive facts, cannot be arbitrary, or, as stated in a decision of the Supreme Court of the Autonomous Province of Vojvodina “*The determination of facts based on the free evaluation of the court shall not rest solely on the internal subjective conviction of the judge, but must also be based on the real accuracy of the court’s conclusion based on objective facts*”.<sup>350</sup>

The conclusion for the existence of decisive facts, drawn on the basis of conscientious evaluation, must be explained by the judge in the rationale to the written guilty verdict. In the guilty verdict the court shall state the facts that are not disputed, and in regards to the disputed facts, the court shall elaborate the reasons due to which these facts have been evaluated as proven or not proven, the evidence from which the facts derived, the reasons due to which specific motions by the parties were dismissed, and the reasons based on which the court decided on the legal issues and especially in ascertaining whether the criminal offense was committed and whether the accused was criminally responsible. Failing to do so, and failing to explain its conclusion in the rationale, or failing to transparently demonstrate the process in which facts were found proven based on the evidence, constitutes a substantive and absolute violation of the legal provisions governing the criminal procedure, which must result in the higher court revoking the judgement.

Legality of evidence can also be seen as an exception to the principle of unfettered consideration of evidence. Evidence obtained by violating constitutional principles, international conventions and laws is illegal, and so is evidence which is a result of illegal evidence, known as *the fruit of poisonous tree*.<sup>351</sup> As such, the court must at any stage of the proceedings dismiss any illegal evidence, especially the one obtained by use of torture, inhumane and degrading treatment.

<sup>350</sup> Supreme Court of the Autonomous Province of Vojvodina, Judgement Kž 1206/62, 11.01.1963.

<sup>351</sup> See *Gafgen v Germany*, no. 22978/05, § 161, 164-167, ECHR, 01.06.2010.

Below can be found an exhaustive elaboration by the Constitutional Court of Bosnia and Hercegovina from 2006 and 2014 on the court reasoning and how it may affect the application of the principle of *in dubio pro reo*:

(...) The unfettered consideration of evidence is, hence, freed of the legal rules that would a priori determine the probative value of certain evidence. However, the unfettered consideration of evidence requires that every item of evidence and its relevance with the rest of the evidence be explained, and that they be brought into a logical mutual connection. The principle of unfettered consideration of evidence does not represent an absolute freedom. This freedom is limited by general rules and regulations of human thinking, logic and experience. This is why the court has an obligation to describe in the verdict rationale the process of evaluation of individual evidence, to bring every single evidence in relation with other available evidence and make conclusions as to whether certain facts are proven. (...) In the light of this, the Constitutional court stresses that the Court of first instance evaluated the testimonies of several witnesses as arbitrary, without providing more detail on the basis of which the Court gained that impression, and not explaining the process of evaluation of the evidence as required by the principle of unfettered consideration of evidence. The Constitutional Court holds that such an explanation does not satisfy the requirement of careful and conscientious assessment of evidence since the subjective belief of the court that the appellant committed the criminal offense he is charged with is not sufficient, but there must be real truth in the conclusion of the court, explained and grounded on the objective facts. Regular courts cannot just say that they do not believe a particular witness just because his testimony is in contradiction with the testimony of another witness they trust, nor is it enough to subjectively qualify the evidence as “arbitrary”. (...) Taking this into account, the Constitutional court finds that the lack of satisfactory explanation of the appellant’s guilt, and the lack of objectification of court’s subjective evaluation with a comprehensive analysis and assessment of the presented evidence, does not correspond to the demand of a fair trial prescribed in Article 6 Paragraph 1 of the European convention. The court also considers that the opinions of the challenged judgments do not satisfy the obligation of respecting the *in dubio pro reo* principle. Based on everything said, the Constitutional Court considers that the opinions of the disputed judgments do not meet the requirements of a fair trial, but give the impression of arbitrariness, so they violated the appellant’s right to a fair trial under Article 6 paragraph 1 of the European Convention.(...) <sup>352</sup>

(...) With regard to the appellant’s allegations about the violation of the principle of *in dubio pro reo*, the Constitutional Court

<sup>352</sup> Constitutional Court of Bosnia and Hercegovina, Judgment AP 1603/05, 21.12.2006.

observes that the appellant considers that there was a violation of the principle *in dubio pro reo* in this case because the courts should have interpreted all the dilemmas and contradictions in favour of the appellant and not against him as they had done. The Constitutional court emphasizes that the *in dubio pro reo* principle is guaranteed in Art. 6 Para. 2 of the European Convention. According to this principle, everyone is presumed innocent until proven guilty in accordance with the law. In this sense, if there is doubt whether a certain person committed a criminal offense he or she is charged with, such a doubt should be resolved to the benefit of the accused. However, in the opinion of this court, the application of the principle of *in dubio pro reo* can be challenged in absence of a comprehensive analysis of all evidence presented in the opinion of the judgment which eliminates such a doubt. In this particular case, the Constitutional court states that the explanation of the analysis performed on all the presented evidence leaves no room for doubt about the court's conclusion about the accused's guilt. Hence, the Constitutional court finds that the principle of *in dubio pro reo* contained in Art. 6 Para. 2 of the European convention has not been infringed in this particular case, so the appeal is deemed unfounded.(...) <sup>353</sup>

### *In dubio pro reo* on expert opinions

The testimony of the expert witness is assessed as any other evidence, according to the principle of unfettered evaluation of evidence. Expert's opinion is not binding for the court but represents evidence which the court evaluates freely, so the court can either accept or reject it. If the court rejects expert's opinion, it shall ground its decision on other evidence, and if there is no such evidence, the court shall conclude that the facts that were supposed to be proven by an expert witness remain unproven. <sup>354</sup>

But the question is what the court should do in a situation when it does not accept the final opinion of the expert witness because it is not convinced in his/her accuracy whilst the fact must be determined through expertise (mandatory forms of expertise). There are two solutions on this. According to the first, the court can establish the questionable fact despite the opinion of the expert witness, while according to the other, the court shall consider the given fact unestablished and shall apply the *in dubio pro reo* principle. The first solution can be unacceptable because the court would, in that case, undertake the function of the expert witness and violate the principle of division of functions in a criminal procedure aimed at providing objectivity of the criminal proceeding. According to the second solution, if the court does not accept the final opinion of the expert witness, it must conclude that the fact subject of expertise remains

<sup>353</sup> Constitutional Court of Bosnia and Hercegovina, Grand Chamber, Judgment AP 4578/10, 24.04.2014.

<sup>354</sup> In this context see the judgment of the Supreme Court of Bosnia and Hercegovina, Kž. 1005/77, See also Kreho, S., *Zbirka sudskih odluka iz oblasti Zakona o krivičnom postupku*, Sarajevo, 1996, p. 124.

unproven, i.e. doubtful. This is why in such a case, as well as in other cases when the court has reasonable doubt about the existence of decisive facts of the case, it shall apply the *in dubio pro reo* principle. This theoretic approach is also supported by case law of the Supreme Court of Croatia:

In the given case there were serious omissions during the investigation, primarily because the evidence was not gathered on basis of which it could have been confirmed with great certainty who was driving the vehicle during the traffic accident, as well as the fact that there were no eyewitnesses of the event, nor has the accused provided relevant data in that respect. Bearing in mind that during the proceedings three medical and one traffic expert witnesses provided their findings and opinions, and that a combined medico-legal and traffic expertise were performed, and what is particularly important, all of the expert witnesses agreed that it could not be determined with certainty who was behind the wheel in the moment of the accident, and that none of the evidence exculpates the accused directly, the conclusion of the First instance court that in determining these adjudicating facts and following the complete assessment of the evidence a dilemma remains, can be considered logical. This dilemma was correctly resolved by the court who acquitted the accused of the charges in compliance with the *in dubio pro reo* principle contained in Art. 340 point 3 CPC”.<sup>355</sup>

In practice, it is possible that the expert witness cannot give a definite answer to a certain question and his/her opinion only allows the possibility of existence of a decisive fact. Therefore, the question is whether the court can accept the opinion of the expert witness that is not adamant but only expresses the possibility of existence of a fact which was subjected to the expertise. The court can accept an opinion of the expert witness who expresses only possibility that a decisive fact exists, as it can be seen from the case law of the Supreme Court of the Federation of BiH:

Therefore, this Court examined, whether due to the expert’s use of the phrase “most likely”, which relates to the assessment whether the injury caused to the victim was a result of assault, a doubt incurred as to the existence of facts defining the criminal offense, which would, if such is the case, result in the application of the principle of *in dubio pro reo* prescribed in Article 3, paragraph 2 of the CPC FBiH. This principle provides that any such doubt or uncertainty about the existence of facts that define the crime shall be adjudicated by the Court in a manner that is most favourable for accused, so the significance and validity of the use of the aforementioned words by the expert witness should have been appropriately evaluated. Before answering these questions, the Court took into account the explanations given by the forensic expert witness and therefore opted for the conclusion that the stab

<sup>355</sup> Supreme Court of Croatia, Judgment I Kž-28/1995-3, 21.01.1997.



wound that the accused inflicted on the victim's right side of the neck (an indisputable fact) is a wound received during an assault. The expert primarily based such an assessment on the depth of the wound of 15 cm, which required a strong swing, which is not the case with defensive injuries where the effect of the knife is not direct, but the victim merely inflicts lacerations to the attacker. Having all of this in mind, the descriptions of injuries inflicted on during assault or in defence are clear and do not overlap, they are mutually exclusive, because according to the expert witness' opinion and description, the wound on the right side of the victim's neck was a wound inflicted in an attack, and was not defensive. He, then superfluously and needlessly used the phrase that it was "a most likely assault wound", knowing that with the previously given statement it could only be described as such. (...) If all this is taken into account then, in opinion of this Court, we cannot say that there is any doubt about the existence of an activity perpetrated by the defendant in which, during an assault, the victim received a stab wound in the right side of her neck, so that in line with *in dubio pro reo* principle, the case could be resolved in a way that is more favourable for the accused. Hence, there is no doubt in the certainty of this fact which the court established on the grounds of the forensic expertise that this was a case of a wound inflicted on the victim during an assault. Precisely due to the fact that there is no doubt about this relevant circumstance which is a part of the structure, that is, presents an element of crime, the application of *in dubio pro reo* principle is not an option.<sup>356</sup>

Considering the fact that during the main hearing, both the prosecution and the defence may call for an expert witness, it is possible that the two separate expert witness give different results. In this situation, the Court must assess both findings and opinions, and opt for the one that is more convincing, and if in doubt in line with the *in dubio pro reo* principle, the court shall accept the one that is more favourable for the defendant. Such a conduct may not always be accepted, and the Court may engage a third expert in order to eliminate the existing dilemma. The third finding and opinion will usually side up with one of the previous two. In this situation, the Court will accept the finding and opinion of the expert that is confirmed by the third expertise. But is such a conclusion by the Court correct? It could be widely discussed whether the court should accept the fact as proven only based on the circumstance that findings and opinion of the expert witness were confirmed by another expert witness. What would happen if the fourth expertise were conducted, which supported the opinion of the expert witness whose findings and opinion were not upheld by the third expert witness? If the court was in such a situation, where there are two different expert findings and opinions supported by

<sup>356</sup>Supreme Court of Federation Bosnia and Hercegovina, Judgment 04 0 K 00097110 Kžk, 13.05.2011.

two pairs, ordering any further expert evaluations would not make any sense, as the next finding and opinion would logically opt for one of the opposed findings and opinions, so the court should apply the *in dubio pro reo* principle and accept the one which is more favourable for the defendant.<sup>357</sup> Therefore, in case of reasonable doubt whether a certain decisive fact exists or not, the court shall apply the *in dubio pro reo* principle, stating the reasons for it in the rationale of the judgement.<sup>358</sup>

### Violation of *in dubio pro reo* principle as ground for appeal

Since the principle of *in dubio pro reo* is contained in the law the party dissatisfied with the decision may ground the appeal on the failure of the court to apply this principle as a substantive procedural violation, if that may have influenced the legal and righteous adoption of the judgement. If the court of appeal finds that there is a substantive procedural violation because of failure of the basic court to apply the *in dubio pro reo* principle, it may repeal the first instance decision and refer the case back to the court of first instance for re-trial.

The court of appeal may also indirectly take into consideration this principle while checking *ex officio* if the decision is unclear, contradictory, or does not contain the reasons for the decisive facts, which is also a substantive procedural violation. So, if the court of appeal, when examining the appealed decision, finds that the facts considered proven do not result from the presented evidence, it may decide that the first instance court in its rationale to the judgement, reasoned on the decisive facts significantly contrary to the contents of the presented evidence, thus committing substantive violation of the criminal procedure law, and that due to the established violation the facts are considered questionable. In such case the court of appeal may even hold a hearing in order to correctly establish the facts of the case and then render a verdict.

For example, the Belgrade Court of Appeal in 2014 found that the trial Court rightfully concluded that the evidence presented by the prosecutor was not sufficient since the persons accused of attacking the police during riots following a political rally, were not identified and it was not confirmed that they have been in the place of the riots beyond reasonable doubt. Therefore, the Court of Appeal confirmed the trial Court's judgement which correctly concluded that there was no evidence to prove that the accused committed the crime offense. The Court based its ruling on the LCP provisions stating that the Court is not entitled to *ex officio* collect and present evidence in order to determine the material truth. The First Instance Court, in the absence of relevant evidence, correctly applied the rule embodied in Article 16, paragraph 4 of the CPC:

<sup>357</sup> Garačić, A., Vještačenja u kaznenom postupku, *Vještak*, br. 1, Zagreb, 1997, p. 3.

<sup>358</sup> Krapac, D., *op. cit.*, p. 477.



The court may base its judgment, or ruling corresponding to a judgment, only on facts of whose certainty it is convinced” and on principle *in dubio pro reo* referred to in Article 16, paragraph 5 of the CPC. In case the Court has any doubts about the facts on which criminal proceedings are resting, or about the existence of the elements of a criminal offence, or about the application of provisions of criminal law, it shall, in its judgment, or ruling corresponding to a judgment, rule in favour of the defendant.<sup>359</sup>

In another case this court sent the case for a re-trial reasoning that:

During the retrial the court is obliged to examine the existing and the new evidence, as needed, and to perform a comprehensive analysis of the examined evidence and of the defence of the accused, bringing these two together so that the factual evidence can be established. Accordingly, the same court of first instance is particularly obliged to assess the credibility of the evidence presented. The First Instance Court shall comply with the *in dubio pro reo* principle, as per Article 18, paragraph 3 of the LCP. This means that the court has to determine with certainty all facts against the accused.<sup>360</sup>

When the appellant claims violation of criminal procedure due to no application of the principle of *in dubio pro reo*, he/she must elaborate on the doubt in the decisive facts in the case and to point the moment in the first instance decision that caused such a doubt. Cases in which, surely, the court failed to apply the principle of *in dubio pro reo* are those where the court, in its rationale to the judgement, explicitly refers to it or uses a wording which states that the existence of certain decisive facts has been established as a possibility only, e.g. “*the existence of that fact is likely*”, “*it is possible that the fact exists*”, and yet the court failed to apply the principle of *in dubio pro reo*. The wrongly established facts, which resulted from such action of the court, are merely a consequence of the failure to apply the principle.

Here one needs to take into account that the rationale of the first-instance decision often does not provide grounds for such claims, simply because the court does not elaborate, at least not frequently, that it had doubts about whether a particular decisive fact exists or not. The opposite situation is significantly more common in practice, where the basic court in its rationale does not invoke any doubt when it comes to the decisive facts. In such cases, obviously, it cannot be concluded that the first instance court made a wrong decision because it acted contrary to the *in dubio pro reo* principle violating the legal provisions from the criminal procedure, but only that it has wrongly established the facts<sup>361</sup>, and as a result of it failed

<sup>359</sup> Court of Appeal Belgrade, Judgment Kz 1 668/14.

<sup>360</sup> Court of Appeal Belgrade, Judgment 108/12.15.03.2013.

<sup>361</sup> Sijerčić-Čolić, H., *Krivično procesno pravo*. Book II. Tok redovnog krivičnog postupka i posebni postupci (Criminal Procedural Law, Regular criminal procedure and separate procedures), Third updated and revised edition, Law Faculty at the Sarajevo University, Sarajevo, 2012, p. 139.

to apply the legal provisions which refer to *in dubio pro reo*. That is visible in the Supreme Court of Croatia rationales below:

The non-implementation of Article 3 para. 2 of LPC, i.e. the principle of *in dubio pro reo* the accused defined as a major violation of the provisions of the criminal procedure which, in the opinion of the court did not take place. Namely, the application of this principle is closely linked to establishing and evaluating the facts which constitute a criminal offence, i.e. on which the application of certain provision of criminal legislation depends. In essence, this is an objection of factual nature and not an objection about the major violation of the provisions of criminal procedure.<sup>362</sup>

And:

As part of the essential violations of criminal procedure as grounds for appeal, the defendant points out that the court did not apply the principle *in dubio pro reo*, thus clearly pointing to a substantial violation of the criminal procedure. However, contrary to these appeal arguments, in this particular case, there was no violation of Article 3, paragraph 2 of the LPC, because, after the presentation of evidence, none of the relevant facts remained in doubt, which is why there was no need for the application of this provision.<sup>363</sup>

Hence, it is obvious why parties invoke violations to the principle of *in dubio pro reo* in its pure form only in exceptional cases. Instead, parties use other grounds for appeal such as the violation of the right to defence as a substantive procedural violation, or violation of the Criminal Code or wrongly established factual situation.

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<sup>362</sup> Supreme Court of Croatia, Judgment I Kž-827/05-5, 07.11.2007.

<sup>363</sup> Supreme Court of Croatia, Judgment I Kž-125/07-6, 17.04.2007.

## FACTS PERTAINING TO THE APPLICATION OF THE STANDARD BEYOND REASONABLE DOUBT IN THE ANGLO-SAXON WORLD

As it has been stated before, although the reasonable doubt language appears in numerous cases from the 1780s onwards, it was not until the nineteenth century that reasonable doubt as a standard was incorporated into the US jurisprudence. Scholars observe that US states gradually accepted the reasonable doubt standard in their own time.<sup>364</sup>

Long before 1970, when the US Supreme Court held in its seminal case *In re Winship*<sup>365</sup> that the reasonable doubt standard is required under the US Constitution, state courts had imposed this standard in state criminal proceedings. For example, in *Robbins v. Ohio* (1857), the Ohio Supreme Court quoted the trial judge's jury instruction:

In most cases of murder in the first degree, it is necessary to establish by proof, *beyond a reasonable doubt*, the fact of killing, the intent to kill, and the deliberate and premeditated malice...<sup>366</sup>

This instruction is quite progressive, although it is not clear from the Court's pithy reference whether the trial judge actually defined the reasonable doubt standard.

In some of the early cases (discussed below), the courts were not explicitly dealing with the definition of reasonable doubt. Rather, the courts attempted to describe reasonable doubt in the context of dealing with other issues, such as the use of circumstantial evidence, the proper application of the standard of proof, or whether the jury has the discretion to acquit when entertaining a reasonable doubt. In dealing with these issues, the courts never settled on a clear definition of the reasonable doubt standard, resulting in the confusion and inconsistency that persists to this day.

In various attempts to describe or clarify the term "reasonable doubt," the courts often used even more confusing terms, such as "moral certainty," "satisfied conscience," and "substantial doubt," or attempted to explain reasonable doubt by way of analogy or through real-life examples. The courts did not always use these terms consistently. As a result, despite the judicial attention devoted to the definition of the reasonable doubt standard, it remains as unsettled and elusive today as it was when it was first introduced in the eighteenth century.

After chronologically discussing the early state and US Supreme Court

<sup>364</sup> To trace the development of the reasonable doubt standard in different US States, see Morano, p. 520-21; Shelagh Kenney, Note, *Fifth Amendment Upholding the Constitutional Merit of Misleading Reasonable Doubt Jury Instructions*, 85(4) J. Crim. L. & Criminology 989, 989-95 (1995) (hereinafter "Kenney").

<sup>365</sup> *Supra* n.278.

<sup>366</sup> *Robbins v. Ohio*, 8 Ohio St. 131, 167-68 (1857).

cases regarding the development of the reasonable doubt standard, several seminal US Supreme Court cases framing reasonable doubt in jury instructions are discussed. This will provide the backdrop on how US Federal Circuit Courts have dealt with instructing on reasonable doubt in the absence of a settled definition. Throughout this discussion, various insightful criticisms of the courts decisions are included for contextual purposes, as well as the author's views regarding the need to define the reasonable doubt standard.

### Commonwealth v. Harman (1846) and Commonwealth v. Rider (1905)

One of the early examples of how reasonable doubt was used and described as a standard of proof is the 1846 Supreme Court of Pennsylvania case *Commonwealth v. Harman*,<sup>367</sup> which was later reviewed and clarified in *Commonwealth v. Rider*.<sup>368</sup>

In *Harman*, the Court discussed the issue of the level of doubt of an accused's guilt that is necessary for an acquittal, stating that the doubt must be "serious and substantial," as opposed to "the mere possibility."<sup>369</sup> Harman was charged with the murder of her infant child. The Court noted that since all evidence was circumstantial, such evidence would be sufficient to instruct the jury to exclude in their mind disbelief or doubt regarding Harman's guilt.<sup>370</sup> The Court indicated that the disbelief or doubt that a juror has must be an "actual and not technical disbelief," and that it will be "enough that his conscience is clear."<sup>371</sup> The Court concluded that "the law exacts a conviction wherever there is *legal* evidence to show the prisoner's guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence."<sup>372</sup> It instructed the jury that a doubt to reach an acquittal must be "serious and substantial – not the mere possibility of a doubt."<sup>373</sup> However, if the jury "can reconcile [the evidence] to any reasonable hypothesis of innocence, [they] *may* acquit."<sup>374</sup> The use of this discretionary language suggests that the jury *may* acquit, as opposed to *must* acquit, in the presence of an actual reasonable doubt as to the guilt of the accused.

Later in 1905, in *Rider*, the Superior Court of Pennsylvania clarified the position taken in *Harman* regarding the jury's discretion to acquit. In *Rider*, the instruction given to the jury at trial stated: "[i]f you have any doubt of the guilt of the defendants ... on the indictments, under the testimony and the law in the case, you *may* give the defendants ... the

<sup>367</sup> *Commonwealth v. Harman*, 4 Pa. 269 (1846) (hereinafter "*Harman*").

<sup>368</sup> *Commonwealth v. Rider*, 29 Pa. Super. 621 (1905) (hereinafter "*Rider*").

<sup>369</sup> *Harman*, at 274.

<sup>370</sup> *Harman*, at 273.

<sup>371</sup> *Harman*, at 273.

<sup>372</sup> *Harman*, at 273 (italics in original).

<sup>373</sup> *Harman*, at 274.

<sup>374</sup> *Harman*, at 274 (emphasis added).

benefit of that doubt.”<sup>375</sup> Citing *Harman* with approval, the Court held that “[a] doubt, to work an acquittal, must be serious and substantial, not the mere possibility of a doubt.”<sup>376</sup> However, the Court then distinguished the position taken in *Harman* as to how the jury must treat a reasonable doubt:

An instruction which must reasonably be held to have given a jury the impression that if they found that such a doubt as the law recognizes existed ... then they were vested with a discretion to determine whether the defendant should have the benefit of that actually existing reasonable doubt, is certainly misleading. The discretion of the jury is to be exercised in determining whether the reasonable doubt exists, if they find that such doubt does exist, then, the legal principle applicable is that they must give the defendant the benefit of the doubt; *not that they may do so in their discretion.*<sup>377</sup>

*Harman* and *Rider* illustrate that the term “reasonable doubt” was not treated as a novelty by the Pennsylvania Courts. It had gained some acceptance in articulating the standard of proof required to reach a guilty verdict.

### Giles v. Georgia (1849)

In *Giles v. Georgia*,<sup>378</sup> the Supreme Court of Georgia discussed the issue of a faulty jury instruction regarding the reasonable doubt standard. *Giles* concerned an appeal of a conviction for libel. The defendant appealed on the basis that the trial judge erred in instructing the jury on “the degree of conviction which should rest on their minds before they found the prisoner guilty.”<sup>379</sup> The defendant specifically contested the trial judge’s statement that though “the defendant was entitled to the benefit of any doubts ... they *must* be reasonable doubts, not a ‘may be so,’ or a ‘might be so.’”<sup>380</sup> In addressing this issue, the Court attempted to define the reasonable doubt standard.

The Court relied on several English treatises on the development of the term “reasonable doubt.” One of the treatises relied upon was Macnally’s *Rules of Evidence on Pleas of the Crown*, wherein he stated that “if a jury entertain a reasonable DOUBT upon the truth of the testimony of witnesses, given upon the issue, they are sworn well and truly to try, they are bound in conscience to deliver the prisoner from the charge found against him in the indictment, by giving a verdict of not guilty.”<sup>381</sup> Macnally referred to Sir Edward Coke, who “exhort[ed] juries not to give their verdict against a prisoner, without plain, direct, and manifest proof

<sup>375</sup> *Rider*, at 625 (emphasis added).

<sup>376</sup> *Rider*, at 625.

<sup>377</sup> *Rider*, at 626 (emphasis added).

<sup>378</sup> *Giles v. Georgia*, 6 Ga. 276 (1849) (hereinafter “Giles”).

<sup>379</sup> *Giles*, at 284.

<sup>380</sup> *Giles*, at 284 (emphasis added).

<sup>381</sup> Macnally, p. 2 (emphasis in original).

of his guilt, which implies, that where there is doubt, the consequence should be acquittal of the party on trial.”<sup>382</sup>

The Court acknowledged that although Macnally’s statement was “well calculated to mislead Juries,” it agreed with his interpretation of the standard.<sup>383</sup> The Court referred to Macnally’s reminder that jurors have the duty “before they pronounce a verdict of condemnation, to ask themselves whether they are satisfied, beyond the *probability of doubt*, that he is guilty of the charge alleged against him in the indictment.”<sup>384</sup> The Court noted Justice Chamberlain’s jury charge in *The King v. Patrick Finny* that “if there be a doubt, I take it to be a clear maxim, founded in humanity as well as law, that you must acquit the prisoner.”<sup>385</sup>

The Court also noted with approval the work of Starkie, stating that “absolute, mathematical or metaphysical certainty is not essential; and besides, in judiciary investigations, it is wholly unattainable. *Moral certainty* is all that can be required.”<sup>386</sup> Starkie stated that “to acquit upon light, trivial and fanciful suppositions, and remote conjectures, is a virtual violation of the juror’s oath[;]” however, “a juror ought not to condemn unless the evidence exclude[s] from his mind all reasonable doubt as to the guilt of the accused, and ... unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest.”<sup>387</sup> The Court agreed that the treatises fairly reflected the language used in the jury instruction given by the trial judge.<sup>388</sup>

The Court stressed that guilt need not “*always* be established by demonstrative and *irrefragable* evidence. It is enough that the evidence, whatever its character, whether positive or presumptive, direct or circumstantial, satisfies the understanding and conscience of the Jury.”<sup>389</sup> The Court used multiple terms to describe the standard of proof in criminal cases: “reasonable doubt,” “moral certainty,” and “satisfied conscience.” As discussed in the previous subsections, these are vague and loaded terms, which convey different meanings and add to the confusion. It does not appear that the Court used these terms to communicate distinct standards, but rather as synonyms in an attempt to clarify the reasonable doubt standard, whether successfully or not. The Court’s interchangeable use of these terms demonstrates a substantial lack of clarity in the definition of reasonable doubt.

<sup>382</sup> *Giles*, at 285, citing Macnally, p. 2.

<sup>383</sup> *Giles*, at 284.

<sup>384</sup> *Giles*, at 285, citing Macnally, p. 3 (emphasis added).

<sup>385</sup> *Giles*, at 285, citing Macnally, p. 5, citing *The King v. Patrick Finny*, at a *Commission of Oyer and Terminer*, Dublin, January 1798, 38 Geo. III, Ridgeway’s Rep. 147.

<sup>386</sup> *Giles*, at 285 (emphasis added), citing Starkie, p. 514.

<sup>387</sup> Starkie, p. 514.

<sup>388</sup> *Giles*, at 285.

<sup>389</sup> *Giles*, at 286 (italics in original).

## Commonwealth v. Webster (1850)

The Supreme Court of Massachusetts case *Commonwealth v. Webster*<sup>390</sup> has endured to this day for the instruction given to the jury by Chief Justice Lemuel Shaw, but it was nonetheless infamous at the time due to the public profile of the victim and the accused. Dr. John Webster, a professor of chemistry at Harvard University, was accused of murdering his colleague, Dr. George Parkman, who was a well-known figure around Boston.<sup>391</sup> *Webster* discussed the level of certainty necessary to warrant a conviction based on circumstantial evidence and provided a definition of the reasonable doubt standard.<sup>392</sup>

The Court noted that this was a case “to be proved, if proved at all, by circumstantial evidence.”<sup>393</sup> It indicated that because “[c]rimes are secret” it becomes necessary to use “all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions.”<sup>394</sup> However, “great care and caution ought to be used in drawing inferences from proved facts,” as “[t]he common law appeals to the plain dictates of common experience and sound judgment; and the inference to be drawn from the facts must be a *reasonable and natural* one, and, to a *moral certainty*.... It is not sufficient that it is probable only: it must be *reasonable and morally certain*.”<sup>395</sup> The Court then added that “inferences drawn from independent sources, different from each other, but tending to the same conclusion, not only support each other but do so with an increased weight.”<sup>396</sup> “[A]ll the facts proved must be consistent with each other, and with the main fact sought to be proved....”<sup>397</sup> Thus, if any fact “necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence upon which the inference depends; and, however, plausible or apparently conclusive the other circumstances may be, the charge must fail.”<sup>398</sup> Furthermore, “[i]t is not sufficient that [the circumstances] create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails.”<sup>399</sup>

<sup>390</sup> *Commonwealth v. Webster*, 59 Mass. 295 (1850) (hereinafter, “*Webster*”).

<sup>391</sup> *Webster*, at 295, 300.

<sup>392</sup> *Webster*, at 310-20.

<sup>393</sup> *Webster*, at 310.

<sup>394</sup> *Webster*, at 311, citing Edward Hyde East, *A Treatise of the Pleas of the Crown* c. 5, § 11 (P. Byrne 1806).

<sup>395</sup> *Webster*, at 312-13 (emphasis added).

<sup>396</sup> *Webster*, at 317.

<sup>397</sup> *Webster*, at 318.

<sup>398</sup> *Webster*, at 318-19.

<sup>399</sup> *Webster*, at 319.



Chief Justice Shaw went on to define the reasonable doubt standard:

Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is *not mere possible doubt*; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel *an abiding conviction, to a moral certainty*, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence, and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact *to a reasonable and moral certainty*; a *certainty that convinces and directs the understanding*, and satisfies the reason and judgment, of those who are *bound to act conscientiously* upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.<sup>400</sup>

Chief Justice Shaw's definition of reasonable doubt would be widely adopted by other courts. For instance, in *Victor v. Nebraska* (1994), the US Supreme Court noted with approval the *Webster* definition as "probably the most satisfactory definition given to the words 'reasonable doubt' in any case known to criminal jurisprudence."<sup>401</sup>

Some commentators criticized the *Webster* charge.<sup>402</sup> Judge May, a contemporary of Justice Shaw, noted that although the attempt to define reasonable doubt in *Webster* was "unsuccessful" and "unfortunate," "the effort to give it a more practical and comprehensible exposition gives promise of a reform which must be hailed with satisfaction."<sup>403</sup> William Trickett in his article, *Preponderance of Evidence, and Reasonable Doubt* (1906), criticized Chief Justice Shaw's instruction arguing that "it is impossible to see how an ordinary juror is to be aided by being told that if he is morally certain of the prisoner's guilt, he is to convict him."<sup>404</sup>

<sup>400</sup> *Webster*, at 320 (emphasis added).

<sup>401</sup> *Victor v. Nebraska*, 511 U.S. 1, 7 (1994) (hereinafter "*Victor*").

<sup>402</sup> See *infra* subsection *Post-Victor Jurisprudence of the US Circuit Courts of Appeal*.

<sup>403</sup> May, p. 663-64.

<sup>404</sup> Trickett, p. 85.

## Miles v. United States (1881)

*Miles v. United States* was the first case in which the US Supreme Court addressed the issue of the definition of the reasonable doubt standard. As one of the grounds of error, the petitioner referred to the jury instruction defining reasonable doubt:<sup>405</sup>

The prisoner's guilt must be established beyond reasonable doubt. Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist so that you feel certain that it exists. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests.<sup>406</sup>

The US Supreme Court found no error in this instruction. The US Supreme Court relied on several state cases, including *Webster* and *Giles*, reasoning that:

The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt. Attempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury. The language used in this case, however, was certainly very favourable to the accused and is sustained by respectable authority.<sup>407</sup>

Portentously, the US Supreme Court observed that attempts to clarify the term "reasonable doubt" would likely result in confusion, rather than clarity. Although the US Supreme Court explicitly recognized the dangers of attempting to define the term "reasonable doubt," it did not suggest any solution to the potential problem.

Professor Miller W. Shealy Jr. notes in his analysis of *Miles* the failure of the Court at this early stage "to firmly settle on a definition marks the origin of the problem."<sup>408</sup>

<sup>405</sup> *Miles v. United States*, 103 U.S. 304, 312 (1881) (hereinafter "*Miles*").

<sup>406</sup> *Miles*, at 309.

<sup>407</sup> *Miles*, at 312, citing *Webster*; *Arnold v. State*, 23 Ind. 170 (1864); *State v. Nash*, 7 Iowa 347 (1858); *State v. Ostrander*, 18 Iowa 435 (1865); *Donnelly v. State*, 26 N.J.L. 601 (1857); *Winter v. State*, 20 Ala. 39 (1852); *Giles*.

<sup>408</sup> Shealy, p. 233, *supra* n.21.

## Hopt v. Utah (1887)

As predicted, in 1887, six years after *Miles*, the US Supreme Court was confronted again with the definition of the reasonable doubt standard in *Hopt v. Utah*.<sup>409</sup> A district court in Utah had convicted the petitioner of murder and sentenced him to death.<sup>410</sup> One of the grounds of appeal was the trial judge's instruction to the jury on the meaning of reasonable doubt.<sup>411</sup> The trial judge had charged the jury as follows:

[I]f you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty...

[A] reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of the evidence, you candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.<sup>412</sup>

The US Supreme Court approved this definition and, in doing so, also discussed the *Webster* jury instruction. It noted that difficulty arises from the *Webster* instruction because "the words 'to a reasonable and moral certainty' add nothing to the words 'beyond a reasonable doubt; one may require explanation as much as the other."<sup>413</sup> The US Supreme Court further referred to *Webster*, stating:

It was there also said, that an instruction to the jury that they should be satisfied of the defendant's guilt beyond a reasonable doubt, had often been held sufficient, without further explanation. In many cases, it may undoubtedly be sufficient. It is simple, and as a rule to guide the jury is as intelligible to them generally as any which could be stated, with respect to the conviction they should have of the defendant's guilt to justify a verdict against him. But in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension.<sup>414</sup>

<sup>409</sup> *Hopt v. Utah*, 120 U.S. 430 (1887) (hereinafter "*Hopt*"). This appeal arose out of Hopt's fourth conviction for the murder of John F. Turner. The three previous convictions had each been overturned by the US Supreme Court. The repeated appeals led to a total time span of seven years between the murder and Hopt's execution, which frustrated the people of Utah and caused the public lynching of five alleged criminals. See Kimberly S. Hanger, *The Frederick Hopt Murder Case: A Darker Side of Utah Territorial History*, 6(0) UCLA Hist. J. 83 (1985).

<sup>410</sup> *Hopt*, at 430.

<sup>411</sup> *Hopt*, at 431.

<sup>412</sup> *Hopt*, at 439.

<sup>413</sup> *Hopt*, at 440.

<sup>414</sup> *Hopt*, at 440.

The US Supreme Court regarded with favour the trial judge's reference to weighty and important concerns in the jurors' lives:

[A]n illustration like the one given in this case ... would be likely to aid them to a right conclusion, when an attempted definition might fail.<sup>415</sup>

By this statement, the US Supreme Court generally approved of the use of analogies when instructing juries on the meaning of reasonable doubt. Shealy argues that instead of leaving the discretion of whether or not to define the term "reasonable doubt" to the trial judges, the US Supreme Court should have embraced the *Webster* definition more firmly. By doing so, the US Supreme Court might have "spared the confusion that currently reigns in this area of the law."<sup>416</sup>

### Holland v. United States (1954)

In *Holland v. United States*, the US Supreme Court approved of a jury instruction describing reasonable doubt as "the kind of doubt ... which you folks in the more serious and important affairs of your own lives might be willing to act upon."<sup>417</sup> This description reinforced the use of analogies to describe reasonable doubt.<sup>418</sup>

The US Supreme Court also approved of the statement in *Miles* that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury."<sup>419</sup> While the Court noted that the jury instruction should have been phrased in terms of "hesitate to act" rather than "willing to act upon," it believed that "the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some."<sup>420</sup>

### In re Winship (1970)

The year 1970 was a watershed moment for the reasonable doubt standard. The US Supreme Court in *Winship* granted constitutional status to the reasonable doubt standard.

*Winship* dealt with the question of "whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult."<sup>421</sup> The Court put forward two reasons to support its holding. 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

<sup>415</sup> *Hopt*, at 441.

<sup>416</sup> Shealy, p. 235.

<sup>417</sup> *Holland v. United States*, 348 US 121, 140 (1954) (hereinafter "*Holland*").

<sup>418</sup> Power, p. 57.

<sup>419</sup> *Holland*, at 140, citing *Miles*, at 312.

<sup>420</sup> *Holland*, at 140.

<sup>421</sup> *Winship*, at 359.

concrete substance for the presumption of innocence,”<sup>422</sup> and “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.”<sup>423</sup> 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 factfinder of [their] guilt with utmost certainty.”<sup>424</sup>

The Fourteenth Amendment to the US Constitution provides that no State “shall deprive any person of life, liberty, or property, without due process of law.” The Court explicitly held that “the Due Process Clause [of the Fourteenth Amendment to the US Constitution] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”<sup>425</sup> This was a radical decision with broad implications.<sup>426</sup> The Court read the reasonable doubt standard into the US Constitution, though it is not explicitly in it. Forlornly, the Court did not define reasonable doubt. Some have criticized the US Supreme Court for failing to address the central issue of how and to what extent should the reasonable doubt standard be defined in jury instructions?

Jon O. Newman (Chief Judge of the US Court of Appeals for the Second Circuit) advances several compelling arguments. He argues that in *Winship* the Court failed to consider “the critically related issue of whether the Constitution set some standard for assessing the sufficiency of evidence that would permit a valid conviction under the ‘reasonable doubt’

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<sup>422</sup> *Winship*, at 363.

<sup>423</sup> *Winship*, at 363.

<sup>424</sup> *Winship*, at 364.

<sup>425</sup> *Winship*, at 364. See also Section 1 of the Fourteenth Amendment to the United States Constitution.

<sup>426</sup> Shealy aptly notes that “the implications of the Court’s holding in *Winship* were nothing less than revolutionary to criminal law. Ultimately, *Winship* and its progeny substantially changed the rules applying to many affirmative defences and some lesser included offenses. In the case of affirmative defences, the defendant no longer has the burden of persuasion. Once such defences are raised, that is, once the defendant has met a ‘burden of production,’ the burden to disprove the existence of an affirmative defence shifts to the prosecution.” See Shealy, p.231, note 28. Shealy relies on several post-*Winship* cases, dealing with claims that the jury instruction regarding the standard of proof violated due process rights: *Montana v. Egelhoff*, 518 U.S. 37, 54 (1996), holding that “[t]he Due Process Clause, U.S. Const. amend. XIV, requires proof beyond a reasonable doubt of every fact necessary to constitute the charged crime, and a jury instruction which shifts to the defendant the burden of proof on a requisite element of mental state violates due process”; *Martin v. Ohio*, 480 U.S. 228, 230-31 (1987), holding that “[u]nder Ohio law, every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution.... The burden of going forward with the evidence of an affirmative defence and the burden of proof by a preponderance of the evidence, for an affirmative defence, is upon the accused.” See also *Francis v. Franklin*, 471 U.S. 307, 313 (1985), holding that “[t]he Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. This constitutional principle prohibits the state from using evidentiary presumptions in a jury charge that have the effect of relieving the state of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.” See also *Sandstrom v. Montana*, 442 U.S. 510, 516-17 (1979); *Patterson v. New York*, 432 U.S. 197, 220-21 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 706 (1975).

standard.”<sup>427</sup> By failing to consider this issue, Newman rightly observes that the Court left room for controversial interpretations of the standard of proof.<sup>428</sup> Referring to *Jackson v. Virginia*<sup>429</sup> – in which the US Supreme Court addressed the issue of whether and how the reasonable doubt standard affected the constitutional sufficiency of evidence in a criminal case – Newman argues that the Court incorrectly interpreted the *Winship* holding by making two different statements about its requirements.<sup>430</sup>

In *Jackson*, the Court stated: (1) “[a]fter *Winship* the critical inquiry ... must be ... whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt;” and (2) “the relevant question is whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”<sup>431</sup> Newman interprets the first statement as follows: “whether the law’s ubiquitous reasonable person, in this case, a reasonable jury, could find the matter proven by the requisite degree of persuasion, in this case beyond a reasonable doubt.”<sup>432</sup> In his view, this is the correct test for determining sufficiency of evidence.<sup>433</sup>

The second statement, according to Newman, presents the idea of a “random distribution of reasonable juries, with the risk of creating the misleading impression that just one of them needs to be persuaded beyond a reasonable doubt.”<sup>434</sup> Newman argues that the second statement “shifts the emphasis away from the law’s construct of the reasonable jury and conjures up the image of a vast random distribution of reasonable juries.”<sup>435</sup> He also observes – as the case law that follows shows – that only the second sentence has been followed by most appellate courts since the *Jackson* case.<sup>436</sup>

Newman suggests “courts must do more than verbalize the ‘reasonable doubt’ standard in jury instructions,”<sup>437</sup> and jury instructions *must* be made clearer. He recommends the Federal Judicial Center Pattern Criminal Jury Instructions:<sup>438</sup>

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal

<sup>427</sup> Jon O. Newman, Beyond “Reasonable Doubt”, 68 N.Y.U. L. Rev. 979, 986 (1993) (hereinafter “Newman”).

<sup>428</sup> Newman, p. 986.

<sup>429</sup> *Jackson v. Virginia*, 443 US 307, (1979) (hereinafter “*Jackson*”).

<sup>430</sup> Newman, p. 987, citing *Jackson*, at 316-317.

<sup>431</sup> *Jackson*, at 318-319 (italics in original).

<sup>432</sup> Newman, p. 987.

<sup>433</sup> Newman, p. 987.

<sup>434</sup> Newman, p. 987.

<sup>435</sup> Newman, p. 987.

<sup>436</sup> Newman, p. 988, citing *United States v. Gordils*, 982 F.2d 64, 70 (2d Cir. 1992), cert. denied, 113 S. Ct.1953 (1993); *United States v. Chaney*, 964 F.2d 437, 448 (5th Cir. 1992); *United States v. Beddow*, 957 F.2d 1330, 1334 (6th Cir. 1992); *United States v. Long*, 905 F.2d 1572, 1576 (D.C. Cir.), cert. denied, 498 U.S. 948 (1990); *United States v. Linn*, 880 F.2d 209, 215 (9th Cir. 1989).

<sup>437</sup> Newman, p. 990.

<sup>438</sup> The Pattern Instructions are non-binding model instructions developed by the Federal Judicial Center, an education and research agency for the federal courts, established in 1967 to promote improvements in judicial administration.

cases, the law does not require proof that overcomes every possible doubt. If based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.<sup>439</sup>

Newman points out that “the misleading phrase about a doubt ‘based on reason’” and the “ambiguous language about ‘hesitating on important matters’” are absent from the Federal Judicial Center Pattern Criminal Jury Instructions.<sup>440</sup> Newman also maintains that the appellate standard for assessing the sufficiency of evidence should be redefined as the “reasonable jury” standard, instead of the “*any* rational trier” standard.<sup>441</sup> The US Supreme Court next discussed the jury instructions defining reasonable doubt in *Cage v. Louisiana*,<sup>442</sup> *Sullivan v. Louisiana*<sup>443</sup> and *Victor v. Nebraska*.<sup>444</sup> In *Cage*, the US Supreme Court invalidated the trial court’s use of the terms “substantial doubt” and “grave uncertainty” in describing reasonable doubt, finding the trial jury instruction unconstitutional.<sup>445</sup> Subsequently, in *Sullivan* the Court addressed the issue of the effects that errors during trial have on an appellate court’s review, holding that a constitutionally deficient reasonable doubt instruction was an error resulting in the automatic reversal on appeal. In *Victor*, the US Supreme Court discussed the concept of “moral certainty,” concluding that the jury’s understanding of “moral certainty” was unlikely to suggest a lower standard of proof than due process requires.<sup>446</sup>

### Cage v. Louisiana (1990)

In *Cage*, the US Supreme Court delivered a *per curiam* (unanimous) opinion reversing the judgment of the Supreme Court of Louisiana and holding that the jury instruction given at trial “violated the reasonable doubt requirement protected by the due process clause.”<sup>447</sup>

The trial judge instructed the jury:

[A reasonable doubt] is one that is founded upon a real tangible substantial basis and not upon mere caprice or conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual and substantial doubt*. It is a doubt that a reasonable

<sup>439</sup>Newman, p. 991, citing Federal Judicial Center, Pattern Criminal Jury Instructions 28, instruction 21 (1987).

<sup>440</sup>Newman, p. 991.

<sup>441</sup>Newman, p. 991.

<sup>442</sup>*Cage v. Louisiana*, 498 U.S. 39 (1990) (hereinafter, “*Cage*”).

<sup>443</sup>*Sullivan v. Louisiana*, 113 S. Ct. 2078, 2082 (1993) (hereinafter “*Sullivan*”).

<sup>444</sup>*Victor supra* n. 401.

<sup>445</sup>*Cage*, at 39.

<sup>446</sup>*Victor*, at 9-17.

<sup>447</sup>*Cage*, at 39.



man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*.<sup>448</sup>

The US Supreme Court found that the words “substantial” and “grave” used in the jury instructions at trial suggested a higher degree of doubt required for acquittal than under the reasonable doubt standard. The US Supreme Court reasoned that “[w]hen those statements are then considered with reference to “moral certainty,” rather than evidentiary certainty, it becomes clear that a responsible juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.”<sup>449</sup> Critics note that *Cage* failed to clarify whether the unconstitutionality of a jury instruction depended on the presence of the critical terms “substantial doubt,” “grave uncertainty,” and “moral certainty.”<sup>450</sup>

### Sullivan v. Louisiana (1993)

In *Sullivan*, the US Supreme Court dealt with the effects that errors during trial have on an appellate court’s review of the case.<sup>451</sup> The Court held that a constitutionally deficient reasonable doubt instruction was an error resulting in automatic reversal on appeal.<sup>452</sup>

In *Sullivan*, the petitioner was charged and convicted of first-degree murder. At trial, the judge gave a definition of reasonable doubt essentially identical to the one held to be unconstitutional in *Cage*.<sup>453</sup> On appeal, the Supreme Court of Louisiana upheld the conviction, finding that the erroneous instruction was a harmless error.<sup>454</sup>

The US Supreme Court reversed the Supreme Court of Louisiana’s decision. It reasoned that in deciding whether the error was harmless, the reviewing court must consider what effect the error had upon the guilty verdict in the case at hand.<sup>455</sup> The US Supreme Court further elaborated:

The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.<sup>456</sup>

The US Supreme Court reasoned “to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee.”<sup>457</sup>

<sup>448</sup> *Cage*, at 40 (italics in original).

<sup>449</sup> *Cage*, at 41.

<sup>450</sup> See Matt Nichols, *Victor v. Nebraska: The “Reasonable Doubt” Dilemma*, 73 N.C. L. Rev. 1709, 1720 (1995) (hereinafter “Nichols”). See also Uviller, p. 35.

<sup>451</sup> *Sullivan*, at 275.

<sup>452</sup> *Sullivan*, at 282.

<sup>453</sup> *Sullivan*, at 277.

<sup>454</sup> *Sullivan*, at 277.

<sup>455</sup> *Sullivan*, at 279, citing *Chapman v. California*, 386 U.S. 18, 24 (1967).

<sup>456</sup> *Sullivan*, at 279, (italics in original).

<sup>457</sup> *Sullivan*, at 279.

The Court further reasoned:

[T]he essential connection to a ‘beyond a reasonable doubt’ factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury’s findings. A reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, ‘the wrong entity judge[s] the defendant guilty.’<sup>458</sup>

The Court recalled the distinction between structural errors, being “structural defects in the constitution of the trial mechanism, which defy analysis,” and harmless errors, “which may be quantitatively assessed in the context of other evidence presented.”<sup>459</sup> Thus, the Court held that the deprivation of the right to a jury verdict of guilt beyond a reasonable doubt “with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.”<sup>460</sup>

### Victor v. Nebraska (1994)

The US Supreme Court revisited the issue of faulty jury instructions in *Victor*. However, it did not take the opportunity to provide a clear definition of the reasonable doubt standard.

*Victor* concerned two separate actions: the petitioners in *State v. Victor*<sup>461</sup> and *People v. Sandoval*<sup>462</sup> were individually convicted of murder and sentenced to death, and appealed the constitutionality of their respective jury instructions defining reasonable doubt.

Sandoval had been convicted of a double homicide.<sup>463</sup> In his case, the jury was instructed:

Reasonable doubt is defined as follows: It is *not a mere possible doubt*; because everything relating to human affairs, and *depending on moral evidence*, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty*, of the truth of the charge.<sup>464</sup>

Victor was convicted of first-degree murder. Similar instructions were given to the jury in his trial:

“Reasonable doubt” is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the

<sup>458</sup> Sullivan, at 279.

<sup>459</sup> Sullivan, at 281, citing *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

<sup>460</sup> Sullivan, at 281-82.

<sup>461</sup> *State v. Victor*, 235 Neb. 770 (1990).

<sup>462</sup> *People v. Sandoval*, 4 Cal. 4th 155 (1992).

<sup>463</sup> *Victor*, at 7.

<sup>464</sup> *Victor*, at 7 (italics in original).

represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, *to a moral certainty*, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the *strong probabilities of the case*, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an *actual and substantial doubt* reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.<sup>465</sup>

Sandoval and Victor argued that these instructions, which included references to “moral certainty,” “substantial” and “grave” doubts, and “strong probabilities” of the case, overstated the degree of doubt necessary for acquittal and therefore unconstitutionally lowered the prosecutions’ burden of proof.<sup>466</sup> After the respective state Supreme Courts of California and Nebraska affirmed their convictions, the defendants filed petitions to the US Supreme Court, and their cases were consolidated.

On appeal, the US Supreme Court reaffirmed the convictions by majority. The Court held, Justice O’Connor delivering the judgment for the majority, that the Constitution neither prohibited nor required trial courts to define the term “reasonable doubt.”<sup>467</sup> She noted that the Court had only once held an instruction on the definition of reasonable doubt to be unconstitutional, that the use of the terms “substantial” and “grave” suggest to an ordinary juror a higher degree of doubt than the standard required for an acquittal.<sup>468</sup> Justice O’Connor noted that no particular form of words is required in jury instructions; “[r]ather ‘taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.’”<sup>469</sup>

Both Sandoval and Victor challenged the use of the term “moral certainty” in their respective jury instructions.<sup>470</sup> The Court stated that it “do[es] not condone the use of the phrase”<sup>471</sup> and “do[es] not countenance its use[.]”<sup>472</sup> however, the inclusion of the phrase did not render the instructions unconstitutional.<sup>473</sup>

<sup>465</sup> *Victor*, at 18 (italics in original).

<sup>466</sup> *Victor*, at 14-22.

<sup>467</sup> *Victor*, at 26.

<sup>468</sup> *Victor*, at 6, citing *Cage*, at 41.

<sup>469</sup> *Victor*, at 5, citing *Holland*, at 140.

<sup>470</sup> *Victor*, at 16, 21.

<sup>471</sup> *Victor*, at 16.

<sup>472</sup> *Victor*, at 21.

<sup>473</sup> *Victor*, at 22.

Regarding Sandoval's claim, Justice O'Connor noted that the instruction given to the jury, in that case, was based on Chief Justice Shaw's instruction from *Webster*.<sup>474</sup> She noted with approval that the *Webster* definition was "probably the most satisfactory definition given to the words 'reasonable doubt' in any case known to criminal jurisprudence."<sup>475</sup>

Sandoval's main objection was to the use of the terms "moral evidence" and "moral certainty" used by the trial judge in the jury instruction.<sup>476</sup> Justice O'Connor stated that "when Chief Justice Shaw penned the *Webster* instruction in 1850, moral certainty meant a state of subjective certitude about some event or occurrence."<sup>477</sup> She noted that previous US Supreme Court cases have stated that "proof to a 'moral certainty' is an equivalent phrase with 'beyond a reasonable doubt.'"<sup>478</sup> While acknowledging that the term "moral certainty" "might not be recognized by modern jurors as a synonym for 'proof beyond a reasonable doubt,'" Justice O'Connor found that the use of the term did not make the instruction unconstitutional. Justice O'Connor found that, although "moral certainty is ambiguous in the abstract, the rest of the instruction given in Sandoval's case lends content to the phrase."<sup>479</sup> Justice O'Connor reasoned that "the moral certainty language cannot be sequestered from its surroundings," distinguishing its use in Sandoval's case from *Cage*, because the context of the instruction meant that "there [was] no reasonable likelihood that the jury would have understood moral certainty to be disassociated from the evidence in the case."<sup>480</sup> Accordingly, the Court rejected Sandoval's contention that "the moral certainty element ... invited the jury to convict him on proof below that required by the Due Process Clause."<sup>481</sup>

Victor's main argument was that "equating a reasonable doubt with a 'substantial doubt' overstated the degree of doubt necessary for acquittal."<sup>482</sup> While the Court acknowledged that the "construction is somewhat problematic,"<sup>483</sup> *Victor* was distinguished from *Cage*, with Justice O'Connor stating "we did not hold that the reference to substantial doubt alone was sufficient to render the instruction unconstitutional."<sup>484</sup> The Court examined the dictionary definition of the word "substantial," and determined that the context in the present case shows that the word was clearly being used to describe the "*existence* rather than *magnitude* of the doubt."<sup>485</sup> With regard to the "hesitate to act" language,<sup>486</sup> the Court

<sup>474</sup> *Victor*, at 8, citing *Webster*, at 320.

<sup>475</sup> *Victor*, at 7.

<sup>476</sup> *Victor*, at 10.

<sup>477</sup> *Victor*, at 12.

<sup>478</sup> *Victor*, at 12, citing *Fidelity Mutual Life Association. v. Mettler*, 185 U.S. 308, 317 (1902).

<sup>479</sup> *Victor*, at 14.

<sup>480</sup> *Victor*, at 16.

<sup>481</sup> *Victor*, at 15.

<sup>482</sup> *Victor*, at 19.

<sup>483</sup> *Victor*, at 19.

<sup>484</sup> *Victor*, at 19-20 (emphasis added), citing *Cage*, at 41.

<sup>485</sup> *Victor*, at 20 (emphasis added).

<sup>486</sup> *Victor*, at 18, "...to pause and hesitate before taking the represented facts as true and relying and acting thereon."

stated that this provided a common sense context in which to interpret the term “substantial doubt.” According to the Court, the jury instruction stayed within constitutional parameters.

In concurring, Justice Kennedy remarked that the phrase “moral evidence” although not fatal to the jury instruction given in Sandoval’s case, was nonetheless so obscure and so malleable that in other circumstances it could put an instruction on reasonable doubt at risk.<sup>487</sup>

In a concurring separate opinion, Justice Ginsburg made some keen observations. She took the view that the “hesitate to act” language, the analogy used in Victor’s jury instruction, was particularly confusing, noting judicial criticism of this language.<sup>488</sup> She also criticized the confusing wording of the jury instruction, which she believed amounted to the trial judge defining reasonable doubt as “doubt ... that is reasonable.”<sup>489</sup> Justice Ginsburg rightly noted that despite the many attempts by trial judges to define the reasonable doubt standard, a clear definition remained wanting.<sup>490</sup> She recommended the model instruction put forward by the Federal Judicial Center.<sup>491</sup>

Justice Blackmun entered a dissenting opinion, joined in part by Justice Souter. His dissent was based on what he believed was a misapplication of *Cage* by the majority.<sup>492</sup> He maintained that “[a]ny jury instruction defining ‘reasonable doubt’ that suggests an improperly high degree of doubt for acquittal or an improperly low degree of certainty for conviction offends due process.”<sup>493</sup> He noted the US Supreme Court’s finding in *Cage* that “the phrases ‘actual substantial doubt’ and ‘grave uncertainty’ suggested a ‘higher degree of doubt’ than is required for acquittal under the reasonable-doubt standard.”<sup>494</sup> He also noted that “those phrases taken together with the reference to ‘moral certainty,’ rather than ‘evidentiary certainty,’ rendered the instruction as a whole constitutionally defective.”<sup>495</sup> He opined that the “majority’s attempt to distinguish [the Victor] instruction from the one employed in *Cage* [was] wholly unpersuasive.”<sup>496</sup>

Justice Blackmun also noted that “the majority’s speculation that the jury in Victor’s case interpreted ‘substantial’ to mean something other than ‘that specified to a large degree’ simply because the word ‘substantial’ is used at one point to distinguish mere conjecture is unfounded and

<sup>487</sup> *Victor*, at 22.

<sup>488</sup> *Victor*, at 24, citing Pattern Criminal Jury Instructions, Report of the Subcommittee on Pattern Jury Instructions, Committee on the Operation of the Jury System, Judicial Conference of the United States Federal Judicial Center (1987).

<sup>489</sup> *Victor*, at 25.

<sup>490</sup> *Victor*, at 26.

<sup>491</sup> *Victor*, at 27; *supra* n. 438.

<sup>492</sup> *Victor*, at 28.

<sup>493</sup> *Victor*, at 29.

<sup>494</sup> *Victor*, at 30-31, citing *Cage*, at 41.

<sup>495</sup> *Victor*, at 30-31, citing *Cage*, at 41.

<sup>496</sup> *Victor*, at 31.

is foreclosed by *Cage* itself.”<sup>497</sup> Justice Blackmun observed that the US Supreme Court did not concern itself with the difference between “substantial doubt” and “grave uncertainty,” remaining unconvinced that there was any possible interpretation of the term “substantial doubt” that would be constitutionally acceptable.<sup>498</sup>

Justice Blackmun agreed with Justice Ginsburg that the “hesitate to act” language is “far from helpful, and may, in fact, make matters worse by analogizing the decision whether to convict or acquit ... to the frequently high-risk personal decisions people must make in their daily lives.”<sup>499</sup> He took the view that the language used in the Victor’s jury instruction, in particular, the term “strong probabilities” and “hesitate to act” did, in fact, make it likely that the jury would apply the incorrect standard of proof.<sup>500</sup>

Regarding the use of the phrase “moral certainty,” Justice Blackmun believed that this phrase was especially dangerous because it was used in conjunction with language that already overstated the degree of doubt necessary to convict.<sup>501</sup> He distinguished the instruction given in Sandoval’s trial from the one in Victor’s trial, and deemed the latter instruction to be particularly egregious as all of the misleading terms used were mutually reinforcing.<sup>502</sup>

Although all the US Supreme Court Justices seemed to agree that “moral certainty” was confusing and ought to be removed, the Court did not provide any alternative definition of the reasonable doubt standard. The Court did not resolve the confusion in *Victor*, which resulted from *Cage*, as to whether all three phrases – “substantial doubt,” “grave uncertainty,” and “moral certainty” – must be present to result in a violation of due process.

### Post-victor jurisprudence of the US Circuit Courts of Appeal

In analyzing the differences between jury instructions within the federal courts of appeal, Robert Power demonstrates in his chart the subtle but potentially significant differences in four areas: (1) Reasonable doubt (RD) and beyond a reasonable doubt (BRD); (2) Subject (who); (3) Verb (action); and (4) Object (which matters).<sup>503</sup> Some of the instructions call on jurors to consider how an objective “reasonable person” would interpret the evidence. By contrast, other instructions call on jurors to consider their own personal opinion on the evidence, presented in Power’s chart as “you.” Power notes that there is no practical distinction between the “reasonable person” or “you,” as the courts acknowledge that in any event jurors will inevitably self-identify with the “reasonable person.”<sup>504</sup>

<sup>497</sup> *Victor*, at 33.

<sup>498</sup> *Victor*, at 33-34.

<sup>499</sup> *Victor*, at 34.

<sup>500</sup> *Victor*, at 35.

<sup>501</sup> *Victor*, at 37.

<sup>502</sup> *Victor*, at 38.

<sup>503</sup> Power, p. 75-76 (The chart is reproduced as presented in Power’s article, including the citations to column 1 “Circuit”), *supra* n.285.

<sup>504</sup> Power, p. 77, citing, *inter alia*, *United States v. Ivic*, 700 F.2d 51, 68-69 (2d Cir. 1983).

<u>Circuit</u>	<u>Doubt</u>	<u>Subject</u>	<u>Verb</u>	<u>Object</u>
D.C. <sup>505</sup>	RD	Reasonable and prudent man	hesitate and pause	graver and more important transactions of life
1st <sup>506</sup>	RD	Reasonable person	hesitate to act	transaction of importance and seriousness
2nd <sup>507</sup>	BRD	Reasonable person	not hesitate to rely and act upon it	most important of his own affairs
3rd <sup>508</sup>	BRD	You	willing to rely and act	most important of your own affairs
5th <sup>509</sup>	BRD	You	willing to rely and act	most important of your own affairs
6th <sup>510</sup>	BRD	You	not hesitate to rely and act	most important decisions
7th <sup>511</sup>	RD	Reasonably prudent person	hesitate	more important affairs
8th <sup>512</sup>	BRD	Reasonable person	not hesitate to rely and act	(none mentioned)

<sup>505</sup> *Egan v. United States*, 287 F. 958, 967 (D.C.Cir.1923). Variations of this analogy are found in other District of Columbia cases. See generally, *Moore v. United States*, 345 F.2d 97, 98 & n. 1 (D. C. Cir. 1965) (describing this instruction as exemplary”).

<sup>506</sup> *United States v. Munson*, 819 F.2d 337, 345 (1st Cir. 1987). This analogy is not found in the circuit's recent pattern instructions. COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N FIRST CIRCUIT, PATTERN JURY INSTRUCTIONS CRIMINAL CASES § 3.02, at 38-40 (1998) (rejecting analogy). The First Circuit has one of the longest pattern reasonable doubt instructions, but rejects moral certainty, the analogy, and the FJC model. *Id.* at 39-41.

<sup>507</sup> *United States v. Delibac*, 925 F.2d 610, 614 (2d Cir. 1991); see also *United States v. Birbal*, 62 F.3d 456, 459-60 (2d Cir. 1995).

<sup>508</sup> *United States v. Jacobs*, 44 F.3d 1219, 1225 (3d Cir. 1995).

<sup>509</sup> COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS – CRIMINAL CASES § 1.06, at 16 (1990). This instruction was upheld in *United States v. Hunt*, 794 F.2d 1021, 1023 n.2 (7th Cir. 1986).

<sup>510</sup> COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N SIXTH CIRCUIT, PATTERN JURY INSTRUCTIONS-CRIMINAL CASES § 1.03, at 6 (1993), cited with approval in *United States v. Goodlett*, 3 F.3d 976, 979 (6th Cir. 1993).

<sup>511</sup> *United States v. Shaffner*, 524 F.2d 1021, 1023 n.2 (7th Cir. 1975). This instruction is no longer given.

<sup>512</sup> MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 78 (1989) (instruction 3.11), upheld in *United States v. Harris*, 974 F.2d 84, 85-86 (8th Cir. 1992).



10th <sup>513</sup>	BRD	You	willing to rely and act upon it	more important of your own personal affairs
11th <sup>514</sup>	BRD	You	willing to rely and act upon it without hesitation	most important of your own affairs

Power demonstrates the wide range of language tolerated in US Federal Courts in defining reasonable doubt:

- What “you” (as a juror) personally:
  - Would be “willing to rely and act” upon in the “most important of your own affairs”;
  - Would “not hesitate to rely and act” upon in your “most important decisions”;
  - Would be “willing to rely and act upon it” in the “more important of your own personal affairs”;
  - Would be “willing to rely and act upon it without hesitation” in the “most important of your own affairs”;

Or:

- What would cause a “reasonable and prudent man” to “hesitate and pause” in the “graver and more important transactions of life”;

Or:

- What would cause a “reasonable person”:
  - To “hesitate to act in a “transaction of importance and seriousness”;
  - “Not hesitate to rely and act upon” in the “most important of his own affairs”;
  - “Not to hesitate to rely and act.”

Or:

- What would cause a “reasonably prudent person” to “hesitate” in their “more important affairs.”

Perhaps the only consistent element across the Circuits<sup>515</sup> after *Victor* is that the Courts will assess the constitutional validity of an impugned

<sup>513</sup> *United States v. Smaldone*, 485 F.2d 1333, 1347-48 (10th Cir. 1973).

<sup>514</sup> COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N ELEVENTH CIRCUIT, PATTERN JURY INSTRUCTIONS – CRIMINAL CASES § 3, at 6 (1985), *cited with approval in United States v. Daniels*, 986 F.2d 451, 456 (11th Cir. 1993).

<sup>515</sup> The US Federal Courts of Appeals (or Circuit Courts) are the intermediate appellate courts of the US federal court system. A Court of Appeals decides appeals from the district courts located within its federal judicial circuit. There are eleven judicial circuits, which are not bound by decisions of the other circuits.

jury instruction as a whole, and not based on its individual elements. However, while this assessment may be the theory, in practice it is not applied consistently across the Circuits.

A number of Circuits have approved particular language, providing definitions by analogy, or using terms such as “moral certainty,” “hesitate to act,” and “substantial doubt.” These terms may be approved in one case, and then overturned in another case involving substantially similar jury instructions. In a number of cases, the Courts have acknowledged that certain terms are misleading or confusing but have still upheld their constitutionality. Shealy concludes that “[t]hese kinds of decisions demonstrate that the *Winship* standard is so ill-defined and ill-understood that virtually any charge on ‘reasonable doubt’ which contains certain buzz words can be found to be permissible or impermissible in an ad hoc manner.”<sup>516</sup> As Shealy puts it, this situation was “the logical outcome of the US Supreme Court’s refusal to define ‘reasonable doubt’ and its continued flirtation with the idea that ‘reasonable doubt’ is self-evident and needs no definition.”<sup>517</sup>

Several commentators offered as an alternative the model instructions prepared by the Federal Judicial Center.<sup>518</sup>

Following the example of the Federal Judicial Center, jury instruction committees of different Circuits prepare “model” or “pattern” jury instructions to help district court judges effectively communicate with jurors. Some of the proposed model instructions, drawing from existing jurisprudence, provide a more or less satisfactory explanation of the standard of proof.<sup>519</sup> Yet, the model instructions do not try to explain every nuance of the standard of proof so as to avoid rendering it more complex and confusing.

For instance, the Pattern Criminal Jury Instructions of the US Court of Appeals for the Sixth Circuit (last updated in September 2015) explain:

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.

<sup>516</sup> Shealy, p. 264-65.

<sup>517</sup> Shealy, p. 268.

<sup>518</sup> Newman, p. 991 (observing that the instruction “contains very useful language”); Power, p. 82, 85 (observing that this instruction “represents the modern trend toward brevity and simplicity,” and “focuses the jury’s attention on the prosecution’s burden instead of implying a burden on the defence to prove a doubt.”); Henry A. Diamond, *Reasonable Doubt: To Define, or not to Define*, 90 Colum. L. Rev. 1716, 1726 (1990) (noting that such definitions have been held to withstand constitutional scrutiny by the Supreme Court).

<sup>519</sup> Some of the pattern jury instructions do not provide any definition, stating only: “On the other hand, if, after fair and impartial consideration of all the evidence, you are satisfied beyond a reasonable doubt of [defendant]’s guilt of a particular crime, you should find [him/her] guilty of that crime.” See Pattern Criminal Jury Instructions for the District Courts of the First Circuit (2015), instruction 3.02; *supra* n. 438.

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.<sup>520</sup>

The Model Criminal Jury Instructions of the US Court of Appeals for the Third Circuit (last updated in April 2015) define reasonable doubt as:

[A] fair doubt based on reason, logic, common sense, or experience. It is a doubt that an ordinary reasonable person has after carefully weighing all of the evidence, and is a doubt of the sort that would cause him or her to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the lack of evidence, or from the nature of the evidence.<sup>521</sup>

Similar language is found in the Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (last updated in May 2014):

Reasonable doubt is doubt based upon reason and common sense, and not doubt based on speculation. A reasonable doubt may arise from careful and impartial consideration of all the evidence, or from a lack of evidence. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person, after careful consideration, would not hesitate to rely and act upon that proof in life's most important decisions. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.<sup>522</sup>

The Seventh Circuit contains no instruction regarding the definition of the reasonable doubt standard. The Commentary to the Pattern Jury Instructions explains that the Seventh Circuit repeatedly held that it is inappropriate for the trial judge to define the reasonable doubt standard for the jury.<sup>523</sup> In *United States v. Glass*, the Court of Appeals of 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.<sup>524</sup> 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

<sup>520</sup> Sixth Circuit Committee, Pattern Criminal Jury Instructions, (last updated March 2014), instruction 1.03.

<sup>521</sup> The US Court of Appeals for the Third Circuit, Model Criminal Jury Instructions (last updated 2015) instruction 3.06. The Model Criminal Jury Instructions for the Fifth Circuit (2015) contain nearly identical language: "a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in making the most important decisions of your own affairs."

<sup>522</sup> Eighth Circuit, Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, (last updated March 2014), instruction 3.11.

<sup>523</sup> Seventh Circuit, Pattern Criminal Jury Instructions (2012), citing *United States v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988) (hereinafter "Glass"). See also *United States v. Hatfield*, 590 F.3d 945, 949 (7th Cir. 2010); *United States v. Bruce*, 109 F.3d 323, 329 (7th Cir. 1997).

<sup>524</sup> *Glass*, at 387 (7th Cir. 1988), citing *Holland*, at 140.

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.'*<sup>525</sup>

### Several examples of Lawyer's Interpretation of Beyond Reasonable Doubt Standard of Proof

It is interesting to see how the attorneys interpreted this standard in their closing statements before the jury in some American courts:

Well, how do you know what presumption of innocence is? When do you know you have it? I have read as much as I could about this and not much is written. Although it is a basic tenet, there is surprisingly little written, but the best explanation I have heard was the explanation offered by the former president on the California Bar Association, Mr. Joseph Ball, who practiced in these courtrooms quite a bit. He said imagine, if you can, if the closest member of your family or your dearest, most trusted friend was accused of wrongdoing. What would your reaction be? Disbelief? Rejection of the accusation? Belief in the innocence of your friend and your family members? A refusal to change until you were shown bit by piece proof that the presumption of innocence was not correct? That is the attitude you should have in the presumption of innocence. You would be of a mind set that resists this accusation that has disbelief in it. That insists that proof, solid proof, quality proof be given to you that would enable you to have a moral conviction to an abiding certainty of guilt. Your oath requires nothing less than that, and that is why to be a juror is a particular discipline because you have to think differently than we ordinarily think in our regular affairs. We all are subject to suspicion. We hear a story, there is an inclination to believe it. Rumor, the same. You have got to as a juror reverse that inclination, that very human tendency, and you have got to sit there and resist that charge, this accusation. What does that mean? It means you take every piece of evidence in this case and you examine it, and you be skeptical of it and disbelieving in it and you turn it over and you see if it has flaws or if it has taint, and if you find it to be in that condition, you reject it, and you are particularly careful when you are called upon to examine a theory of the prosecution as opposed to evidence, and I am going to be talking quite a bit about the difference in a case

<sup>525</sup> *Glass*, at 387, (italics in original, internal citations omitted).

between evidence and theories, and you are particularly careful when a prosecutor, and I have no quarrel with this, who has the mind-set that the defendants are guilty, and then roams through 20,000 pages of transcript pointing out every quotation, every word he could generate to hook into that theory that the defendants are guilty. You actually should go through the transcript with an opposite mind; that the defendants are innocent, and so when they can weave skillfully and laboriously over seven days of patchwork a quilt of guilt by picking and plucking and choosing and selecting and omitting and overlooking everything to hook into a theory of guilt, you have to be careful because that is precisely what you shouldn't do. You should be doing just the opposite. The presumption of innocence has a very practical effect also aside from that. The presumption of innocence places the burden of proving this case upon one side, and the court will tell you reading directly from the instructions that you will get in writing as well as orally from the court, this presumption, referring to the presumption of innocence, places upon the State, the prosecution, the burden of proving him guilty beyond a reasonable doubt. In other words, it is the presumption of innocence that says the prosecution and only the prosecution has the burden because the defence need not prove innocence. That is presumed in law, and if you shift that burden onto the defence for any reason and require the defence to prove something in this courtroom, you are in violation of that commandment and your oath. Time and again it's been my experience when the prosecution is short on evidence when the prosecution doesn't have a case, the prosecution will perform the old trick of turning the tables and will say to you rhetorically in argument, "Why haven't the defendants proven that?" They will ask questions when they don't have evidence. "Where is the raincoat? Where is Little Bear?" They will point to the opening which the court has told you time and again is not evidence of anything in this case and they will say, "Where is that evidence?" That is done when the prosecution doesn't have the evidence and they would like to somehow shift the burden, but you have to be mindful that is precisely what is happening and you have to guard against it ... be mindful of the fact that what the prosecution is saying to you, in effect, is I don't have a case. I want you to look at the defendants' failure to prove innocence. But that is not what you are to do that is precisely what you are not to do ... So the presumption of innocence is the first commandment of the courtroom, and it carries with it necessarily the rules on the burden of proof and who has the burden. The second commandment is that no one could have their liberty taken from them in this country unless the prosecution offers proof, proof beyond a reasonable doubt. In other words, that presumption that the defendants are innocent, which you must keep in your mind, is a presumption that can only be overcome if there is proof beyond a reasonable doubt that overwhelms the presumption. This, too, calls upon you to break with the ordinary

thought patterns that you have because if at the end of this case-- and I have no doubt but that innocence is amply shown here--but if at the end of this case you have a suspicion of guilt or you think there's a possibility of guilt, even a probability of guilt, under the law that the court will give to you, you cannot vote for a guilty finding unless you have an abiding conviction to a moral certainty of guilt, which transcends and is much beyond the question of possibility, probability, a maybe, a perhaps, and speculation. Oftentimes jurors have walked out of a courtroom voting not guilty for someone who they thought might have committed the crime. They have performed their duty precisely in accordance with their oath. I don't think it is close in this case, but I think it is important to think about it. Your function actually is a narrow function in the law. The question before you is not really question of guilt or innocence. It is not that. You will be given verdict forms, and when you look at those verdict forms as to which way you vote, there is no verdict for innocence. There is none. There's only a verdict form for guilty and not guilty on each of the charges ... because you are not to concern yourself with the question of innocence. The sole issue is: Has the prosecution offered enough evidence, proof, that satisfied you beyond a reasonable doubt, an abiding conviction to a moral certainty? That's the only question. If they have, guilty; if they haven't, irrespective of any other attitude you might have on innocence or suspicion, it is not guilty. So what we are engaged in, in this process of eleven months, is the question of, has there been presented to you enough evidence, proof, that you are satisfied that the prosecution has sustained its burden of bringing your mind to an abiding conviction to a moral certainty.<sup>526</sup>

And:

Now, the two principles of law that I want to discuss with you are the presumption of innocence and the Commonwealth's burden of proving its case beyond a reasonable doubt. The presumption of innocence has been discussed with you. The judge explained it to you. When you sat out there before you were selected as jurors, there were questions asked of you during the selection, and the presumption of innocence means basically that the fact that someone has been arrested, charged, against whom a bill of information was issued and stands in court, that is not evidence against him. He is cloaked with the presumption of innocence and he carries that with him through the entire proceedings, until such time as twelve people are convinced beyond a reasonable doubt that he has committed the offense charged. Now, the judge explained to you the practical significance presuming someone innocent before hearing any evidence. But I would like to indicate to you that there is a more basic fundamental reason as to why there is a presumption of innocence. You

<sup>526</sup> Matthew Bender Inc.2001, Criminal Law Advocacy, summation in People v. Skyhorse by defense lawyer Leonard Weinglass, available at:<http://www.claraweb.us/wp-content/uploads/2013/07/Reasonable-Doubt-NC-2002.htm> (last accessed 14 November 2016).

know, we have all kinds of rules in the criminal process. We have procedural and technical rules, then we have some fundamental, substantial rules. The presumption of innocence is that type of rule. It is unwavering. It is part of our criminal justice system ... And I would like you to understand it fully and entirely, so that when the judge describes or explains the law to you, and you analyze and deliberate on the evidence, and you are told about the presumption of innocence and the Commonwealth's burden of proof, that it is not something that goes in one ear and out the other. It is not something that you take as some technical or procedural rule. It is part of our criminal justice system. And it relates to our actual idea of what a prosecution is... The point I'm making is that there are fingerprint experts, there are ballistics experts, there are medical technicians, there are investigators; anything that you can conceive of to investigate and to prosecute, the Commonwealth of Pennsylvania has it at its disposal. So what does the person accused of the crime have? The person accused of a crime, you, me, any other citizen in the Commonwealth of Pennsylvania, he has the presumption of innocence. I mention that to you so that when you review the evidence in the case, when you deliberate on it, that you think of it in those terms. Now, the other concept in the law is that the Commonwealth of Pennsylvania has to prove its case beyond a reasonable doubt. Now, what is a reasonable doubt? The judge will define it. The judge will say something like this: He will say a reasonable doubt is that type of doubt that would cause a reasonable person to hesitate from acting in a matter of importance to himself. That kind of doubt that would cause a reasonable person to restrain from acting in a matter of the highest importance to himself. It is a real doubt. It is not a fanciful doubt, the kind of a doubt that you conjure up in your mind to avoid the unpleasant duty of convicting someone. The Commonwealth does not have to prove its case beyond all doubt because there is a doubt about everything, but it must be a reasonable doubt. Now, you make decisions everyday in the week. The kind of decisions that you make everyday in the week are not the kind of decisions that you are to make in determining guilt or innocence, that is embodied in the concept of beyond a reasonable doubt. You may decide whether you will take the 8:30 train or drive into work. Whether you will wear a suit and tie or go casual. Whether you will go out to lunch or to Horn and Hardart's, whether you will go with your girlfriend or not. You make that decision, decide whether or not to wear a suit and tie, whether or not to go out to lunch, say you don't like to go out with her anyway. So you weigh that and come to a decision. But that is not the kind of decision I am talking about because the definition is that kind of doubt that would cause a reasonable person to be restrained from acting in a matter of the highest importance to himself or herself. What kind of decision involves a matter of the highest importance to yourself? Well, that may very well be whether you are going to get married, whether you are going to have a baby, whether you are going to change your job, whether you are going to



buy your new home, what college you're going to send your son to. These--this is the type of decision--this is the type of decision that is embodied in the concept of reasonable doubt. So when you go through the evidence in this case, when you evaluate it and sift through it, when you come to the point of making a decision, I want you to think of it as the type of decision like the examples that I just gave you.<sup>527</sup>

### The United Kingdom (England and Wales)

The United Kingdom's ("UK") judiciary has repeatedly tried to define reasonable doubt, but to date, the higher courts have just as often found these definitions to be incorrect. While the higher courts suggest that judges should generally abstain from providing juries with a definition, the following cases still give an impression of the ways in which the reasonable doubt standard *cannot* or *should not* be defined.

In *Regina v. Summers* (1952), the UK Court of Criminal Appeal held that it is advisable not to instruct the jury on the definition of reasonable doubt since the explanation results in more confusion.<sup>528</sup> In *Summers*, the appellant appealed his conviction and sentence for theft by the Surrey Court of Quarter Sessions (a local criminal court in England and Wales).<sup>529</sup> Although the Court of Criminal Appeal found no grounds for interfering with either the conviction or sentence and dismissed the appeal, Lord Chief Justice Goddard made some observations on the use of the expression "reasonable doubt."<sup>530</sup>

While summing up the evidence at the end of the trial, the presiding judge stated:

We have used the words "reasonable doubt." Some people have difficulty in understanding that. I feel sure you will not have any difficulty in understanding it. If you come to the conclusion on the evidence when you are dealing with these conversations: "This might have happened, or it might not," that is a reasonable doubt. I do not want you to bring yourself into that frame of mind if your real view is: "It is just barely possible." ... Look at it from the point of view of ordinary people, as if you were considering something in your ordinary lives. Would you, as ordinary people, if this had been something you had been told about by friends of yours, be inclined to believe them or disbelieve them? That is the sort of thing which is meant by "reasonable doubt." It is nothing to do with lawyers' jargon; it is merely the sort of judgement which the ordinary man of the world brings to bear on his own affairs, and look at it from that point of view.<sup>531</sup>

<sup>527</sup> Matthew Bender Inc.2001, Criminal Law Advocacy, summation in *Commonwealth v. Hammen* by defence lawyer Richard DiMaio, available at: <http://www.claraweb.us/wp-content/uploads/2013/07/Reasonable-Doubt-NC-2002.htm> (last accessed 14 November 2016).

<sup>528</sup> *Regina v. Summers*, [1952] 1 All E.R. 1059 (hereinafter "*Summers*").

<sup>529</sup> *Summers*, at 1059.

<sup>530</sup> *Summers*, at 1059.

<sup>531</sup> *Summers*, 1059-60.

On appeal, Lord Chief Justice Goddard<sup>532</sup> stated:

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. It is far better, instead of using the words “reasonable doubt” and then trying to say what is a reasonable doubt, to say to a jury: “You must not convict unless you are satisfied by the evidence given by the prosecution that the offence has been committed.” The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt, and that it is their duty to regard the evidence and see if it satisfies them so that they can feel sure, when they give their verdict, that it is a right one.<sup>533</sup>

*Summers* demonstrates that it may be difficult to define reasonable doubt, and that attempts to explain it may confuse the jury, rather than clarify the term. Based on this, the Court of Criminal Appeals advised against defining the term and concluded that the better decision would be to stop using the expression.

Lord Chief Justice Goddard reaffirmed his opinion regarding the risk of confusion in defining reasonable doubt in *Regina v. Hepworth & Fearnley* (1955).<sup>534</sup> Noting that “[a] case is never proved if any jury is left in any degree of doubt,”<sup>535</sup> Lord Chief Justice Goddard stated that it is more confusing for the jury to attempt to define reasonable doubt:

Another thing that is said is that the recorder only used the word “satisfied.” It may be, especially considering the number of cases recently in which this question has arisen, that I misled courts when I said in [*Summers*] ... that I thought it was very unfortunate to talk to juries about “reasonable doubt,” because the explanations given as to what is, and what is not, a reasonable doubt were so very often extraordinarily difficult to follow, and it is very difficult to tell a jury what is a reasonable doubt. To tell a jury that it must not be a fanciful doubt is something that is without any real guidance. To tell them that a reasonable doubt is such a doubt as to cause them to hesitate in their own affairs never seems to me to convey any particular standard; one member of the jury might say he would hesitate over something and another member might say that that would not cause him to hesitate at all. I, therefore, suggested that it would be better to use some other expression, by which I meant

<sup>532</sup> Rayner Goddard (1877–1971) was Lord Chief Justice of England from 1946 to 1958. Goddard was known for his strict sentencing and conservative views, and was nicknamed “The Tiger.” He once dismissed six appeals in one hour in 1957. See Allan Wingate, Lord Goddard: His career and cases by Glyn Jones and Eric Grimshaw (London, 1958); *The Last of the Tiger*, *Time*, 1 September 1958, available at <http://content.time.com/time/magazine/article/0,9171,863716,00.html> (last accessed 14 April 2016).

<sup>533</sup> *Summers*, at 1060.

<sup>534</sup> *Regina v. Hepworth & Fearnley*, [1955] 2 Q.B. 600 (hereinafter “*Hepworth & Fearnley*”).

<sup>535</sup> *Hepworth & Fearnley*, at 603.

to convey to the jury that they should only convict if they felt sure of the guilt of the accused.<sup>536</sup>

He further stated:

I should be very sorry if it were thought that cases should depend on the use of a particular formula or particular word or words. The point is that the jury should be directed first, that the onus is always on the prosecution; secondly that before they convict they must feel sure of the accused's guilt. If that is done, that is enough.<sup>537</sup>

Lord Chief Justice Goddard concluded:

I hope it will not be thought that we are laying down any particular form of words, but we are saying it is desirable that something more should be said than merely "satisfied" – we think that the conviction should be quashed.<sup>538</sup>

In *Regina v. Ching* (1976), the Court of Criminal Appeals cautioned judges against any attempts to "gloss on what is meant by 'sure' or what is meant by 'reasonable doubt.'" <sup>539</sup>

In *Ching*, the appellant was accused of theft from a supermarket. The accused put some grocery items into a shopping bag and some items in a trolley. When he reached the check-out point, he handed the bag to his girlfriend and paid only for the goods in the trolley. He was then stopped by the store detective, who called the police.<sup>540</sup>

During the jury's deliberations, although the case seemed to be of a type tried every day in many criminal courts, the jury had difficulty in reaching a verdict. The foreman of the jury informed the judge:

The problem seems to centre around the question of the doubts that we have. Several of you, yourself included, your Honour, saw fit to point out that, if we had any doubts, then we were to find him not guilty. It is on this particular point.<sup>541</sup>

It is not clear whether the jurors meant that they were merely telling the judge that they had doubts, or that they needed a clarification of what "doubt" means.<sup>542</sup> The judge interpreted the comment as if the jury had asked for further directions, and instructed:

It is the duty of the prosecution to prove the charge on the whole of the evidence beyond a reasonable doubt. A reasonable doubt, it has been said, is a doubt to which you can give a reason as opposed to a mere fanciful sort of speculation such as "Well, nothing in this world is certain nothing in this world can be proved." As I say, that

<sup>536</sup> *Hepworth & Fearnley*, at 603, (internal citation omitted).

<sup>537</sup> *Hepworth & Fearnley*, at 604.

<sup>538</sup> *Hepworth & Fearnley*, at 604.

<sup>539</sup> *Regina v. Ching*, 63 Cr. App. R. 7, 10 (1976) (hereinafter "*Ching*").

<sup>540</sup> *Ching*, at 8.

<sup>541</sup> *Ching*, at 8.

<sup>542</sup> *Ching*, at 8.

is the definition of a reasonable doubt – something to which you can assign a reason. It is sometimes said the sort of matter which might influence you if you were to consider some business matter. A matter, for example, of a mortgage concerning your house, or something of that nature.<sup>543</sup>

After this instruction the jury left the courtroom to deliberate, returning four minutes later with a verdict. The jury convicted the appellant by a majority of eleven to one of the first count of theft and acquitting him of the second count of theft.<sup>544</sup>

On appeal, the appellant argued that this jury instruction resulted in a lower standard of proof, because, upon receiving the instruction, the jurors were able to reach a final decision within four minutes, although they had spent hours discussing the first count.<sup>545</sup>

The Court of Criminal Appeals dismissed the appeal.<sup>546</sup> The Court reasoned that in most cases judges would be advised not to “attempt any gloss upon what is meant by ‘sure’ or what is meant by ‘reasonable doubt.’”<sup>547</sup> The Court recalled that in “the last two decades there have been numerous cases before this Court, some of which have been successful, some of which have not, which have come here because judges have thought it helpful to a jury to comment on what the standard of proof is.”<sup>548</sup> The Court noted that experience “has shown that such comments usually create difficulties.”<sup>549</sup> Lord Justice Lawton stated that this case was exceptional:

This is the sort of case in which, as I have already pointed out, the jury possibly wanted help as to what was meant by “doubt.” The judge thought they wanted help and he tried to give them some. He was right to try and that is all he was doing. He seems to have steered clear of the formulas which have been condemned in this Court such as “such doubt as arises in your everyday affairs or your everyday life” or using another example which has been before the Court, “the kind of doubts which you may have when trying to make up your minds what kind of motor car to buy.”<sup>550</sup>

The Court further stated that by the time a judge sums up the evidence, he has had an opportunity to observe the jurors and should choose the most appropriate words with which to make that particular jury understand that it must not return a verdict against a defendant unless it is sure of his guilt.<sup>551</sup> The Court relied on *Walters v. The Queen* (1969).<sup>552</sup> In *Walters*,

<sup>543</sup> *Ching*, at 8.

<sup>544</sup> *Ching*, at 8.

<sup>545</sup> *Ching*, at 8.

<sup>546</sup> *Ching*, at 11.

<sup>547</sup> *Ching*, at 10.

<sup>548</sup> *Ching*, at 10.

<sup>549</sup> *Ching*, at 10.

<sup>550</sup> *Ching*, at 10.

<sup>551</sup> *Ching*, at 10.

<sup>552</sup> *Walters v. The Queen* [1969] 2 A.C. 26 (hereinafter “*Walters*”).

the trial judge in Jamaica gave the jury a long explanation as to what was meant by reasonable doubt, which was criticized upon the same lines as the jury instruction in *Ching*. The criticisms were considered by the Privy Council,<sup>553</sup> which concluded:

By the time he sums up the judge at the trial has had an opportunity of observing the jurors. In their Lordships' view it is best left to his discretion to choose the most appropriate set of words in which to make *that* jury understand that they must not return a verdict against a defendant unless they are sure of his guilt; and if the judge feels that any of them, through unfamiliarity with court procedure, are in danger of thinking that they are engaged in some task more esoteric than applying to the evidence adduced at the trial the common sense with which they approach matters of importance to them in their ordinary lives, then the use of such analogies as that used by Small J. in the present case, whether in the words in which he expressed it or in those used in any of the other cases to which reference has been made, may be helpful and is in their Lordships' view unexceptionable.<sup>554</sup>

Reasonable doubt remains undefined in British jurisprudence.<sup>555</sup>

## Canada

Similar to the courts in the UK, Canadian appellate courts have declined to define reasonable doubt. The following case illustrates one trial judge's definition, which the Canadian Supreme Court held to be deficient.

In *Regina v. Brydon*, the appellant was convicted of five counts of sexual assault.<sup>556</sup> After commencing deliberations, the jury sent a note to the trial judge requesting further instructions concerning the definition of reasonable doubt. The trial judge instructed:

(i) ...if you believe that the accused is probably guilty or likely guilty but still have a reasonable doubt, you must give the benefit of that doubt to the accused; ... (ii) ...after examining all of the evidence you may be left with a reasonable doubt as to whether the accused is guilty or not guilty; ... (iii) ...if you are unanimous in that doubt you must give the benefit of that doubt to the accused.<sup>557</sup>

The Canadian Court of Appeal upheld the conviction, being satisfied that

<sup>553</sup> The Judicial Committee of the Privy Council is the court of final appeal for the UK overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee. See *Judicial Committee*, Overview, available at <http://privycouncil.independent.gov.uk/judicial-committee/> (last accessed 14 April 2016).

<sup>554</sup> Walters, at 30 (italics in original).

<sup>555</sup> See David Pannick, *Jurors Who Are in Reasonable Doubt*, Times (London), 17 January 1995, at 2. See also Thomas V. Mulrine, *Reasonable Doubt: How in the World is it Defined?* 12(1) Am. U. Int'l L. Rev. 195, 218 (1997).

<sup>556</sup> *Regina v. Brydon*, [1995] 4 S.C.R., 253, para. 4 (hereinafter "*Brydon*").

<sup>557</sup> *Brydon*, para. 5.

the instruction did not amount to reversible error.<sup>558</sup> The case went to the Canadian Supreme Court, which granted the appeal and ordered a new trial.<sup>559</sup>

The Canadian Supreme Court noted that questions from the jury must be answered in a “careful, complete and correct manner.”<sup>560</sup> It reasoned that, “[i]n light of the importance of the burden of proof and reasonable doubt filter to the integrity and reliability of a verdict and to the fairness of an accused’s trial, a trial judge’s instructions must be careful, lucid and scrupulously sound.”<sup>561</sup>

The Court held that in assessing whether a trial judge’s instructions on the burden of proof amount to reversible error, a court must consider:

- i. whether the impugned instruction is inconsistent with what was said in the initial charge or is simply erroneous standing by itself; and
- ii. whether, after placing the inconsistency or error in the context of the charge as a whole, there is a reasonable possibility that the jury might have been misled by those instructions into either applying a standard of proof less than proof beyond a reasonable doubt or improperly applying the burden of proof or reasonable doubt standard in arriving at their verdict.<sup>562</sup>

The Court considered the first instruction of the trial judge, when read in the context of the entire jury charge, could not have misled the jury into applying a standard of proof less than the required standard of proof beyond a reasonable doubt.<sup>563</sup> It considered that, although the second impugned instruction was confusing for the jury, “in itself [it] would not be sufficient to order a new trial.”<sup>564</sup> However, the Court considered the third instruction, which instructed the jury that they must be unanimous in their doubt before they could acquit “[was] clearly an error.”<sup>565</sup> The Court reasoned:

[W]hile a jury’s verdict had to be unanimous, jurors could arrive at that verdict by taking different routes. This instruction tainted all of the trial judge’s earlier instructions on reasonable doubt.... coupled with the previous instruction, there is a reasonable possibility that the trial judge’s erroneous instruction may have misled the jury into improperly applying the reasonable doubt standard in arriving at their verdict.<sup>566</sup>

The Court granted the appeal and ordered a new trial.<sup>567</sup>

<sup>558</sup> *Brydon*, para. 9.

<sup>559</sup> *Brydon*, para. 25.

<sup>560</sup> *Brydon*, para. 16.

<sup>561</sup> *Brydon*, para. 18.

<sup>562</sup> *Brydon*, para. 19.

<sup>563</sup> *Brydon*, para. 21.

<sup>564</sup> *Brydon*, para. 23.

<sup>565</sup> *Brydon*, para. 24.

<sup>566</sup> *Brydon*, para. 24-25.

<sup>567</sup> *Brydon*, para. 25.

## ECTHR JURISPRUDENCE

The ECtHR jurisprudence deserves careful consideration. Countries that have signed the ECHR are subject to the jurisdiction of the ECtHR. Thus, its interpretation and application of the reasonable doubt standard, *in dubio pro reo* principle, the burden of proof, presumption of innocence, and what constitutes a just procedure in general, is instructive and could serve as a minimum definition for the national legislation and jurisprudence.

### THE STANDARD OF PROOF AT THE ECtHR

In the *Greek*<sup>568</sup> case from 1969, the European Commission of Human Rights (“Commission”) had to decide what standard of proof to apply in evaluating evidence related to allegations of a violation of Article 3 of the ECHR.<sup>569</sup> The Commission held that allegations of breaches of Article 3 must be proved beyond a reasonable doubt. It further explained that “‘reasonable doubt’ is ‘not a doubt based on a merely theoretical possibility,’” but is “a doubt for which reasons can be given.”<sup>570</sup>

In the *Greek* case, the applicant governments (Denmark, Norway, and Sweden), extended<sup>571</sup> their applications to the Commission to include

<sup>568</sup> *Denmark v. Greece*, no.3321/67, *Norway v. Greece*, no.3322/67, *Sweden v. Greece* no.3323/67, and the *Netherlands v. Greece* no.3344/67, European Commission, 1969, (hereinafter: “Greek”).

<sup>569</sup> Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

<sup>570</sup> *Greek*, p. 196, para. 30.

<sup>571</sup> The initial applications included allegations under Articles 5, 6, 8, 9, 10, 13 and 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See Report of the Sub-Commission, Volume 1, p. 1; *The Greek case*, 12 Y. B. Eur. Conv. H.R., para. 3 (1969).



allegations of torture and ill-treatment of political detainees under Article 3 of the ECHR. The applicants submitted evidence such as reports of different forms of torture and ill-treatment and a list of alleged victims.<sup>572</sup> The respondent government (Greece) challenged the admissibility of this evidence, arguing that it was insufficient.<sup>573</sup> Greece also introduced evidence contesting the allegations of torture and ill-treatment, such as Greek legislation, documentary evidence and statistics, and several International Committee of the Red Cross reports.<sup>574</sup>

The Commission declared the applicants' allegations admissible, reasoning that although the applicants' evidence was insufficient at this stage, considering the current situation in Greece,<sup>575</sup> the remedies indicated by the Greek government were not sufficient or effective.<sup>576</sup> The Commission stated that, before addressing the substance of the allegations, it was necessary "to take [a] position on certain issues which must determine [the Commission's] examination of the evidence."<sup>577</sup> Thus, the question before the Commission was the "standard and means of proof to be applied" in evaluating the evidence submitted by the applicants.<sup>578</sup>

The Commission stated that the allegations "must be proved beyond reasonable doubt."<sup>579</sup> The Commission defined reasonable doubt as:

A reasonable doubt means 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.<sup>580</sup>

The Commission did not provide any authority to support its choice of the reasonable doubt standard, which was subsequently reaffirmed by the ECtHR and applied in several other cases.

In *Ireland*<sup>581</sup> case, one of the parties contested the applicability of the reasonable doubt standard in assessing evidence alleging a violation of Article 3 of the ECHR. Reaffirming that the reasonable doubt standard applied based on the Commission's decision in the *Greek* case, the ECtHR further elaborated on the sufficiency of evidence required to meet this standard. It added that proof beyond reasonable doubt may follow from the coexistence of sufficiently strong, clear, and concordant inferences, or of similar un rebutted presumptions of fact.

<sup>572</sup> *Greek*, p. 187, paras. 6-7.

<sup>573</sup> *Greek*, p. 187, para. 4.

<sup>574</sup> *Greek*, p. 188, para. 8.

<sup>575</sup> The Commission specifically pointed to the dismissal of thirty judges and public prosecutors on 29 May 1968. See *Greek*, p. 187, para. 5.

<sup>576</sup> *Greek*, p. 187, para. 5.

<sup>577</sup> *Greek*, p. 194, para. 23.

<sup>578</sup> *Greek*, p. 194, para. 23.

<sup>579</sup> *Greek*, p. 196, para. 30.

<sup>580</sup> *Greek*, p. 196, para. 30.

<sup>581</sup> *Ireland v. United Kingdom*, 25 ECtHR, Ser. A, (1978), (hereinafter: *Ireland*).

In *Ireland*, the UK government was dealing with acts of terrorism perpetrated by members of the Irish Republican Army (“IRA”) and Loyalist groups in Northern Ireland.<sup>582</sup> The government introduced special powers of arrest and detention without trial. These powers were widely used against members of the IRA and against persons suspected of being involved with the IRA.<sup>583</sup>

The Irish government submitted an application to the Commission alleging that various interrogation practices used by the UK authorities amounted to torture and ill-treatment that violated Article 3 of the ECHR.<sup>584</sup>

The UK government did not contest the allegations regarding the breaches of Article 3 of the ECHR. However, it maintained that the use of interrogation practices belonged to the past; the techniques had been abandoned and would not be reintroduced in the future.<sup>585</sup> The UK government argued that it had implemented various measures to prevent torture and ill-treatment and to provide reparation for their consequences.<sup>586</sup>

In assessing the evidence submitted by the applicant, the Commission referred to the *Greek* case and adopted the reasonable doubt standard.<sup>587</sup>

The Irish government contested the application of the reasonable doubt standard at the ECtHR. It argued that this standard was excessively rigid. The Irish government submitted that if the reasonable doubt standard were to be applied, the system of enforcement would prove ineffective. The government further argued that in cases of *prima facie* evidence, States that fail to assist the Court in finding the truth would not bear a risk of finding a violation of Article 3.<sup>588</sup>

The UK government requested the ECtHR to follow the standard adopted in the *Greek* case.<sup>589</sup> The ECtHR reaffirmed the approach of the Commission concerning “proof beyond reasonable doubt” relying on the *Greek* case.<sup>590</sup> The ECtHR stated that:

[T]o assess [the] evidence, the Court adopts the standard of proof ‘beyond reasonable doubt’ but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.<sup>591</sup>

<sup>582</sup> *Ireland*, paras. 4, 11-12, 16. The conflict between these two groups was representative of the antagonism between Catholics and Protestants in Northern Ireland. The IRA, predominantly Catholic, was seeking independence from the UK and the Loyalists, predominantly Protestants, opposed the idea of independence. *Ireland*, para. 15.

<sup>583</sup> *Ireland*, paras. 38-39.

<sup>584</sup> These interrogation practices, the so-called “five techniques,” included wall-standing, hooding, deprivation of sleep and food, and other practices. These practices were considered to amount to torture and inhuman or degrading treatment according to the Irish government. See *Ireland*, paras. 2, 96-104, 106-07, 161, 167, 169.

<sup>585</sup> *Ireland*, paras. 153-54.

<sup>586</sup> *Ireland*, paras.152-53.

<sup>587</sup> *Ireland*, para. 161.

<sup>588</sup> *Ireland*, para. 161.

<sup>589</sup> *Ireland*, para. 160.

<sup>590</sup> *Ireland*, para. 160.

<sup>591</sup> *Ireland*, para. 161.

In this specific case the Commission found that the interrogation practices constituted a violation of Article 3 of the ECHR.<sup>592</sup>

The specificity of the reasonable doubt standard at the ECtHR underpins the role of the ECtHR's commitment to protect human rights at the state level. At the ECtHR proceedings, no evidence is inadmissible: the Court has the power to evaluate evidence freely.<sup>593</sup>

The ECtHR's interpretation of the reasonable doubt standard has been criticized in dissenting opinions for leaving excessive room for judicial discretion and arbitrariness.<sup>594</sup> Critics argue that it is easy for the respondent party to create doubts in the judges' minds by adducing evidence that would otherwise be inadmissible in common law systems.<sup>595</sup> For instance, in *Labita* case (2000), eight of the seventeen judges of the Grand Chamber stated:

The majority of the Court considered that the applicant has not proved "beyond all reasonable doubt" that he was subjected to ill-treatment in Pianosa as he alleged. While we agree with the majority that the material produced by the applicant constitutes only prima facie evidence, we are nonetheless mindful of the difficulties which a prisoner who has suffered ill-treatment on the part of those responsible for guarding him may experience, and the risks he may run, if he denounces such treatment...We are accordingly of the view that the standard used for assessing the evidence in this case is inadequate, possibly illogical and even unworkable ... in the absence of an effective investigation....<sup>596</sup>

The ECtHR addressed this criticism in the case *Nachova* (2005), stating:

In assessing evidence, the Court has adopted the standard of proof "beyond reasonable doubt." However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under art 19 of the Convention – to ensure the observance by the Contracting States of their engagement

<sup>592</sup> *Ireland*, para. 147.

<sup>593</sup> *Nachova and others. v. Bulgaria*, no. 43577/ 98 & 43579/98, 6.07.2005, para. 147 (hereinafter "*Nachova*"), stating: "In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact."

<sup>594</sup> See *Labita v. Italy*, no. 26772/95, 06.04.2000, Joint Partly Dissenting Opinion Of Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall And Zupančič; See also Sonja C. Grover, *The European Court Of Human Rights As A Pathway To Impunity For International Crimes* 125 (Springer Science & Business Media 2010).

<sup>595</sup> Ugur Erdal, *Article 3 of The European Convention on Human Rights: A Practitioner's Handbook* 258 (Hasan Bakirci & Boris Wijkstrom eds., 2006).

<sup>596</sup> *Labita v. Italy*, no. 26772/95, 06.04.2000, Joint Partly Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič, para. 1.

to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formula for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.<sup>597</sup>

In ECtHR proceedings, the necessary degree of proof depends on the specific facts at issue. For instance, when the State controls the evidence, it is almost impossible to establish a violation conclusively for the individual making the allegations against the State. Thus, the ECtHR shifts the allocation of the burden of proof to the government.<sup>598</sup>

## THE RIGHT TO FAIR PROCEDURE IN THE ECtHR CASE-LAW

In the *Geerings*<sup>599</sup> case the Court has found that *“if it is not found beyond a reasonable doubt that the suspect has actually committed the crime and if it cannot be established as a fact that any advantage, illegal or otherwise, was actually obtained by the suspect in connection with the crime, a measure like confiscation of goods allegedly connected to the crime cannot be ordered, because it would be based on a presumption of guilt”*<sup>600</sup> and therefore incompatible with Article 6 (2).

The case can be summarised as follows: the applicant was arrested and placed in pre-trial detention on suspicion of involvement – together with others – in various thefts of lorries containing merchandise. After the conclusion of the investigation, a first instance national court had established that the applicant had been involved in the theft of 120 laundry dryers from a lorry and in several thefts of lorries. The applicant lodged an appeal with the local Court of Appeal which quashed the first

<sup>597</sup> *Nachova et al. v. Bulgaria*, nos. 43577/98 and 43579/98, 2004, para. 147.

<sup>598</sup> For example, in *Anguelova v. Bulgaria*, App. 38361/97, 13.06.2002, the ECtHR stated that “Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.” *Anguelova v. Bulgaria*, para. 111 (2002) (hereinafter “*Anguelova*”) (emphasis added).

<sup>599</sup> *Geerings v. Netherlands*, no. 30810/03, ECHR, 01.03.2007.

<sup>600</sup> *Ibid.* §47.

judgment and convicted the applicant of having participated only in some of the thefts and acquitted him of the remainder of the charges. In the meantime, the prosecutor requested the judge to issue an order for the confiscation of an illegally obtained advantage which, according to the public prosecutor, amounted to 67,020.16 Euros, including also goods related to the charges the applicant had been acquitted of. The applicant argued that a confiscation order could only be imposed in respect of the offences of which he had been found guilty. The local Court of Appeal granted the request of the prosecutor, thus referring the confiscation also to goods related to the crimes the defendant had been acquitted of.

In the case of *Telfner*<sup>601</sup> the Court stated that there had been a shift of the burden of proof, since the accused, who refused to give evidence, had been convicted of a road traffic offence on the basis of the fact that he was the driver of the vehicle, despite the fact that no evidence had been found to corroborate the statement. More specifically, the decision of the national court was based on the facts that, although the car was registered under his mother's name, the accused was the main user of the vehicle and that he was not at home the night of the accident - facts which required from him, according to the national court, to present evidence that he was not the driver. The Court recalled that Article 6 (2) "*requires, inter alia, that the burden of proof is on the prosecution, and any doubt should benefit the accused ... Thus, the presumption of innocence is infringed where the burden of proof is shifted from the prosecution to the defence ... In requiring the applicant to provide an explanation although they had not been able to establish a convincing prima facie case against him, the (national) courts shifted the burden of proof from the prosecution to the defence*"<sup>602</sup>.

In the *Heaney and McGuinness*<sup>603</sup> case, the Court underlined the connection between the right of the defendant to remain silent, guaranteed by Article 6 (1) and presumption of innocence envisaged in Article 6 (2), specifying that the obligation for the accused to talk, foreseen in the national law, violated the principles enshrined in Article 6 (1) and (2) of the convention. Namely, a large explosion occurred in County Derry in Ulster and five British soldiers were killed. Approximately an hour and a half after the explosion, Irish police officers on surveillance duty noted a light in a house around four miles from the scene of the explosion and shortly after, having obtained a warrant, searched the house and found an assortment of gloves (rubber and knitted), balaclavas, caps and other clothing. The men in the house, including the owner and the applicants, were arrested and detained by the police under section 30 of the Offences against the State Act 1939. It was suspected that the bombing had been carried out by the IRA and the two applicants were suspected of involvement in the

<sup>601</sup> *Telfner v. Austria*, no. 3501/96, ECHR, 20.06.2001.

<sup>602</sup> *Ibid.*, §15§18.

<sup>603</sup> *Heaney and McGuinness v. Ireland*, no. 34720/97, ECHR, 21.03.2001

bombing. Heaney and Mc Guinness were cautioned by police officers in the usual terms, namely they were not required to say anything unless they wished to do so and were also informed that anything they did say would be taken down in writing and might be given in evidence against them. Mr. Heaney was then questioned about the bombing and about his presence in the house where he was arrested. He refused to answer the questions put to him. Police officers then read section 52 of the 1939 Act to him and he was requested, pursuant to that section, to give a full account of his movements and actions in the hours close to the explosion: again he refused to answer any questions. The same conduct was held by Mr McGuinness. Therefore both of them were charged with the offence of failing to account for their movements (in accordance with section 52 of the 1939 Act), convicted by the Special Criminal Court and sentenced to six months of imprisonment.

Their appeal filed with the High Court was rejected and as a consequence they filed an application with the ECHR, complaining, under Article 6 of the Convention, about having been punished, through the application of section 52 of the 1939 Act, for relying on their rights to silence, against self-incrimination and to be presumed innocent during police questioning. The Court decided that there had been a violation of Article 6 Paragraphs 1 and 2 of the Convention, recalling its established case-law to the effect that, *“although not specifically mentioned in Article 6 of the Convention, the rights relied on by the applicants, the right to silence and the right not to incriminate oneself, are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right in question is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention”*<sup>604</sup>.

In the case *Tirado Ortiz and Lozano Martin*<sup>605</sup> however, the Court has specified that Article 6 (2) cannot be invoked to exclude the possibility to conduct breath, blood or urine tests during the criminal investigation. Obviously, if the principle of *in dubio pro reo* and of presumption of innocence were extended until the extreme consequences, it would become impossible in most of the cases for the police and the prosecution to perform any investigative action, since resolving any doubtful situation in favour of the accused eventually would block the investigation. In particular the Court has stated that *“The right not to incriminate one pre-*

<sup>604</sup> *Ibid.*, § 40.

<sup>605</sup> *Tirado Ortiz and Lozano Martin v. Spain*, no.43486/98, ECHR, 22 June 1999.



supposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant; breath, blood and urine samples; and bodily tissue for the purpose of DNA testing”.

In the case of *Ajdarić*<sup>606</sup>, the Court found the Croatia in violation of the principle *in dubio pro reo* because of the lack of court reasoning, which constituted a violation of Article 6 paragraph 1 of the ECHR. In this case, the applicant was convicted on three counts of murder perpetrated in Kutina in 1998, and sentenced to 40 years in prison, solely on the basis of hearsay evidence of a witness. The witness was a former police officer and was himself convicted (judgement not final) to 7 years in prison; the applicant met the witness in the prison hospital in 2005. The witness said that he had overheard conversations between the applicant and a third person while staying in the same hospital room with five other inmates, in which they had discussed perpetrating the criminal offence together.

The ECtHR found that the national courts made no effort to verify the statements made by this witness, but accepted them as truthful, irrespective of the fact that medical documentation showed that he suffered from mental disorders; also, the national courts did not take into account contradictory statements made by other witnesses either. The Court went far in exploring contradictions between different statements, contradictions in statements themselves, and inconsistencies in some issues, and has stated: “All these discrepancies called for an increasingly careful assessment by the domestic courts. In this connection the Court points out to the requirement that the parties in the proceedings have to be heard and their objections properly addressed and notes that the applicant made serious objections as to the reliability of evidence given by S.Š., pointing out to various discrepancies and lack of logic in the statement of S.Š., as well as to the lack of any connection between him and the criminal offences at issue. The applicant referred to specific facts and documents which called into question the statement given by S.Š. Thus, he pointed to the confused and imprecise nature of the statements by S.Š. As to the allegation by S.Š. that the applicant had opened a “business” in Banja Luka with the money taken from the victims in 1998, the applicant presented documents showing that

<sup>606</sup> *Ajdarić v. Croatia*, no. 20883/09, ECHR, 04.06.2012.



*he had started his car-dealing enterprise back in 1990. He also challenged the reliability of S.Š. as a witness on the ground of his mental illness.*<sup>607</sup>

Further, the Court analysed the reasoning of the judgment and stated that national courts made no comments on any mentioned discrepancies or on the contradictory witness statements: *“Against the above background, the Court finds that in the present case the decisions reached by the domestic courts were not adequately reasoned. Thus, obvious discrepancies in the statements of witnesses as well as the medical condition of S.Š. were not at all or not sufficiently addressed. In such circumstances, it can be said that the decisions of the national courts did not observe the basic requirement of criminal justice that the prosecution has to prove its case beyond reasonable doubt and were not in accordance with one of the fundamental principles of criminal law, namely, in dubio pro reo.”*<sup>608</sup>

When it comes to the errors during the deciding about facts or in the implementation of the laws, it is the view of the Court that this is not its duty unless such errors led to infringement of the rights protected by the Convention. As an example, in the *Hajnal*<sup>609</sup> the Court found violation of Article 6 § 1 of the Convention because in the criminal proceedings evidence was used which was obtained contrary to Article 3. *“The Court stands by the opinion that admission of statements which were obtained through torture or other ill-treatment, and which serve as evidence to establish relevant facts in criminal proceedings, makes the whole proceeding unfair. This finding applies irrespective of the probative value of the statements and irrespective of whether their use was adjudicating for conviction.”*<sup>610</sup> And vice-versa, in *Schenk*<sup>611</sup> the Court stated that although the admission of *unlawfully obtained evidence* does not in itself violate Article 6, it *can give rise to unfairness* on the facts. In this case, which pertained to a use of a recording which was illegal in so far as it was not ordered by the investigating judge, the Court held that there was no violation of Article 6 (1) because the defence was able to challenge the use of the recording and there was other evidence supporting the conviction of the accused.

As it can be seen from the paragraph above the right to defence is one of the basic requirements for the right to fair procedure. Below are elaborated few cases where the Court found that the right to a fair procedure was violated due to the infringement of the right to an adequate defence.

<sup>607</sup> *Ibid*, §46.

<sup>608</sup> *Ibid*, §51.

<sup>609</sup> *Hajnal v. Serbia*, no.36937/06, ECHR, 19.06.2012.

<sup>610</sup> *Ibid*, § 113.

<sup>611</sup> *Schenk v. Switzerland*, no.10862/84, ECHR, 12.07.1988.

Namely, in the case of *Iljazi*<sup>612</sup> the applicant was charged for trying to bring into the country 9.5 kg of heroin, purchased from an unidentified seller in Istanbul, loaded into a cargo area of a truck which belonged to a company managed and owned by him. The national court found him guilty and convicted him with 5,3 years of imprisonment for illegal drug trafficking. The applicant claimed a violation of Article 6 § 3 (d) of ECHR because of the domestic courts' refusal to admit the written statements and ensure presence at trial of witnesses S.B. and T.S., who had apparently stated that the applicant had neither been personally involved nor observed the loading of the goods into the truck. The applicant further submitted a copy of the statements, translated into Macedonian language, since those statements were being taken by Kosovo authorities (the point where the goods entered the country), on a request of the national authorities. The applicant claimed that by doing that the national court has wrongfully established the case facts.

Although ECtHR reiterated that *"the admissibility of evidence is primarily a matter that is regulated by national law"*, and that the purpose of the Court is *"not to give a ruling as to whether statements of witnesses were properly admitted in evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair"*, as well as that Article 6 § 3 (d) *"does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter"*, the Court has found that *"there might be exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6."*<sup>613</sup>

So, in this particular case the Court found violation of Article 6 §§ 1 and 3 (d) of the Convention since *"in the absence of any direct evidence, the applicant should have been afforded a reasonable opportunity to challenge the assumption that he had loaded and hidden the drugs in the truck. The refusal to examine the defence witnesses, at least T.S., led to a limitation of the defence rights incompatible with the guarantees of a fair trial enshrined in Article 6."*<sup>614</sup>

Furthermore, in the case of *Duško Ivanovski*<sup>615</sup> the applicant was sentenced to two and a half years of imprisonment for illegal drug trafficking. The applicant was searched on 04 February 2003, without a court warrant and in the absence of witnesses, as allowed by Law in exceptional circumstances. The police confiscated 13 keys and a mobile phone from him. On that same date, an investigating judge issued two warrants for search of two apartments and other accompanying premises owned by the applicant's father (nos. 8 and 9 in the building in which the applicant

<sup>612</sup> *Iljazi v. the former Yugoslav Republic of Macedonia*, no.56539/08, ECHR, 03.01.2014.

<sup>613</sup> *Ibid.*, § 40.

<sup>614</sup> *Ibid.*, § 47.

<sup>615</sup> *Duško Ivanovski v. the former Yugoslav Republic of Macedonia*, no. 10718/05, 24.07.2014.

lived) on the grounds of reasonable suspicion that the applicant was involved in drug trafficking. During the search, more than 2000 kg of heroin was found in a cellar which belonged to another apartment, no. 10, of the same building, and which was opened with a key confiscated during the personal search of the applicant. According to the expert report the locking system of the padlock to the cellar of apartment no. 10 had been damaged and it could be opened with any object, including with all of the keys confiscated from the applicant. Another expertize confirmed that a fingerprint of the applicant's middle finger was found on the package with drugs. The applicant claimed violation of Article 6 of ECHR because the decision was based on illegal evidence and that the domestic courts refused his request to call witnesses and to order a separate expertize.

The ECtHR in its decision reiterated that *“While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts. It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question.”*<sup>616</sup> However, the Court further reiterated that: *“In determining whether the proceedings as a whole were fair, it must be taken into consideration whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy.”*, as well as that: *“Although it is normally for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce, there might be exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6.”* So, in this particular case the Court found a violation of Article 6 §§ 1 and 3 (d) of the Convention on the account of the domestic courts' refusal to hear the defence witnesses and admit alternative expert evidence.

In the *Kovač*<sup>617</sup> case the applicant complained that in the criminal proceedings against him he was deprived of a fair trial since he was not able to put questions to M.V. as a witness against him, which is a violation of Article 6, paragraph 1 and 3 (d) of the Convention. The applicant in 2002 was charged with indecent act against a minor, a twelve-year old girl

<sup>616</sup> *Ibid.* § 42.

<sup>617</sup> *Kovač v. Croatia*, no. 503/05, ECHR, 12.10.2007.

with mental disability. The alleged victim, M.V., gave evidence before an investigating judge in the presence of a psychologist, but the applicant, who at that stage was not represented by a lawyer, was not present. At trial the applicant denied the charges. The victim was then recorded that she upheld the statement made before the investigating judge but the statement was not read out. Other witnesses were also heard, none of whom had seen the alleged acts and who gave evidence only on the subsequent events. The Court convicted the applicant for indecency against a minor and sentenced him to six months of imprisonment. It based the applicant's conviction to a decisive degree on the statement made by the victim before the investigating judge. The applicant appealed complaining that he was not given an opportunity to question M.V and that her testimony given before the investigating judge was reworded by the judge and did not represent the accurate picture of what she said, especially taking into consideration that at the age of 12, she could not read or write and did not know the names of any of her teachers. The higher Court dismissed the appeal. It accepted that the wording of her testimony had been formulated by the investigating judge and that the testimony would have sounded more convincing had it reproduced M.V.'s own words, but it did not find that this shortcoming made a significant impact. The appellate court made no comments on the applicant's complaint concerning his lack of opportunity to question M.V.

The EHtCR in this case reiterated *“that the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 1 and 3 (d) of Article 6, provided that the rights of the defence have been respected. As a rule these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings.”* The Court further stated that *“principles of fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify. In this respect, the Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, the victim's interest must be taken into account. The Court therefore accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labors.”* In this particular case however the Court found that *“the applicant cannot be*

*regarded as having had a proper and adequate opportunity to challenge the witness statement which was of decisive importance for his conviction and, consequently, he did not have a fair trial”.*<sup>618</sup>

In its judgment on the case of *Topic*<sup>619</sup> the Court also noted that: “(...) *the applicant’s request for the eyewitnesses to the event to be heard was not vexatious, it was relevant to the subject matter of the accusation, and that it could arguably have strengthened the position of the defence or even led to the applicant’s acquittal, had it been confirmed that he had in fact thrown a beer can and not the package containing drugs into the rubbish bin.(...) However, the trial court dismissed the applicant’s request by merely noting that all the relevant facts had been sufficiently established (...) which cannot be considered a reasoned decision in itself, and could suggest that the witness statements heard by the domestic court were one-sided.(...) The Court therefore considers that by dismissing all requests by the defence and accepting all the prosecution arguments and evidence the trial court created an unfair advantage in favour of the prosecution and consequently deprived the applicant of any practical opportunity to effectively challenge the charges against him”.*<sup>620</sup>

In this case ECHR emphasised the importance of the words “under the same conditions” and “equality of arms” in the matter: “*With this proviso, it leaves it to the competent national authorities to decide upon the relevance of proposed evidence, in so far as this is compatible with the concept of a fair trial, which dominates the whole of Article 6 (...). It is accordingly not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth (...). Thus, when the applicant has made a request to hear witnesses which is not vexatious, and which is sufficiently reasoned, relevant to the subject matter of the accusation and could arguably have strengthened position of the defence or even led to the applicant’s acquittal, the domestic authorities must provide relevant reasons for dismissing such request(...).The Court notes that the applicant contended that the package found in the rubbish bin did not belong to him, which was why he had refused to sign the seizure record of the package and requested a forensic analysis in order to obtain evidence as to whether he had had any contact with the package(...). He also argued that he had in fact thrown a beer can into the bin, and in support of his arguments he insisted that three persons, eyewitnesses to the event, be questioned. In denying the charges against him the applicant insisted throughout the proceedings that he had thrown a beer can into the rubbish bin and not the package containing drugs. (..)In this respect the Court notes that one of the police officers who testified before the trial court, in fact the one, who found the package, confirmed*

<sup>618</sup> *Ibid.* §26, §32.

<sup>619</sup> *Topic v. Croatia*, no. 51355/10, ECHR, 10 October 2013.

<sup>620</sup> *Ibid.* §46, §47, §478.

that he had also found beer cans in the bin, thus making the applicant's line of defence not fully vexatious or improbable (...). Accordingly, the evidence of the police officers, as witnesses for the prosecution, could have been refuted by the statements of the other three eyewitnesses (...). In the absence of any material evidence such as fingerprint or DNA traces, which were never retrieved from the package although the defence requested it, those witness statements could have played a significant role in strengthening the position of the applicant's defence or even led to his acquittal (...), given that the criminal court is bound by the *in dubio pro reo* principle(...).<sup>621</sup>

Again, in the case of *Navalnyy and Yashin*<sup>622</sup> the Court has required that an applicant must be "afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent"<sup>623</sup>. The Court has also found that: "(...)the circumstances of the applicants' confrontation with the riot police had been in dispute between the parties to the administrative proceedings (...). However, the courts acting in those proceedings had decided to base their judgment exclusively on the version put forward by the police and had refused to accept additional evidence, such as video recordings, or to call other witnesses, when the applicants sought to prove that the police had not given any orders before arresting them. The Court considers that in the dispute over the key facts underlying the charges where the only witnesses for the prosecution were the police officers who had played an active role in the contested events; it was indispensable for the Justice of the Peace and the Tverskoy District Court to exhaust every reasonable possibility of verifying their incriminating statements (...). The failure to do so ran contrary to the basic requirement that the prosecution has to prove its case and one of the fundamental principles of criminal law, namely, *in dubio pro reo*.(...).<sup>624</sup> It is clear that the applicant should have had the right to prove the facts in favour of his defence, but was rejected by the court to do so.

Interesting for observation are the stands of the Court referring to the issue of detention, in the sense of whether the prosecution managed to present sufficient evidence to prove that there was reasonable suspicion in the defendant's guilt.

Namely, in the case of *Stepuleac*<sup>625</sup> the lawfulness of the detention and whether there were sufficient reasons for the detention were questioned. The applicant was the owner of a security company, which secured a petrol supply company. Upon a complaint by the petrol supply company that one of employees of the security company allegedly stole fuel, the applicant,

<sup>621</sup> *Ibid.* §40, §42, §43, §44, §45.

<sup>622</sup> *Navalnyy and Yashin v. Russia*, no.76204/11, ECHR, 20.04.2015

<sup>623</sup> *Ibid.* §82.

<sup>624</sup> *Ibid.* §83.

<sup>625</sup> *Stepuleac v. Moldova*, no. 8207/06, ECHR, 06.02.2008.



having conducted internal investigation in his company, informed the petrol company that the applicant's employee G.N. confessed he had been stealing petrol, but was refusing to pay for the damage, so the applicant suggested to the petrol company that they should inform the police. Few months later the employee G.N. complained to the Police that people from the security company where he was employed, threatened him with violence in order to obtain money from him and that he was illegally held in detention. The next day the Prosecution opened an investigation against the applicant and another employee in his company. Three days later the applicant was arrested. The first arrest ended with the applicant being placed in house arrest, to be released on bail later on by the Court of Appeal. In the meantime, his company licence was revoked and the applicant informed the media that the prosecution and his arrest were a result of the intent of the Ministry of Interior to monopolize the security services market by destroying competitors, including his company. Then, the applicant was arrested again with expanded criminal investigation against him and two others, for alleged blackmailing of two potential victims. National Court ordered detention and the national Appellate Court upheld that decision.

The ECHR found that although the complaint lodged by G.N. to the Police did not directly indicate the applicant's name, the only ground cited by the prosecuting authority when arresting the applicant and when requesting the court to order his pre-trial detention was that the victim G.N. had directly identified him as the perpetrator of a crime. So for the Court *"It is unclear why his name was included in that decision at the very start of the investigation and before further evidence could be obtained."*<sup>626</sup> Moreover, the Court noted that *"the domestic court, when examining the request for a detention order (...), established that at least one of the aspects of G.N.'s complaint was abusive (...). This should have cast doubt on G.N.'s credibility. The conflict he had with the company's administration (...) gives further reasons to doubt his motives. However, rather than verifying this information, which was easily obtainable from the law enforcement authorities, particularly given the large number of prosecutors assigned to the case, the prosecutor arrested the applicant partly on the basis of his alleged kidnapping of G.N. This lends support to the applicant's claim that the investigating authorities did not genuinely verify the facts in order to determine the existence of a reasonable suspicion that he had committed a crime, but rather pursued his arrest, allegedly for private interests. (...)"*<sup>627</sup>

The Court concluded according to the information in its possession

*"does not satisfy an objective observer that the person concerned may have committed the offence"*<sup>628</sup>. There was, accordingly, a violation of Article 5

<sup>626</sup> *Ibid.* §70.

<sup>627</sup> *Ibid.* §72.

<sup>628</sup> *Ibid.* §73.



§1 of the Convention in respect of the applicant's first arrest.

Regarding the second arrest the Court further found that *“Had the applicant indeed committed the crime and had he wanted to pressure the victim or witnesses or destroy evidence, he would have had plenty of time to do so before December 2005, and no evidence was submitted to the Court of any such actions on the part of the applicant. There was, therefore, no urgency for an arrest in order to stop an ongoing criminal activity and the 24 investigators assigned to the case could have used any extra time to verify whether the complaints were prima facie well-founded. Instead of such verification, the applicant was arrested on the day when the investigation was initiated (...). More disturbingly, it follows from the statements of the two alleged victims that one of the complaints was fabricated and the investigating authority did not verify with him whether he had indeed made that complaint, while the other was the result of the direct influence of officer O., the same person who registered the first complaint against the applicant ... This renders both complaints irrelevant for the purposes of determining the existence of a reasonable suspicion that the applicant had committed a crime, while no other reason for his arrest was cited (...).The Court is aware of the possibility of a victim retracting his or her statements because of a change of heart or even coercion. However, whether or not a victim signed a complaint can be verified by objective forensic evidence and there is nothing in the file to suggest that the person had lied to the domestic court about not having signed the complaint. Indeed, if it were shown that the victim had actually signed the complaint but later retracted it under duress, the domestic court would have had serious reasons for refusing the applicant's request for release. No such concerns were expressed by the court (...).<sup>629</sup>*

So, as in the case of the first arrest, the Court concluded that it does not see in the file any evidence to support a reasonable suspicion that the applicant committed a crime. Therefore, the Court has found a violation of Article 5 §1 of the Convention in respect of the applicant's second arrest too.

Similarly, in the case of *Lazoroski*<sup>630</sup> the applicant complained under Article 5, paragraph 1, 2 and 3 of the Convention that his deprivation of liberty had not been based on any of the permissible grounds and that he had not been informed of the reasons for his arrest. Namely, on 6 August 2003 the applicant received a phone call from an Intelligence Service officer to come to the police station for a “talk”. J.S., a high ranking official in the Intelligence Service gave a verbal order for the applicant's arrest on suspicion that he was armed and might leave the country. At 23.15 hours on the same day (6 August), the applicant was arrested by the police near the border, he was taken to the police station, searched, and according to the report he was found with a mobile phone, passport, identity card and a licence to carry arms. According to the parties, a

<sup>629</sup> *Ibid.* §76-78.

<sup>630</sup> *Lazoroski v. the former Yugoslav Republic of Macedonia*, no. 4922/04, ECHR, 08.01.2010.

gun was also found, but it was not recorded in the report. The applicant was handcuffed and transferred to city police station by the Intelligence Service, but he managed to contact his lawyer on his mobile phone. At 2 a.m. on 7 August 2003 the applicant signed a report in which he waived his right to a lawyer. There was no record of the questioning. The applicant claimed that he was questioned about the work of his superiors (one of the executive managers of a company), about certain members of the then opposition political party and certain high-profile journalists. His personal belongings were given back to him and he was released at 9 a.m. The applicant brought his alleged unlawful arrest to the attention of the Ministry of Interior, Sector for Internal Control. The Sector noted that the applicant's arrest and detention had been carried out in compliance with the law, except for minor errors in the minutes concerning the body search. The applicant also requested an investigating judge to review the lawfulness of his deprivation of his freedom, claiming that he had been detained unjustifiably, that he had not been informed of the reasons for his detention, that his lawyer had been prevented from attending the questioning, and that the arrest had been carried out without a court order. On 26 January 2005, after the applicant lodged five requests for expediting the proceedings the investigating judge found that the applicant had been lawfully deprived of his freedom under the suspicion of arms trafficking. On 18 February 2005 the court panel dismissed the applicant's appeal. The applicant filed an application before the ECHR. The ECtHR concludes that the applicant's deprivation of liberty did not constitute lawful detention effected "on reasonable suspicion" and therefore was a breach of Article 5 § 1 (c) of the Convention. The ECtHR in its reasoning reiterated that *"the facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at a later stage of the process of criminal investigation. In the instance case, however, there was nothing to suggest that the applicant was involved in trafficking in arms. Even in the proceedings before the Court, the Government did not present any material that would persuade it to conclude otherwise. The "operative indications" of the Intelligence Service, in the absence of any statement, information or a concrete complaint cannot be regarded as sufficient to justify the "reasonableness" of the suspicion on which the applicant's arrest and detention were based."*<sup>631</sup>

Further in the text it is presented the wealthy case-law of the Court dealing with the violation of presumption of innocence by public officials declaring someone's guilty before he/she is being convicted with a final court decision.

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<sup>631</sup> *Ibid.* §48.

In the case of *Minelli*<sup>632</sup> the Court has considered that Article 6 (2) is breached by a decision of a national court which states that a person is guilty of an offence before that person has been tried and found guilty of it. In particular, the Court specified that *“the presumption of innocence will be violated if, without the accused ‘s having previously been proved guilty according to law and notably without his having had the opportunity of exercising his right to defence, a judicial decision concerning him reflects an opinion he is guilty. This may be so even in the absence of any formal finding: it suffices that there is some reasoning suggesting that the (national) court regards the accused as guilty”*<sup>633</sup>. In the above case a private prosecution for defamation against Mr. Minelli was dismissed because it had become statute-barred. Notwithstanding that, the national court ordered Mr. Minelli to pay part of the costs of the proceedings arguing that the defendant would have been probably convicted if the criminal offence had not extinguished because of prescription. The Court stated that Article 6 (2) had been violated by that decision, since the national court had shown that it was satisfied of the accused guilty on the basis of a mere estimation without any formal finding.

In the case of *Lagardere*<sup>634</sup> the applicant's father, J.L. Lagardère, was chairman and managing director of two companies called Matra and Hachette. A third company, called Lambda, representing some shareholders in Matra and Hachette, lodged a complaint for misappropriation of corporate assets, together with an application to join the proceedings as a civil party. As a consequence, J.L. Lagardère, in his capacity as chairman and managing director of Matra and Hachette, was charged of having knowingly fraudulently misused assets of those companies against their interest. Afterwards the Paris Criminal Court declared the prosecution against J.-L. Lagardère time-barred and as a consequence also the civil party action was declared inadmissible. The decision was appealed by Lambda and the Supreme Court, after declaring that the prosecution had lapsed, this time as a result of the accused death, quashed the judgment of the Court of Appeal concerning the civil action and the case was sent before a different Court of Appeal. The latter court declared the instances of misappropriation of corporate assets committed in 1988 time-barred, but not those committed in the financial years 1989 to 1992 and considered that the late applicant's father had acted against the interests of the companies Matra and Hachette. The conclusion of the Court of Appeal was that the system set in place by Mr J. L. Lagardère constituted the offence of misappropriation of corporate assets and ordered the heirs of the late J.L. Lagardere to pay the civil party Euros 14,345,452.52 in damages.

The applicant appealed the above decision, but his request was not granted and he finally lodged an application with the ECHR: in the above

<sup>632</sup> *Minelli v. Switzerland*, no. 8660/79, ECHR, 25 March 1983.

<sup>633</sup> *Ibid.* § 37.

<sup>634</sup> *Lagardere v. France*, no.18851/07, ECHR, 12.07.2012.

claim he complained that the French courts had violated his father's right to the presumption of innocence, since they had declared his father responsible for the crime, although the criminal proceedings had lapsed and he had never been found guilty prior to his death. On the point, the Court reaffirmed that a distinction had to be made between decisions or statements that reflect the opinion that the person concerned is guilty and those which merely describe a state of suspicion. The former violate the presumption of innocence, while the latter have been found to be in conformity with the spirit of Article 6 of the Convention. Besides, the Court reiterated that Article 6 (2) of the Convention applies also to situations where the person concerned is not, or is no longer, the object of a "criminal charge", for instance to judicial decisions taken after the discontinuation of the criminal proceedings or after an acquittal and that that if the national decision on compensation contains a statement imputing the criminal liability of the respondent party, this could raise an issue falling within the ambit of Article 6 (2) of the Convention.

In the present case the Court noted that the Court of Appeal in its judgment held *"that the constituent elements of the offence of misappropriation of corporate assets to the detriment Matra and Hachette are established for that period against Mr Jean-Luc Lagardère"*<sup>635</sup>: such a statement leaves no room for doubt that the Court of Appeal considered the applicant's father guilty as charged, even though the prosecution against him had lapsed and no court had ever found him guilty while he was alive. Hence Article 6 (2) of the Convention had been violated by the decision on the national court.

Furthermore, in *Clave*<sup>636</sup> case, elaborating on the scope of the presumption of innocence, ECtHR clarified that Article 6 (2) does not only apply to the operative part of a judgment – to the decision whether or not the defendant is found guilty – but also to its reasoning. In this case, the applicant was the father of a daughter whose former wife laid information with the police that the applicant had sexually abused his daughter. The daughter was questioned by police and a psychological expert was commissioned to assess the credibility of her statements. The applicant was charged with sexual abuse of children and sexual abuse of persons entrusted to him for upbringing. Regional Court Muenster acquitted him of all charges, and give reasoning pointing out that *"...the Chamber assumes, in sum, that the core events described by the witness have a factual basis, that is, that the accused actually carried out sexual assaults on his daughter in his car. Nevertheless, the acts could not be substantiated, in terms of either their intensity or their time frame, in a manner that would suffice to secure a conviction. The inconsistencies in the witness's testimony were so marked that it was impossible to establish precise facts."*

The applicant considered that, despite the fact that the appellate court

<sup>635</sup> *Ibid.* § 20.

<sup>636</sup> *Clave v Germany*, no. 48144/09, ECHR, 15.01.2015.

had acquitted him on account of insufficiency of proof, the appellate court's reasoning amounted to a finding of guilt. After the applicants complaint to Federal Court of Constitution stating that judgment violated the presumption of innocence the Constitutional Court declared the complaint inadmissible and the applicant lodged an application with the ECtHR. The German Government argued that the presumption of innocence did not apply to the reasoning of a judgment and that decision of the German court is in line with Article 6 (2) which only require that a defendant be acquitted if not proved guilty beyond reasonable doubt.

The ECtHR rejected the argument made by the German government that presumption of innocence did not impose any boundaries on a court when providing reasons for the acquitting judgment. On contrary, ECtHR pointed out the importance of reasoning of judgment stating that the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6 § 2. In the judgment, the Courts stated: *"In view of these elements, the Court considers that the Regional Court's impugned statements went beyond a mere description of a state of (remaining) suspicion by using unfortunate language. They must be said, in the circumstances, to have contradicted or "set aside" the applicant's acquittal by amounting to a finding that the applicant was guilty of the offences he was charged with."*

In the case of Lavents<sup>637</sup> the Court established that there was a breach of Article 6 (2) because the judge of the trial had given interviews to the press during of the trial in which she had stated that she was not sure whether to convict the accused for all or only some counts of the indictment and had expressed her surprise with the defendant completely denying all charges, thus alleging that the defendant should have somehow proved his innocence: the Court affirmed that, by releasing such a statement prior to the end of trial, the judge had blatantly violated the presumption of innocence.

The Court has confirmed the above approach in the case of Alenet de Ribemont<sup>638</sup>. In this case, a member of the French Parliament and former Minister was murdered in front of the applicant's home. The victim was visiting his financial adviser, who lived in the same building and with whom Mr. Ribemont was planning to open jointly a restaurant in Paris. This plan was financed by the victim who lend money to the applicant and for making him responsible for repaying the loan. Once the judicial investigation for murder was initiated, the police of Paris detained several persons, including Mr. Alenet de Ribemont. On the day of the arrest, the French Minister of the Interior and several high rank police officer had a press conference. One of the officers, stated that Mr. Alenet was one of the instigators of the murder, and his colleagues have their statements in support of his own. Afterwards Mr. Alenet de Ribemont

<sup>637</sup> *Lavents v. Latvia*, no.58442/00, ECHR, 28.02.2003.

<sup>638</sup> *Alenet de Ribemont v. France*, no 15175/98, ECHR, 10 February 1995

was formally charged with aiding and abetting murder and was taken into custody where he stayed under detention on remand. He was released after three months of detention on remand with a discharge order was finally issued after three years. After having been released, Mr. Allenet de Ribemont submitted a claim for compensation based on Article 6 par. 2 of the Convention, but the claim was dismissed by the national courts: more specifically Mr. Allener sought compensation of ten million French francs for the non-pecuniary and pecuniary damage he maintained he had sustained on account of the above statements by the Minister of the Interior and senior police officials.

ECHR stated that Government of France had wrongly argued that presumption of innocence could be infringed only by a judicial authority. On the contrary, the Court acknowledged that the principle of presumption of innocence was above all a procedural safeguard in criminal proceedings, but that its scope was more extensive, and that it imposed obligations not only on criminal courts but also on other authorities. The Court stated that Article 6 (2) is surely violated if a judicial decision concerning a defendant reflected an opinion that the person is guilty before he has been proven so by law, specifying that *“It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty”*<sup>639</sup>; but the Court also stressed that presumption of innocence may be infringed not only by a judge or court but also by other public authorities.

At the time of the press conference, some of the highest-ranking officers in the French police referred to Mr. Allenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder. This was clearly a declaration of the applicant’s guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. Therefore the Court stated that there had been a breach of Article 6 (2).

In the case of *Krause*<sup>640</sup> the Commission has stated the following: *“Article 6 (2), therefore, may be violated by public officials if they declare that somebody is responsible for criminal acts without a court having found so. This does not mean, of course, that the authorities may not inform the public about criminal investigations. They do not violate Article 6 (2) if they state that a suspicion exists, that people have been arrested, that they have confessed etc. What is excluded, however, is a formal declaration that somebody is guilty”*. In that case, the applicant was arrested under suspicion of having committed various offences and was placed in solitary detention on remand. Before the commencement of the main trial, the Head of the Swiss Federal Department of Justice and Police was interviewed on

<sup>639</sup> *Ibid.* §35.

<sup>640</sup> *Krause v. Switzerland*, no.13126/87, ECHR, 20 May 1992.



television in connection with the Entebbe kidnapping of an Air France airplane. The kidnappers had requested the release of various prisoners who were detained in Israel and Europe, *inter alia* the applicant. The Swiss Government refused to free the applicant and the Minister stated on television the following: “*Petra Kreuse cannot be considered simply as a Palestinian fighter for freedom. She is a person who has committed common law offences - offences in connection with explosives -and she must accept responsibility for this. In autumn she will have to stand trial as a prisoner on remand. One cannot fight against terrorism by releasing terrorists*”.

In relation to the above declarations on television, the Commission deemed that there had been no infringement of Article 6 (2), despite the claims of the applicant. The Commission admitted that the Minister had said on television that the applicant had been responsible for committing crime, adding immediately that she had been yet to be tried and that he did not know what the judgment would be. Therefore, according to the Commission, in such a context it was clear that the Minister just wanted to inform the public about an ongoing criminal investigation against the applicant. The Commission concluded that, although the statement of the Minister could have been worded more carefully, it could be seen as information released by the Government referring the doubt in the applicant and an announcement of the near trial. Therefore the Commission found that there had been no infringement of Article 6 (2). However, the Court specified that the principle underlined in Article 6 (2) was not only a procedural guarantee applicable in criminal proceedings but had much wider with an aim of protecting a person from being treated as guilty for a crime prior the end of a trial, by any public servant (in addition to the judicial authorities).

In the case of *Daktaras*<sup>641</sup>, the prosecutor stated in his decision rejecting the request for termination of the proceeding that the defendant Daktaras was guilty. On those grounds Daktaras filed a complaint with the Court, claiming that his right to presumption of innocence had been infringed by the statement of the prosecutor. In this case, the Court noted that the prosecutor did not make the impugned statements in a context which is independent from the criminal proceedings, like a press conference for instance, but were put down in his decision in the preliminary stage of the proceeding, in which he rejects the applicant’s request to discontinue the persecution. The Court found the word “proven” which was used by the prosecutor in the rationale which rejects the request for termination of the investigation, as an unfortunate choice of word, but yet legitimate, because the prosecutor was not addressing the issue whether the guilt of the applicant was established by the evidence but to the issue whether sufficient evidence about the applicant’s guilt was in the case file, so as to justify the next step for putting the case on trial.

<sup>641</sup> *Daktaras v. Lithuania*, no. 42095/98, ECHR, 17.01.2001.



Therefore the Court concluded that the statements used by the prosecutor did not breach the principle of presumption of innocence, since it was a procedural decision assessing whether to continue or dismiss the proceeding and it was not a decision about the of the defendant which would have breached Art. 6 (2) of the Convention.

In the case of *Karaman*<sup>642</sup> the Court stated that the principle of presumption of innocence may also be infringed on account of premature expressions of a suspect's guilt made within the scope of a judgment against separately prosecuted co-suspects. The applicant was the founder of a Turkish TV station broadcasting both in Turkey and in Germany. During a program broadcast by the above TV, there were reports on charitable aid projects and appeals for monetary donations. In its appeals, the association running the collection of proceeds (the association involving the applicant and other people) stressed that the funds donated would be used directly and exclusively for charitable purposes and for the funding of social projects. After some time the prosecution authorities of Frankfurt launched an investigation against several individuals on suspicion of having fraudulently used the majority of funds donated to the association for commercial purposes and their own benefit. An investigation against the applicant, based on the same grounds, started some time later, but the proceedings against the applicant and the co-suspects remained separated. Some suspects stated that they could not decide how the donated funds had been used, that they had been integrated into the hierarchy of a criminal organization whose leaders were in Turkey and in which the applicant had played a leading role and that they had to obtain the applicant's prior approval as to any decision related to the use of the donations. In the judgment issued against the co-suspects, the national court emphasized the responsibilities of the applicant in a few sentences, even though he was not a part of the above proceedings. Furthermore, the presiding judge, when delivering the judgment, said that "*strings were pulled at the level of Kanal 7*" (the TV station) and that the convicted had "*acted in accordance with instructions they had received ... in particular from Zekyria Karaman, ..., ... and ... The main persons in charge were located in Turkey*".<sup>643</sup> The applicant lodged a complaint with the Federal Constitutional Court arguing that the references in the reasoning of the court to his role in the fraudulent use of the donated funds had violated the principle of presumption of innocence. After the complaint was rejected by the German national courts, Mr. Karaman applied the ECHR. Foremost, the Court stated that the aim and purpose of the Convention was protecting people which is why its provisions had to be interpreted and applied in order to make its safeguards practical and effective. Having said that, the Court noted

<sup>642</sup> *Karaman v. Germany*, no. 17103/10, ECHR, 07.07.2014.

<sup>643</sup> *Ibid.* § 15.

that the relevant passages in the judgment issued against other suspects and concerning the involvement of the applicant in the fraudulent use of the donated funds (which was also the subject of the parallel criminal investigations instituted against the applicant), notwithstanding such statements were not binding with respect to the applicant, may have a prejudicial effect on the proceeding against him. In particular, the Court considered that in the above case, since the applicant was prosecuted separately, he was not a party to the proceeding against the co-accused and was therefore deprived of any possibility of contesting the allegations made during this proceeding as to his involvement in the crime. However, the Court acknowledged that in order to assess the responsibility of the co-suspects, the local court could not avoid mentioning and evaluating the role and the intentions of all of the persons “behind the scene” in Turkey, including the applicant, and consequently, there had not been an infringement of Article 6 (2). The decision was not unanimous and two judges delivered a dissenting opinion stating that, actually, the decision of the local court was an infringement of Article 6 (2).

In spite of the two opposed opinions, it seems that the decision of the ECHR could hardly be disputed and that an infringement of Article 6 (2) could occur only if statements as to the guilt of a person who is not a party in a criminal proceeding, are made without giving reason for that. Otherwise, it would be impossible to try defendants in those criminal proceedings (for instance, for the crime of criminal association) where, due to various reasons, not all accused could be tried (as the inability to try them *in absentia* or to notify some of the defendants about the start of the trial, or, because the investigation of some suspects has been completed, while for others it has been not). It would be necessary, though, to assess the responsibility of those suspects who are not subjects to trial, in order to make the decisions about the guilt of those defendants who are on trial. In the case of *Butkevicius*<sup>644</sup> the Chairman of the Lithuanian Parliament released a press statement saying that the Minister of Defence, who was just arrested in a hotel lobby after accepting an envelope full of US dollars, had taken a bribe and that he had no doubt the Minister was corrupt. The Court stated that these remarks amounted to statements made by a public official of the applicant’s guilt, which is a violation of Article 6 (2). More specifically, the Court recalled that the presumption of innocence enshrined in Article 6 (2) of the Convention is one of the elements of a fair criminal trial and that the above principle is violated by a statement of a public official concerning a person charged with a criminal offence, asserting that the above individual is guilty before being proven so by law. Although the impugned remarks of the Chairman were brief and made on separate occasions, in the Court’s opinion they amounted to declarations about the applicant’s guilt made by a public official, which could induce

<sup>644</sup> *Butkevicius v. Lithuania*, no. 48297/99, ECHR, 26.06.2002.

the public opinion into his guilt and could prejudice the assessment of the facts by the competent judicial authority. Therefore, in the above case, the Court confirmed its persistent jurisprudence that not only can the judges or courts infringe the presumption of innocence, but it could also be violated by public authorities.

In the case of *Mulosmani*<sup>645</sup> the Court made distinction between the statement of guilt made by official persons and private persons, or by official persons in the capacity of private individuals, specifying that only official statements can infringe Article 6 (2). In this case, a member of the Albanian Parliament and his two bodyguards were shot as they came out of the Democratic Party headquarters in Tirana. The MP and one bodyguard died the same day in hospital, whereas the second bodyguard was seriously injured. Immediately after the assassination, Mr. Sali Berisha, the then DP's chairman and a well-known public personality, went on air accusing the applicant of being the author of the crime.

An investigation was conducted against the applicant and the prosecutor asked for the applicant's arrest. The following passage of the request is striking: *"Subsequent to the murder, in a televised press conference, the Chairman of the Democratic Party mentioned the name of the accused Jaho Mulosmani as the perpetrator of the crime. This position was maintained in the press release issued by this [Democratic] Party in the days following the murder. This position ... gains credibility given the fact that the murder occurred close to the [DP's] headquarters and that the surrounding environment and bars were frequented by its own members and admirers"*<sup>646</sup>.

The prosecutor's request was granted and the applicant was finally arrested. Even the national court, in its decision on detention on remand, made reference to the statement given by Mr. Berisha: *"The accused's authorship of the crime was declared by the DP's chairman, Mr. Berisha, in a press statement on the very day, immediately after the murder. This position was maintained in the DP's press release, naming the accused Jaho Mulosmani as the perpetrator of the crime"*<sup>647</sup>. Due to these reasons, the applicant complained with the Court that Mr. Berisha's statement had deprived him of the benefit of the presumption of innocence under Article 6 (2) of the Convention.

As to the above case, the Court emphasized that presumption of innocence is violated when a public person's statement about the accused alludes that this person is guilty before his guilt has been legally proven. The Court specified further that the issue of whether a statement given by a public official is a violation of the principle of presumption of innocence must be dealt with the particular circumstances in which the impugned statement was made.

<sup>645</sup> *Mulosmani v. Albania*, no. 29864/03, ECHR, 08.01.2014.

<sup>646</sup> *Ibid.* § 27.

<sup>647</sup> *Ibid.* § 28.

As to the above case, the Court noted that Mr. Berisha's statement was made prior to the indictment against the applicant or prior to his situation being "substantially affected", even though it had surely impacted the proceedings, as it results from the prosecutor's application and the ruling of the national court. Notwithstanding that, the Court considered crucial that Mr. Berisha could not be regarded as having acted as a public official and that he was not involved in the criminal investigation into the MP's murder as a police officer, investigator or a prosecutor. He acted as a private individual, in his capacity as the chairman of a political party which was legally and financially independent from the State. His statement, which was made in a heated political climate, could be regarded as his party's condemnation of the MP's assassination. Therefore, according to the Court, in the present case, there was no breach of Article 6 (2) of the Convention.

On the other hand, the above reasoning appears to be disputable, since, despite what was stated in the judgment, the Court itself did not take in consideration the context of the declaration made by Mr. Berisha: in fact, even though he did not hold any official position, he was one of the most prominent persons in the country and the chairman of a powerful political party. His influence was so relevant that his declaration was quoted both by the prosecutor and the national court. So, despite the decision of the Court, it appears that in the present case there was an infringement of Article 6 (2) since the above statement could certainly influence the judicial authorities involved in the proceedings.

In the case of *Fatullayev*<sup>648</sup> the Court outlined a fundamental distinction between a statement which affirms that a person is only suspected of having committed a crime and an adamant statement, in the absence of a final conviction, that an individual has committed the crime. In this case, the applicant was the founder and editor-in-chief of newspapers published in the Azerbaijani and Russian language. The newspapers were widely known for frequently publishing articles which harshly criticised the government and various public officials. On 30 March 2007, one of these newspapers published an article written by the applicant, where he described the possible consequences of Azerbaijan's support for a "anti-Iranian" resolution of the United Nations Security Council, evoking the possibility that "*the Iranian long-range military air force, thousands of insane kamikaze terrorists and hundreds of Shahab-2 and Shahab-3 missiles*" struck some targets on the territory of Azerbaijan, targets which were analytically indicated in the story. Shortly after the publication of the article, the Prosecutor General made a statement to the press, noting that the above article had contained information which constituted a threat of terrorism and that a criminal investigation had been commenced against the applicant. As a consequence of the publication of the article, the

<sup>648</sup> *Fatullayev v. Azerbaijan*, no.54204/08, ECHR, 29.04.2015.

applicant was finally convicted of the crimes of threat of terrorism and of inciting ethnic hostility.

The Court reiterated that Article 6 (2), in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with the proceedings and that presumption of innocence does not only prohibit the premature expression by the tribunal itself of the opinion that the person “charged with a criminal offence” is guilty before he has been so proved according to law, but also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect is guilty and to prejudge the assessment of the facts by the competent judicial authority. Besides, the Court stressed that Article 6 (2) could not prevent the authorities from informing the public about criminal investigations in progress, but it required that they do so with all the discretion and circumspection necessary. However, it was specified by the Court that a fundamental distinction had to be made between a statements that someone is only suspected of having committed a crime and an adamant declaration, in the absence of a final conviction, that an individual has committed the crime. The Court emphasised the importance of the choice of words in the public officials’ statements before a person has been tried and found guilty: whether a statement made by a public official is a violation of the principle of the presumption of innocence must be determined on the particular circumstances in which the impugned statement was made; in the present case, the impugned statement was made by the Prosecutor General in an interview to the press, in a context independent of the criminal proceedings. The Court emphasized the fact that the applicant was a well-known journalist, which required from the State officials, including the Prosecutor General, to keep the public informed about the alleged crime and the ensuing criminal proceedings. However, these circumstances could not justify the absolute lack of caution in the choice of words used by officials in their statements. Furthermore, the statement at issue was made just a few days following the initiation of the criminal investigation – it is particularly important that in the initial stage, even before the applicant has been formally charged, public allegations which could be interpreted as confirmation of the applicant’s guilt should not be made as an opinion given by a senior public official.

The Prosecutor General’s statement unequivocally declared that the applicant’s article indeed contained a threat of terrorism and that “*this information constitutes a threat of terrorism*”. Given the high position held by the Prosecutor General, particular caution should have been exercised in the choice of words for describing the pending criminal proceedings. Therefore the Court considered that these specific remarks, made without any qualification or reservation, amounted to a declaration that the applicant had committed the criminal offence of threat of terrorism.

Thus, the above remarks could prejudice the assessment of the facts by the competent judicial authority and could encourage the public to believe the applicant guilty, before he had been proved guilty according to law: therefore the Court stated that in the present case there had been a violation of Article 6 (2) of the Convention.

In the case of *Neagoie*<sup>649</sup> the factual case concerned a statement made by the spokesperson of the Court of Appeal before the latter had conducted its deliberations, encouraging the public to consider the applicant guilty of – among other things – homicide. In particular, the spokesperson of the Court of Appeal had made the following statement to the press: *“the Court of Appeal is probably going to quash the county court judgment. I am assuming that the defendants will be found guilty”*.

The Court was aware of the importance of the case to the public (the case had aroused a great deal of interest in the media) and hence, the interest of the media in the proceedings. Nevertheless, the spokesperson of the Court of Appeal had not confined himself to releasing solely the information on the proceedings but had disclosed his personal opinion on Mr. Neagoie’s guilt. The Court emphasized that a distinction had to be drawn between a straightforward expression of suspicion about an individual and the public disclosure of a personal view concerning his guilt. The spokesperson of the Court of Appeal had not simply informed the media of the charges against Mr. Neagoie but had made his personal opinion regarding the guilt of the defendant public, thus encouraging the public to consider the applicant guilty. Finally, the Court pointed out that the fact that Mr. Neagoie was eventually found guilty had no impact on the right to presumption of innocence, which has to be respected until a judicial decision has been delivered. The Court specified that Article 6 (2) of the Convention governs criminal proceedings in their entirety, “irrespective of the outcome of the prosecution”. Therefore the Court stated that the applicant did not benefit from the requisite safeguards for a fair trial, that presumption of innocence had not been respected and that there had been a violation of Article 6 (2) of the Convention.

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<sup>649</sup> *Neagoie v. Romania*, no. 25319/08, ECHR, 21.10.2015.





