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In dubio pro reo – Limitation or Confirmation of the Necessity to Assume the Truth in Criminal Proceedings?[2]

Abstract: *The principle in dubio pro reo is one of the basic principles of the criminal procedure. Extensive time and effort invested in its analysis have not led to the elimination of concerns associated with it. Nevertheless, the fact that the principle in dubio pro reo is an important factor contributing to the significant improvement of the defendant's position in criminal proceedings is undeniable. For this reason, it represents an important qualitative shift in the position of the defendant as compared to the earlier periods of criminal trials. That is the reason why it deserves special attention and research effort. The object of the author's interest is the relation of the principle in dubio pro reo with the truth. More precisely, the author will closely examine whether the principle in dubio pro reo constitutes a restriction or, on the contrary, a confirmation of the necessity of establishing the truth in criminal procedure. The aim of this paper is to present and analyse theoretical perceptions about this relationship, but also to present and argue the author's perceptions on the subject matters.*

Keywords: *criminal procedure, truth, principle in dubio pro reo, defendant.*

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Introduction

In dubio pro reo is a principle of criminal procedure that is very complex and, in theory, has long raised doubts and disagreements. Some of these disagreements concern the legal nature and even the existence of the *in dubio pro reo* principle. They question whether *in dubio pro reo* is a rule or a principle of criminal proceedings, whether is it a standalone rule / principle or merely the consequence of other rules. There are also doubts about its relationship with the truth: whether it relates only to facts or to legal issues as well. It would be too ambitious to present all aspects of this principle because that would significantly exceed the scope of this paper. For this reason, we will explain the essence of this principle (without referring to specific normative solutions of any legislation) and then move on to consider its relationship with the truth. We consider this to be one of the more important aspects of the *in dubio pro reo* principle.

Consideration of the relationship between the *in dubio pro reo* principle and the truth will be based on the consideration of the temporal sequence (chronology) of events in criminal proceedings, but also on the cause and effect relationship, that is, the causality of events in criminal proceedings. Something like this should allow for a logical justification for the analysis of the subject of interest, on the one hand, but also for the conclusions we will draw from it, on the other.

During the research, the author used the theoretical method, analysis, synthesis, induction and deduction.

About the *In dubio pro reo* principle

The *in dubio pro reo* principle has very significant consequences in criminal proceedings, and this is particularly true of the defendant. Namely, this principle requires a judge in all cases where decisive (legally relevant) facts have not been established with a degree of certainty to exclude such facts. The same applies in the face of doubt about them: the judge always removes that doubt in favor of the defendant. We, therefore, hold that Grubiša correctly states that the question of the significance and scope of the *in dubio pro reo* rule is reduced to the question of how the court should proceed if specific facts that should be determined in the proceedings fail to achieve certainty, in other words, if such facts remain unproven and suspicious. The *in dubio pro reo* rule only guides judges on how to act when they find out that a fact remains doubtful to them or when it appears to them as possible (Grubiša, 1966: 315, 335).[3] The *in dubio pro reo* principle "only paraphrases the thought that a defendant should be released from the charge if his guilt is not fully (with certainty - cf. S.M.) proven, no matter what his suspicions charge" (Damaška, 1958: 109). If the prosecution fails to convince the court that the defendant committed an offence, the *in dubio pro reo* principle requests the court to find the defendant not guilty.[4] Fenyvesi points out that a fact can be attributed to the detriment of the defendant, only if it is proven without a doubt. If the court remains in doubt as to the fact that is the subject of proof and after exhausting all possibilities of proof, it must be valued in the court's decision in favor of the defendant (Fenyvesi et at., 2004: 82).

It is very important to note here that there are two possible situations in which the court and the defendant may find themselves. *First*, if there is a definite doubt concerning the facts that are to the detriment of the defendant, the court must consider that they have not been established. *Second*, if the court remains in irreconcilable doubt as to the facts that

[3] It should be noted that Grubiša uses the phrase "the *in dubio pro reo* rule". We will not, on this occasion, discuss whether it is the principle or the rule of criminal proceedings. We will use the term "principle", except when referring to other authors who may use the term "rule".
Writing about the problems involved in the necessary defense of Stratenwerth in a particular place, he states that "...the rule that lack of evidence works in the defendant's favor (*in dubio pro reo)* ..." (Stratenwerth, 1986: 733). We believe that the aforementioned *lack* of evidence, however, should be understood more broadly, and so it should be borne in mind that, in addition to the lack of evidence, it may exist in situations where evidence exists, but they are qualitatively and / or quantitatively ineligible to cast doubt on decisive facts. Here we also point to a very interesting thought, with which we fully agree, according to which – nothing prevails except proof, and presumption is not proof – see (Bradley, 1897: 185).

[4] See Abe, 1957: 259.

are to the benefit of the defendant, it must assume that they have been established.[5] [6]

Obviously, in both cases, the decision of the court regarding a decisive (legally relevant) fact, which cannot be determined with a degree of certainty, is in favor of the defendant. Factual doubt should be resolved in favor of the defendant – the rule accepted in modern legal systems (Damaška, 1973: 506). It is for these reasons that the principle contributes to equalizing the position of the parties' assessments. In other words, thanks to this principle, the defendant can make it much easier and more successful to parry, among other things, and perhaps most importantly, the public prosecutor, who is, *de facto*, a party with a significantly more

[5] At this point we consider it appropriate to point out the following: namely, in theory it is possible to find statements implying that the facts that support the defendant, and in respect of which there is doubt, must be taken *to exist*, and vice versa. This is essentially identical to the determination that the court must take the facts *as established*, and vice versa. In both cases, there are reasons for and against a particular fact, and neither group of reasons can eliminate the other. We believe that it is quite correct to use the term "established" as well as the term "existing". There are no essential differences between the two. The only difference is in the way (path) of coming to a statement of (in)certainty, that is (in)existence of facts. Such a situation may be the result of an evidentiary proceeding, on the one hand, or the result of the application of the *in dubio pro reo* principle, on the other.

[6] Even with regard to what is said, there are different understandings in theory. Namely, Vasiljević writes that the *in dubio pro reo* principle does not consist in the fact that, in case of doubt whether a fact stands to the detriment of the defendant, the court must assume that it does not stand. That would only be the application of a general rule of proof. The principle, in fact, is that the court, in case of doubt as to whether a fact stands *in favor* of the defendant, should take that fact as opposed to the general rule that the facts relevant to the judgment must be fully established (Vasiljević, 1971: 310).

On the other hand, Brkić, for example, points out that consistent application of the *in dubio pro reo* rule would be reduced to the following: all the facts that the accused is charged with must be established with certainty, and if this is not established, it is assumed that they do not exist. Conversely, all the facts in support of the accused, if a doubt arises that they may exist, and if that doubt cannot be ruled out with certainty, must be taken to exist (Brkić, 2012: 299).

We believe that it is not right to point out at the beginning of the presentation an opinion with which we do not agree, and we consider it completely wrong. Specifically, some authors point out that the *in dubio pro reo* principle applies both to facts and to legal issues (Bostedt, Dungel, 2008: 389). We wonder how the court can find itself in irresistible doubt about legal issues, when the rule that they are aware of the law applies, and there are rules regarding the interpretation of the law.

favourable position in criminal proceedings.[7] For this reason, Grubač believes that the *in dubio pro reo* principle, like any other institution of *favor defensionis*, is based on the principle of equality of procedural parties and the aspirations of the legislature and the court to remove from the defendant all harmful consequences that may occur, without complete certainty about conditions (Grubač, 2004: 300). Marković points out that in the criminal proceedings - because of the position of the defendant -there can be no equality of parties as present in civil proceedings, and the *in dubio pro reo* principle is the last means of remedying the position of the defendant (Marković, 1930: 247). Given this effect of the *in dubio pro reo* principle, there is, in theory, an understanding that this principle underlies the presumption of innocence.[8] This, however, is only partially true.[9] Specifically, this could be valid only if an acquittal was rendered. In the case of a conviction, when there is doubt concerning the circumstances on which, for example, the amount of the sentence depends, there can be no question of presumption of innocence.[10] The conviction unequivocally

[7] It should not be forgotten that the public prosecutor's office, as a state body, has behind him a state apparatus that significantly improves and facilitates its position in criminal proceedings. The defendant, on the other hand, lacks such "luxury".

[8] There is an inevitable link between the *in dubio pro reo* principle, the presumption of innocence and the burden of proof. Other authors also point to this (Anderson, 1992: 190; Giannoulopoulos, 2007: 199; Jong, Lent, 2016: 32).

[9] Knežević points out that the presumption of innocence and the *in dubio pro reo* rule are interconnected institutions that are important for achieving the defendant's procedural equality. However, to be satisfied with the statement that the *in dubio pro reo* rule is a consequence of the presumption of innocence, would mean to remain on the surface of the problem (Knežević, 2004: 733).

Grubiša points out that such a set-up would only look correct if the matter was viewed in a simplified manner, when deciding whether or not the defendant was guilty, whether he could be punished or not. He also notes that it is not certain that the setting could provide a solution for cases that are much more common in practice, and when it is not decided on a guilty-guilty plea, but on the question of the existence of certain facts that burden the defendant, such as a qualifying fact, the grounds for sentencing and others (Grubiša, 1963: 43).

Also, in the context of material burden of proof, Grubiša points to the inconsistency that exist in the theory in case when the question of the existence of facts that are outside of the framework of the established nature of the criminal offence arises, such as grounds for excluding illegality, grounds for excluding guilt, etc. – more on this in Grubiša, 1958: 435-436.

[10] Jekić points out that the presumption of innocence is a general characteristic of a defendant's personality and only acts as long as he or she possesses the capacity of a suspect, defendant or accused (Jekić, 1998: 155).

negates the presumption of innocence.[11] We believe that there is no obstacle to the *in dubio pro reo* rule being considered as a consequence of the presumption of innocence, in a criminal case ending in *an acquittal*(!). Logically, something like that would be a viable concept. However, it is also apparent that this would be the ultimate simplification of the essence of things.

On the Truth in Criminal Proceedings

Truth in criminal proceedings is a category that has long caught the attention of theorists. Much has been written about the truth. However, despite a great deal of research commitment, there are many contentious questions regarding the truth. Some of these are characteristics of the truth that can be established in criminal proceedings. In other words, is the truth material, formal, subjective, objective, absolute or relative? Is it at all possible to establish the truth in criminal proceedings? Can truth be considered as a principle of criminal procedure and perhaps even a supreme principle? All these are just some issues that, at this point, we will not even try to address. Such a thing would go beyond the scope of this paper, and any simplified presentation of such complex and significant issues would remain superficial, and therefore entirely unjustified.

In theory, there is no agreement as to the relationship between the *in dubio pro reo* principle and the truth. More specifically, it is debatable whether the said principle limits or even precludes the establishment of the truth in criminal proceedings.

Aristotle defines the very essence of the truth wonderfully and concisely. He writes: "... to say that a being is not or that it will not be is false; and to say that a being is, but will not be, is true..." (Aristotel, 2001: 257). This determination of the truth is sufficient for criminal proceedings. In other words, the truth is a coincidence of objective reality with our knowledge of it. So, to put it simply, we can speak the truth when what is a part of objective reality is unchanged in our consciousness as well. There is no discrepancy between occurrence, condition, event, etc., and

[11] A confirmation of our opinion in theory is found in (Grubač, 2009: 257).

their appearance in human consciousness, but coincidence. It is precisely because of this that Aćimović defines the truth conceptually as a valid judgment or an accurate statement, that is, a right attitude, which signals a psychological judgment or statement that is in agreement with the objective reality (Aćimović, 1971: 234-235). Truth is a valid judgment or a right attitude, that is, a judgment or attitude that has a mark of conformity with objective reality (Bajić, 1975: 15).

When it comes to criminal proceedings, decisions can only be based on facts of which the court is convinced.[12] This leads us to the conclusion that certainty is nothing more than a criminal name for the truth. So, to put it differently, but virtually the same - decisions can only be based on facts of which the court is convinced. Any doubt must be eliminated since the slightest hinders the attainment of certainty. Therefore, it stands out that, logically speaking, there is no valid conclusion when in doubt (Tapani, 1979: 152). Čubinski writes: "In the modern procedure, the principle is: *in dubio pro reo*. Consequently, a conviction requires the suspicion or even the likelihood that the defendant committed the crime and that no circumstances that preclude his guilt or punishment turn into certainty". It encourages the right of the state to punish the culprit (Čubinski, 1933: 477). The court aims to establish guilt beyond reasonable doubt based on the presented evidence during the proceedings (Davies et al., 2005: 278).

Vodinelić points out that certainty arises when all criminal and other scientific methods have been used, all necessary circumstances have been identified and investigated, all possible versions (including the defence's) have been examined, and thus the possibility of the opposite or otherwise is excluded (Vodinelić, 1975: 354). It is quite evident that the appearance of certainty is conditioned by serious and properly directed work and effort. However, all efforts (of course, provided they are not absent) will not always result in certainty. Sometimes, certainty will remain at the level of the ideal that is sought but not reached, while greater or lesser possibilities of the opposite or otherwise are an indispensable element of such process situations. Škulić points out that the available evidence may sometimes not be sufficient. Even the most ideal presentation of evidence

[12] Clearly, this requirement is one of the basic prerequisites for establishing the truth in a criminal proceeding and expressing it in the proper way through an appropriate judicial decision.

and the most up-to-date treatment of the court, as well as the use of the latest available evidence techniques, need not, in any case, be sufficient to remove any reasonable doubt in court (Škulić, 2013: 70).

The court then finds itself in a somewhat specific situation. This is because, on the one hand, it has to resolve the criminal matter, and on the other hand, it can base the decision solely on the facts of which it is certain. Also, the defendant must not suffer any adverse consequences of this situation - that is, the existing suspicion cannot be adversely affected.

The way out of this situation is in the results achieved by applying the *in dubio pro reo* principle. Therefore, any doubt must be resolved in favor of the defendant.

In doing so, the court considers that a particular fact is either established with certainty or not established, depending on whether it benefits the defendant or is to his detriment, although that fact is not de facto established with certainty.

This is precisely the segment of the *in dubio pro reo* principle that is of cardinal importance. It is its relationship with the truth. The fundamental question is, since, in the way described, this principle, by its effects, can allow the untruth to penetrate criminal proceedings,[13] does it constitute a restriction on the truth? This question is, in theory, controversial. We will deal with it in the sequel.

Relationship between the *in dubio pro reo* principle and the truth *General considerations*

The relationship between the *in dubio pro reo* principle and the truth is quite complicated. Analysing it requires knowing and understanding the substance of the criminal proceedings and its objectives. It is also necessary to know the sequence of activities in criminal proceedings and the cause-and-effect relationships of those activities. This is precisely what

[13] Namely, when a court is in doubt, the result of acting in an *in dubio pro reo* principle need not be based on truth. The problem is that this cannot be verified, otherwise the doubt would have been eliminated "on a regular basis", and it is quite clear that there would be no need to activate the *in dubio pro reo* principle then. However, we do not consider the *in dubio pro reo* principle as such a limitation of truth. Why this is the case will be explained below.

will be the primary criteria for analysing the relationship between the *in dubio pro reo* principle and the truth, all because the chronology and causality of events are verifiable, and thus certain. Besides, the chronology and causality of events (occurrences), without exception, reflect the relationship between events (occurrences).[14] We also believe that for a proper and complete understanding of the substance of the issue, it is not necessary to bear in mind the nature and character of the reasons that give rise to the *in dubio pro reo* principle.

The fundamental question that will be answered in the following sections is: is the *in dubio pro principle* a restriction on the establishment of the truth in criminal proceedings or, on the contrary, an affirmation of the necessity of establishing the truth?

Timeline of criminal proceedings and their cause and effect relationship

The criminal process is a very complex mechanism, whose components (stages, phases, process actions, etc.) are in close interconnections. This means that each of these components must have its own time dimension and a well-defined relationship with other elements in terms of time. In other words, the timing of each criminal proceeding must be clearly and unambiguously determined. Thus, for example, it is not possible to file a remedy before a decision can be made that can be the subject of a rebuttal of that remedy; it is not possible to reach a judgment unless the decisive facts have been established.

This leads us to the conclusion that, in order to properly grasp the relationship between the *in dubio pro reo* principle and the truth, it must be borne in mind that the activation of the principle was preceded by the inability to remove doubts as to decisive facts. This further implies that the activities of the court and the parties were not sufficient and / or

[14] Šušnjić points out that "... science does not pay attention to phenomena as much as relations between them, because all that matters is the relationship ..." (Šušnjić, 2007:53).
That is the reason why we have not been exhaustive in explaining the principle and truth in criminal proceedings – we have been so only to the extent necessary because the focus of this paper is on the relationship between the *in dubio pro reo* principle and the truth.

appropriate to (formally and/or factually) remove doubt as to the decisive facts. This state of affairs essentially determines the further sequence of events (activities) in criminal proceedings, that is, the inability mentioned is *the cause*[15] of the activation of the *in dubio pro reo* principle. Essentially, the timeline of events is at the root of their causal relationship. This is because the cause of a particular phenomenon must always precede that phenomenon, which can then only occur as a consequence.[16] This is another reason why we do not consider the *in dubio pro reo* principle a limitation of the truth. On the contrary, it would practically (unfoundedly) challenge the completely indisputable relationship between cause and effect. They do not seem to us to be viable opinions from which, directly or indirectly, it follows that a consequence causes a cause. Šušnjić thus emphasizes that the consequence arises from the cause, which means that it follows in time; the next occurrence cannot be the cause of the earlier one. Cause and effect cannot occur at the same moment. If there was no time gap, then a cause and an effect would not be distinguishable, and then the principle of causality would be pointless (Šušnjić, 2007: 86).

One of the certainly pressing questions regarding this principle of criminal procedural law is: does the *in dubio pro reo* principle represent a limitation to establishing the truth? All perceptions on the subject matter could be classified into two broad groups.

Thus, some authors (Zlatić, Grubiša) consider the *in dubio pro reo* principle as a restriction of the truth. They are generally based on a formal evidentiary rule that is contrary to the principle of a free trial, but also that the fact is taken as established even though it is not established at the

[15] Here we must point to the following. Namely, the cause must be distinguished from the reason. Both cause and reason precede a particular event, but they are by no means essentially the same category. The cause is a certain condition, occurrence, event, and the like, which, in any case, is preceded by the consequences. The reason, however, is just a "drop that overflowed the glass", which essentially has its base in the cause. Accordingly, the cause for applying the *in dubio pro reo* principle are the circumstances which make it impossible to establish the truth in criminal proceedings (more on them under a separate heading). The reasons for applying the *in dubio pro reo* principle are not the circumstances that lead to the inability to ascertain the truth, but the statement of the existence of the inability to remove doubt as to the decisive facts, that is, the statement of the existence of an unquestionable doubt regarding those facts.

[16] Admittedly, this may be easier to notice in the natural sciences (for example, through the “action-reaction” relationship), but it is also fully applicable here.

main trial with complete certainty (Lazin, 1985: 61-62).[17] According to Davidov, the *in dubio pro reo* rule constituted a restriction on finding the truth in mixed criminal proceedings. The broader relationship between the *in dubio pro reo* rule and the principles of the truth is contained in the question of whether the epilogue of the evidentiary procedure (decision) is a true reflection of reality. In this sense, the *in dubio pro reo* principle undoubtedly appears as a limitation of the principle of the truth. This is because the consistent application of this rule implies that the facts that are to the benefit of the defendant, if they appear as possible, are presumed to exist (i.e. established). These facts, while not obsolete, are based on the application of the law, just as if they were obsolete. Isn't this a restriction on the full, actual truth? (Davidov, 2017: 76-77). Interestingly, Davidov points out only the facts that benefit the defendant, but not the ones that harm him.

We believe that such understandings are problematic. This is because they overlook the chronology of criminal activity as well as the causal link between these activities.

Another group of authors, however, believes that the *in dubio pro reo* principle is not an obstacle to establishing the truth. Thus, Lazin indicates that the court must resolve the doubt and has two options. Either they will assume that the fact exists or that it does not exist. In this case, both solutions can be questioned based on whether they correspond to the truth, but, logically, neither of these two solutions can be said to be contrary to the truth because the truth could not be ascertained. This is because, concerning the relevant fact (doubtful fact), the truth has not been established, since the existence of that fact has been established with certainty. Thus, it is impossible to determine whether a conclusion made by applying the *in dubio pro reo* rule is contrary to the truth or not (Lazin, 1985; 62-63). Josipović emphasizes that the logically unsustainable thesis is that it is a form that departs from the principle of the search for real truth (Josipović, 1983: 64).

[17] It should be noted that "full certainty" is emphasized. This, we believe, could very easily indicate the existence of some partial certainties. We do not think it is possible to increase certainty. For this reason, such formulations should be avoided. Vodinelić points out that the notion of certainty can only be unambiguous, absolute and unique (Vodinelić, 1975: 356).

This presentation aims to develop an idea regarding the state of affairs in theory concerning the subject matter in question. It does not aim to present the understandings of all possible authors and the reasons that gave rise to such understandings. We believe that this is not necessary for us on this occasion, and especially if we set the criteria for analysing the subject of interest of this paper as we did in the previous text.

The reasons for the necessity of applying the **in dubio pro reo** *principle*

In order to properly understand the relationship between the truth and the *in dubio pro reo* principle, we believe it is necessary to bear in mind the essence of the reasons that give rise to the application of the *in dubio pro reo* principle.

We believe that the reasons for the inability to establish the truth in criminal proceedings can be both subjective and objective.[18] Essentially, Deyong points out that the purpose of proof is to establish the truth. However, not every evidentiary activity can achieve the stated goal because of different subjective and objective reasons (Deyong, 2013: 13).

Subjective reasons are reflected in the errors and abuses committed by subjects whose activities have some connection with criminal proceedings, which are undertaken in criminal proceedings or before its commencement (for example, these may be the activities of a court, a prosecutor, a defendant, the police, an expert witness, witnesses). Mistakes can be due to ignorance, unintentional omission, overlook, and the like. However, it should be borne in mind that, when it comes to abuse, there can be no mention of error. In that case, a planned action, of course, should not be permitted.[19]

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[18] For more on the same position see Moravac, 2018: 133-135.

[19] We will illustrate this with an interesting case study. Kovač presents a case claiming that suspects were beaten severely by police to sign confessions. One of the officers struck a suspect with a thick volume of the Criminal Code to make it clear that everything was lawful and that there should be no superfluous illusions (Kovač, 2000, 122). In this case, the apparent abuse of the police, which is reflected in the unlawful conduct, leads to serious procedural consequences (sanctions). This further means that the confession cannot be used as evidence even if it is quite obvious that the suspects committed the crime they are charged with.

This group of reasons should result in the application of specific provisions such as, for example, provisions on unlawful (legally invalid) evidence. In such cases, the doubt as to why to decide in favor of the defendant can be only formal. This means that, in fact, there can be undoubtful facts, but they cannot be expressed legally. This is because the fundamental procedural sanction of the provisions on unlawful evidence is reflected in the necessity to exclude such evidence, i.e. the impossibility of using it, regardless of its importance in the particular case.

*Objectiv*e reasons, in our understanding, are reflected in the quality and quantity of the factual composition of a particular case. They are also reflected in the passage of time. The factual composition of a particular case is nothing more than a set of sources of knowledge based on which the court has to decide. that is, to reach a degree of certainty. Quantity and quality of the content of the factual set are categories that vary considerably and depend on the type of crime. This means that the most important thing for us here is the fact that the factual set of different crimes is very different. It is not the same if we talk about murder, counterfeiting or computer fraud. All offenses are objectively different in the scope and quality of the leads and the available evidence. What is also important is the level of development of criminalistics and the sciences associated with it. This is because, directly or indirectly, they enable the detection of clues and the exploitation of their probative potential.[20]

Another objective factor that is inevitable is the passage of time.[21] Over time, the traces fade and disappear, and their detection and transformation into evidence become much more difficult and often impossible. Therefore, time in this context has an inevitably destructive impact. Therefore, the famous criminalist E. Locard points out that "the time that passes is the truth that escapes us".

It is necessary to notice the inevitable and close correlation between subjective and objective factors, which is, above all, reflected in the cause

[20] Taking into account the constant and rapid development of criminalistics and other related sciences, we can conclude that the reach of objective reasons, in this part, is significantly reduced on a daily basis.

[21] It is not said without reason that time always works for the offender. Also, one should not forget that one of the basic principles of criminalistics is *the principle of operability and speed*.

and effect relationship. We will clarify this with a simple example. Let us take as an example the (non)professionalism in conducting investigations. It is inevitably a subjective factor, and omissions in this regard can be the result of error or abuse (of course, a combination of the two is possible). Even the most professional investigation can result in a qualitatively and quantitatively weak factual basis for a particular case. In this case, it is an objective reason, which is reflected in the consequences of the crime's phenomenological characteristics. On the other hand, for crimes that have a lot of evidence, the problem can be reflected in unprofessional and belated investigation, which is nothing but a subjective factor. In this case, the phenomenological characteristics of the crime need not appear as a problem.

We conclude that subjective reasons do not have to, and we believe that very often, they will not prevent the factual (informal) establishment of the truth, but it will undoubtedly preclude its legal (formal) expression and affirmation. So, if we simplify things completely, we can say that, in this case, it is quite clear what happened and who is to blame, but a court decision cannot legally express this.

On the other hand, objective reasons preclude factual ones, which inevitably means that they also preclude the legal establishment of the truth.

Thus, although both subjective and objective reasons may lead to the activation of the essence of the *in dubio pro reo* principle, the inability to establish the truth is considered purely for objective reasons. Subjective reasons for this have only the inability to ascertain the truth in a legal sense, not because it is not objectively possible, but because certain subjects, through their actions, have "missed" the chance to actually do so.

Our view of the relationship between the **in dubio pro reo** ***principle and the truth***

The result of an evidentiary proceeding may be to remove any doubt as to the decisive facts. That would be one ideal state of affairs. However, such a situation is not without exception in practice. In other words, it is possible that even after a comprehensive and careful engagement by the court and the parties concerning specific decisive facts, the court remains in unwavering doubt. Then there is room for the application of the *in dubio pro reo* principle, and there is nothing in dispute.

We believe that the *in dubio pro reo* principle is not a restriction on the truth, but rather a restriction on the reasons discussed above. These reasons are the cause of the inability to reach the degree of conviction necessary to reach a judgment, which is a certainty.

We draw this conclusion based on the consideration of the time course of events, their cause and effect relationships, and the basic rules of logic.

The *in dubio pro reo* principle teaches us that in the event of clear doubt, the court must decide in favor of the defendant. Therefore, it is only if the doubt is not resolved that the court has to act per the *in dubio pro reo* principle. This, in theory, is not in dispute, and we would say that, based on the conceptual definition of a principle, a proper conclusion can be drawn about its relation to the truth in criminal proceedings. We are also convinced that this can be done without much effort.

However, we also find that this principle constitutes a restriction on the truth. This is somewhat surprising to us. This leads us to ask ourselves: what is the cause, what is the consequence, and what is next in time? If we answer this question correctly, we have resolved the "problem" correctly. We have already indicated that it is evident that the *in dubio pro reo* principle can only be activated when doubts about decisive facts cannot otherwise be eliminated. Thus, the *in dubio pro reo* principle is due to the state of inability to remove doubt. The court will only act per the *in dubio pro reo* principle when the state of the existence of a persistent doubt is established. This inevitably means that the application of the *in dubio pro reo* principle, chronologically speaking, comes only after it is established that the court is in irrepressible doubt as to the decisive facts. How then can the *in dubio pro reo* principle be a restriction on the truth? We believe that this is not logically viable. It is only logical for this principle to be a consequence of the procedural situation of the inability to remove doubt in relation to decisive facts.

Lazin realizes that "…the court did not make a decision more favourable to the defendant under the *in dubio pro reo* rule, but such a decision was a logical consequence of the fact that the court failed to establish the truth (obtains a degree of belief that fits certainty – cf. S. M.) neither in terms of existence nor in the absence of a fact…" (Lazin, 1985:

45). We believe that it was said to be accurate, and we agree. The court did not rule on the *in dubio pro reo* principle. This principle only indicated to the court how it must remove the doubt, thus creating the conditions for a court decision.[22] In other words, the *in dubio pro reo* principle enables the necessary degree of quality of the factual substrate on which a judicial decision can be based.

We will also point to Bayer's opinion here. Specifically, Bayer writes that if a court were to doubt that there was a legally relevant fact, if it believed it existed and made a judgment that would be appropriate to that fact, if it were indeed established, such a judgment would not be logically based because the court neglected that a doubtful fact maybe does not really exist. If, however, the court believed that the relevant doubtful fact did not exist and made the appropriate judgment – it would neglect the possibility that it might still exist (Bayer, 1986: 36). Grubač indicates that the *in dubio pro reo* rule is contrary to logic because it is assumed that what has not been proven is proven (Grubač, 1996: 92). We fully agree with these claims. In this sense, the *in dubio pro reo* principle cannot boast of logical foundation. However, on the other hand, we do not consider that this could serve as an argument to defend the thesis that the *in dubio pro reo* principle would constitute a restriction on the truth.[23] This only indicates to us that it is a qualitative defect in the result obtained by the application of the aforementioned principle, which is ultimately a consequence of the inability to ascertain the truth. In other words, it only tells us that even the *in dubio pro reo* principle is not "almighty" and without restriction, which is quite natural and acceptable. [24] This is why the *in dubio pro reo* principle is not the best choice, but indeed the only possible (only suitable) choice (Deyong, 2013:14). In a sense, too, Epps points to this by stating that the *in dubio pro reo* principle seems to require

[22] The court decision is based on the factual (objective reality) of the particular case, and the *in dubio pro reo* principle is "just" a method for completing, that is, creating a factual set suitable for reaching a court decision.

[23] We point out that Bayer and Grubač do not do that in the texts we used!

[24] Neither the free evaluations of the evidence, nor the free trial conviction are perfect, nor can we therefore easily address the same complaints. We also find the opinion that judicial freedom is limited by two principles – *in dubio pro reo* and the presumption of innocence – see (Jackson, Kovalev, 2006: 112).

a compromise between the release of many culprits and the rescue of the few innocent ones (Epps, 2015: 1078).

After all that has been said, it should also be pointed out that the *in dubio pro reo* principle is not a manifestation of unjustified favouring the defendant, as one might conclude through an extremely superficial observation of this issue. On the contrary, the *in dubio pro reo* principle is a legal expression of the necessity of protecting a defendant in the event of the imperfection of the factual substrate of a particular case. There is nothing unjust in that, but rather an expression of the fundamental civilization achievements. According to Bayer, the general tendency to favor a defendant in all doubtful cases cannot be understood differently from one of the consequences of the general humane tendency to mitigate the blade of criminal law (substantive and procedural, and the right to enforce criminal sanctions), which is evident in many countries and areas (Bayer, 1986: 42).

The* in dubio pro reo *principle as confirmation of the need to establish the truth in criminal proceedings

From our previous statements, an attentive reader might at least be aware of our position on the relationship between the *in dubio pro reo* principle and the truth. Namely, in our view, the *in dubio pro reo* principle is a confirmation of the necessity of establishing the truth.

The *in dubio pro reo* principle testifies about the importance of the truth and the necessity of basing a decision on the truth. This is so significant that the last doubt must be eliminated. In this sense, the *in dubio pro reo* principle precludes a court decision from being based on facts of which the court is not convinced. It represents a kind of barrier to the penetration of possible, but not inconceivable, arbitrariness in criminal proceedings. For this reason, the *in dubio pro reo* principle is not a restriction of the truth, but rather a confirmation of the necessity of establishing the truth. If the truth cannot be established in the course of the proceedings, the *in dubio pro reo* principle enters the scene, indicating that the doubt will be eliminated. It is quite obvious that this will not be arbitrarily, but always in favor of the defendant. The *in dubio pro reo* principle, its essence and the consequences of its application, underlie the importance of the truth. It is also based on fairness. This is because it always benefits the defendant as a procedural party, which, *de facto*, has a worse procedural position over the opposing party – the authorized prosecutor (especially the public prosecutor).[25] In other words, the defendant must not suffer any adverse consequences for any reason that may trigger the *in dubio pro reo* principle. If the criminal authorities cannot authentically prove the reality of a suspicious fact, then the circumstance cannot be attributed to the accused. Such doubts should be used to support the defendant (Vigh, 2000-2001: 144). We think that it is quite sure that the opposite would inevitably constitute an unjustified aggravation of the defendant's position since, theoretically speaking, for example, it would be sufficient for the authorized prosecutor to merely dispute the defendant's defence (thus, preventing a certain degree of certainty from being attained) and the court to decide to the detriment of the defendant. That is why it is always in the defendant's favor. To put it simply, if doubt cannot be resolved and certainty (truth) established, this must not be a reason for the defendant to suffer the consequences.[26] It would be, in a significant degree, contrary to the aspiration of establishing equality of arms of the procedural parties,[27] but also to the universal requirements and understanding of

[25] "The procedural benefits, which inevitably have a bearing role of the public prosecutor in criminal proceedings, are compensated by various procedural concessions to the defendant (*favores defensionis*)" (Živanović, 1941: 126).

[26] The police, the attorney general (especially the public prosecutor), and ultimately the state itself, have ample opportunity to ascertain the truth (unless it is an extreme case). If they fail to do so, it is inevitably a serious problem, but it must not be a problem that will have legal consequences for the defendant.

[27] It should be noted that, as already stated, the aim is to establish equality of arms of the process parties. We are firmly convinced that it is a "mere" pursuit that can never result in equality of arms. The process parties might eventually be formally equal (though this is highly debatable), but in fact, there will always be lesser or greater inequality. This inevitably stems from the very substance and structure of the criminal procedure. Essentially, Bajović is of the same opinion. She points out that it is also clear to the lay observer that parties in criminal proceedings cannot, by the nature of things, be equal to those of litigants. This is because in criminal proceedings the "dispute" is actually conducted between a state whose interests are represented by a public prosecutor with all the machinery of repressive organs on his side and a natural person, i.e. a defendant, who in some cases does not even have a lawyer (Bajović, 2015: 110). In this sense it is also emphasized that it is a matter of procedural fairness to place the burden of proving the defendant's guilt on the prosecutor (public). This is because it has significant capabilities at its disposal over the defendant (Hannibal, Mountford, 2002: 211). Also, the above has to be done with regard to all the elements of the offense that the defendant is charged with (Carlson, 1985: 175-176).

justice and fairness.[28] It would also mean that an individual, by acquiring a defendant's position, was *a priori* placed in a position which, even with minimal involvement of the opposing party, could lead to his or her defence becoming impaired. Simply put, the criminal procedure would thus be reduced to triviality.

This tells us best how important the truth is (or at least should be) in criminal proceedings. At this point, we consider it expedient to summarize our understanding of the essence of this issue. This is because, from the above stated, it could, directly or indirectly, follow that the *in dubio pro reo* principle could definitively, without a doubt, lead to the penetration of falsehood in criminal proceedings. We do not intend to dispute this. However, we have clearly stated and clarified the substance of the reasons we consider to be a restriction on the truth. We have also stated that the *in dubio pro reo* principle is a logical consequence of these reasons, and is not in itself a restriction on the truth! This should eliminate the space for possible objections that one might find appropriate. Also, since doubt cannot always be eliminated, which means that the truth cannot be established with respect to decisive facts, is it logical to claim that the *in dubio pro reo* principle is the restriction of the truth? There would be no logic in that. In order to be able to state that something is a limitation of the truth, we must first know what is true in a particular case. It is only after that that we consider and analyse the two categories, and then determine whether something is a limitation of the truth. Only in this way can we come to the right conclusion.

Writing about the *in dubio pro reo* principle, Grubiša states the following: “This principle, as a postulate of sound logic and practical reason, based on the limitations of human knowledge and the imperfection of its sources and means of knowing, is a reliable guide to the judge on the difficult and responsible path of discovering the truth of facts” (Grubiša, 1966: 316). Therefore, we posit the *in dubio pro reo* principle is based on the limitations of human knowledge, its sources and its means. In other words, it is a consequence of the imperfections and limitations mentioned above. Therefore, we think that it is only logical to consider these limitations and imperfections as limitations of the truth. Also, if the *in dubio pro reo* principle is a reliable guide for a judge on the path to discovering the truth

[28] It means – both procedural justice and fairness.

of the facts, which means that it serves the purpose of establishing the truth in a criminal proceeding, we do not think it would be logical to consider it as a limitation of the truth. Something like that would be contradictory.[29]

Conclusion

The *in dubio pro reo* principle, in all its aspects, has long attracted the attention of theoreticians, and we are quite sure that it will be so in the future. One of the critical aspects of this principle is its relationship with the truth. One could ask whether the *in dubio pro reo* principle constitutes a restriction on the establishment of the truth in criminal proceedings. As we explained, the opinions on this are divided. Our opinion on the issue at hand is quite clear. We believe that the *in dubio pro reo* principle does not constitute a restriction of the truth in criminal proceedings, but that, on the contrary, it is a confirmation of the necessity of establishing the truth in criminal proceedings. We have drawn such a conclusion based on a consideration of the chronology of activities in criminal proceedings, the cause and effect relationship of those activities, and the basic rules of logic. We believe that it is only in this way that the relationships among phenomena can be viewed correctly, and then the proper conclusions can be drawn. Only in this way can the "problem" of concrete research be adequately addressed.

We have outlined and explained the reasons that may trigger the *in dubio pro reo* principle. This is especially important for noticing and understanding the causal relationship between them and the *in dubio pro reo* principle. Also, a proper understanding of this relationship is a basic premise for grasping the relationship between the *in dubio pro reo* principle and the truth. All our presentations were dedicated to this end.

In the process of the evolution of the defendant's procedural position in criminal proceedings, the *in dubio pro reo* principle has also played an important role. The restrictive nature of the scope of the defendant's rights

[29] This is one of the reasons why Grubiša's understanding is particularly interesting to us. Namely, Grubiša believes that the *in dubio pro reo* principle is a restriction on knowing the truth in criminal proceedings see (Lazin, 1985: 62). However, we are of the opinion that the above quotation does the exact opposite.

has been considerably reduced by the *in dubio pro reo* principle. Therefore, it appears that the *in dubio pro reo* rule originates from the legal evaluation of the evidence and the spiritual mood that governed the defendant in the mid-9th century: pity and mercy without real help (Vasiljević, Grubač, 1982: 552). Some authors go a step further, pointing out that, historically – the roots go much further, even as far back as the 13th century, because continental judges, applying the theological doctrine to criminal law, developed the *in dubio pro reo* rule (Johnson, 2016: 241). Some, however, emphasize that the *in dubio pro reo* principle is of such importance that it is a fundamental principle of the legal process and must take precedence (Smith, 2007: 502). It also points out that, even when the subject of criminal proceedings is the most severe crime, the rule of law and their judiciary does not allow the action of "direct courts", nor do they allow conviction without proven guilt. In criminal proceedings characterized by the rule of law, the *in dubio pro reo* principle applies. Therefore, if, after all available evidence has been adduced, the court remains only in doubt as to the guilt of the defendant and does not gain a firm conviction having committed the crime charged against him renders a verdict in favor of the defendant and acquits him of the charge (Škulić, Bugarski, 2015: 120). Therefore, the *in dubio pro reo* principle inevitably represents a significant form of protection for the defendant, which is to prevent the deterioration of his or her position without sufficient reason and is based on fundamental legal and social values that are entirely undisputed and represent significant civilizational acquits. We may also ask ourselves: "is our greatest fear that an innocent person might be wrongly convicted, or that the guilty might go free?" (Brandon, 2016: 179). This question is always topical, and we think it fits in well with the thinking behind the *in dubio pro reo* principle.

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In Dubio Pro Reo – ograničenje ili potvrda neophodnosti utvrđivanja istine u krivičnom postupku?

Apstrakt: *Načelo in dubio pro reo jedno je od osnovnih načela krivičnog postupka. Dug period i izraziti napori koji karakterišu njegovo analiziranje, nisu doveli do otklanjanja nedoumica koje su vezane za njega. Ipak, nesporna je činjenica da je načelo in dubio pro reo važan činilac znatnog poboljšanja položaja okrivljenog u krivičnom postupku. Iz tog razloga ono predstavlja važan kvalitativni pomak u procesnom položaju okrivljenog u odnosu na ranije periode krivičnog sudovanja. Upravo zbog toga zaslužuje posebnu pažnju i istraživački napor. Predmet interesovanja autora jeste odnos načela in dubio pro reo sa istinom. Preciznije rečeno, autor će detaljno sagledati da li načelo in dubio pro reo predstavlja ograničenje ili, upravo suprotno, potvrdu neophodnosti utvrđivanja istine u krivičnom postupku. Cilj ovog rada je da prikaže i analizira teorijska shvatanja o tom odnosu, ali i da prikaže i argumentuje shvatanja autora o predmetnim pitanjima.*

Ključne reči: *krivični postupak, istina, načelo in dubio pro reo, okrivljeni.*