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Rationality in Truth Finding; Procedural and Evidential Needs

The term rationality or rationalization is used to signify different concepts, psychologists, economists and lawyers mean different things by the same word. But even in the science of penal law no uniform notion of rationalization could be formulated although it is frequently mentioned as a requirement indicating the quality of the criminal justice system (CJS). Some authors use the term as a synonym for efficiency meaning that the CJS is able to achieve its ends. In other formulations rationality is regarded as optimization, i.e. the fulfilment of the tasks at a reasonable cost. According to another definition, the CJS is operating in a rational way if it may keep up with the technical revolution and make use of the achievements of science.

At the preparatory meeting for the seminar no uniform definition of rationality was formulated, so the contributors were left almost full scope in employing their own concept. However, the enumeration of the shortcomings in the operation of the CJS provided certain orientation.

It is partly the great number and the confusion of definitions that made me choose a less scientific definition of rationality, according to which the CJS is regarded as rational if it is fit for fulfilling its functions reliably in compliance with the generally accepted values and requirements set for its operation. Thus, as a point of departure we have to give the definition of the CJS, clarify its functions and identify those requirements it has to meet.

The CJS is structured to consist of various interrelated phases (subparts) which has the function of solving the conflicts caused by the violation of legal norms through enforcing and effectuating substantive criminal law. In that process the objective truth has to be found within a reasonable time and the economic employment of resources so that both the directly involved participants and the public could and should follow the process and should accept the final decision as a result of the understanding of the way leading to it.

The interpretation of rationality outlined above obviously involves a certain reduction: we do not analyze the rationality of the values it has to adhere to. We do not examine, e.g. whether it is rational to structure the CJS to consist of several phases or whether it makes sense to expect the CJS to find the truth.

Instead of questioning or analyzing these goals and requirements we rely on the common agreement supported by historical experience. (In this sense rationalization may mean the rationalization of the irrational: irrational goals and values may be promoted through rational instruments.)

Similarly, we refrain from examining the rationality of substantive criminal law in spite of our awareness of the fact that irrational provisions of penal law will reduce the chance of the CJS to arrive at decisions acceptable for the parties involved and the community (unless we regard the criminal process as an institution entitled to correct deficiencies of substantive penal law, as it is sometimes claimed by several scholars).

Our task to improve the rational operation of the CJS would be a relatively easy one if we could prove that all the goals, values and other requirements tend to support each other. In this case the improvement of one single element would automatically result in a higher quality of the operation of the CJS as a whole. As a matter of fact, some of the requirements indicate a relationship of mutual support. The speeding up of the process, e.g. tends to increase the preventive effect of punishment and may promote truth finding and so may do some of the safeguards as well (e.g. the division of procedural functions). But there are also counteracting goals the CJS must achieve at the same time and conflicting values which the system has to keep to (internal tension within the CJS). We regard, e.g. the CJS as an integrated system with interrelated subparts, but on the other hand, the generally accepted principle of the division of procedural functions tends to result in separateness and disintegration since it presupposes the operation of more or less independent agencies with their specific obligatory interests, ends and particular values.

As far as the relation of the various procedural phases is concerned, the employment of scientific achievements tends to push the pre-trial phase into the fore, while on the other hand, most criminal lawyers profess the thesis proved by historical experience that the court conducted trial must be the central part of the criminal process.

Truth finding may be enhanced by several coercive measures and modes of taking evidence which however contrast with the principle of due process and the respect for individual liberties. The existence of several successive phases in

the process and multiple supervision of the decisions are likely to improve the quality of truth finding but run counter to the requirement of accelerating the procedure; the full employment of technical means may be hampered by the requirement that the parties and the public should be able to follow the process.

From the acceptance of these conflicting functions and counteracting requirements and values it follows that the rational operation of the CJS depends greatly on the balance of these elements. And if this balance is disturbed rationality calls for re-establishing the equilibrium. In the paper I discuss problems which indicate that a given end or value has been restricted to a secondary role during the last decades and try to make suggestions for re-establishing the balance.

The defects in the balanced operation of the CJS may be traced back to different factors. In certain cases the CJS was unable to react to the challenge of the changes in the social environment leading to the neglect of certain objectives and expectations set for the operation of the system. So, e.g. criminal activity becoming growingly international or complicated economic crimes hinder the enforcement of substantive penal law to a significant extent. There are also difficulties in the operation of the administration of justice originating from the internal evolution of the criminal justice system (e.g. changes in the function and importance of the pre-trial phase, the vanishing of organs promoting the integration of the system). Finally, we may find also values that could never be implemented in practice but only recent empirical studies could convincingly prove the great gap between legal doctrine and reality (e.g. the equality of arms).

I. The Lack of Intersectoral Coordination

1. The lack of integrating agencies

We defined the CJS as a system consisting of interrelated phases and referred to the organizational autonomy and independent values of each subpart. The organizational separateness - the transformation of the idea of the separation of power to the CJS - is regarded as a significant safeguard of the defendant's rights and there are also authors who believe, the separation of the procedural phases and the differences in the operation of the various agencies acting in the criminal process may also promote truth finding. However, recent criticism of the CJS indicates that separateness and disintegration have reached a level hampering the rational performance of the administration of justice. In his general report prepared for the international con-

gress on "Criminal Justice Processes and Perspectives in a Changing World" (Milan 14-17 June 1983) Professor Bassiouni gave an analysis of the fragmentation and disintegration within the CJS but already a decade earlier Professor Wolfgang had suggested to enhance intersectoral coordination for making the CJS accountable.

Now if we take the criminal process as one part of the CJS we may experience the same trend of disintegration, namely the polarization of the process into two separate phases of diverging nature since the agencies capable for integrating the process through ensuring the adjustment of the pre-trial phase to the expectations of the trial have been pushed into the background in the course of the last few decades.

First, it is the institution of the investigating magistrate that has lost significance: some systems have fully abolished it but in countries which had maintained the institution it is but a fraction of criminal matters that are investigated under the actual control of the magistrate, while most part of his activity is restricted to the judicial confirmation of the actions taken by the police or the prosecutor. Undoubtedly, the original function of the investigating magistrate on the Continent was not that of serving as a link between investigation and trial. Initially, in the absence of a modern police organization, he was engaged in actual investigating activity, later his judicial impartiality was considered to be an adequate counter-balance to the clearly inquisitorial nature of the pre-trial phase. (It may be assumed that the investigating magistrate has been preserved in those countries where the inquisitorial character of the pre-trial phase has been maintained.) However, independent of his original function the investigating magistrate could serve as a channel to transmit the requirements of the trial phase to the investigation and by its disappearance the CJS has lost one of its integrating components.

Besides the investigating magistrate, it was the prosecutor who was expected to coordinate the two principal phases of the criminal process. The assumption was a realistic one: the prosecutor representing the charge before the court and whose performance was measured according to the conviction rate could reasonably be expected to fulfil his duties in directing and supervising the investigative activity intensively and with special view to the evidentiary requirements of the trial.

However, in many countries a development can be experienced that runs counter to the legislative intention, according to which police and prosecutor should cooperate in the pre-trial phase and the leading role of the prosecutor should ensure that investigation be conducted with an orientation

to the rules of the trial and by this the integration of the two procedural phases. A great number of countries report that investigation is practically conducted by the police due to its superiority in investigating skills and technologies, while the prosecutor's activity is restricted to bring and represent charges. This kind of division of labour may reduce the efficiency of crime control since the two agencies, in addition to their organizational separate-ness operate in diverging ways and indices of successful performance. The aim of the police is to clear the case from a criminalistic viewpoint which does not necessarily coincide with the mode of taking evidence ensuring conviction at the trial. For this, however, the police does not have to care, acquittal or dropping the charge by the prosecutor not being indices demonstrating failure in police performance. On the other hand, investigations terminated for mistakes made by the police do not appear as indicators of deficient prosecutorial performance in a number of countries.

At first sight the mentioned separateness and disintegration does not seem to cause dramatic problems for the rational operation of the CJS since the conviction rate is traditionally high all over Europe. This, however, indicates only that the CJS fulfils its filtering function in an appropriate way. But if a trial oriented agency would enter the process at an earlier stage, fewer cases had to be dismissed at the charging phase and, on the other hand, hopeless cases (hopeless from the point of view of conviction) could be screened out in time and material and human resources could be saved.

For enhancing integration several solutions should be considered, from among which the re-introduction of the institution of the investigating magistrate seems to be the less probable. Even in countries where the institution is deeply rooted in legal tradition and its existence does not cause dramatic difficulties in the operation of the CJS, there are experts recommending its abolition. Apart from this, the idea of re-introducing the institution was rejected also in countries where a comprehensive transformation of the pre-trial phase was implemented or planned.

As the second solution, trial orientation could be enhanced by entrusting the police as the agency actually conducting investigation with prosecuting and representing charges before the court. This may seem to be a logical conclusion from our train of thought outlined above and there are systems existing where the authority to prosecute is shared by police and prosecutors (Norway, England, etc.). However, experience gained in these countries indicates that this solution should not be recommended either. The system in Norway, e.g. may hardly serve as a general pattern since officials in the higher echelons of the police entrusted with representing charges before the court belong to the

Public Prosecution Authority and the whole police force is partly subordinate to instances of the Public Prosecution Authority. As far as England is concerned, the whole system is developing into establishing the office of public prosecution all over the country. And this trend is not surprising if we consider that police officers lack legal training and that the police is first of all an organ of law enforcement operating on the assumption of guilt which hampers the intrusion of trial orientation.

What remains is the increase in intensifying prosecutorial activity in the pre-trial phase. Several ideas have been formulated some of them suggest to unite police and prosecution in one single organization. In this case, however, the balance between integration and separateness may become disturbed again, now the other way round, into the direction of over-integration. In the socialist countries, where prosecutors, in addition to their obligation to prosecute, perform the ombudsman-like function of supervising legality in general, the solution is searched for within the frames of existing legal provisions: prosecutors are obliged to participate intensively in the pre-trial phase and make use of their rights already provided by the legal regulations.

2. Preparation for the trial

Trial oriented operation during investigation would be all the more desirable since a further integrating institution of the process, the preparation of the trial seems to be shaking, too. reviewing the various legal systems on the Continent, we may distinguish roughly to basic models. According to the first it is a separate judicial body (council of accusation) which decides on the issue whether there is sufficient evidence to bring the case to trial. According to the second, it is the trial judge's responsibility to check whether the charge is well-founded and to prepare the trial in a technical sense. The choice between the two models depends on a number of factors: besides legal tradition, it is mainly the character of the investigation that may exert a decisive impact on the choice. (The council of accusation e.g. is likely to be preferred in countries where investigation is conducted in a more inquisitorial manner and where the weak position of the defence has to be counterbalanced by an additional filtering agency.)

In the case of the preparation of the trial the tension between conflicting goals appears clearly: on the other hand, this phase should be apt to filter out unfounded charges effectively which, of course, is time and energy consuming, on the other hand, it should be speedy and cost saving. From these two requirements, it is the second that seems to have been given priority in most legislations,

since the number of cases screened out at this stage of the process is rather low. This may be explained by the fact that actions open for the court at the stage of preparing the trial is limited (restrictions on taking evidence or evaluating the credibility of evidentiary means) as a consequence of the intention to save the priority of the trial and to ensure the court's impartiality.

Summing up, the development of the stage of the preparation for the trial tends to move towards simplification and acceleration while the filtering function is restricted mainly to examining the prevalence of formal preconditions for further procedure (jurisdiction, limitation, etc.). The effective screening out of cases before the trial should be done during the investigation through broadening the rights of the defence and by a stronger emphasis on trial orientation.

Under these circumstances the preparation by the trial court being rather simple and speedy, could be advocated. The frequently voiced criticism of the system that the judge may form a certain preconception of the case before the actual trial should not be overestimated in a system in which the presiding judge, in order to perform his expected active role in the trial must get acquainted with the dossier in advance by necessity.

II. Difficulties in Enforcing Substantive Law

1. Simplification in more complex cases?

A criminal justice system unable to perform one of its primary tasks, the enforcement of substantive law deserves to be called irrational. If effective law enforcement is made impossible on a mass level for procedural reasons, measures for rationalizing the process are justified. In recent times various types of offences have challenged the traditional operation of the CJS, such as political crimes (mainly terrorism), organized and economic crime and cases involving a great number of time-consuming expert opinions. From among these cases I shall leave out trials against political defendants and confine myself to those cases where there is a certain degree of consent, so both the court's competence to decide the case and substantive criminal law are accepted by the parties.

As far as economic and related crimes are concerned, the main problem lies in the fact that convicting offenders within the traditional procedural frame is frequently impossible or can be achieved through a Pyrrhic victory by sacrificing many of our commonly accepted principles. Thus the requirement of speedy procedure, the immediacy or

orality principles are frequently violated and the principle of legality, i.e. the duty to prosecute all the reported cases cannot be observed fully in most of these trials. Procedure is extremely expensive and the long duration of the trials does not strengthen the public's trust in the effective operation of the administration of justice.

It is frequently argued that economic and related crimes can be fought to a limited extent only for deficiencies in substantive penal law or that the final solution falls outside the competence of the CJS. However, certain procedural changes could also contribute to combat the mentioned forms of criminality more effectively. So, e.g. the creation of a special procedure is conceivable for this type of cases with a certain restriction of the immediacy and orality principle that could result in the speeding up of this kind of procedures.

Of course, there can be counterarguments to a solution like this. First, legislators seem to be cautious in prescribing specific rules for specific types of offence; according to our concept this may involve the danger of violating equal protection of the law. Further, the proposed creation of a special procedure runs counter to the traditional way of construing specific forms of procedure. Traditionally, simplified procedures have been used to handle cases regarded as less complicated (and less serious) with the primary function to contribute to the reasonable allocation of resources within the CJS. On the other hand more complex procedural means have been employed for more serious and complicated cases based on the assumption that these procedural equipments may reduce the possibility of judicial error.

Finally, the idea of construing a more simple procedure for complicated cases could be rejected on the ground that the orality and the immediacy principles are fundamental part of our legal tradition to which we strictly adhere to, partly because of their close connection of the principle of public trial.

However, the weight of the outlined counterarguments should not be overestimated. Special procedures, if it is the type of offence that underlies their application (and not certain personal characteristics of the offender) do not violate equal treatment before the law by necessity. Thus, the crucial point is to lay down accurately the conditions for the application of a special procedure by the law so that these preconditions should not be open to interpretation, discretion and eventual abuse on behalf of the agencies acting in the administration of justice.

As far as the "endangered" principles are concerned, a deep analysis of their real function is advocated. The orality principle, e.g. does not have an inherent value, it serves

much more as a medium, as the external form of the dialectic way of discovering the truth, which implies the method of arguing and counterarguing, of stating and refuting, i.e. a certain degree of tension and contradiction. If the dynamic of tensions is lacking in the trial (as it is frequently the case in trials for economic and related crimes where mainly onesided declarations are made) the orality principle will lose its function. In the same way, the actual function of the immediacy principle as well as that of public trial should be analysed.

2. Delay in justice

The long duration of the process is not a specific nature of trials in cases of economic and related crimes, it indicates much more a disease of the operation of the CJS in general. The delay is caused by a number of factors including the increase in the number of crimes reported and organizational shortcomings but recently empirical data and interview with judges and court personnel have revealed a new factor in many countries: procedure frequently has to be adjourned because summoned victims and witnesses (and also defendants) simply do not appear at the trial. One explanation for this phenomenon may be the growing role of the investigating phase: witnesses and the victim are more than once interrogated thoroughly by the police so by the opening of the trial their interest is cooled off. But the main reason might be the decrease in the prestige of courts. The general public, instead of regarding the courts as institutions solving the fundamental conflicts within the community consider them mainly as institutions delivering a specific service as one of the many agencies, and in addition, as one which is not the most effective in enforcing respect.

However, only temporary success could be achieved through more severe sanctioning of not complying with court summons. Long term solution calls for efficient legal propaganda convincing people of the importance of the CJS, as well as rational decriminalization lessening the assembly line functioning of the administration of justice. But there remains a lot to be done by procedural law, as well. The general speeding up of the investigation may result in keeping alive the interest of victims and witnesses and their support and cooperation could be enhanced by a victim and witness oriented criminal policy (calling also for changes in procedural law) as it has been suggested recently by a number of victimologists.

III. Visibility of the Procedure and of the Decision-Making Process

Exclusionary rules vs. free evaluation of evidence

The rule of the free evaluation of evidence that had replaced the system of formal (or legal) proof on the Continent is frequently held responsible for the irrational performance of the CJS. It is argued that the free discretion over evidence not only enables the intrusion of extra-legal considerations in the decision-making process but also renders it impossible to reveal the real motives on which the court decision is based and so an effective control by the parties and the higher instances over the decision-making process is almost hopeless. As a consequence, the acceptance of the final decision as a legitimate one is hampered. The Continental system of free evidence is frequently confronted with the system of exclusionary rules which in addition to safeguarding the rights of the defendant is said to make the decision-making process more visible.

For a realistic evaluation of the two contrasting procedural arrangements, however, one has to analyse the Continental and the American systems as totalities. Attention has to be paid, e.g. to the absence of detailed motivation in the American system which of course reduces the visibility and accountability of the decision-making process. Second, the system of exclusionary rules has to be placed in the organizational context that preconditions its existence. The American CJS is based on the so called coordinate model, the strict hierarchical structures have not developed within the various agencies. In the absence of intra-agency supervision and control external procedural arrangements, e.g. exclusionary rules are required to ensure that legal regulations are followed by the law enforcing agencies. (The effectivity of such external means of control is ensured by the system of electing of prosecutors who are forced to present a favourable conviction rate.) In the hierarchically structured continental model there are other, mainly intra-organizational means for ensuring the legality of taking evidence, such as effective check by superiors, liability under labour law, disciplinary measures.

As a consequence of the differences of the organizational context (to which differences in ideology should be added) of the two criminal justice systems, Continental procedural law does not seem likely to adopt the system of exclusionary rules to a broad extent. This, however, should not mean that the search for methods making the performance of the CJS more rational from the viewpoint of visibility and accountability would be meaningless.

Several solutions could be considered, some of them may appear rather provocative. We could, e.g. analyse to what extent the secret deliberation and ballot reminding of divine justice are consistent with rationality in the sense of visibility and the possibility of control. One could also question the role of forced unanimity in furthering the decision's acceptance and ask why procedures for submitting dissenting opinions are made so difficult as to dissuade the individual judge of expressing disagreement.

We could also consider whether visibility could not be furthered by putting the obligation on the judge to give an account of the facts of the case and of evidence before bringing decisions as it is the rule in certain legislations for civil lawsuits. Apart from enhancing transparency, such a summing up of the facts of the case and of evidence could also contribute to a decrease in the number of unfounded appeals.

For bringing actual and declared motives of the decision closer, courts should be forced to put their decisions with the motivation in writing within the shortest time possible. Finally, a much debated procedural innovation, the division of the trial into two phases could be re-considered, this time from the point of view of making the decision more transparent.

SOMMAIRE

La rationalité dans la recherche de la vérité:
exigences et problèmes de la procédure et des preuves

Le terme "rationalisation" est utilisé pour désigner différents concepts; les psychologues, les économistes et les criminologues le conçoivent d'une façon différente. Même dans les sciences juridiques il est impossible de parler d'une notion uniforme de rationalisation, quoique le mot soit souvent employé pour indiquer une caractéristique du système pénal.

C'est en partie à cause du grand nombre de définitions et de la confusion qu'elles créent que j'ai choisi une définition moins "scientifique", selon laquelle un système pénal peut être considéré comme un système fonctionnant rationnellement s'il est apte à remplir ses fonctions d'une manière sûre et satisfaisant les conditions généralement acceptées qui ont été imposées à ses activités. C'est pourquoi nous devons commencer par clarifier les fonctions du système pénal et par énumérer toutes les valeurs sur lesquelles il doit être basé et toutes les conditions qu'il doit remplir.

Du point de vue de sa structure le système pénal consiste de plusieurs parties qui ont des relations mutuelles, et sa fonction est de résoudre les conflits causés par la violation des lois pénales par l'opération du droit pénal positif et l'exécution des peines. Dans ce processus on doit découvrir la vérité en un temps raisonnable et en faisant un usage économique des ressources, et aussi bien les parties que le public doivent être en mesure de suivre le procès et de se former une opinion sur la décision finale par leur compréhension du raisonnement sur lequel elle est fondée.

Il faut noter qu'il y a des éléments contradictoires dans la définition et des conflits et des tensions dans le système pénal. Par exemple, nous considérons le système pénal comme un système intégré composé de parties qui ont des relations mutuelles, mais le principe de la division des fonctions et des tâches procédurales mène souvent à la séparation des éléments et à la désintégration, parce que ce principe présuppose l'existence de services plus ou moins indépendants ayant des intérêts d'organisation et des objectifs spécifiques et se basant sur des valeurs particulières.

Si nous acceptons ces fonctions contradictoires et ces valeurs antagonistes il est clair que l'action rationnelle du système pénal dépend dans une large mesure de l'équilibre de ces éléments, et si cet équilibre est perturbé la rationalité exige qu'il soit rétabli.

Dans l'exposé certains problèmes sont étudiés qui montrent que pendant les dernières décennies une fonction ou valeur déterminée a été réduite à un rôle secondaire et des suggestions sont faites pour rétablir l'équilibre et pour diminuer la tension entre la doctrine et la pratique.

Les sujets suivants sont traités dans la communication:

1. Le manque d'intégration du système pénal et la bipolarisation du procès, c'est-à-dire la division en deux phases séparées fondées sur des approches et des valeurs nettement différentes;

- le rôle présent et futur du magistrat chargé de l'instruction et du ministère public dans la phase précédant le procès;
- l'instruction préparatoire, "Zwischenverfahren"
- l'importance croissante de l'enquête et le changement éventuel de la fonction du procès

2. Les difficultés de maîtriser la criminalité économique: faut-il introduire une procédure simplifiée pour les affaires complexes?

3. Le besoin d'une procédure accélérée.

4. Le caractère ambivalent de l'aveu: moyen de preuve pour établir les faits et facteur influençant le jugement.

5. Système des preuves légales ou libre appréciation des preuves: il faut clarifier comment les magistrats arrivent à leurs décisions et faciliter le recours.

Кароли Бард

Тема 2: Рациональность в установлении правды, процедурные и доказательные потребности и проблемы

Тезисы доклада

Термин "рационализация" используется в разных концепциях, психологи, экономисты и криминологи подразумевают разные вещи используя одно и то же слово. Но даже в правовой науке нет однозначного значения для термина рационализация, хотя этот термин используется часто для означения качества уголовно-правовой системы (УПС).

Частично из-за большого количества определений и из-за неясности их использования я выбрал "менее научное" определение, согласно которому УПС можно считать рациональной действующей системой, если она выполняет свои функции надежно и согласно принятым широко требованиям к её работе. Поэтому, мы должны для определения исходного положения выяснить функции системы уголовного правосудия и перечислить все те ценности и требования, с которыми она имеет дело.

По своей конструкции УПС состоит из различных взаимосвязанных фаз (подэлементов) и её функция заключается в разрешении конфликтов являющихся последствиями нарушения уголовного закона используя существующее и проводящее законы в жизнь уголовное право. В этом процессе объективную истину нужно найти в течение разумного периода времени и с экономным использованием занятых ресурсов и таким образом, чтобы обе непосредственно заинтересованные стороны, а также публика смогли следить за ходом процесса и воспринимать окончательное решение как результат понимания проводящегося к нему пути.

Как мы видим, уже в самом определении заключены соревнующиеся и противоречивые требования (внутренние конфликты и напряжения внутри самой системы УПС). Мы считаем, например, что УПС является объединяющей в одно целое взаимосвязанные подэлементы системой, а с другой

стороны принцип разделения процессуальных функций и задач имеет отделяющую и дезинтегрирующую тенденцию, так как это предполагает более или менее самостоятельную работу органов со своими организационными интересами, целями и особыми ценностями.

Из существования этих противоречивых функций и противодействующих ценностей следует, что рациональное функционирование УПС во многом зависит от сбалансированности этих элементов. Если же этот баланс между элементами разрушен, достижение рациональности требует восстановления равновесия.

В данном докладе я рассматриваю определенные проблемы, которые указывают на то, что предложенную функцию или ценность стеснили на второстепенную роль в течение последних десятилетий и предлагаю восстанавливать баланс и снизить напряжение между правовой доктриной и практикой.

В докладе рассматриваются следующие проблемы:

1. Недостаток интеграции в УПС, поляризация процесса, т.е. разделение процесса на две отдельные фазы, действующие на основе строго отличающихся друг от друга подходов и ценностей
 - настоящее положение и будущее исследующего судьи и обвинителя в течение предсудебной фазы;
 - передача дела в суд / подготовка судебного процесса (Zwischenverfahren);
 - возрастание значения исследования и возможные изменения в роли суда.
2. Сложности контроля экономических преступлений: введение в употребление упрощенных процедур для более сложных дел?
3. Требования к ускорению процедуры.
4. Двойственная роль признания: средство доказательства в установлении истины и влияющий на приговор фактор.
5. Исключительные правила versus свободная оценка свидетельства: изменение процесса принятия решения более видимым и субъекта пересматриваемым.

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As an instrument of formalized social control, the system of criminal procedure is entrusted with the enforcement of sanctions against citizens trespassing provisions of criminal law. Since criminal sanctions should be inflicted only on persons who are guilty, the criminal procedure has to provide a machinery to ascertain whether the alleged offender really is guilty. Factfinding - or what also may be labelled as the discovery of the truth - is one of the principal objectives of criminal procedure.

Acting as a machinery of justice, the procedural system has to provide safeguards for the citizens. Their fundamental rights as human beings should be protected within that system. The factfinding process must be fulfilled with due regard to these rights. An efficient process has to be balanced against a genuine respect for the personal freedom of the citizen - the efficiency has thus to be held within the boundaries of a rational and just system.

The first phase of factfinding - the investigation - will to the greatest extent be performed outside the courts; in my country through the police acting as a branch within the prosecution authority. The investigation will act as a "filter-system", leading to the result that a great number of cases will be dropped, owing to the lack of necessary evidence, or owing to reasons of a procedural or substantive character. As to these last mentioned reasons, differences may occur due to the material essence of the system based either on the principle of legality or on expediency.

The factfinding process within the courts can be constructed in different ways, manifesting themselves in two extreme systems - already mentioned by the Rapporteur. According to the first system - the inquisitorial or Continental one - it is the task of the judge to establish the truth of the case. According to the other - the adversarial (the accusatorial) or Anglosaxon one - the task of presenting the evidence at the trial is placed in the hands of the parties. In that system the judge ordinarily need not actively participate in the factfinding process. Having mentioned the two extremes, I would like to emphasize that in practice shades and modifications have been made within both systems. The Danish professor Stephan Hurwitz has rightly noticed: "The importance of the concepts 'accusatorial and inquisitorial process' lies mainly in their capacity of slogans, stressing opposing tendencies within the criminal process". A Norwegian colleague of Hurwitz - professor Andenaes - has in his book on Criminal Procedure