Chapter 7
A Comparative Approach to the Evaluation of Evidence from a 'Fair Trial' Perspective

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7.1 Introduction

Criminal procedures at Hungarian courts are often criticised for being too reliant on the case of the prosecution. This excessive reliance manifests itself in a mere formal judicial consideration of the evidence presented that results in convictions based on few and nonconclusive evidence. This problem is characteristic of a number of jurisdictions in Eastern Europe not just Hungary; it is feasible to study the phenomenon from a comparative perspective. The objective of this chapter is not to provide a comprehensive and systematic overview on evidence rules and practices of the countries concerned but to substantiate a connection between the political background of a legal system and the fair judicial evaluation of evidence as a professional issue.

7.2 The Relationship Between the Evaluation of Evidence and the Enforcement of a Fair Trial

It is an interesting phenomenon that in literature concerning the requirements of a fair procedure, different authors favour focusing on those requirements of 'fairness' which can be clearly described and the application of which can be relatively accurately measured (e.g. adequate defence, right to silence, length of procedures).

Of course, each requirement is equally important, but even in spite of methodological difficulties, we cannot ignore the analysis of those elements of a fair

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procedure that are present only as general norms at the level of positive law and the prevalence of which significantly depends on the perceptions of actors in the administration of justice.

The greatest stake in the criminal procedure is what facts are established by the court. Other drivers of a fair procedure are also important (independence and impartiality of the courts, right to appeal, effective defence), because they indirectly ensure that the evidentiary procedure will be fair towards the accused. If we consider these guarantees fundamental, then we must particularly focus on the 'core' of the evidentiary procedure: the problem of assessment and evaluation. In criminal procedures, one such requirement of a fair procedure is that evidence is assessed in such a way that is reasonable and in accordance with the interests of society while at the same time is fair towards the accused as well. A procedure in which the evaluation of evidence by the court is one sided, or in which guilt was determined based on very few or only distant evidence, would be difficult to call fair.

In criminal procedures, however, evaluation of evidence is the area in which the calibration of exact standards is the most difficult. Any criticism can be easily fended off based on the principle of free evaluation of evidence: evidence has no predetermined binding power and can become either compelling or unimportant based on the circumstances of the given case or in some instances, even based on formally unexaminable 'judicial wisdom'. Perhaps these difficulties motivated the European Court of Human Rights in the Monnel and Morris case to state the following: in the cases brought before the court, only the fairness of the procedure is examined, and its examination does not extend to determining whether the competent bodies made legal or factual mistakes.[1] However, these contradictions cannot give reason for us to not attempt to find solutions and rational models which, while minimising limitations on freedom of evaluation, are capable of ensuring the fair evaluation of evidence to the greatest extent. Otherwise, we can easily face worrying developments like in Hungary where, for example, according to a Supreme Court decision, a witness testimony in itself – without any further evidence – is enough to make a conviction.[2]

By present day, in the development of Western criminal procedure law, fundamental regulations have been established to specifically serve fairness in the evidentiary procedure. These are uniquely interrelated, and their coincided and simultaneous application ensures fairness in the evidentiary procedure.

In evidentiary procedures, when reasonable, legally obtained evidence must be examined by the court directly. The court can freely evaluate evidence but has an obligation to account for in its justification why specific facts were established, and, in connection to this, why certain evidence was either used or thrown out. If after the assessment process, the existence of a fact remains doubtful, the court must apply the *in dubio pro reo* rule (giving the benefit of doubt to the accused) and take this into consideration in concluding the verdict.

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[1]Monnel and Morris Affair, Decision of 2 March 1987, A series, volume 115.

[2]BH 1987. 391.

It can thus be concluded that in the evaluation of evidence, the discretionary freedom of judges does not fully determine which statement of facts is accepted as the basis for the verdict: freedom of evaluation is not equivalent to reliance on judicial intuition. The remaining rules of evidence place reasonable limits on discretion, primarily the obligation to reason and the *in dubio pro reo* rule. During the comparative analysis, I sought to answer how the opportunity of free evaluation of evidence can be reconciled with other rules that ensure fair consideration.

7.3 Methodological Questions

In the search for solutions to fair evaluation of evidence, the comparison of laws undoubtedly plays an important role – but such analyses presume we already have some sort of preliminary assumption of which legal systems could serve as an appropriate model for us. Since the purpose of criminal procedural fairness is to guarantee citizens' rights are protected against the state power, the requirement of a fair procedure can be evaluated as a political expectation. According to Károly Bárd, a fair trial serves to prevent, and maybe even expose, the forces and processes working against democracy and to fend off the possible consequences of such a verdict. His stance on the relationship between the rule of law and fair trial is clear: 'A criminal conviction is the most serious interference with the individual's sphere of freedom. This is why it is commonplace to state that the treatment of the accused in a criminal case is the best indication of the general state of human rights in a given society, because this is where collective and individual interests directly collide' (Bárd 2003: 72–73).

With regard to this, I attempted to ensure that the comparison does not only consider legal technicalities but also accounts for the differences in political structures. So, instead of the traditional practice of contrasting common law and continental law, in my comparison, I focused on including both older (United States, England) and newer (e.g. Germany, Italy, France) solid democracies under the rule of law, systems that have undergone democratic revolution in the past two decades – but remain politically unstable (e.g. Poland, Hungary) – as well as centralised countries, in which less limitations are placed on the power of the state (Russia, Azerbaijan, China). The comparison of common law and continental legal systems only plays a role to the extent when differences in the criminal procedure systems are reflected in different approaches applied in different legal systems, in terms of the position of the accused person.

Throughout my comparison, I took into account how at the level of written law the evidence standard is defined in each legal system and how each guarantees the fair nature of the evaluation of evidence. However, I considered it more important to analyse what types of practices developed in reality in each legal system. Lessons from legal history have demonstrated that similar legal texts in different political atmospheres can have very different roles in legal reality. In accordance with this assumption, I used primarily secondary sources that evaluated the practices of the legal systems analysed.

7.4 Results of the Comparative Analysis

7.4.1 The Standard of Proof Required for Conviction

In this area, the differences in common law and continental legal systems are clearly apparent. However, the differences are not based on the varying legal characteristics of the two systems (precedent versus 'code law') but on historical traditions and political-philosophical principles justifying legal practice. The first observable difference is manifested in that in common law countries, the standard of proof varies depending on the type of case given. In Anglo-Saxon systems, fundamentally different standards are applied in criminal versus civil procedures, whereas in continental law, the differences are much more uncertain (Kengyel 2005). In civil cases in common law systems, the standard of proof requires that the evidence supporting the plaintiff's claims must be more substantive (preponderance standard). This means that it is more likely than not that the facts the plaintiff claims occurred (Clermont 2009: 469). In criminal procedures, the standard of proof is much higher. As the court held in Lego v. Twomey, a fact can only be evaluated against the accused if its existence is proven beyond reasonable doubt.[3] In contrast, in continental legal systems, the goal in criminal proceedings is to reach 'absolute certainty', while in civil cases, only very few cases require a level less than 'bordering on certainty' (Kengyel 2005).

Second, in common law countries, lawyers in criminal cases do not seek reaching absolute certainty but are satisfied with a level of probability in which reasonable doubt has no place. In continental law, facts proven beyond *any* doubt are evaluated, based on which – according to the doctrine – the judge establishes his/her own inner conviction (*inner conviction standard*). According to certain authors, the judicature hopes to approach the level of complete certainty as closely as possible, which is why they strive to support the justification of their decision by their deepest, innermost convictions. According to Clermont, this is why judges in continental systems are more likely to acquit or dismiss a petition (Clermont 2009: 471).

The apparent differences in requirements of proof are the result of the differing functions of the procedural systems. The requirement raised by continental legal systems, in terms of the high level of proof, supports public justification and the legitimacy of judges. The courts give the impression that their decisions are based only on real, and not presumed, facts. In other words, proof must be beyond any doubt in order for it to be evaluated (Clermont 2009: 472). According to Erzsébet Kadlót, this was also the result of the fact that during the process of centralisation, the state took over from the injured party the right to carry out the procedure of calling to account. The state justified this by claiming that in contrast to an unprepared layman, a professionally operating state apparatus is capable of discovering the 'objective truth' (Kadlót 2010).

[3]Lego v. Twomey, 404 U.S. 477 (1972).

In common law procedures, besides the discovery of truth, an important goal is to minimise the costs of incorrect decisions. The costs vary depending on procedure type, which serves to explain the existence of different levels of probability. The most considerable social consequence is a judgement establishing criminal liability of an innocent person, which is why in common law systems, a higher level of proof is required in establishing the facts in criminal trials than in civil trials (Clermont 2009: 485). The 'cost' in this case is ethical: the burden of conscience that results from condemning the innocent (in civil cases: the non-defaulting party) (Tadros and Tierney 2004: 402).

Even in questions regarding the standard of proof applicable in criminal procedures, the two different historical models reflect different traditions and approaches regarding the relationship between the state and the citizens.

In spite of this, the question remains: which model fits fair trial requirements more? More accurately, the question would be: in the evidentiary procedure against the accused, what degree of doubt must be ruled out in order for the evaluation of evidence to be considered fair? Doubt, or doubtfulness, does not operate on an 'all-or-nothing' principle but is manifested in seamless degrees. We too feel that sometimes a given statement may raise strong doubts, while other statements may leave us with few doubts. At first glance, it seems that the strict continental rule serves best to protect the innocent: the burden of 'absolute certainty' ensures that no innocent individuals are convicted. However, if the courts took this completely seriously, no one would ever be convicted. A shred of doubt always remains, even if only because our knowledge of the world is nowhere near complete, and there are physical, chemical, biological and psychological relationships and laws we have yet to discover. Attaining mathematical proof outside of math (and pure logic) is impossible. We knew that Newton's laws appeared certain – up until they were replaced by Einstein's new paradigm. Then how could a judge be 100 % certain in establishing the facts? Witnesses can be fooled by their own senses or weakness of memory. Material evidence does not speak for itself; in most cases, the judge is not competent in the question of evaluating the expert's opinion. But even if, in a given case, several mutually reinforcing and overwhelming sources of direct evidence exist against the accused, can we be certain that an acute, rapidly subsiding disorder did not arise that resulted in mental incapacity of the individual (or maybe perhaps he was under hypnotisation)? Of course, this is an extreme example, but it highlights that in a strict sense, absolute certainty cannot be achieved in the evidentiary procedure.

Considering these epistemological obstacles, the perfectionist desire to demand absolute certainty from the courts is pointless. What is more important is that it is not only pointless but also dangerous considering the fair evaluation of evidence. The introduction of such a standard results in the courts not taking it seriously (because it cannot be taken seriously). Under such circumstances, with the absence of certain standards, a practice could come into being that reduces the level of proof required for conviction to such a low level, that even from a distance could not be considered fair towards the accused. In my opinion, this is the situation in present-day Hungary, and this is also supported by an empirical study which was carried out in 2010 by me

and my colleagues. A statistical analysis of nearly 300 cases shows that on average courts examined more witnesses in cases ending in acquittal than in cases ending in conviction. Thus, it seems that innocence must be more thoroughly proven than guilt (Bencze 2010: 86–90).

Returning to the search for proper solutions, it appears fundamentally important for us to find some kind of justifiable standard – the application of which can be reasonably expected of the courts. Achieving absolute certainty is obviously impossible; therefore, the standard of proof necessary for conviction must be lowered. The doctrine of 'reasonable doubt', developed in Anglo-Saxon legal practice, requires *moral certainty* to be achieved. It became clear in the works of seventeenth- and eighteenth-century philosophers that areas exist which cannot be analysed in absolute or mathematical terms, because by their very nature (*natura rerum*), they are incompatible with such proof. However, the conclusion drawn from this is not that acceptable proof, degree of certainty and convincing certainty cannot exist. A reasonable person will be satisfied with proof that is subject to consideration. Moral certainty, in contrast to theoretical-scientific and theological certainty, is linked to reasonableness of human practice – for example, to state administration or to the administration of justice. The term 'moral' suggests that someone has arguments upon which his actions cannot be morally condemned, for example, a judge having this degree of certainty may sentence someone to prison. In this manner, on one hand, absolute, metaphysical, coercive certainty can be distinguished from moral certainty (the latter is enough to determine guilt), while on the other hand, weightless, trivial, unusual assumptions can be differentiated from reasonable doubt. Thus, proof beyond reasonable doubt does not require guilt to be proven mathematically with absolute certainty, but at the same time, this does not mean it is a faint, simply theoretical or unserious doubt – but rather, a doubt that after analysis and thorough consideration any competent, intelligent and impartial person can recognise as existent (Waldman 1959). Hence, it is important that the absence of doubt not be determined based on the psyche of the judge trying the case: this is a universal standard, the base of which is the reasonably thinking average person. The achievement of moral certainty – since it does not expect those applying the law to have superhuman capabilities, means a standard with better accountability, and so it gives greater protection to the falsely accused innocent.

Superiority of the common law approach is conspicuous if we include the law of pre-economic and political reform China in the comparison, which exhibits the dangers of the continental approach: sacrificing fair procedures for the interest of state protection. In China, even before the Cultural Revolution, they believed that the in dubio rule is not applicable: if a fact is not proven beyond doubt, investigation must continue until absolute certainty is reached (Thieme 1984). It is not surprising then that countries such as communist China or the once-communist Soviet Union, which placed collective interests before individual interests and which believed in the objectivity and infallibility of the state, did not consider achieving absolute certainty impossible (Stevens 2009). It is thus clear that evidentiary fairness is closely linked to the rule of law and democracy in a given legal system.

Second, it can be concluded that different expected levels of certainty in the two legal families are not the result of different legal approaches but stem from differing political principles and approaches behind criminal procedures. It would not be opposing to the legal culture of continental legal systems, if the general level of certainty were developed in as much detail as the Anglo-Saxon doctrine.

7.5 Legal Instruments to Suppress Arbitrary Discretion

7.5.1 Obligation to Justify

In the process of establishing the facts, in filtering out the distorting effects of individual subjective convictions, one of the best solutions could be public control over the decision. The verdict, and especially the publicity of the justification, forces the decision-maker to support his/her conclusion of facts with evidence that is reasonable and generally accepted. Beyond this, even during the evaluation of evidence, the obligation to justify incites the judge to rethink his/her concept about the facts of the case over and over again. Because of this – in continental legal systems – as a general rule, the evaluation of evidence must be justified. Within each legal system, the differences can be grasped into what extent the legal regulations provide points of reference and guidance to the judge concerning what the justification must include.

The most detailed and well-developed expectations are defined in German law: the justification must be such that it is clearly understandable even without knowledge of the case. A simple listing of the facts does not constitute justification; the assessment must be logical and coherent. The justification is inadequate if concerning a given fact, the court failed to report why it was considered proven or why it was dismissed. A further requirement obligates the judge not only to argue in favour of the accuracy of his/her own insights but to also consider the arguments brought forth. For example, in the case of witness testimonies, this means that the relevant testimonies must be assessed in great detail in the judge's decision, especially if in the testimony the possibility of facts contrary to the testimony arises. The obligation to refute counterarguments exists in Belgium as well, but with that the judge must rebut the legal claim, and not the arguments supporting it (Cape et al. 2010: 290–291, 87). So, if it can be clearly proven that the accused had not legitimate self-defence, the court does not have to argue the defence claims of the accused one by one.

In Italy, it is also a fundamental expectation of the courts to convince the reader of the decision: under the given circumstances, the best possible decision was made, which is supported by the fact that accordingly, the rules of evidence are adequately detailed. The fair consideration requirement is clearly highlighted in the detail rule according to which the judge may only refer to evidence in his/her justification if it was presented during the trial, that is, the evidence underwent the test of questioning

by the participants (Cape et al. 2010: 406, 409). It is typical of Eastern European countries that the rules for evaluation of evidence leave ample room for judicial discretion and do not contain clear guidelines. The Hungarian law on criminal procedures requires the justification of the decision to contain only that the evidence was accounted for and evaluated.[4]

In part, this general rule is why the Hungarian practice is often satisfied with merely formal justification (e.g. the justification simply accounts for the evidence but does not analyse, compare or explain why each was accepted or dismissed, and in many cases the justification does not extend to cover all evidence used). Justification panels have developed, through which even decisions based on the extremely little and weak evidence can be justified, such as the acceptance of a realistic and coherent testimony without material review (Bencze 2010: 29, 59–60, 64–66). It is no coincidence that the rate of successful prosecutions in Hungary, according to the Annual Reports of the Chief Prosecutor,[5] is high even in an international comparison and has been a steady 96–97 % over the past several years. The risks associated with such practice – especially in politically sensitive cases – are clear.

Similar to Hungary, the rate of acquittal in Poland is very low (2–3 %). According to advocates of the Polish practice, the reason for this is that only the most serious and most thoroughly investigated cases are brought before the courts. A further general problem is that the justification of the decision usually only includes the law applied and the judge does not extend to cover the special circumstances of the case (Cape et al. 2010: 435, 458, 460).

In Turkey, according to attorney reports, some judges simply copy the arguments of the prosecution and the defence into the justification, so the judge's system of arguments is essentially missing. Others refer to the text of the law but provide no real justification and common phrases (e.g. 'based on the court's discretion . . . ') recur as well (Cape et al. 2010: 526). The explanation for this is that the operation of the Turkish courts is burdened by extreme case loads, and that there is no public online database of decisions.

From the above, it may seem that legal systems in which serious cases are decided upon by juries, bodies having no justification obligation, have accumulated deficits concerning the fair evaluation of evidence. Juries are also often accused of making decisions based on subjective considerations and neglectful impressions (Frank 1949). In spite of this, if the suppression of arbitrary decision-making – the most important phase in terms of a fair trial – is kept in mind, it can be clear that a decision-making process with multiple actors, and especially the argumentation preceding it, can be suitable for the case to be argued from relatively many perspectives and in the determination of whether the crimes in the indictment occurred, and for the possible subjective aspects in the decision to be filtered out more easily.

[4]Criminal Procedure Code (hereinafter: C.P.C.), 1998, (Hun) s.258 (3)(d).

[5]http://www.mklu.hu/cgi-bin/index.pl?lang=hu

Therefore, in terms of fair evaluation, such decision-making can be equivalent to the control brought by the obligation to justify.

7.6 The Limitations of Free Evaluation

According to Károly Bárd, the introduction of a free system of proof can be regarded as the manifestation of faith in the unlimited cognitive abilities of the human mind, as the triumph of the concept of rationality (Bárd 1987).

The medieval, often irrational evidentiary procedures (e.g. arbitraments of God) were later replaced by formalistic evidentiary systems, in which the probative value of evidence was predetermined – but this too had its own disadvantages. The principle of free evaluation of evidence directly reflects on this historical antecedent when it declares: the probative value of evidence and means of evidence is not predefined in law. General experience suggests, however, that it can be problematic as well if the law is built upon a degree of rationality which strays far from the run-of-the-mill reality: that is the case if generalised principles and expectations are set as the goal to be achieved, which seem more like utopian ideals than criteria that can be met. For example, in principle, the reconstruction of the actual thought processes going on in the mind of the accused is part of the evidentiary procedure, which in many cases is a hopeless undertaking, since often even the perpetrator is unaware of these. Such an obviously inconceivable task can have detrimental effects on analysis of the facts that are otherwise provable and need to be proven and on evaluation of testimonies and other sources of evidence. As I mentioned above as an example, in Hungarian judicial practice, it is absolutely acceptable to dismiss a testimony – without any further argument – if the court holds that it is 'unrealistic'. It is far from the concept of fair consideration.

Capitalising on these insights, many countries place limitations on free evaluation. An example of such limitations is the corroboration principle, which requires at least two separate sources of evidence in order to make a conviction (in Scotland, e.g. corroboration is universally applied). In Holland, the judge may only use a testimony made to police if it is supported by other sources of evidence (witness testimony or report). The law in Holland also lists other sources of evidence that are only admitted in corroboration, for example, police reports, expert testimonies and other documents, such as notes or diaries. According to the law in Portugal, the judge cannot question and is obligated to admit expert testimony, unless a technical objection arises (Pradel 1992: 451). Further limitations on free evaluation are observable in legal systems which do not admit certain sources of evidence, even if those would be capable of proving the facts. Again, transparency of evidence is the goal behind this: a conviction should only be based on evidence that has undergone the adversarial process.

This does involve the fact not only that evidence obtained outside of trial is more unreliable but also that the fundamental right of the accused to contest evidence presented must be guaranteed. Although, one author (Jean Pradel) believes that in

general all legal systems have a rule according to which witnesses are not obliged to testify before trial, specifically to police, and that only few exceptions exist to this rule (Pradel 1992: 441). However, we will see that this rule can actually only be considered general in modern, constitutional democracies. In other legal systems, the right to contest evidence is provided to a much lesser extent.

In England and the United States, one of the cornerstones of the rules of evidence is the question of hearsay evidence. In the United States, according to federal provisions on criminal proceedings, evidence based on hearsay testimony is not admissible, with the exception of certain well-defined circumstances.[6] The same is true in England: courts do not admit hearsay evidence, unless terms specifically detailed in law are applicable.[7]

The substantive taking of evidence occurs during trial in Italy and Belgium as well. According to Italian law on criminal procedures, in establishing the facts, statements made outside of the courtroom are not admissible, except as evidence to prove the credibility of witnesses or of the accused. During the taking of evidence, with very few exceptions, personal perception is the most important. However, a negative characteristic of the Italian system is that although information justifying the arrest cannot be taken into account during trial, in practice this nonetheless influences judges in determining guilt. This may be a consequence of the practice common in most continental legal systems today, according to which the investigation phase carries too much weight, and that the most important and conclusive sources of evidence are not only collected but also thoroughly evaluated first during this phase. In France, for example, analysers of the practice highlight that evidence taken during trial is less significant, while the investigation file has overwhelming importance during the evidentiary procedure, which typically steers the judge in the general direction of establishing a guilty verdict (Cape et al. 2010: 92, 231, 405, 410, 554).

Not surprisingly, the same is true in Russia as well: before the trial, the judge is obligated to read the investigation materials (the 'dossier') and must examine whether a sufficient amount of evidence exists needed in order to convict the accused (JRank Russia).

Testimonies made to the police have strong probative value in Hungarian judicial practice as well: not only are these used in determining credibility but are also used as evidence supporting convictions in cases where all testimonies made during trial were contradicting those made to police (Bócz 2006; Bencze 2010: 61–63). Interestingly, it was a Hungarian judge who came to defend this practice by stating that trial publicity hinders effective evidentiary hearings because public trials provide a less relaxed environment for the presentation of witness testimonies compared to a police investigation where detectives apply tested techniques to 'ease the tensions' (Bíró 1994).

[6]Fed. R. Evid. 803 (1999).

[7]Criminal Justice Act, 2003, c.44 (U.K.) s.114.

7.7 The Problem of the Burden of Proof

The burden of proof lying on the accuser is one of the fundamental pillars of criminal procedures in constitutional legal systems, which stems directly from the principle of the presumption of innocence. Experience has shown, however, that in nearly all legal systems, effective administration of justice has forced the burden of proof to be handled more leniently. The problem with strict enforcement is the same as with the 'beyond any doubt' standard of proof: if it were consistently applied, the court could not bring condemning judgements even in cases where rational insight would require it to do so. The question to be clarified then is when and to what extent can limitations on the presumption of innocence be acceptable in the evaluation of evidence.

Among different legal systems, discrepancies in this area are detectable in whether the burden of proof shifts at a point predefined by the lawmakers, or if this happens implicitly, often not even consciously, through judicial practice. The advantage of the former solution is that it becomes clear which unproven facts burden the authorities and which are attributable to the accused; in the latter case, the rights of the accused may be seriously violated.

In England, besides the acknowledgement of the presumption of innocence, in many cases the burden of proof lies with the accused (e.g. illegal possession of a firearm, lawful self-defence, plea of mental incapacity). Many laws specifically place the burden of proof on the accused, and also, the courts may interpret the law in such a way that the burden is shifted. According to a study, in more than 40 % of cases, the accused must prove the claims of his/her defence or disprove the occurrence of the alleged crime. If he/she is unsuccessful in doing so, a conviction may result (Cooper 2003). In English practice, one of the main problems is that of proportionality. According to analysts, in this sense the practice of the courts lacks theoretical foundation (Tadros and Tierney 2004: 431–433).

In France, the burden of proof shifts under certain predefined circumstances as well. For example, in cases such as drug-related crimes, trafficking and self-defence, the accused has the obligation to prove specific facts. In a case against France, the European Court of Human Rights acknowledged that within reasonable boundaries, while taking into account the significance of the given case and the right of the accused to defend himself/herself, shifting the burden of proof does not violate the presumption of innocence.[8]

In countries where individual rights have less significance, such as Western democracies, a hidden shift of the burden of proof is observable. It may be that in Turkey, the rate of conviction is 'only' 80 %, the burden of proving innocence lies with the accused, because the judges are inclined to presume their guilt. Where the saying 'where there's smoke, there's fire' prevails, it is difficult to endorse the presumption of innocence (Cape et al. 2010: 505, 523).

[8]Salabiaku Affair, Decision of 7 October 1988, A series, volume 141.

The communist Soviet Union viewed the presumption of innocence as 'bourgeois nonsense', incompatible with the inquisitor nature of criminal proceedings – however, in present-day Russia, this principle is stated in § 49 of the Constitution. Still, we cannot discuss its practical application. This is supported by statistical data, according to which in 1998 less than one per cent of cases resulted in acquittal. One of the most controversial rules of criminal procedures is that if evidence is insufficient, the judge may order the investigation to continue even after the trial has begun. During the Soviet era, this rule enabled the judges to make convictions even in the absence of sufficient evidence. But even today, if the law assigns such a role to the judge, it makes it questionable whether the accuser bearing the burden of proof is adequately enforced (Thaman 2013).[9]

Hungarian procedural rules are no different: it is the ex officio obligation of the judge to notify the prosecutor if he/she considers the indictment to be incomplete and order him/her to make amendments or to find other means of evidence.[10] These provisions essentially make the judge a 'second accuser', who must now share the burden of the unproven with the prosecutor. For this reason, it is difficult to expect the judge to not consider it his/her own failure, when despite his/her efforts, he/she must acquit the defendant. It is no coincidence that while analysing Hungarian judicial justifications, we often run into signs of a hidden shift of the burden of proof (Bencze 2010: 49). This approach is exemplified by an excerpt from the justification of a judgement in a criminal case: 'The defendants failed to provide a reasonable explanation [sic] why it was in the victim's interest to initiate criminal proceedings'.[11]

Reports indicate that in the Eastern world, the presumption of innocence in weighing evidence exists merely on paper. In Azerbaijan, the Constitution and the Criminal Procedure Code as well as the laws governing administrative offences contain explicit provisions relating to the presumption of innocence. Azerbaijan also acknowledged the international human rights as binding upon itself, which not only declares but emphasises the importance of this principle. Despite this, the accused are generally treated as guilty throughout the procedure, up until they have cleared themselves of the charges. So it can be said that in Azerbaijan, the presumption of guilt prevails, and it is up to the accused to prove his/her innocence. This attitude shows that in Azerbaijan, the Soviet mentality continues to live on, that the authorities taking part in the investigation and the indictment (police and prosecutors) never make a mistake concerning the grounds of the charges.[12]

[9] Ibid. 53.

[10] C.P.C. s.268 (1).

[11] Judgement No. 812/2006 of Metropolitan Court of Hungary.

[12] Organization for Security and Co-Operation in Europe (2006) The Presumption of Innocence in Azerbaijan – Executive Summary. Retrieved from http://www.osce.org/baku/20270

7.8 Summary

From this short analysis, covering the main directions and tendencies rather than the topic as a whole, several conclusions can be drawn concerning the fairness of the evidentiary procedure. In connection with the level of proof, we were confronted with the importance of how the standards of proof must be realistic and not wish for the impossible (otherwise, they would become nonsensical). Concerning the area of justification of consideration, we could see that in general, it can be stated that the practice in well-developed democracies is that convictions must be based on evidence and not on opinions or presumptions. The judge not only has to justify his/her decision, he/she must also provide an answer to what arguments confute contradictory statements concerning relevant questions. From the analysis of rules limiting the free evaluation of evidence, it can be concluded that legal systems in mature democracies do not trust in 'judicial wisdom' as much as younger democracies do, and that the enforcement of fair trial actually necessitates this precautionary approach. Although at first it may seem strange, we can nonetheless conclude that in specific cases, shifting the burden of proof does not weaken but rather strengthens the effective application of the in dubio rule.

Two further general conclusions can be drawn from the analysis. First, fair consideration of evidence cannot be deprived of reasonably detailed rules (e.g. concerning provisions on justification requirements, the inadmissibility of certain evidentiary instruments, corroboration requirements), because this way, the risk of judges falling into the trap of their own prejudice or conditioned thinking is reduced, and so is the risk that their first impressions mislead them.

Second, differences in legal solutions that ensure the fairness of free evaluation have not developed in accordance with the classic legal family categorisation, and from this perspective, neither the development level of jurisprudence nor the professional preparedness of judges serves as the most important element of guarantee. A much stronger correlation can be shown between the age and depth of democratic traditions. If respect for individual rights is deeply rooted in the attitude of legislators and judges, then in general, judicature and the regulations concerning consideration will develop fairly as well. The superiority of the common law legal systems in this area can be traced back to this tradition and not to the peculiarities of their legal technical solutions.

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