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THE NEED TO PROVIDE REASONS IN COURT JUDGMENTS: SOME DEVELOPMENTS IN EAST AND WEST

I. INTRODUCTION

Today, it is generally accepted that judicial judgments should in principle contain reasons for the decisions made in the proceedings. Explaining in a written form why the court made this or that decision is considered to be an element of due process of law. A decision that is not motivated is in many countries considered to be a violation of the basic procedural principles. Sometimes, the obligation to motivate judgments is also embodied in the national constitutions[1]. The proper motivation is often associated with the concept of the fair and public trial. The public (including the public media) should be able to see that the justice is done, thus reinforcing the public confidence in the justice system. Public availability of reasoned decisions thus contains a certain element of democratic control. The judges answer to the legitimate expectations of the citizens by issuing clearly motivated decisions[2].

[1] E.g. the Belgian or Spanish Constitution contains an obligation of the judges to state the reasons for decisions.

[2] See Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible

To a certain extent, the need to motivate judgments is connected also with the international human rights standards. It is in particular important in the context of the right to the public pronouncement of judgments which is contained in Article 6 § 1 of the European Human Rights Convention[3]. The need to motivate decisions is also mentioned in the various documents of the international organisations, including the founding documents of the European Union[4]. Some argue that there is a basic obligation for all Community acts to be motivated – an obligation which does not only exist in respect of individual acts but in respect of regulatory decisions as well[5].

While not denying the importance of the motivation of judgments, in this paper I am going to present a different perspective on the need to insert reasons into judicial judgments. As in many other areas, the right to have a reasoned judgment has to be balanced with other important goals of the judicial proceedings, such as the right to a trial within reasonable time. Since writing the reasons of the judgments is, out of all judicial activities, one of the most time-consuming, it has an important impact on overall speed and effectiveness of the judicial proceedings. Excessively lengthy grounds for decisions can, irrespectively how complete and legally correct they might have been, in certain circumstances jeopardize the citizens' right to effective justice[6].

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behaviour and impartiality, Strasbourg, 19 November 2002, CCJE (2002) Op. N° 3, p. 40.

[3] So, e.g. the European Court of Human Rights had to decide whether the reading out of only the operative part of the judgment in open court in the applicant's civil case complied with Article 6 § 1 (right to a fair trial in connection to the right to the public pronouncement of the judgment). It concluded that the object pursued by the protected right, namely to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial, was not achieved in that case, since the reasons which would make it possible to understand why the applicant's claims had been rejected were inaccessible to the public. See *Ryakib Biryukov v. Russia*, no. 14810/02, § 45, 17 January 2008, ECHR 2008.

[4] E.g. in Art. 253 of the EC Treaty ("regulations, directives and decisions... shall state the reasons on which they are based"). The same phrase can be found in Art. 11 of the Statute of the Administrative Tribunal of the United Nations.

[5] See Pappas, Spiros, The status and future of indefinite contracts within the EU, 2007, para. 12–13.

[6] In one criminal case in Croatia, the presiding judge was drafting his 300-pages long explanation of the judgment during the period of three years. When he was over writing his judgment that sentenced the accused to lenghty prison sentences, the statute of limitation period expired and they were released.

The particular target of this paper is the relationship of the reasons of judicial decisions to one of the principles that is broadly accepted as one of the cornerstones of the law of evidence in the Continental Europe, i.e. the principle of the free evaluation of evidence. As every law student knows, the dispositive part of every decision on the merits is a result of the application of legal provisions on the established facts. Insofar, legal reasoning in court judgments deals with two types of issues – with issues of law (*questions iuris*) and the issues of fact (*questions facti*). The issues of law are in the centre of every legal education and practical training of legal professionals, and insofar feature prominently also in the context of providing reasons in judicial decisions. The legal arguments have more or less the same structure in all legal cultures. However, the factual reasoning in judicial decisions is a quite different story. The aim of this article is to illustrate how different may be the approach to explaining the factual findings in judicial decisions. It depends on the underlying theory of evidence – on the concepts of burden of proof, standard of proof, but also on the composition of the fact-finding body and the overall concept of trial, as well as on the public perception of the role of judges and their status in society.

II. THE INITIAL ASSUMPTIONS: THREE EQUATIONS ABOUT THE NEED TO MOTIVATE JUDGMENTS

I will start with the most abstract relations, i.e. with the relations between the motivation of judgments and the role and status of judges in the society. Initially, some working assumptions will be presented in the form of three simple equations regarding the need to motivate judicial judgments. They are the following:

1. The need to motivate judgments is proportionate to the level of distrust in judges.

2. The need to motivate judgments is proportionate to the institutional ability to control and change judgments through various levels of judicial hierarchy.

3. The need to motivate judgments is proportionate to the level of technical competence and qualifications of the trial judges.

These three equations may be illustrated by a well-known (although most likely apocryphal) historical anecdote about a British Governor who was sent to Bahamas, where he was also to discharge the duties of the Chief Justice. As he was not a lawyer, he was particularly concerned whether he would be able to fulfill all his tasks. However, congratulating him on his appointment, the most prominent lawyer of those times, who was himself also a part of the British political establishment, Lord Mansfield CJ, gave him a comforting advice: "Decide causes to the best of your judgment, but never give reasons in support of your decisions". Why? "For your judgment will almost certainly be right and your reasons almost certainly wrong"[7].

There are several conclusions that we can draw out of this anecdote.

First, that within close political allies there is no superfluous care about the correctness of decisions and the need to correct errors.

Second, that there is no special need to motivate judgments if we are at the top of the government and no appeal can be launched against our decision.

Third, that requiring non-lawyers to express legal grounds for their actions and decisions is misplaced, or simply stupid.

Now, we may say that we have come a long way since Lord Mansfield gave his reputable advice. We can certainly agree with the President of the Court of Appeal of New Zealand that "these days a judgment is likely to be considered bad in law if it gives no reasons"[8]. However, the conclusions drawn from this anecdote and the accuracy of our three equations have not been fully refuted. In fact, the recent practice of the European Court of Human Rights in Strasbourg (ECtHR) in many aspects confirms all three findings.

[7] The anectode was cited in a number of sources. From the older ones, see e.g. *Cobbett's Political Register,* Vol. XIV, London (Cox and Baylis), 1808, p. 110.

[8] HJ Anderson, The Appearance of Justice, *Waikato Law Review,* 2004(12), Issue 1, p. 1.

III. EUROPEAN COURT OF HUMAN RIGHTS AND MOTIVATION OF JUDGMENTS

As to the first submission, the one about the motivation and the level of distrust, only tentative evidence can be offered, in any case rooted on the arguments that are politically not quite correct. Yet, with all reservations, I stay with the submission that it is possible to demonstrate on the recent jurisprudence of the ECtHR that the Court shows much greater lenience in respect to shortened or lacking reasons in judicial decisions when judiciaries of so-called "old democracies" are concerned, while in the case of new member states ("New Europe") this requirement was construed in a much stricter sense.

In the past years the lack of reasons was regularly found to be a cause of the violation of the right to a fair trial from Art 6-1 ECHR in respect to the fairness of the proceedings when the respondent states were e.g. Poland, Romania, Ukraine or Moldova[9]. In such cases, the court regularly found violations, while insisting on the statement that ... according to [the Court's] established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based[10].

On the other side, in a number of cases from England, France, Netherlands or Spain, the court has repeated that the extent to which the duty to give reasons applies may vary:

[It] cannot be understood as requiring a detailed answer to every argument raised by the parties. Accordingly, the question whether a court has failed to fulfil its obligation to state reasons can only be determined in the light of the circumstances of the particular case[11].

[9] See e.g. *Nieruchomości Sp. z o.o. v. Poland,* no. 32740/06, § 31, 2 February 2010; *Salov v. Ukraine,* no. 65518/01, § 89, ECHR 2005-VIII; *Boldea v. Romania,* no. 19997/02, § 23, ECHR 2007-II (extracts); *Grădinar v. Moldova,* no. 7170/02, § 107, 8 April 2008.

[10] *Salov v. Ukraine,* cit. § 89. See also: *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I; *Gorou v. Greece (no. 2),* no. 12686/03, § 8 (Sajó dissent), 14 June 2007; Hirvisaari v. Finland, no. 49684/99, § 30, 27 September 2001.

[11] See *Ruiz Torija v. Spain,* 9 December 1994, § 26, Series A no. 303-A; *Van de Hurk v. the Netherlands,* 19 April 1994, § 61, Series A no. 288; *Burg v. France* (dec.), no. 34763/02, ECHR 2003-II; *Hiro Balani v. Spain,* judgments of 9 December 1994, Series A nos. 303-A and 303-B, p. 12, § 29, and pp. 29–30, § 27, respectively; *Helle v.*

Although violations were occasionally found also in the "old democracies", and rarely even in the developed jurisdictions of the North, in cases from those states, violations were found with a much lesser regularity, and more tolerance for shortened reasons (or even no reasons) was demonstrated.

With respect to the much less need for the motivation of judgments if they are not open to appeal, the Strasbourg Court itself gave a telling statement. In *Suominen*[12] and *Estate of Nitschke*[13] cases, the Court wished "to emphasise that the function of a reasoned judgment is to afford the parties the possibility of an effective appeal and to show to the parties that they have been heard". Apparently, the conclusion that may be drawn is that the need to give motives is lesser if no appeal may be launched against the decision. Further on, it also follows that the need to motivate judgments has to be interpreted in a stricter manner for the lower court judgments, while the decisions of the appellate courts are subject to more lenient standards.

In a way, the ECtHR confirmed the latter conclusion in various decisions in which it had expressly stated that

... in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision[14].

In the same sense, the Strasbourg Court has approved the practice of discretionary leave to appeal by the higher instances, even though the court did not provide any explanation for such a decision – it had only "recapitulated the applicant's grounds of appeal and had stated that they were not such as to warrant granting leave to hear the appeal"[15]. In this context, we may be reminded that in civil matters the ECHR generally does not provide for the necessity of the right to appeal.

Finland, judgment of 19 December 1997, Reports of Judgments and Decisions 1997–VIII, § 55; *Higgins and Others v. France,* judgment of 19 February 1998, Reports 1998-I, p. 60, § 42.

[12] *Suominen v. Finland*, no. 37801/97, § 37, 1 July 2003.

[13] *Estate of Nitschke v. Sweden*, no. 6301/05, § 45, 27 September 2007.

[14] See, *mutatis mutandis, García Ruiz v. Spain* [GC], cit. § 26; *Helle v. Finland,* cit., §§ 59 and 60; *Hirvisaari v. Finland,* no. 49684/99, § 30, 27 September 2001. *Hautakangas v. Finland* (dec.), no. 61560/00, 17 January 2006.

[15] *Bufferne v. France* (dec.), no. 54367/00, § 1, ECHR 2002-III (extracts).

Finally, the permissibility or reducing of fully waiving the requirement of motivation for the decisions made by lay judges was also admitted by the European Human Rights Tribunal, So, e.g. in *Papon* case, it was stated that French procedure before the Assize Court was not violating the rule that adequate reasons for judgments have to be given. Namely, this requirement

... must also accommodate any unusual procedural features, particularly in assize courts, where the jurors are not required to give reasons for their personal convictions[16].

The role of reasons, so the Strasbourg Court, is in jury proceedings overtaken by the questions framed and put to the jury by the President of the Assize Court. These questions, in French law, can be challenged by the public prosecutor and the accused and they may request leave to put others, mindful that, in the event of a dispute, the Assize Court would rule, giving reasons, as it had done in this case. So while the jury had only been able to reply 'yes' or 'no' to each of the questions put to it by the President, those questions had formed a framework on which the decision had been based. The precision of those questions had adequately compensated the lack of reasons for the jury's replies[17].

All in all, this case-law (and similar examples from comparative civil procedure) demonstrates that the need to motivate court judgments depends on various external factors. It also indicates the need to somewhat soften the reliance on usual adagio in legal theory that reiterates the central role of the motivation of judicial judgments for the rule of law.

With this background, I am turning to the main issue of this contribution, which concerns primarily the motivation of the part of the judgments that deals with the establishment of the factual background of the decision.

[16] *Papon v. France (no. 2)* (dec.), no. 54210/00, ECHR 2001-XII (extracts). See also (on a similar system in Belgium) *R. v. Belgium*, no. 15957/90, Commission decision of 30 March 1992, DR 72, pp. 195, 199, and *Zarouali v. Belgium*, no. 20664/92, Commission decision of 29 June 1994, DR 78-B, pp. 97, 109.

[17] *Papon,* ibid.

IV. EXPLAINING FACTUAL FINDINGS: FREE EVALUATION OF EVIDENCE BETWEEN INTIME CONVICTION AND STRICT OBJECTIVE RULES

The need to provide reasons for judgments, if taken seriously, should deal with all the important aspects of decision-making. In other words, the judgments should be equally well reasoned in respect to the issues of fact and the issues of law. However, it is undisputed that the issues of fact, at least from a systemic perspective, significantly differ from the issues of law. In all hierarchically organized modern legal systems the need for systemic consistency gives precedence to the issues of law, as demonstrated by the fact that a number of Supreme Courts in Europe view their main (or even the only) role in the harmonization of legal findings, and prohibit expressly raising any issues of fact before them. This was not always like that: in the medieval law, turning to the supreme judicial authorities, e.g. to the King or the Pope, had a strong element of individual equity. The Biblical image of King Solomon, pronouncing individual justice in the concrete case, may serve as a strong landmark of individual justice triggered by fact-finding at the very peak of judicial hierarchy. Today, however, the situation is completely the opposite – those who seek individual justice will often be turned down by the highest courts, which are increasingly focused on the legal problems of general importance, and mostly have neither authority nor sympathy for factual issues[18].

Why has the role of factual findings in the modern legal systems been diminished, to the effect that in some judicial proceedings facts cannot be successfully invoked even in the regular appeal process[19]? There are many reasons for it, such as the rise of codification, the

[18] See more on the role of Supreme Courts between their public and private purpose in the general report of Jolowicz in Yessiou-Faltsi, Pelayia (ed.), *The Role of the Supreme Courts at the National and International Level,* Thessaloniki (Sakkoulas), 1998, p. 37–63. For a description of more recent developments, which reveal further strengthening of trends towards the public and systemic functions of the Supreme Courts, see Ortells Ramos, Manuel, *Los recursos ante Tribunales Supremos en Europa. Appeals to Supreme Courts in Europe,* Madrid (Difusion Juridica), 2008.

[19] E.g. in Croatia appeal in small claims is admissible, but issues of fact in such appeals may not be raised. See Art 467 para 1 of the Code of Civil Procedure.

overall dominance of the rationalist and deductive methods and the strengthening of centralist and absolutist trends in the government. I will, however, concentrate on how these developments reflected on the theory of evidence, and the resulting consequences for the motivation of judgments.

The procedural model resulting from the XIX century and applicable both for civil and criminal proceedings advocated the doctrine of the free evaluation of evidence. This doctrine did not evolve in a straight-forward manner. It is certain that the doctrine was the reaction to numerous strict evidential rules in the judicial proceedings of *ancient regime.* During French Revolution, it was initially advocated to free the procedure from any bonds and ties and replace the rules with the intimate conviction – *intime conviction* – of the fact-finders. This proposition was, however, rooted on another presumption that, in fact, did not take place, namely on the presumption that professional decision making by professional judges will be replaced by the jury trial, inspired by Anglo-American examples. In the end, the jury trial did not develop in Europe as a practice on a broader scale, and this had a direct impact on the understanding of the free evaluation of evidence[20].

Today, it is quite clear that the free evaluation of evidence doctrine does not mean the unlimited reliance on *intime conviction.* Had this been the case, no motivation regarding factual findings in the judgment would be possible at all, just as it is never required from the members of the jury to explain their ultimate motives and reasons for their decision. In the current European practice, judges, although in principle unbound by formal legal rules regarding evaluation of evidence, are not free to decide arbitrarily. They must, as uttered in numerous textbooks of civil procedure, examine carefully all the evidence presented to them and decide as reasonable fact-finders, bound by the common sense and generally approved professional and scientific me-

[20] On the development of the doctrine of free evaluation of evidence in Continental Europe and its ties with the concept of jury trial see more in Walter, Gerhard, *Freie Beweiswürdigung,* Tübingen (Mohr), 1979 (see in particular p. 69); see also Nobili, Massimo, *Il principio del libero convicimento del giudice,* Milano (Giuffre), 1974.

thods of arriving to conclusions about relevant facts. Of course, their factual findings also have to be explained in their judgments[21].

However, the doctrine of free evaluation of evidence is not free from ambiguities, neither in theory nor in practice. In a certain sense, the alarm bell of the *intime conviction* is still ringing in the contemporary doctrine of free evaluation, as – in spite of all the objectivity of the methods and tools (and that objectivity is still, at least in the practice of civil procedure, to a large extent illusory) – the judge must be fully convinced that the evidence taken has produced the full proof of the disputed facts.

The ambiguity in the concept of free evaluation of evidence is most visible regarding the very final question in the evaluation of evidence – the question whether the required standard of proof has been satisfied. Here, the stumbling block is in the very impossibility to define the required standard by any objective means. In the Continental law, there is largely a uniform and identical standard of proof for proving the merits of the case both in civil and criminal proceedings – the standard that is referred to as the standard of "certainty" or the "beyond reasonable doubt" standard (as opposed to the common law standard of "balance of probabilities"). Although there may be a consensus about the statement that this standard requires a "very high level of probability" for successful proving of contested facts, there is virtually no agreement about what this high level of probability means in objective, empirical terms. The very term "certainty", although apparently objective, ultimately relates to the individual perception of the acting judges, what is more accurately expressed in the term of "beyond reasonable doubt" – because doubt is in any case a psychological category[22].

[21] For this concept and the obligation to provide reasons for factual findings see e.g. in Austrian doctrine Rechberger/Simotta, *Zivilprozessrecht,* Wien (Manz), 2009, at 753; for older theory: Fasching, *Zivilprozessrecht,* Wien (Manz), 1990, at 817; in Croatian theory Triva/Dika, *Građansko parnično procesno pravo,* Zagreb (NN), 2004, pp. 166–167.

[22] Such concept of a universal standard of proof, applicable both in civil and criminal cases, can be found in many judicial judgments of courts in Continental Europe since the mid-19th century. A characteristic example may be a judgment of the German *Reichsgericht* which spoke about the „high level of probability" that is not absolutely undoubtful, but is pragmatically sufficient in the everyday life (decision of 14 January 1885, RGZ 15, p. 338 etc.).

The internal tension between objective and subjective elements in the doctrine of free evaluation of evidence can be illustrated on the famous German case – the *Anastasia* case[23]. In that case, which is today a part of any anthology of cases relating to *Freie Beweiswürdigung,* the German *BGH* (Supreme Federal Court) came to a famous Pythian dictum about the essence of the required standard of proof in civil cases – this essence being a kind of not-undoubted-certainty. In its famous 1970 decision, the BGH expressed the required standard of proof in the following words:

Auf diese eigene Überzeugung des entscheidenden Richters kommt es an, auch wenn andere zweifeln oder eine andere Auffassung erlangt haben würden. Der Richter darf und muss sich mit einem für das praktische Leben brauchbaren Grad von Gewissheit begnügen, der den Zweifeln Schweigen gebietet, ohne sie völlig auszuschliessen[24].

Of course, the formula which requires "practical level of certainty" that does not exclude the doubt altogether, but still "commends the doubt to shut up" raised considerable attention and resulted in various criticisms, e.g. stating that this formula is "a nonsense", a complete *contradictio in adiecto*[25]. However, the 1970 decision of German Federal Court, in our view, only expressed (with German preciseness) the basic ambiguity that is deeply built into the contemporary concept of the free evaluation of evidence: it is tentatively objective and verifiable concept, but, at the same time, a concept that requires an inherent personal element of judicial consciousness and conviction. Therefore, the BGH itself concluded its ruling with the statement that the expression requiring judge to be satisfied with probability that is

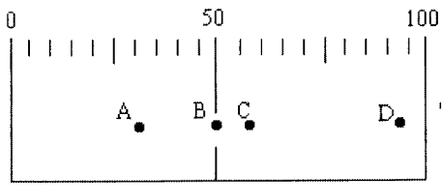
[23] In that case, German courts had to decide whether a certain Anna Anderson was in fact the last surviving member of the Russian imperial family, i.e. the Grand Duchess Anastasia Nikolaevna of Russia, the daughter of Tsar Nicholas II of Russia and his wife Alexandra Fyodorovna (Alix von Hessen). The last Russian Tsar was murdered by the Bolshevik secret police on July 17, 1918 with all members of his family, but according to rumors, his youngest daughter Anastasia escaped the slaughter, as her body had not been found in the grave. The BGH decision of 1970 could not come to conclusive proof of identity; only in 2009, after discovery of another grave, it was proven by DNA testing that all four daughters of Tsar were in fact murdered.

[24] *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (BGHZ), 53:1970, p. 247; see also *Deutsche Richterzeitung,* 1970, pp. 82–85.

[25] See Leipold, Dieter, *Beweismass und Beweislast im Zivilprozess,* Berlin–New York (de Gruyter), 1985, p. 9.

approaching certainty is incorrect if it does not take into account the personal conviction of the acting judge that the facts have been established truthfully.

No matter whether objective or subjective, it is important to note that the civil standard of proof which requires certainty or high probability leaves a broad space of doubt between the two extremes – certainty about the truthfulness and the certainty about the falsity of the disputed facts. Namely, if certainty is needed in both directions (either for positive or negative establishment of facts), then all intermediate establishments (even if proving probability of certain statements or its counter-statement) are not sufficient for a positive establishment of facts. The following graph demonstrates it in a simplified manner: if the left hand side is zero probability, and the right hand side absolute certainty (100 percent probability), than – under the standard of certainty, only the case D could be taken as proven (and this only if certainty is found to be equal high – not absolute – probability). Under the standard of preponderance of probabilities (which is, with more or less variations, adopted as a standard for civil cases in Common Law countries)[26], only case B would be considered as not proven, while all other cases would reach the required standard of proof (A = factual statement is false; C and D = factual statements are true).



But, if the conviction has not been reached in either way, i.e. if the judge, after the evidence was presented, is not convinced that it is

[26] In Common Law countries, the civil standard of proof was developed in the classical works of Wigmore and Thayer. In civil cases, it is phrased in a way that burden of persuasion is not satisfied only if, after taking of evidence, the trier of facts still is in a „mental equipoise". See Wigmore, John Henry, *Evidence in Trials at Common Law* (Chadbourn rev.), Boston (Little, Brown), 1981, p. 283; Thayer, James Bradley, *A Preliminary Treatise on Evidence at the Common Law*, Boston (Little, Brown), 1896, pp. 384–388.

proven beyond reasonable doubt neither that the disputable assertion is true, nor that it is not true, he has to conclude that the free evaluation of evidence has failed. Consequently, if more than reasonable doubt still remained in judge's mind, he would be bound to reach his decision not on the basis of free evaluation of evidence, but on the basis of burden of proof rules – the rules that have to lead him lead the judge out of the *non liquet* situation (a situation where the court cannot prove the facts to the required standard of proof)[27].

The burden of proof rules, in this doctrine, are the rules that have to be derived from the interpretation of legal rules. Whereas in criminal case one may, on the constitutional grounds, safely assume that the risk of uncertainty should always go one way – i.e. in the favor of the defendant (*in dubio pro reo*), there are no conclusive grounds for such a result in civil cases. On the contrary, there may be multiple reasons why a judge can, in the case of doubt, reverse the burden of proof rules and find in favor of the claimant[28]. Therefore, in the civil proceedings, there is no automatic ruling for the defendant in the case of doubt. It also means that, for every *non liquet* situation the judge should look deeper into the law, try to find express or implied guidance for distribution of the burden of proof, and rule accordingly. And, of course, he should thoroughly motivate his decision, which may, ultimately, be challenged also in front of the highest *fora* in judicial hierarchy. The burden of proof decision is, namely, the decision based on the legal reasoning, and not on the evaluation of evidence (which, obviously, did not succeed). Therefore, this time the issues of law come into the forefront, while the factual issues become more or less irrelevant.

[27] *Non liquet* means in Latin "not clear". While in common law *non liquet* is sometimes defined as comprising the situations where there is no applicable law, in this paper *non liquet* is understood as customary on the European Continent, i.e. as the term that denotes only factual uncertainty (lack of applicable law is, on the other hand, a situation known as "refusal of action", *denegatio actionis*).

[28] *E.g.* in medical malpractice cases where injured party could not prove the actions of a defendant hospital; in labor cases where court may in doubt find for the worker; or simply in cases in which the evidence is manifestly more under control of the defendant.

V. BURDEN OF PROOF AS A STRATEGY OF MOTIVATING FACTUAL JUDGMENTS: WESTERN AND EASTERN APPROACH

One should not forget the first step in this line of reasoning. It is the step in which the individual judge has to reach the bottom line, and ask himself whether he is convinced or not – by reexamining the evidence and the results of the whole proceedings, as well as by an intimate act of introspection in his own consciousness. We may debate to which extent this initial finding is within individual discretion of the first instance judge, or whether and how this finding may be controlled. I will, however, not explore further these issues in an abstract manner. Instead, I will focus on one simple comparison that may be interesting from the point of view of comparative civil procedure.

The conventional burden of proof theory (so-called *Normentheorie*), as most prominently defined by the German professor Leo Rosenberg in 1900, was and still is extremely popular in Europe and elsewhere (e.g. in Latin America)[29]. In a more or less modified version it is still accepted as the mainstream doctrine in a great number of countries. However, the practical acceptance of this scheme of arriving to factual findings (and explaining them) seems to have been rather different.

In the German and Austrian practice, the decisions motivated by some sort of burden of proof arguments happen quite regularly, to the extent that a number of books and practical guides present and elaborate in a very technical way law and jurisprudence regarding distribution of the burden of proof in different legal fields (e.g. in the law of contracts, labor law, medical malpractice etc.)[30]. Therefore we may state that the strategy of motivating judgments' factual basis by

[29] Rosenberg Leo, *Die Beweislast nach der Civilprozessordnung und dem Bürgerlichen Gesetzbuches*, Berlin, O. Liebmann, 1900. (2nd ed. 1923; 3rd 1953; 4th 1956; 5th 1965). The book was translated into Spanish and published in Argentina – see Rosenberg Leo, *La carga de la prueba*, Buenos Aires: Ediciones Juridicas Europa–America, 1956.

[30] For a very comprehensive practical approach to burden of proof in private law see e.g. Baumgärtel, Gottfried, *Handbuch der Beweislast im Privatrecht*, Koln (Heymann), 2nd ed. 1991.

burden of proof is frequently used and makes the mainstream of decision-making.

On the very opposite side of the spectrum, one may quote the example of socialist and post-socialist countries from Central and South-Eastern Europe. In this text, I am referring mostly to Croatia and other successor countries of former Yugoslavia. However, a lot of the features of such approach to motivation of factual findings in judgments may also be found in the other countries of the European East.

What is the main feature of the practical approach to stating reasons for factual findings in Eastern European judgments? It is a deep contrast between the doctrinal acceptance of the high standard of proof in civil matters (i.e. certainty, high probability), while, at the same time, in case law one can found a manifest absence of judgments motivated on the burden of proof concepts[31]. Therefore, although the doctrinal background was same (i.e. the reliance on the Austro-German models of civil procedure), and even the law was very closely or even identically phrased, what was the standard practice in one jurisdiction was the "missing link" in another. Even the addition of the express legal rules authorizing and commending judges to decide based on the burden of proof rules "if they cannot establish facts with certainty" did not help[32] – the judgments motivated by burden of proof rules are now, just as ever, a rare bird (*avis rara*). Instead, the prevailing method of motivating factual findings in judgments is the one derived from the "intimate conviction": in the grounds of judicial decisions, it is stated that the judge was satisfied by evidence and has found the facts, after evidence-taking, with certainty.

How can we explain such a discrepancy? Obviously, it can hardly be assumed that e.g. Croatian and the other Eastern European judges have better and stronger tools to find the ultimate truth then their German colleagues. One possible, yet also quite improbable explana-

[31] In Croatian civil procedure, judgments based on the burden of proof arguments were continually very rare, and only in the past few years their frequency started to increase. See Uzelac, Alan, *Teret dokazivanja,* Zagreb (Pravni fakultet), 2003.

[32] In Yugoslav Code of Civil Procedure (which was later embraced by the successor countries), an express rule authorizing judges to apply the burden of proof rules if facts cannot be established with certainty was inserted only in 1990, a year before the dissolution of the federation (Art 221a).

tion, would be that post-Socialist judges psychologically tend to be convinced much sooner than the most experienced Western European judges, e.g. because they have a simpler mind-setting or tend to be quite naive.

If we reject the both explanations, the remaining explanation is that, faced with the inevitable uncertainties, in the practice of civil adjudication standard of proof is interpreted in a way that differs significantly from the doctrinal and normative commands of 'certainty'. Indeed, an analysis may show that in a number of judgments the courts arrive to 'certainty' in a rather summary way, in spite of the procedural realities of limited cognitive means and not overly abundant evidentiary sources. Thus, we may even claim that a significant number of civil judgments in the Eastern part of Europe demonstrate in their motivation the "fictitious certainty" or the "fictitious absence of doubt"[33].

Why so? Do Eastern and South-Eastern European judges succumb under some sort of external pressure and force themselves to be satisfied "beyond reasonable doubt" even when this is apparently impossible? Let me fist offer as an explanation the following statements, which play certain, although not the most important role:

1. It is easier to motivate a judgment by intimate conviction than by the meticulous analysis of the legal rules, in pursuit of the most adequate burden or proof rule;

2. Motivating judgments by intimate conviction reduces the opportunity to control the judgment, since subjective feelings (state of consciousness) cannot be verified from the outside;

3. If a judge sticks to the free evaluation of evidence, it will effectively narrow the scope of legal remedies, as issues of fact are generally not admissible before the highest courts, whereas the burden of proof rules as legal rules may be subject to secondary appeals, cassations and the other special legal remedies.

[33] In the past two decades, I have tried to trace decisions based on the burden of proof in Croatian legal practice. In spite of introduction of burden of proof concepts in a number of laws, until today such decisions are relatively rare. Admittedly, in the past five years, they started to occur more often, but still not in proportions that would be expected.

The most important reasons, however, lie elsewhere – in the historical development that has changed the perception of the judges, their social role and function, and the social reputation of the professional jurists. Its roots are in the still surviving Socialist legal tradition and its paternalistic and inquisitorial concepts of judicial proceedings[34]. One of the main procedural features of that tradition was empowering the court to actively participate in the fact-finding process – order evidence *ex officio* or even find facts on its own motion. From the today's perspective, the authority of the court to control the process and to order the taking of evidence may seem modern, as it concurs with the current trends of promoting judicial management[35].

Yet, the authority to take evidence may also mean co-responsibility for the results of the evidence-taking. When coped with certain distrust towards private initiative of the parties and the idea that it is the court's, and not the parties' principal task to reach the desired results, a failure to arrive to the required level of certainty becomes the problem of the court, and not the problem of the parties. This also has its procedural consequences: a decision that is motivated by the burden of proof instead of the standard of certainty may be taken as erroneous – as a demonstration of cognitive weakness and insufficient evidentiary efforts of the court. As our study of Croatian practice in 1990's showed[36], a judgment motivated by the burden of proof arguments often triggered an appeal, whereby the losing party argued that the facts have not been sufficiently established. When the Code of Civil Procedure was changed, introducing a ban on new facts and evidence on appeal, nothing changed in practice: this time, instead

[34] I have summarized the main features of this tradition, as opposed to both civil and common law traditions in Uzelac, Alan, Survival of the Third Legal Tradition? *Supreme Court Law Review* (2010), 49 S.C.L.R. (2d), pp. 377–396.

[35] E.g. the ALI/UNIDROIT Principles of Transnational Procedure (2006) provide in 9.3.6. that the court should, if necessary, order the taking of evidence *ex officio*. The similar trends towards judicial case management, which includes an active judicial role in respect to ordering and producing evidence in the proceedings, can be identified in a number of national jurisdictions in Western Europe, including France, the Netherlands and England and Wales. In Austria and Germany the active role of judges in fact-finding process is reality already for decades.

[36] See Uzelac, Alan, *Istina u sudskom postupku* [The concept of truth in judicial proceedings], Zagreb (PF), 1997.

of the factual errors, the parties started to object to procedure, as the failure of the judges to make use of their procedural powers to influence the fact-finding process.

In any case, such arguments would often have the success with the higher court. If so, on appeal the judgment would be struck and remitted to the first instance court with the following main message: "if you were not convinced by the evidence presented, you have not tried hard enough – try harder!" The reason for such an attitude of the higher courts lies in the long dominance of the doctrine that the courts should – also in civil cases – control the parties, educate them as the need may be. The principle that encapsulated this style of procedure was the pursuit of "material truth" principle. In the inquisitorial manner of conducting the civil proceedings, all remaining doubts in respect of factual background of the case were likely to be viewed as the failure of the judge to find the truth. Such failures had to be corrected, and not circumvented by alternate strategies (such as the burden of proof, which, finally, in the extreme inquisitorial process cannot burden the parties, but only the court).

But this is not all. As already noted, the motivations for judgments based on the intimate conviction can apparently be more difficult to be attacked upon appeal, as subjective categories of judicial consciousness and conviction are difficult to control. Yet, in the inquisitorial model of proceedings this is not necessarily so. In fact, if the higher courts have at their disposal the "try harder" approach, they may also remit the judgments reasoned by the "certainty" of the intimate conviction because, in the view of the higher court, insufficient evidence was collected.

Of course, remittal of the judgment is not a pleasant outcome for the judge who wrote the judgment. But, it has a number of positive side-effects for both the trial judge and the appellate judges. For example, the remittal of the case is not a final decision, and therefore the responsibility for the decision can be attributed neither to the lower, nor to the higher court. Also, the goal of material truth is such a powerful ideological concept that it can justify delaying of the case and other, more technical details, such as numerous adjournments of

hearings. There are also other collateral results that may be evaluated positively from a judicial perspective. In such a way, the responsibility for resolving socially sensitive cases that may bring negative publicity or attract negative emotions regarding judges who decided them can be "cooled off" by delaying the process, or by entangling the parties in a vicious circle of decisions and remittals, until the issue at stake would be resolved by itself.

This presentation of post-Socialist approach has, admittedly, the elements of an ideal type. It is a model which analyses possible strategies of explaining grounds of judicial fact-finding in the judicial decisions, and the possible impact of the alternative strategies under particular historical and social circumstances. Empirically, it is difficult to assess how broadly this model is spread, and give precise indications about the differences that may exist on a national, regional or local level. Yet, there is a least some circumstantial evidence that supports the submission about this model being widely spread among the Eastern European countries. Namely, a great number of them share the same difficulties with establishing a sufficiently efficient justice system – and the main reason can very hardly be found in the lack of resources[37]. All of these countries have been often found responsible for the violations of the human right to a trial within a reasonable time, which sometimes amount also to the violation of the right of access to justice. In the context of civil adjudication, excessive number of evidentiary hearings, as well as successive remittals upon legal remedies, played a prominent role among the reasons for the length of proceedings[38].

[37] The evaluation rounds of the CEPEJ (European Commission for the Efficiency of Justice) show that most of the Eastern and South-Eastern countries have a number of judges that is over the average (the post-Yugoslav countries being here at the very peak of European statistics). Compare European Justice Systems editions, http://www.coe.int/cepej.

[38] See on that issue Calvez, Françoise, *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights*, Strasbourg, 2007. Grgić, A., The Length of Civil Proceedings in Croatia: Main Causes of Delay, u: Uzelac, A./van Rhee, R. (ed.), *Public and Private Justice*, Antwerpen/Oxford, 2007, pp. 158–161.

VI. CONCLUDING DELIBERATIONS

In the very end, I would like to depart from the description of the strategies of motivating judgments in Eastern Europe and return to my initial equations, suggesting some possible further conclusions of a general nature.

First, it is inherently hard to control accuracy of factual findings. As shown by the given examples, judges can always find an alternative strategy in order to achieve the desired goals; there is no guarantee that higher instances will come to more accurate findings.

Giving reasons for judgments should be in the function of efficient proceedings. Judges must take responsibility for making final decisions, and have to deliver justice promptly.

Filtering mechanisms should be considered – good reasons for judgments can best be noticed only if it is not needed to write a detailed judgment for every manifestly ill-founded case. Options to limit appeals should be considered as well.

Facit: if the need to motivate judgments is proportionate to the level of distrust in judges, we have to work more on the trust in judges, and less insist on the detailed motivations.