



**The Correlation Of In Dubio Pro Reo And In Dubio Pro Duriore  
Principles In The Criminal Proceedings Of Switzerland And Russia**

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**The Correlation Of In Dubio Pro Reo And In Dubio Pro Duriore Principles In The  
Criminal Proceedings Of Switzerland And Russia**

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**ABSTRACT**

The criminal process in both Switzerland and Russia has traditionally been related to a mixed type, which assumes that pre-trial stages are based on the inquisitional (investigative) beginning, and judicial - on the adversarial. At the same time, the purpose of legal proceedings, in the opinion of the majority of continental proceduralists, is to establish material truth. It is on its achievement directed investigative and other procedural actions. At the same time, the question inevitably arises about the nature, limits and logic of the cognitive activity of criminal justice bodies.

In this regard, the author, on the basis of normative and doctrinal sources, including German, Swiss, Austrian, examines the procedural and legal principles in dubio pro reo (in doubt - in favour of the accused) and in dubio pro duriore (in doubt - according to the strictest version ) on the example of the Swiss and Russian law and order. It is shown that in the criminal justice of these states they balance among themselves and counterbalance each other. According to the European approach discussed in the article, the principle in dubio pro duriore in order to establish the material truth in pre-trial proceedings somewhat restricts, constricts the presumption of innocence. On the contrary, when considering a case in a court of first instance, the latter manifests its full force. In this article it is shown that in the domestic science the principle in dubio pro duriore has not yet been developed, but has become widespread in practice. In the Russian legal literature, the ratio of the principles in dubio pro reo and in dubio pro duriore has not been studied practically at present either in monographs or in other publications. This article will serve to eliminate and fill this gap.



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**Keywords:** presumption of innocence, initiation of criminal case, indictment, evidence, pre-trial proceedings, preparation of case for trial, examination of a case on its merits, criminal proceedings, the criminal proceedings in Switzerland, *in dubio pro reo*, *in dubio pro duriore*.



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## 1. INTRODUCTION

The principle of the presumption of innocence (*in dubio pro reo*) [22, 5] has been sufficiently completely covered in the domestic procedural science [15, 74-78] Its legal nature, action at various stages of the process and other aspects have been thoroughly considered, inter alia, in a comparative law aspect [13, 1-224]. At the same time, the question of its relationship with the *in dubio pro duriore* principle, highlighted in the doctrine, has practically not been touched upon, although their correlation and interrelation in the criminal process are of considerable interest. The exception is only provided by Professor L.V. Golovko's article titled "*In Dubio Pro Duriore* Principle and the Theory of Insurmountable Doubts or on the Benefit of Study of the Swiss Criminal Procedure Doctrine" [14, 72-84] and lawyer V.V. Klyuvgant's article titled "Accusational Inclination in Latin (notes with regard to A.A. Trefilov's article)" [15, 74-78].

## 2. MATERIALS UND METHODS

The *in dubio pro duriore* principle was not directly regularized in the Criminal Procedure Code of the Russian Federation and was not singled out individually in the Russian procedural science. Nevertheless, it was to a certain extent developed in Switzerland, Germany, Austria, Liechtenstein and other foreign laws and orders (let us limit ourselves to the analysis of European countries).

This Latin expression has no unambiguous established translation into Russian, but, based on the meaning, transferred to it by the foreign doctrine, it would be appropriate to denote it in the following way: "in case of doubt – under the most stringent option" (or "in case of doubt – for the worse"). The following are the German-language analogues: «*Im Zweifel für das Härtere*», «*im Zweifel für die Anklageerhebung*». It is opposed to another principle of justice, which is much more known since the times of Roman law – *in dubio pro reo* ("in case of doubt – in favour of the accused").

Let us consider this principle first by the example of the Swiss law and order. In general terms, it consists in the following. If the police have doubts whether to start the preliminary investigation, it is necessary to proceed with its conduct (absence of the stage of initiation of a criminal case is this is an indirect evidence of the existence of this principle). If the prosecutor doubts whether it is necessary to issue a ruling on the commencement of proceedings on the case, then he must give it. If this official, based of the available



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body of evidence, is not unambiguously confident of the articles of the criminal law, according to which charges should be brought, the charges should be brought with respect to a more serious criminal action among the alleged actions (even if there are certain grounds to suppose that the accused has probably committed a less serious criminal action).

In turn, when the judge subscribes a measure of procedural compulsion, including a confinement under guard, or when the judge renders a sentence, he (she), on the contrary, must proceed from the presumption of innocence (Art. 10 of the Criminal Procedure Code, Art. 32 of the Constitution of Switzerland) and must interpret all the doubts in in favour of the accused within the framework of the “*in dubio pro reo*” principle.

Professors C. Riedo and G. Fiolka explain the essence of this principle in the as follows: “An issue on the outcome of the trial is complicated when there is no certainty with respect to the criminal guilt of the accused in the pre-trial proceedings. The “*in dubio pro reo*” principle (the presumption of innocence) is not applied at this stage; it only applies with respect to the conviction of the person of a committed criminally punishable act. On the contrary, in case of doubts during the preliminary proceedings, the classification of the crime must be *most stringent* [13,224].

Swiss scientists trace statutory regularization of this principle, in particular, in Part 1 of Art. 319 of the new Criminal Procedure Code, which was approved in 2007 and entered into force in 2011 [, according to which the public prosecution office files an indictment before a competent court in the event that, based on the conducted preliminary investigation, the grounds for suspicion were taken into consideration as sufficient ones; and, at the same time, the public prosecution office is not entitled to issue an order of punishment. Essentially, under this approach, it is not the credibility, but only a certain degree of probability of the fact that the person is guilty of commitment of the crime, which will be required in order to transfer the case to the court. On the contrary, the court can only convict a person upon availability of a body of investigated evidence, which provides the evidence of his (her) criminal guilt.

The Supreme Court of Switzerland pointed out directly in its decision dated July 11, 2011, No. 1B\_123/2011 that “an indictment must be filed if conviction seems more probable than a sentence of acquittal” (the original text is as follows: «*Anklage erhoben*



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*werden muss, wenn eine Verurteilung wahrscheinlicher erscheint als ein Freispruch*)». In this respect, as stated in the doctrine of this country, the public prosecution office is only allowed to terminate the case if it is evidently impossible to hold the person criminally accountable or if prerequisites of the procedure are definitely absent. If it is “only doubts that are available, then indictment and judicial evaluation of the facts of the case must follow”.

Apparently, the considered approach reflects a conceptual idea, according to which the determination of a case on its merits is an exclusively judicial function. It must not be performed by criminal justice authorities. Their task is to investigate preliminary the facts of the case, as well as to check if there are any obstacles to the examination of the case on the merits. This approach implies that in pre-trial proceedings of Switzerland. The competent authorities (police and public prosecution office) must in the first instance lay emphasis on the formal, but not on the essential side of the case. Only in the case where the innocence of the person is evident, preliminary investigation must not be initiated, while the initiated investigation must be terminated.

The analysis of the Swiss legislation and the analysis of the doctrine of this country show that the “*in dubio pro duriore*” concept has deep theoretical grounds. Police inquiry and preliminary investigation are conducted within framework of pre-trial proceedings (*Vorverfahren* – word for word translation: “pre-proceedings”). Since it is only a preliminary (not final) investigation of circumstances of the case that takes place at this stage, and the criminal prosecution authorities do not yet imperatively claim somebody’s criminal guilt and only express their procedural position, then, in order to protect the rights and legitimate interests of the affected, as well as to protect the rights and legitimate interests of the society and state, it is necessary to investigate the circumstances of the case with maximum completeness and comprehensiveness. If police and public prosecution office would keep questioning everything each time in the process of preliminary investigation and would demonstrate passive inaction instead of active investigation measures with respect to the possible violations of law (if only not to curtail somebody’s rights), then, probably, no case will be initiated and no case will get to the court for the examination on its merits.



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Based on this principle, singled out by the Swiss doctrine and judicial practice, at the stage of preliminary investigation, one should not require an unwaveringly high degree of proof of the decisions taken by the authorities that conduct the investigation; mistakes are even allowed within reasonable limits, otherwise, fill-scale struggle against crime will be impossible. In turn, in the court, the principle of the presumption of innocence is, on the contrary, revealed to the full extent. It is exactly the principle of the presumption of innocence that is a defining principle in the rendering of a sentence, in particular, in the classification of the crime, which is carried out by the court.

Let us also note that the *in dubio pro duriore* principle is supported by the European Court of Human Rights. We see it, in particular, in the argument in Case of M.C. v. Bulgaria dated 04.12.2003. At the stage of pre-trial proceedings, the public prosecution office terminated the criminal case with respect of two persons, suspected in the rape of a female minor and sexual assault applied to her, and substantiated this ruling by the principle of the presumption of innocence. The ECHR agreed with the arguments of the complainant who stated that the investigation was not conducted comprehensively and completely, in consequence of which the argument, associated with this presumption, is unacceptable [20].

The conclusion is that the *in dubio pro reo* and *in dubio pro duriore* principles, singled out in the Swiss criminal procedure law, balance among themselves and counterbalance each other.

Does the *in dubio pro duriore* principle exist in the Russian criminal justice?. In our opinion, for better or for worse, the analysis of the corresponding norms of the Criminal Procedure Code and practice of its application makes it possible to answer this question in the affirmative.

1. Notwithstanding the absence of a direct requirement as to the establishment of the objective truth, in some of its norms (Art. 33, Part 2 of Art. 154, 239.1), the Criminal Procedure Code of the Russian Federation points to the need for comprehensiveness in the establishment of the circumstances of the case. In order to ensure the compliance with this requirement, classification of crimes in pre-trial proceedings must fully reflect all the criminally punishable acts, allegedly perpetrated by the suspected and accused – even in the event that the degree of proof of each individual constituent element of a crime and



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each individual criminal episode is different (it happens extremely rare that they were all proved with the same degree of persuasiveness).

2. This principle is evidenced by the practically established classification of crimes in a ruling on the initiation of a criminal case. For example, in case of disappearance of a person, the case is usually initiated under Article 105 (“Murder”), but not under Article 126 (“Abduction”), Article 127 (“Illegal Deprivation of Liberty”), etc.<sup>[1]</sup>. In case of an explosion in the subway or in transport, a criminal case is initiated under Article 205 (“Act of Terror”), Article 205 (“Illegal Acquisition, Transfer, Sale, Storage, Transportation, or Bearing of Firearms, Its Basic Parts, Ammunition, Explosives, and Explosive Devices”), which contain the constituent elements of crimes, correspondingly, serious and extremely serious crimes (although, an accident or violation of rules of safety regulations could be suspected). In the situation under consideration, one should suspect the worst and perform the whole package of verification and operational-investigative activities. Subsequently, based on the acquired information, a new and more precise classification will be performed.

3. Establishing the grounds for the initiation of a criminal case (Part 2 of Art. 140) and for the indictment (Part 1 of Art. 171), the Criminal Procedure Code of the Russian Federation implies that the degree of proof of the person’s guilt can be lower at this moment than in the in the judgement of conviction (Part 4 of Art. 302). The progress of cases at the stages is conditioned by the strengthening of the body of evidence, which is available to the criminal justice authorities.

4. For better or for worse, the so-called “classification with a margin” has become widespread in the practice of the law-enforcement authorities, which conduct inquiry and preliminary investigation. A.D. Nazarov describes this phenomenon in the following way: “In their desire to secure themselves against the return of the case for a supplementary investigation, law enforcement practitioners extensively employ a method of the so-called “*classification with a margin*” in the classification of the charge during the investigation and inquiry, that is, in order to be safe in a difficult situation with the classification of a criminally punishable act, they classify it according to a more serious article (or a more serious part of the article) ..., arguing in the meantime that in case of nonconfirmed indictment, in case of insufficient evidence ..., the court will ... always, without the return



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of the case for a supplementary investigation, be able to re-classify the act towards the mitigation of its classification” [19, 127].

This approach is as a rule evaluated exclusively negatively in the doctrine. Y.N. Rakhmanova considers it as a manifestation of an accusational inclination. V.V. Kolosovsky goes still further in his consideration that the classification with a margin represents “a wrongful conduct of the subject of the classification”, that is, an official crime in its essence (Art. 285, Art. 286 and other articles of the Criminal Code of the Russian Federation)[18].

*From the point of view of European (including Swiss, Austrian, German, etc.) procedural logic, one cannot fully agree with this approach (with the assumption that **the authors of this article by NO means support the classification with a margin** as an ambiguous and contradictory procedural phenomenon).*

In the first place, if the guilt of a person of commitment of a crime is confirmed by a certain (even a slim) body of evidence, that the authority, which conducts the proceedings on the case, is fully entitled to classify the act preliminarily according to a more serious article of the Criminal Code. This exactly constitutes its discretion.

In the second place, nobody has cancelled the principle of free evaluation of evidence (Art. 17 of the Criminal Procedure Code). This norm directly stresses that all the subjects of proof are free in the evaluation of evidence: not only the judge and the members of the jury, but also the prosecutor, the investigator, the inquiry officer. The key point is not to lose the sight of comprehensiveness, completeness and objectivity of the investigation.

In the third place, the application of the *in dubio pro duriore* principle does not in any way contradict the principle of the presumption of innocence (Art. 49 of the Constitution, Art. 14 of the Criminal Procedure Code). The accused, irrespective of the classification of his (her) acts in the pre-trial proceedings, is considered innocent until his (her) guilt of the committed crime is proved in accordance with the procedure established by law and established by the court sentence, which has duly entered into force.

In the fourth place, the term “classification with a margin” itself looks troublesome. Any classification at the pre-trial stages is preliminary: the evaluation of evidence does not lead to the conviction of the person. The separation of procedural functions in the pre-





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trial proceedings is designed for the prosecution to make efforts to prove the guilt of the person, and for the defence – to make efforts to prove his (her) innocence. If we criticize the “classification with a margin”, then we also have to disapprove the «classification with a shortage” (in this case a person will undeservedly escape the criminal responsibility for individual constituent elements of crimes), as well as to condemn the actions of the lawyer who insists on it in his (her) petitions. Obviously, one should strive for the golden mean, however, it is extremely difficult to find it in pre-trial proceedings; for this purpose it will be necessary to examine the case on its merits. In this connection, logical and legalistic contradictoriness of the adversariality model, provided for in Art. 15 of the Criminal Procedure Code, lies in the fact that it is actually *de facto* absent at the stages of inquiry and preliminary investigation, since:

1) there are no two equal parties (there are no parties at all until the emergence of a suspect in the case),

2) there is no independent arbitrator, who takes a final decision – only a court, which will emerge in the original jurisdiction, can be an independent arbitrator,

3) there is no subject of dispute itself (until the emergence of a suspect and preliminary classification of his (her) acts). In this connection, in our opinion, it can be concluded that adversariality is a qualitative, but not a quantitative category. It cannot be “a little bit” – it is either present or absent.

In this respect, the presumption of innocence is the most important principle of the Russian criminal process. Its action is revealed to the full extent during the examination of a case on its merits; predominantly – in the rendering of a sentence. No *in dubio pro duriore* principle can already be possible at this stage. By virtue of the presumption of innocence, all the doubts must be resolved in favour of the accused.

### **3. CONCLUSIONS**

Thus, we see that the *in dubio pro duriore* principle operates at pre-trial stages of criminal justice both in Switzerland and in Russia. This principle has not yet been developed in the domestic science, but the *de facto* principle has become widespread in practice. In this case, the positive foreign experience can be taken into consideration in the study of the issue on the correlation of the *in dubio pro reo* and *in dubio pro duriore* principles in Russia.



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At the same time, today it can be stated that the action of the first of them is manifested at pre-trial stages of the procedure, while the action of the second one is manifested at trial stages. The authors do not claim to the admission of the correct judgments expressed in this article, but they hope that it will provide an occasion for the further dialogue on this issue.

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**The Correlation Of In Dubio Pro Reo And In Dubio Pro Duriore  
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*Revista Publicando, 5 No 15. (2). 2018, 229-240. ISSN 1390-9304*

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