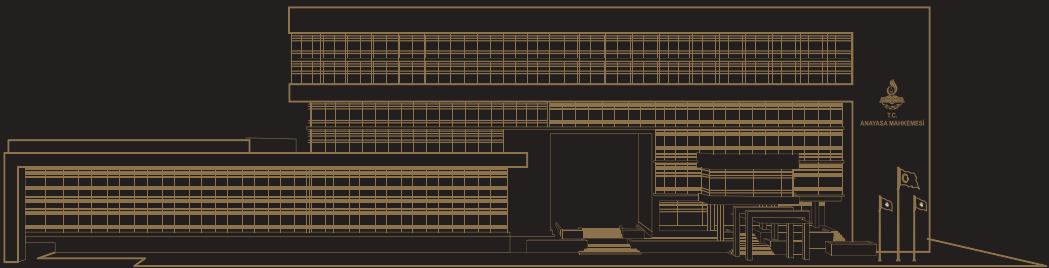




# Constitutional Justice in Asia

“Presumption of Innocence”



7<sup>th</sup> Summer School of the Association of  
Asian Constitutional Courts and Equivalent Institutions



# Constitutional Justice in Asia

“Presumption of Innocence”

7<sup>th</sup> Summer School of the Association of  
Asian Constitutional Courts and Equivalent Institutions  
8-14 September 2019, Ankara

Organised by  
The Centre for Training and Human Resources Development of AACC  
The Constitutional Court of the Republic of Turkey



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*The opinions expressed in this book are personal views of the writers, and do not necessarily reflect the official opinions of the national constitutional/ supreme courts, or the AACC.*

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# Constitutional Justice in Asia

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## MESSAGE OF THE PRESIDENT

The Constitutional Court of the Republic of Turkey organized the 7<sup>th</sup> Summer School Program of Association of Asian Constitutional Courts and Equivalent Institutions (AACC) under the theme of “Presumption of Innocence” in Ankara and Eskişehir on 8 – 14 September 2019 within the scope of the AACC activities.

We are pleased to host the 7<sup>th</sup> Summer School of the AACC in Turkey. We believe that the presentations of the participants throughout the Summer School made significant contributions to the field of comparative constitutional justice and reflected legal experiences and practices of the AACC members.

Summer School Programs of the AACC gather the participants in a sincere atmosphere to share their experiences and studies that would contribute to the constitutional justice and rule of law in the Asian continent. These programs also serve for the expansion and strengthening of cooperation among our institutions. I would like to express my contentment in presenting this publication, which collects the papers and presentations of the participants to the Summer School program for the benefit and use of all the members of the AACC.

Taking this opportunity, on behalf our Court and on my own behalf, I would like to extend my sincere thanks to all jurists and legal experts who contributed to this publication.

I hope this book will serve as a useful resource for all.

Prof. Dr. Zühtü ARSLAN  
President of Constitutional Court of  
the Republic of Turkey





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## OPENING ADDRESS

by

**The President of the Constitutional Court of the  
Republic of Turkey**

**Grand Tribunal Hall, Ankara, 9<sup>th</sup> September 2019**

**Esteemed Guests,**

**Distinguished Participants**

I would like to extend you all my most sincere and respectful greetings.

Today, we have gathered to inaugurate the 7<sup>th</sup> International Summer School. First of all, it should be noted that the summer school program has been organized by the Turkish Constitutional Court (“the Court”) every year since 2013 as an activity of the Association of Asian Constitutional Courts and Equivalent Institutions (“the AACC”).

In the 3<sup>rd</sup> Congress of the AACC held in Indonesia in 2016, it was decided that a Permanent Secretariat of the AACC be established and that a Centre for Training and Human Resources Development, one of the three primary sections of the Secretariat, be established in Turkey. In this framework, the 7<sup>th</sup> Summer School is being organized by this Centre, established within our Court, within the scope of the activities of the Permanent Secretariat of the AACC.

The summer school programme is also attended by the courts/institutions of guest countries alongside those of the member countries aims at ensuring enhanced exchange of information and experience on constitutional justice as well as developing inter-institutional relations. More generally, this event serves for the Association’s objective to improve democracy, rule of law and human rights.

In this sense, more countries have been invited to this year’s summer school event. I would like to mention the courts/institutions whose representatives are among us today: Constitutional Court of the



Republic of Azerbaijan, Constitutional Court of Bulgaria, Constitutional Court of the Republic of Indonesia, Supreme Court of the Republic of the Philippines, Constitutional Court of Palestine, Constitutional Court of Georgia, Constitutional Court of Croatia, Constitutional Council of Cameroon, Constitutional Court of Montenegro, Constitutional Council of the Republic of Kazakhstan, Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, Constitutional Court of the Republic of Korea, Constitutional Court of the Republic of Kosovo, Supreme Court of the Turkish Republic of Northern Cyprus, Federal Court of Malaysia, Constitutional Court of Mongolia, Constitutional Tribunal of the Republic of the Union of Myanmar, Constitutional Court of Uzbekistan, Supreme Court of Pakistan, Constitutional Court of Thailand and Constitutional Court of Ukraine.

Lastly, representatives from a total of 22 countries, including the Constitutional Court of the Republic of Turkey hosting the event, have participated in this year's summer school programme. I would like to note that this is the widest-reaching event which has been held so far.

### **Theme: Presumption of Innocence**

The themes of summer schools generally concern the fundamental rights and freedoms. As a matter of fact, the subjects of principle of equality and prohibition of discrimination, right to a fair trial, freedom of expression, right to respect for private life, migration and refugee law as well as right to liberty and security have been discussed in the summer schools organized so far. The subject of this year's summer school is the presumption of innocence. During the programme, along with the discussions as to how this principle is interpreted and implemented in the Turkish legal system, the participants will also deliver presentations to provide an insight into the presumption of innocence from their countries' perspective. In addition, a jurist from the European Court of Human Rights ("the ECHR") will give a lecture on the legal framework and practices on international level.

Thus, presumption of innocence will be scrutinized during the conference, and the participants will have the opportunity to share their knowledge and experiences in this respect. All presentations delivered throughout the programme will be compiled in a book and made available to those concerned as in the previous summer schools.



Although the theme will be elaborated with the presentations that will be delivered during the sessions which will start afternoon, I would like to briefly mention some issues.

As with every topic discussed, it is necessary to start with a question of definition. What is presumption of innocence? Presumption of innocence is defined, in the broadest sense, as the presumption of an individual's innocence until he is proven guilty by a court decision. This principle is among the procedural safeguards of the right to a fair trial.

In fact, the principle of presumption of innocence has undergone a long and arduous historical journey, as the other fundamental rights have. Presumption of guilt once prevailed in many geographies. Arthur Schopenhauer stated that in Europe, up to the fifteenth century, the innocence of the accused had to be proven by sworn witnesses. If the accused could find no witnesses or refused the witnesses not in favour, recourse was a trial by the judgment of God, which generally meant to call for a duel (A. Schopenhauer, *Yaşam Bilgeliği Üzerine Aforizmalar*, 2006, İş Bankası Yayınları, p.75).

In the post-Second World War period, presumption of innocence was first worded in the universal and regional human rights instruments. In Article 11 § 2 of the Universal Declaration on Human Rights (1948) and Article 6 § 2 of the European Convention on Human Rights (1950), presumption of innocent has been recognized as an element inherent in the right to a fair trial.

In Turkey, presumption of innocence dates back to the Ottoman Code of Civil Law (*Mecelle*) that was formulated at the last era of the Ottoman Empire. In Article 8 thereof, it is enshrined that 'Everyone is free of debt unless proven otherwise'. If anyone claims to be owed, he is obliged to substantiate it. In short, the plaintiff has to prove the claim. This principle laid down in the *Mecelle* -a civil law text- is incorporated into the criminal law as presumption of innocence.

Article 38 of the Turkish Constitution, titled "Principles relating to offences and penalties", provides that "*No one shall be considered guilty until proven so by a court decision*". Presumption of innocence is explained in the legislative reasoning of the said article as the following:



*“Presumption of an accused’s innocence until he is proven guilty with a final judgment means that he is not obliged to prove his innocence and that ‘the burden of proof’ is on the claimant. This presumption will be ‘rebutted’ after the claimant proves his allegation without any reasonable doubt and the court will then render a decision on conviction; otherwise the accused will be acquitted”.*

In addition, the Constitution-maker acknowledges the presumption of innocence as an absolute principle that cannot be limited even in a state of emergency. Accordingly, *“no one can be considered guilty until proven so by a court decision”* even in times of war, mobilization and a state of emergency (Article 15 § 2 of the Constitution).

### **Presumption of Innocence in the Court’s Decisions**

The Constitutional Court has rendered important decisions on the interpretation and implementation of the principle of presumption of innocence within the scope of both constitutionality review and individual application. Undoubtedly, in the sessions to take place afternoon, the academics and our rapporteurs, who are expert in this area, will elaborate this issue.

I would like to briefly mention, in very general terms, some outstanding issues concerning the presumption of innocence that have been discussed in the judgments of the Constitutional Court.

First of all, it should be noted that although the presumption of innocence was not explicitly worded in the Constitution of 1961, the Court interpreted the presumption of innocence as an element inherent in the rule of law and used it as a reference norm in some of its judgments at the material time. For example, in one of its judgments of 1975, it found Article 70 § 2 of the former Law no. 1750 on Universities contrary to the presumption of innocence as well as to the university autonomy within the scope of an action for annulment brought by the Ankara University. The impugned provision stipulated that the faculty members be suspended from office by the Council of Ministers, which had been vested with the authority to take over the universities in cases where the freedom of education was at peril, and they could be reinstated, after the take-over decision was lifted, on the condition that there was a final decision proving their innocence.



In this respect, the Court considered that “*Those seeking to be reinstated in their previous position are to rebut the charges against them, thereby endeavouring for years before judicial authorities.*” Therefore, “the principle of innocence”, one of the basic tenets of the criminal law, would be turned down by “the principle of guilt”, and the person concerned would be to prove that he did not commit the offences imputed to him. Accordingly, the Court found Article 70 §2 contrary to Article 120 of the Constitution as well as of the principle of state of law and must be therefore annulled (*see* E.1973/37, K. 1975/22, 11, 12, 13, 14, 25 February 1975).

In its decision as to the constitutionality review, which was rendered by the beginning of this year, the Court recognized the principle of presumption of innocence as a “fundamental right”. In the Court’s view, the presumption of innocence is a fundamental right which secures that everyone charged with a criminal offence shall be presumed innocent until a final conviction rendered at the end of a fair trial. Pursuant to the presumption of innocence, a person may be declared guilty and subject to criminal sanctions only after he is convicted with a final court ruling (*see* E. 2018/101 K. 2019/3, 13 February 2019).

As a requisite of the presumption of innocence, no one can be declared guilty and treated as a criminal neither by judicial authorities nor by public authorities unless his guilt is established with a court ruling (*see* *Kürşat Eyol*, no. 2012/665, 13 June 2013; and *Nihat Özdemir*, no. 2013/1997, 8 April 2015).

The presumption of innocence is applicable also to the civil cases and disciplinary proceedings in conjunction with criminal law. However, disciplinary investigations are conducted independently of criminal investigations. Therefore, imposing a disciplinary penalty on, or awarding compensation against, an individual in spite of the fact that he has not been convicted of the same acts during the criminal proceedings will not automatically infringe the presumption of innocence (*see* *Mustafa Kıvrak*, no. 2013/3175, 20 February 2014, 36).

At this point, the language used by the courts and public authorities is of significant importance. Use of a language incriminating a person -who has not been convicted with a final judgment or has been



acquitted for lack of evidence or for any other reason or in respect of whom the proceedings have been discontinued, suspended or the pronouncement of the judgment has been suspended- will be in breach of his presumption of innocence.

In its recent judgment, the Court found a violation of the presumption of innocence due to the statement “the party inflicting violence” which was stated in an interim decision issued by the family court. In the impugned case, an interim measure was indicated by the family court against the applicant, who had allegedly inflicted violence against his ex-girlfriend. In the interim decision, the phrase “party inflicting violence” was used in the absence of any finding as to the applicant’s guilt. In the meantime, the criminal investigation conducted against him was terminated with a decision of non-prosecution. In that case, the Court found a violation by considering “*the imputed statement is a troublesome expression capable of creating the impression that the person concerned has committed the acts likely to constitute an offence, which goes beyond its purposive use. It should be noted that, in practice, other appropriate expressions such as ‘party allegedly inflicting violence, party allegedly posing a risk to inflict violence or party against whom an interim measure is sought’ are used rather than the impugned statement*”.

As does the European Court of Human Rights, the Constitutional Court also states that shifting of the burden of proof will not be, under certain circumstances, in breach of the presumption of innocence. Accordingly, “*as long as it rests, in general, on the claimant to prove the guilt, shifting of the burden of proof will not be in breach of the presumption of innocence in cases where there are provisions shifting the burden of proof to the accused in the context of defence or presumptions of fact or law*” (see E.2013/38, K.2014/58, 27 March 2014; and *Adem Hüseyinoğlu*, no. 2014/3954, 15 February 2017). Undoubtedly, factors such as the severity of the restrictions imposed on the rights, preservation of the right to defence as well as refutability of the presumption must also be taken into consideration.

Lastly, I would like to note that the principle of the presumption of innocence requires the public authorities to avoid incriminating the persons in the absence of a final conviction establishing guilt while making public statements within the scope of criminal justice.



Before ending my speech, I would like to once again welcome the participants of the 7<sup>th</sup> Summer School event and extend my gratitude for their participation as well as contributions to the event. I would like to once again express my thanks to all distinguished academicians and jurists who will contribute to this program with their presentations.

I finally thank all my colleagues and the staff taking role in the organization of the event. I wish that the 7<sup>th</sup> Summer School be fruitful and successful.

I once again greet you all with my sincere respects.

Prof. Dr. Zühtü ARSLAN  
President of the Constitutional Court of  
the Republic of Turkey







## OPENING SPEECH ON THE SEVENTH SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE

**Esteemed Guests,**

First of all, welcome to our country and our Court. I would like to express my pleasure to host you, esteemed lawyers from 21 different countries, in our Court.

Our Court, as the Centre for Training and Human Resources Development, has organized this year's Summer School with the theme of "Presumption of Innocence" within the scope of the activities of the Permanent Secretariat of the Association of Asian Constitutional Courts and Equivalent Institutions ("the AACC").

The summer school that was first held in 2013 has become a tradition upon the positive feedbacks of the participants and started to be organized every year. This year's summer school, namely the 7<sup>th</sup> Summer School, unlike the previous ones, has welcomed participants from more countries. In this sense, the participation of distinguished lawyers from 21 different countries in Asia, Africa and Europe to this event has demonstrated that the activities of the Centre for Training and Human Resources Development has achieved their intended objectives and made a great contribution to the strengthening of the AACC.

The academic programme of the 7<sup>th</sup> Summer School is planned to be held in Ankara and the social and cultural programme is planned to be held in Eskişehir.

The theme of this year's academic programme is the presumption of innocence, a fundamental human right. The right of defence as well as the right to a fair trial cannot be deemed to exist in a system where the presumption of innocence, which should be respected in accordance with the Turkish Constitution even in times of war, mobilization and a state of emergency, is not applied. However, recently, individuals may be declared guilty, in the absence of a judicial decision, on social



media that has been strengthened through the widespread use of the internet. Such events, which are considered as an interference with the right to honour and dignity for being outside the legal proceedings, require more diligent respect for the presumption of innocence for their probable impact on the proceedings.

In this respect, the sharing of experience by the participant delegations in terms of the legislation and case-law applicable in their countries will expand horizons. In addition, presentations to be delivered by the prominent academics studying in the field of human rights law and a senior jurist from the European Court of Human Rights will enable us to see the theoretical and practical applications in the field of presumption of innocence.

During the social-cultural programme, the participants will have the opportunity to see the cultural and natural beauties of Eskişehir. The presentations to be delivered throughout the programme will be compiled in the book of the 7<sup>th</sup> Summer School and made available to the participants.

Ending my speech, I would like to express my belief that the 7<sup>th</sup> Summer School programme that will continue during a week will be very fruitful for the participants in terms of both academic and professional relations.

Taking this opportunity, I once again welcome you and I would like to express my gratitude, in particular to our esteemed President Mr. Zühtü Arslan who has provided his full support to organize the summer school programme, to you, our distinguished guests, for your participation and contributions as well as to my all colleagues who have made great effort for the organization, and I wish that it will be a successful programme.

I greet you all with my sincere respects.

Murat ŞEN

Secretary General of the Constitutional  
Court of the Republic of Turkey

***PRESUMPTION OF INNOCENCE IN  
THE JUDGMENTS OF THE TURKISH  
CONSTITUTIONAL COURT***

***Mehmet Sadık YAMLI***

***CONSTITUTIONAL COURT OF  
TURKEY***





## PRESUMPTION OF INNOCENCE IN THE JUDGMENTS OF THE TURKISH CONSTITUTIONAL COURT

*Mehmet Sadık YAMLI\**

### I. INTRODUCTION

This presentation will focus on the aspects of the presumption of innocence addressed by the Turkish Constitutional Court (hereinafter, “the Court”) in the decisions rendered within the scope of individual application.

Article 148 of the Constitution of Turkey provides that;

*“Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities.”*

According to this provision of the Constitution, in order for the merits of an individual application that is lodged with the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public force, must fall within the scope of the European Convention on Human Rights (hereinafter, “the Convention”) and the additional protocols to which Turkey is a party, in addition to it being guaranteed in the Constitution.

It is not possible to decide on the admissibility of an application which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention (*Onurhan Solmaz*, No: 2012/1049, 26/3/2013, § 18).

The Turkish Constitutional Court follows the European Court of Human Rights. As a result, there are similarities between the judgments of two courts.

---

\* Rapporteur Judge, Constitutional Court of the Republic of Turkey.



## II. THE SCOPE OF PRESUMPTION OF INNOCENCE

The presumption of innocence is guaranteed under Article 38 of the Turkish Constitution. The Article titled “Principles relating to offences and penalties” reads that “*No one shall be considered guilty until proven guilty in a court of law.*”

The presumption of innocence is also safeguarded by Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial, in the paragraph “*Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.*”

The Turkish Constitutional Court declares that: “*These two provisions protect the same right: Presumption of innocence.*”

According to the Court’s precedent (S.M. [PA], No: 2016/6038, 20/6/2019, §§37-38):

- Presumption of innocence is an element inherent in the right to a fair trial.
- Presumption of Innocence is a procedural guarantee that applies in the course of a criminal prosecution.
- This provision extends only to persons who are or have been subject to a criminal charge.

### A. Two Aspects of Presumption of Innocence

The Court has acknowledged in its case law the existence of two aspects to the protection afforded by the presumption of innocence:

1. a procedural aspect relating to the conduct of the criminal trial,
2. and a second aspect, which aims to ensure respect for a finding of innocence in the context of subsequent proceedings, where there is a link with criminal proceedings (like disciplinary and civil), which have ended with a result other than a conviction (*Galip Şahin*, B. No: 2015/6075, 11/6/2018).

### B. Guarantees of Presumption of Innocence

There are three main guarantees of the presumption of innocence:

1. Guarantee regarding the period when the individual is under a criminal charge,



2. Guarantee regarding the period after the criminal charge has ceased to exist by a decision other than conviction judgment,
  3. Guarantee regarding the burden of proof.
1. Guarantee regarding the period when the individual is under a criminal charge:

The inferences from the Constitutional Court's case law can be enumerated as follows:

1. *Presumption of innocence prohibits any early disclosure of the individual's guilt until the criminal proceedings are concluded, in other words, until his/her guilt is proven by a court decision;*
2. *The civil or administrative courts carrying out the proceedings should not impose a criminal charge on the relevant person;*
3. *The applicant's innocence should not be tarnished by the reasons specified in the decisions of the public authorities or the language used in the decisions;*
4. *In other words, no inference should be made as to the fact that the applicant has committed the imputed offence and therefore is guilty;*
5. *The statements in the decision, by its wording and context, should not point to the fact that the imputed offence has been committed within the context of the criminal law;*
6. *There should be no consideration implying or admitting the individual's guilt.*

However,

1. *Disciplinary or administrative proceedings may be initiated on the sole ground that a criminal investigation has been launched;*
2. *Disciplinary sanction may be imposed while the criminal proceedings against the individual are pending;*
3. *Criminal procedure law and disciplinary law are subject to different rules and principles. Less stringent standards of proof may be applicable in the disciplinary law;*
4. *In civil and administrative cases, assessment can be made relying on the elements of the pending criminal proceedings but independently of whether it constitutes a criminal offence.*





In addition, the phrase “until proven guilty by a court decision” does not mean that a decision should be given by a first instance or appeal court, but that such decision should be duly finalized. In other words, an individual is still innocent until the finalization of the first instance court’s decision (Precedent decisions: *Galip Şahin*, no. 2015/6075, 11 June 2018; *Hasan Okan Deligöz*, no. 2015/16727, 21 March 2019; *Songül Çetinatar*, no. 2015/13176, 12 September 2018).

2. Guarantee regarding the period after the criminal charge has ceased to exist by a decision other than conviction judgment

In cases where the criminal case is discontinued for any reason or the accused is acquitted as it has not been found established that he/she committed the imputed offence, he/she shall still be presumed innocent.

The second aspect of the presumption of innocence comes into play when a decision other than conviction judgment is rendered at the end of the criminal proceedings and requires that the innocence of the individual is not suspected in relation to the criminal offence in the subsequent proceedings and that the public authorities avoid actions and practices that may create the impression before the public that the individual is guilty (see *Galip Şahin*, no. 2015/6075, 11 June 2018, § 40).

In civil and administrative cases, making a decision based on the criminal proceedings concluded by a decision other than conviction may lead to a violation. Listed below are some examples of circumstances when proceedings are ordered to be discontinued, except for conviction:

1. *Discontinuation for expiry of the statutory time-limit;*
2. *Suspension for a certain period, and subsequently termination, of the proceedings;*
3. *Suspension of the pronouncement of the judgment;*
4. *Acquittal for lack of sufficient evidence.*

In several cases, the Constitutional Court concluded that the wording of the decisions rendered, in conjunction with a decision suspending the pronouncement of the judgment, as a result of the administrative proceedings was in breach of the applicants’ presumption of innocence



(Precedent Decision: *Mehmet Akif Korkmaz*, no. 2015/16027, 13 September 2018).

### 3. Additional guarantee of presumption of innocence

Another principle inherent in the presumption of innocence is that a person shall be relieved of the burden to prove his/her innocence. As he has already been presumed innocent, he/she shall not be obliged to prove his/her innocence.

However, in administrative sanctions imposed, under the specific circumstances of a concrete case, due to misdemeanors, standards as to presumptions of responsibility may be construed in a more flexible manner, compared to the criminal offences and penalties. However, even in such a case, presumptions of proof must not attain the extent which would infringe the presumption of innocence.

If there are rules as well as presumptions of law or fact which shifts the burden of proof to the accused, reversal of the burden of proof does not constitute a direct violation of presumption of innocence. Nevertheless, anyone must not be automatically declared guilty on the basis of irrefutable presumptions. In other words, it must be possible for the applicant to rebut the presumption involving criminal charge against him/her during the proceedings and the trial judge must consider such alleged presumptions (Precedent decisions: 1. *Ahmet Altuntaş and others*, [Plenary], no. 2015/19616, 17 May 2018; 2. *Mehmet Güzeloğlu (2)*, no. 2014/12757, 7 June 2017).

### 4. Violation of presumption of innocence due to the news in the press during the proceedings

If the news is formulated relied on the statements of public officials and politicians, the individual applications are dealt with by the Constitutional Court under presumption of innocence. According to the Court:

- The applicants must demonstrate precisely which statements are in breach of their presumption of innocence. It is not suffice to file a complaint on the basis of expressions that are general in nature.



- Besides, to make public initiation of an investigation against an individual does not *per se* constitute a violation of presumption of innocence (*Erdal Tercan* [Plenary], no. 2016/15637, 12 April 2018).

If the news does not rely on the statements of public officials and politicians, then the applications will be examined under the right to respect for the honor and dignity safeguarded by Article 17 of the Constitution as well as the freedom of the press.

In the view of the Constitutional Court, presumption of innocence affords protection for an individual's not being considered guilty by the public authorities until proven so by a court decision. However, freedom of expression safeguarded by Article 26 of the Constitution also entails the freedom to receive and impart information, as well. Therefore, the presumption of innocence safeguarded by Article 38 § 4 of the Constitution does not prevent the authorities from informing the public of any pending criminal investigation. However, as it is necessary to respect for presumption of innocence, Article 38 § 4 necessitates to act with utmost caution and prudence in imparting such information (*Nihat Özdemir* [Plenary], no. 2013/1997, 8 April 2015, § 22).

### III. CONCLUSION

The presumption of innocence is a fundamental element of a fair trial and also of rule of law. It safeguards the persons not only during the criminal cases but also in related civil and administrative cases. Public authorities, including judges in any courts, should pay attention to their statements about accused.

***THE APPLICABILITY OF THE  
PRESUMPTION OF INNOCENCE IN  
CIVIL CASES: THE CONSTITUTIONAL  
COURT'S S.M. JUDGMENT***

***Zehra GAYRETLİ***

***CONSTITUTIONAL COURT OF  
TURKEY***





## THE APPLICABILITY OF THE PRESUMPTION OF INNOCENCE IN CIVIL CASES: THE CONSTITUTIONAL COURT'S S.M. JUDGMENT

Zehra GAYRETLİ\*

The presumption of innocence, known as a settled principle in criminal law, was first explicitly laid down in the French Declaration of the Rights of Persons and citizens of August 26, 1789. In Article 9 of the Declaration "*As every man is presumed innocent until he has been declared guilty, if it should be considered necessary to arrest him, any undue harshness that is not required to secure his person must be severely curbed by Law*". The presumption of innocence expressed in a way similar to the definitions in many subsequent papers, was repeated in the contracts and in the constitution. Nowadays, the presumption, which has a place in many international texts on Human Rights, is regarded as the cornerstone of the law of reasoning and the right to a fair trial.

The presumption, is clearly set out in paragraph 4 of Article 38 titled "Principles relating to offences and penalties" of the Constitution of the Republic of Turkey (hereinafter "the Constitution") and according to the paragraph, no one can be considered guilty until proven guilty in a court of law.

On the other hand, the right to a fair trial is guaranteed in the first paragraph of Article 36 of the Constitution. The reasoning of Article 14 of the Law numbered 4709 and dated 03.10.2001 regarding the inclusion of the phrase the right to a fair trial into Article 36 of the Constitution states that "*with the amendment, the right to a fair trial, which is also guaranteed in international conventions the Republic of Turkey is a party to, is included in the text*".

Therefore, it is understood that the purpose of the inclusion of the phrase into Article 36 of the Constitution is to ensure the constitutional

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guarantee of the right to a fair trial regulated in the European Convention on Human Rights (hereinafter “the Convention”). In other words, the right to a fair trial has become a part of the Constitution.

The presumption of innocence, one of the most important principles of criminal law, states in a rhetorical definition that a person who is charged with a criminal offense should be presumed innocent until a final judgment has established that she/he is found to be guilty at the end of a fair trial, and it is also a requirement of the principle of the rule of law. Because the presumption of innocence, which is one of the fundamental principles of a democratic society, serves to prevent the suspected individual from being treated arbitrarily as a criminal.

The presumption of innocence, which has not yet been fully elucidated in theory and constitutional justice is often used in the context of criminal proceedings. However, allegations of violation of the presumption may be brought up in disciplinary proceedings conducted simultaneously or independently of criminal proceedings and, in cases of civil proceedings – if in connection with a criminal proceeding.

Although the presumption of innocence is a procedural safeguard under criminal proceedings, in order to ensure that protection can be applied in a practical and effective manner, it should prevent persons who have been acquitted or who have not proceeded with criminal proceedings in any way being treated as guilty by public officials or authorities. Within this scope, the presumption of innocence should be taken into consideration in any proceedings that do not qualify as criminal proceedings following the criminal case (such as civil, or disciplinary). Thus, the guarantee provided by the presumption has a "second dimension" which indicates that criminal proceedings continue even after an acquittal or the criminal case is terminated or dismissed for a procedural reason.

In the *Galip Şahin* judgment of the Constitutional Court dated 11.06.2018 (Application Number: 2015/6075), the Court laid down the fundamental principles of the first dimension of the presumption of innocence regarding the procedural aspect in criminal cases and on the "second dimension" which transcended criminal proceedings



to other proceedings. Accordingly, the guarantee provided by the presumption of innocence, which is an element of the right to a fair trial, is determined as follows:

The first aspect of the guarantee relates to the period in which a person is charged with a criminal offense, in other words the period that starts with a person being charged with criminal offences (is under criminal charge) and lasts until the criminal proceedings are concluded, and thus prohibits early (premature) disclosures of the person's guilt and actions. With these procedural aspects regarding the conduct of criminal proceedings, the presumption guarantees that the accused will be tried in an impartial court. Moreover, the scope of this assurance is not only limited to the court that conducts the criminal proceedings. As a matter of fact, no state representative can neither imply nor make a statement that the person is guilty until he is proved guilty.

The second aspect of the guarantee provided by the presumption comes into play when a provision is established other than a conviction (i.e.: acquittal, discontinuance, etc.) as a result of the criminal proceedings, and in the subsequent proceedings following the criminal proceedings, state authorities have to avoid actions and practices that may suspect the innocence of the person and may give that impression (for ECtHR judgements in the same vein see *Seven v. Turkey*, No: 60392/08, 23/1/2018, § 43; *Allen v. United Kingdom* [GC], No: 25424/09, 12/7/2013, §§ 92-105, 120-126).

In order for the presumption of innocence, which is a safeguard on criminal charges, to be applied in non-criminal "conflicts regarding civil rights and obligations", it must be determined that there is a connection between the civil proceedings in question and the criminal proceedings against the person. The main reason for the need for a connection is that the review of the Constitutional Court within the scope of the individual application is limited to the rights guaranteed in the Convention. As it is known, in order for the presumption of innocence to be applied in "disputes regarding civil rights and obligations", the bodies of the Convention seek a connection between the civil proceedings in question and the pending or finalized criminal proceedings about a person.





The Constitutional Court considers the following criteria when assessing whether a link exists:

- the result of the decision given in the criminal proceedings has been taken into consideration and evaluated in "disputes regarding civil rights and obligations",
- the evidence contained in the penalty file has been examined,
- investigating the engagement of the person (suspect / accused) concerning the incidents that have given rise to the accusations,
- comments on the possible guilt of the person have been made,

However, the Constitutional Court acknowledges that the above facts, which indicate the existence of the link between the non-criminal proceedings and the criminal proceedings, cannot be counted on through exhaustion, and that these may vary depending on the type and content of the proceedings in which the judgments were made. But, it was emphasized that the language used in the decision would be critical when evaluating the existence of the connection.

In its assessment of the proceedings in connection with the criminal case, the Constitutional Court emphasizes the language used by the decision-making authorities in general and pays attention to whether the person concerned has been charged with an offense or whether the acquittal was questioned. According to the Constitutional Court, the expressions used in subsequent proceedings following the criminal proceedings should not give the impression that a person's innocence is suspected. Accordingly, in related cases that follow a criminal case that has not resulted in conviction, the judicial and administrative authorities declaring the person guilty of crossing their mandate or making certain inferences in this context may lead to a violation of the presumption of innocence. In order to determine whether the presumption of innocence has been violated in such a case, the Constitutional Court notes that the reasoning of the decision should be considered in its entirety and that the final decision is based solely on acts that have not resulted in conviction.

In its recent *S.M* judgment (No: 2016/6038, dated 20/6/2019), the Constitutional Court reviewed the complaint about the presumption



of innocence regarding the statements made in an injunction given by a family court.

This decision may be regarded as one of the typical decisions on the applicability of the presumption of innocence in a case that is not criminal but in connection with one. In fact, the finding of the violation of presumption of innocence in the decision is based on the fact that the civil court, which is loyal to a legal regulation, has used verbatim the terms mentioned in the said law in its reasoned decision. In other words, the trial court has decided in accordance with the legal regulations. But, as it is known, the Constitutional Court does not review the compliance with the law. In the case of individual application reviews, the norm for measures is the Constitution itself; there is no review of compliance with the law.

On the other hand, it would be appropriate to give a brief explanation of the background of the aforementioned decision before evaluating it.

As it is known, the problem of violence against women is considered as a clear violation of human rights and is considered as a public health problem all over the world. Within the scope of the fight against violence against women, many international studies have been carried out and also amendments envisaging preventive measures have entered into force in national legislations. Within the scope of these efforts, the Council of Europe took a decisive step and the Convention on Prevention and Combating Violence against Women and Domestic Violence was opened for signature on 11 May 2011 in Istanbul. This convention is the first convention in international law that has power of sanctions regarding violence against women and domestic violence. The Convention is referred to as the "Istanbul Convention" since it was opened for signature in Istanbul and Turkey was the first country to sign it.

In the definition article of the Convention, "violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.



In parallel with the developments in international law, new legal regulations were also adopted in Turkey. In this context, the Law numbered 6284 dated 8/3/2012 on the Protection of the Family and the Prevention of Violence against Women was prepared and entered into force in accordance with the Istanbul Convention. The purpose of this law is to ensure the protection of women, children, family members and persons who are victims of unilateral persistent follow-ups; who are exposed to violence or who are in danger of being exposed and to regulate the procedures and principles regarding the measures to be taken to prevent violence against these persons. Violence under this law is described as *“The acts which results or will probably result in person’s having physical, sexual, psychological and financial sufferings or pain and any physical, sexual, psychological, verbal or economical attitude and behavior which include the threat, pressure and arbitrary violation of the person’s freedom as well and conducted in social, public and private space.”*

According to Article 2 paragraph (g), a perpetrator of violence is defined as *“the people who exhibit attitudes and behaviors defined as violence in this law or entail the risk of exhibiting them.”*

In the instant case, the applicant's criminal complaint was filed against him by his ex-girlfriend on the allegation that he had been following and harassing her. Thereupon, within the scope of the criminal investigation initiated against the applicant for the violation of the peace and tranquility of the persons, an interim measure was issued by the law enforcement agency according to Article 5 of the Law numbered 6284 not to exhibit an attitude and behaviors including the threats of violence, insult and humiliation against the victim of violence, not to approach the protected persons and their residences, schools and workplaces, the friends or relatives and children of the protected person even though they haven't been subject to the violence, without prejudice to the decisions that allows personal connection with children.

This decision taken by the law enforcement authority was approved by the family court. In the meantime, the criminal investigation against the applicant resulted in a lack of prosecution on the grounds that there was no sufficient evidence to be brought against the complainant's abstract allegations.



The applicant appealed against the decision of the family court, after the criminal investigation ended with a decision of non-prosecution, because the term perpetrator of violence was used against him. However, the appellate authority, which examined the applicant's appeal, rejected the objection on the grounds that *“no evidence and documents would be sought for the use of violence in order to make a decision, and that there was no unlawful approach in the family court’s decision”*.

According to the above-mentioned legal regulations, in order for the family court to issue an injunction, it is not necessary that the person against whom the measure was requested has actually committed violence. As a matter of fact, the nature of the precautionary decision lies in the aim of protecting women against violence before any violence is committed. How will one's presumption of innocence be maintained in such circumstances?

The applicant issued an individual application to the Constitutional Court claiming that due to the use of term “perpetrator of violence” in the precautionary decision the impression that he had committed a crime was given and that his presumption of innocence had been damaged by the statements used in the precautionary decision which were based on untrue allegations.

The Applicant alleges that the phrase “perpetrator of violence” is defined in the Law numbered 6284 as *“the people who exhibit attitudes and behaviors defined as violence in this law or entail the risk of exhibiting them”*, but that the practice to use the term “perpetrator of violence” in the templates for every incident violates the presumption of innocence.

The Constitutional Court first dealt with the issue in terms of admissibility since the dispute was related to a case arising out of family law and falling within the scope of civil rights and obligations. The Court then observed that the judgments delivered by the instance courts contained statements indicating that the applicant had been assessed in relation to the offense under the criminal investigation carried out, and concluded that there was a link between the civil proceedings and the criminal proceedings.

In its examination on the merits, the Constitutional Court stated that the legislator adopted the Law numbered 6248 according to the



standards determined in international conventions Turkey is a party to, in order to follow an effective and rapid method for the protection of the family and the immediate protection of the person who is exposed to violence or is in danger of being exposed to violence; and that in this law violence is described as the acts which result or will probably result in the person's having physical, sexual, psychological and financial sufferings or pain and any physical, sexual, psychological, verbal or economical attitude and behavior which include the threat, pressure and arbitrary violation of the person's freedom as well and conducted in social, public and private space; and that perpetrator of violence is described as the people who exhibit attitudes and behaviors defined as violence in the relevant law or entail the risk of exhibiting them.

In this respect, the subject of the injunction within the scope of the Law numbered 6284 - whether in the nature of the crime - is that form of action which could result in violence in a broad sense, in fact, the actual subject of the measures in the Law numbered 6284 that emphasized the distinction between mentioning violence and crime concept is in the event of forming a criminal expression.

However, according to the Constitutional Court, when assessing the presumption of innocence, it is necessary to evaluate the expressions used in the court decisions that have been given as a result of other proceedings against persons who have no final convictions, and they should be assessed under concrete circumstances of whether the statements were used in a manner that exceeded their context and purpose.

The Constitutional Court stated that instead of using the term perpetrator of violence as a template in precautionary decisions of this nature, it should be evaluated within the framework of each concrete case and with a meticulous approach by the court or other judicial authorities. Although the term perpetrator of violence is used in the Law, it is pointed out that there is no provision that mandates the use of this term by practitioners for all cases.

The Constitutional Court, stating that similar precautionary decisions replaced "perpetrator of violence" with "alleged perpetrator of violence", "alleged to entail the risk of exhibiting violence" or



“against whom an injunction was requested”; expressed that in terms of implementation, the term perpetrator of violence in general, was a problematic term that gave the impression that the person had committed actions that could raise the subject of crime in a manner that would exceed the intended purpose limits.

As a result, even if the terminology of violence of the Law numbered 6284 has a broader meaning than the concept of crime and the concept of perpetrator of violence is a technical term that includes people who are at the risk of practicing it -even if not perpetrating it, it was understood that the use of the expression of perpetrator of violence for the applicant in the circumstances of the concrete event exceeded the purpose limit on the context and circumstances in which it was used, giving the impression that the applicant had committed the action that was the subject of the decision of non-prosecution or that he had actually practiced different acts of violence; therefore, it was concluded that the belief that the applicant had committed or was guilty of the actions subject to the injunction was reflected in the judgment.

It was stated by the Constitutional Court that the problem arose because of the terminology preference of the degree courts and it was stated that these terms were not effective on the result that would require a retrial and that there was no legal benefit in a retrial. It was stated that the violation could be remedied by removing the relevant statements from the court decision.

The Constitutional Court has conducted numerous case studies on the alleged violation of the presumption of innocence in other proceedings in connection with criminal cases and established a consistent case-law on this matter. Accordingly, it is emphasized that the language used by judicial authorities should be taken into consideration in order not to overshadow the innocence of the person in connected trials based on the criminal charge.

According to the Constitutional Court, civil and administrative courts should not exceed the limits of their jurisdictions to go beyond their duties to examine the case before them and include accusatory statements in the manner of expression used in reasoned decisions,



and they should not cast doubt on the innocence of individuals that are in relation to criminal charges that have not been finalized (or are suspended). In this respect, utmost attention should be paid to the words used in the expressions in court decisions in order not to violate the presumption of innocence of persons.

***THE PRINCIPLE OF THE  
PRESUMPTION OF INNOCENCE IN THE  
CONTEXT OF CONSTITUTIONAL LAW***

***Sabina BABAYEVA***

***CONSTITUTIONAL COURT OF  
AZERBAIJAN***







## THE PRINCIPLE OF THE PRESUMPTION OF INNOCENCE IN THE CONTEXT OF CONSTITUTIONAL LAW

*Sabina BABAYEVA\**

In any democratic law-governed society with a developed legal system, there is a presumption of innocence, which means that every citizen is assumed to be honest, respectable and innocent until proven otherwise in the manner prescribed by law and confirmed by a court judgment.

Moreover, the burden of proof of guilty lies on those who accuse and not the accused person himself/herself must prove his/her innocence.

Broadly speaking, the presumption of innocence should be considered as a general legal principle, all humanities progressive idea. It acts not only in criminal law, where it is most clearly manifested, but in all areas of law, in the entire legal system.

The presumption of innocence is the presumption of honesty and human decency of a citizen. The principle of the presumption of innocence determines the nature of the relationship between the state, its bodies, officials and citizens, on the one hand, and the person against whom a suspicion or a criminal charge, on the other.

Although this principle is formulated as a criminal procedure, its action goes beyond the framework of the criminal procedure itself and requires everyone - not only from the bodies conducting criminal proceedings (crime investigator, prosecutor, court), but also from other persons (acting in the field of labor, housing and other relationships) – behave to a person whose guilt of a criminal charge has not been proved in a final judgment, as innocent.

In international legal acts, the presumption of innocence was expressed in the Universal Declaration of Human Rights adopted by

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the UN General Assembly on December 10, 1948: *“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense”* (Article 11). In accordance with Paragraph 2 of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: *“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”* A similar provision is also protected in the International Covenant on Civil and Political Rights, adopted by the UN General Assembly on December 10, 1966.

According to Paragraph 3 of Article 148 of the Constitution of the Republic of Azerbaijan, international treaties to which the Republic of Azerbaijan is a party, are an integral part of the legislative system of Azerbaijan. Thus, Azerbaijan has undertaken to ensure any person with the rights and freedoms proclaimed in international legal acts. For the law of criminal procedure, these principles and norms are of particular importance, since it is this branch of law that regulates such a specific sphere of public relations that sufficiently substantively affects the most important human rights (right to life, freedom, security of person, respect for private life and etc.). That is why in international legal acts on human rights, the utmost attention is paid to guarantees of the rights of persons involved in the field of criminal proceedings.

The Constitution of the Republic of Azerbaijan (Article 63) enshrines one of the most important principles of a democratic law-governed state - the presumption of innocence.

According to this Article, everyone has the right to the presumption of innocence. Everyone who is accused of crime shall be considered innocent until his/her guilt is proved legally and if no court judgment has been brought into force. If there are reasonable doubts concerning the guilt of a person, then his/her conviction is not allowed. A person accused of crime is under no obligation to prove his/her innocence. When exercising the justice, illegally obtained evidence cannot be used. No one can be convicted of crime without a court judgment. It should be underline that Article 63 which is enshrined in Chapter III of the Constitution *“Fundamental Rights and Freedoms of Man and Citizen”*



has great political and legal significance. The political significance of this fact lies in the fact that the principle of the presumption of innocence is raised to the level of national legal regulation of personal, political and socio-economic rights and freedoms i.e. to the highest level.

In other words, the right of the accused person to consider himself/herself innocent until proved otherwise equals both in meaning and importance to such rights as the right to life, liberty and security of person, equality, protection of dignity, i.e. to the universal rights inherent in every person from birth, which ensure his/her freedom.

The expression “presumed to be innocent” means that if there is a reasonable assumption that the accused (suspected) person has committed a crime, the Constitution does not a priori exclude the guilt of the person, but provides for a verification of this assumption by the court and does not allow the assumed guilt to be identified with conclusively established. If after the conclusion of the criminal proceedings, such an assumption is not confirmed, this entails the rehabilitation of the person.

The rules of the presumption of innocence contain a prohibition and recognition of the unlawful treatment of someone as a person guilty of crime if the judgment of conviction has not entered into effect.

In the absence of a corresponding judgment, a person shall not be subjected to criminal sanction or restrictions on labor, family and other rights and freedoms of a man and citizen due to his conviction of crime.

**A number of important provisions follow from the principle enshrined in Paragraph II of Article 63 of the Constitution:**

- no innocent person shall be prosecuted and convicted (Articles 8, 39 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as “the CPC”));
- no one may be prosecuted other than on the basis of and according to the procedure established by law (Article 10 of the CPC);
- an accused person can be found guilty only if, during the trial, the guilt of the accused person in the commitment of crime is proved (Articles 42, 351 of the CPC);



- any irremediable doubt is to be interpreted in favor of the accused person (Articles 21, 280, 350 of the CPC);
- circumstances related to a case which are subject to verification must be investigated thoroughly, fully and objectively;
- take into consideration circumstances which incriminate or exonerate the suspect or accused person as well as circumstances which mitigate or aggravate his criminal responsibility (Article 28 of the CPC);
- if there is insufficient evidence of the accused's participation in the commitment of crime and the impossibility of collecting evidence, the case is terminated by proceedings (Articles 289, 290, 297 of the CPC) or an acquittal is issued (Article 42 of the CPC).

Paragraph III of Article 63 of the Constitution exempts the accused person from the obligation to prove his/her innocence. According to Article 21 of the CPC, *“proving the charge and refuting the evidence brought forward to defend the accused (suspect) person is the duty of the prosecution”*.

The social significance of the provision on the inadmissibility of shifting the burden of proof to the accused person consists, in the fact, that the dependence of the conclusions of the prosecutor and the court on the subjective facilitation is eliminated from the desire and abilities of the accused person to prove his/her innocence, his/her abilities to establish the existence of mitigating or absence of aggravating circumstances.

The provision formulated in Paragraph II of Article 63 of the Constitution also applies to defense lawyer who is a representative of the accused or suspected of criminal proceedings. The prosecutor or the court are not entitled to impose on the defense lawyer the duty from which his/her defendant is free.

The idea of the presumption of innocence as a kind of privilege for criminals is incorrect. On the contrary, indemnifying those who are mistakenly suspected and accused of illegal repressions, the presumption of innocence contributes the criminal prosecution, conviction and punishment of actual criminals.



The provision on the inadmissibility of the use of evidence obtained in violation of the Law in Paragraph II of Article 63 of the Constitution is formulated in relation to the administration of justice. However, it extends to the pre-trial stages of criminal proceedings and preliminary investigations as well.

Violations of the law upon receipt of evidence include non-compliance by representatives and authorities with the prohibitions established by law and the limited conditions for their activities, as well as the performance by them of actions that violate, restrict, constrain the rights and freedoms of man and citizen enshrined in the Constitution. The use of evidence obtained in violation of the civil and human rights and freedoms enshrined in the Constitution is prohibited, including the following rights: the right to protection of the dignity of the person, the right to protection from torture and violence, other cruel and degrading treatment or punishment, the right to liberty and inviolability of person, etc. The use of evidence obtained in violation of adversarial principle and principle of equality of arms in legal proceedings is not allowed.

At the same time, the expression of Paragraph IV of Article 63 of the Constitution means a ban on ascribing the statements of the accused and other persons involved in the case through violence, threats and other illegal measures. A confession of its guilt by accused person can be the basis of a conviction judgment only if the confession is confirmed by the totality of the available evidence. No one may be forced to testify against himself or against his close relatives, he has the right to refuse to incriminate them without fear of negative legal consequences for himself/herself (Article 20 of the CPC).

In criminal proceedings, the principle of the presumption of innocence does not lose its significance even after a court judgment is passed when verifying the legality and validity of it and is a rule that determines the direction and procedure for administration of justice: both appeal and cassation courts, assessing the validity of the conclusions made in the judgment of the court of first instance concerning the guilt of the convict should specifically come from this principle, and not from the presumption of the truth of the conviction.



Article 127 of the Constitution provides for the independence of judges and the basic principles and conditions of administration of justice. It should be noted that this article does not refer textually to the presumption of innocence only for the accused, i.e. for the person against whom an order to prosecute has been issued, its provisions apply equally to a suspect who is detained on suspicion of crime or prior to being charged with a measure of restraint (Article 21 of the CPC).

The presumption of innocence also implies that irremediable doubts of guilt are interpreted in favor of the accused person. Irremediable doubts are considered to exist when the evidence gathered in the case does not clearly indicate the guilt or innocence of the accused person and the methods and means of collecting evidence provided by law have been exhausted.

When there is a possibility of eliminating doubts in the process of proof, their interpretation in favor of a particular decision is unacceptable - such doubts should be eliminated.

Article 21 of the CPC considers the presumption of innocence.

The article indicates that any accused person of commitment of crime shall be found innocent until his guilt is not proven in accordance with the procedure provided for by the Code and if the court has not delivered a final judgement to that effect. A person's conviction is inadmissible even if there is a substantial suspicion of guilt. In accordance with the provisions of the Code, doubts, which cannot be eliminated in the course of the respective legal procedure in proving the prosecution, shall be resolved in favor of the accused (suspect) person. Similarly, doubts not eliminated in the application of criminal procedural and criminal laws shall be resolved in his/her favor. A person, accused of commitment of crime, is not obliged to prove his/her innocence. The obligation of proving the prosecution, the rebuttal of arguments put forward in defense of the accused person, falls on the party of the prosecution.

Studying the presumption of innocence in the constitutional legal aspect, the Constitutional Court in its decision "On the interpretation of the concept of the person who committed a crime that does not



represent a great public danger”, provided for in Articles 72, 73 and 74 of the Criminal Code of the Republic of Azerbaijan of December 25, 2009, noted:

*“The presumption of innocence, enshrined in the Constitution, international treaties and national legislation, excludes a person from being convicted without a criminal conviction before a competent court. In this sense, the presumption of innocence, while reflecting an objective legal status, protects the person charged or the person suspected of commitment the crime from premature conviction. The content of the above mentioned guarantee influences the regulation of criminal procedure relations and, subsequently, the establishment and administration of criminal law relations. Moreover, the presumption of innocence is one of the guarantees of the other human rights enshrined in the Constitution, including the honor and dignity of everyone provided for in Article 46 of the Constitution of the Republic of Azerbaijan.”*

This position is reflected in the decision of the European Court of Human Rights in the case of *Garycki v. Poland* of 6<sup>th</sup> February 2007. The judgment states that the presumption of innocence enshrined in Paragraph 2 of Article 6 of the Convention is one of the elements of justice required by Paragraph 1 of this Article. The presumption of innocence is considered to be violated if a court judgment or a statement by a public official against a person accused of a crime before his guilt is proved in accordance with the law contains an opinion on his guilt. Even in the absence of any official opinion, it is sufficient to have certain arguments to present the accused to the guilty, party by a court or official. An expression of such an opinion by the court itself would inevitably create a contradiction with the presumption in question.

However, a conclusion reflecting an opinion on the guilt of the person concerned must be distinguished from a conclusion simply expressing a “suspicious situation”.

Therefore, it can be concluded that both in the course of the preliminary investigation and in the course of the court proceedings a suspicion of the commitment of crime by a person may be formed. Thus, if there is a reasonable suspicion that a person has previously





committed one or more crimes and is subsequently charged with such a suspicion, it is possible that the person may be prosecuted as a person who has previously committed a crime without a court decision having entered into legal force. This does not conflict with the presumption of innocence. And the question of guilt or innocence of a person in the commitment of crime is decided by a court decision on the merits.

On June 17, 2010, the Constitutional Court of Azerbaijan adopted a relevant decision on "Interpretation of Articles 39.1.5 and 41.2 of the Criminal Procedure Code of the Republic of Azerbaijan".

The Constitutional Court in its decision, mentioned that the right to prove everyone's innocence in the commitment of an act, provided for by criminal law, was not restricted in contradiction with Articles 60 and 63 of the Constitution, which guarantee judicial protection and the presumption of innocence, and the provisions of Articles 2 and 6 of the Convention, which guarantee the right to an effective investigation and a fair trial. On the other hand, the termination of criminal proceedings under Article 39.1.5 of the CPC, without taking into account the legitimate interests of the deceased person's close relatives, may also cause damage to the objectives of criminal procedure law. From the point of view of achieving these objectives, conviction and acquittal are recognized as two related parties to the criminal procedure activity.

Establishment of the truth on grounds of the crime committed serves to the prevention of crime. From this point of view, it is worth to underline that when a criminal prosecution (or criminal case) is discontinued in connection with the death of a person found to have committed a crime, this person is deemed to have committed an act, provided for by criminal law, even if the person's guilt is not proven in court on the merits. Such a solution does not exclude the possibility of the real offender avoiding liability and continuing his criminal activity, on the contrary, contributes to the increase of this probability. This is unacceptable from the point of view of the above mentioned provisions of the Constitution.

The Constitutional Court adopted a decision in which it was recommended to the *Milli Majlis* (Parliament) of the Republic of Azerbaijan to establish the rights of close relatives and the defense



lawyer of the deceased person to participate in the criminal process in the application of Article 39.1.5 of the CPC in accordance with Article 41.2 of this Code as soon as possible. Prior to making appropriate amendments and additional provisions to the criminal procedure legislation, the right of close relatives and the defense lawyer of the deceased person to appeal against the decision on termination of the criminal prosecution (or criminal case), according to Article 39.1.5 of the Code, may be implemented in supervision proceedings.

Summarizing the above, it should be noted that the principle of presumption of innocence is the basic constitutional principle enshrined in the Constitution of the Republic of Azerbaijan and the CPC of the Republic of Azerbaijan.

The significance of the Constitution of Azerbaijan in criminal proceedings is determined by the fact that it contains a number of fundamental norms, which, in view of its supreme legal force, must correspond to sectoral criminal procedure legislation.

Constitutional norms are known to a much wider range of citizens than the norms of criminal procedure law. Hereof, the norms of constitutional law allow citizens to better understand the tasks facing the judicial authorities, rights and obligations of participants in criminal proceedings, which leads to the observance of legality in the administration of criminal proceedings.

The importance of this principle is due to the fact that it protects human and civil rights and freedoms of man and citizen, which, according to the Constitution, have the highest value. Non-observance of this principle raises the question of the legality and relevancy of the charges filed against. It can be concluded that the presumption of innocence plays a fundamental role for a lawful and fair trial, which is appealed to restore social justice and bring the offender to criminal liability. In other words, the meaning of the principle of the presumption of innocence is that every person who has committed a crime should be fairly punished and no innocent person should be held criminally responsible and convicted.



***PRESUMPTION OF INNOCENCE***

***Daniela Emilova DIMITROVA***

***CONSTITUTIONAL COURT OF  
BULGARIA***





## PRESUMPTION OF INNOCENCE

*Daniela Emilova DIMITROVA\**

In my presentation, I will focus on the dimensions of the principle of presumption of innocence in the legal system of the Republic of Bulgaria.

First, I would like to emphasize that under Article 5 (4) of the Bulgarian Constitution; *“International treaties which have been ratified in accordance with the constitutional procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation.”* In that respect, the provisions regulating the presumption of innocence in the international legal instruments, namely Article 11 (1) of the Universal Declaration of Human Rights and Article 14 (2) of the International Covenant on Civil and Political Rights are part of the legislation and have priority over the national provisions. When considering regional conventions, the same is valid as regard to Article 6 (2) of the European Convention on Human Rights (hereinafter “the Convention”). As far as the Charter of Fundamental Rights of the European Union, its provisions are binding due to the Bulgarian membership to the European Union.

Second, in Bulgaria the presumption of innocence is a principle with a constitutional value. Article 31 (3) of the Constitution states: *“A defendant shall be considered innocent until proven otherwise by a final verdict.”* and according to paragraph (4) *“The rights of a defendant shall not be restricted beyond what is necessary for the purposes of a fair trial.”*

Last but not least, the Constitution stipulates that even during war or state of emergency, the right to be presumed innocent cannot be restricted.

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This right is also part of the right to a fair trial in the national legislation and a leading principle of the criminal proceedings. According to Article 16 of the Bulgarian Criminal Procedural Code, *“The accused shall be presumed innocent until the reverse is established by virtue of a final verdict.”*

How does the Constitutional Court interpret the presumption of innocence in its case law?

In relation to its power to rule on motions for the establishment of unconstitutionality of the legislative acts, the court was approached by the Bulgarian President with the request to proclaim the unconstitutionality of the provision of the Protection of the Classified Information Act according to which access to classified information is denied to persons against whom there is a pending pre-trial investigation or criminal proceedings regarding committing of a crime of a general nature. The court found that the subject of the proceedings is the essence and the scope of the restriction in order for the national and public security to be protected. In general, it is possible and constitutionally permissible for the rights of the citizens to be restricted when this is necessary for protection of the national security. When estimating the proportionality of the limitation, the court finds that this provision puts a mark on equality between conviction by virtue of a final verdict and a pending criminal trial. In this regard, if a convicted person suffers the consequences of the conviction, this should not be transferred to a person against whom the trial is pending.

The court reaffirms that one of the fundamental principles of the criminal proceedings is the presumption of innocence established in the Constitution and envisaged in the Criminal Procedure Code that the accused is presumed innocent until the reverse is established by a final verdict. This presumption could only be rebutted by a final verdict. Consequently, only from the moment of the final verdict could the person could suffer the consequences in their legal sphere which the laws relate to the fact of the conviction, including those related to the possibility to get access to classified information.

Undoubtedly, the presumption of innocence is applied in relation to everyone who is accused in committing a crime without any exceptions.



This is valid *per argumentum a fortiori* to persons who are subject to investigation without any charges being brought against them.

The impugned provision puts a mark on the equality between the restriction imposed as a result of a conviction and resulting from a criminal proceeding initiated but not completed. In both cases, the legal consequences for the persons concerned are the same, without constitutionally justified basis.

Thus, even without a conviction for a crime of a general nature, the existence of pending criminal proceedings would be a ground for refusal of access to classified information. According to the court, this legislation does not provide an effective corrective mechanism for protection of the accused.

The next case is related to the Judiciary System Act (hereinafter “the JSA”). According to its Article 225 (3) “*In cases where a judge, prosecutor or an investigating magistrate has been indicted of a deliberate criminal offence or disciplinary proceedings have been opened against him, compensation shall not be paid until completion of the criminal or disciplinary proceedings.*” In its decision, the court finds that the provision does not contradict the Constitution. According to the court, there is no violation of the principle of presumption of innocence. Postponement of the payment of the one-time gratitude compensation under the conditions of Art. 225, para. 3 of the JSA is the moral assessment made by the legislator in the presence of sufficient evidence of conduct whereby the judge, prosecutor or investigator deviated from the order of morality and impeccability which gave rise to disciplinary or criminal proceedings against him.

The ultimate aim of the impugned provision is to preserve the integrity of the magistrate’s service and the trusts of the citizens in the judiciary.

The payment of a monetary compensation to a judge, prosecutor or investigator before the outcome of the criminal proceedings against them will undoubtedly prejudice the authority of the judiciary. And the preservation of the prestige of the judiciary and the trust in it, undermined by the behavior of the dismissed magistrate, is a goal of the highest constitutional order and a prerequisite for its normal and unimpeded functioning.





According to the court, obtaining compensation for dismissal as a judge, prosecutor or investigator against whom there is pending criminal proceedings would be incompatible with the very nature of the payment as an expression of gratitude for the long-standing loyal service.

Under the current Bulgarian Constitution, judges, prosecutors and investigators have only functional immunity designed to create a favorable environment free of pressure and influence to resolve cases. This is intended to guarantee independence of the magistrates when performing their functions.

Against this background, when criminal proceedings against a dismissed magistrate are conducted in the presence of sufficient data for a crime committed in the course of the performance of official duties, this will negatively project itself on his professional functions. In these cases, the provision of Art. 225, para. 3 of the JSA also performs a preventive and deterrent function - to refrain judges, prosecutors and investigators from acts and actions that affect the core of justice.

In its next decision, the court had the opportunity to interpret the presumption of innocence in the light of the jurisprudence of the European Court of Human Rights (hereinafter "the Court"). The proceedings were initiated by the Supreme Prosecutor in relation to the provisions of the Criminal Code according to which for certain criminal offences committed through negligence the perpetrator is not punished at the request of the victim. The argument in the request was that this regulation violates the constitutional principle of the presumption of innocence, since without having been proven by a verdict that one person has committed a crime, it is released from punishment at the will of another person and also this provision contradicts Article 6 (2) of the Convention.

According to the court, the acts committed under the disputed provisions of the Criminal Code do not cease to be crimes for which punishments are imposed. However, in the presence of the conditions specified in the law, the legislator allowed the perpetrators to be released from punishment if the victims so request.



The Court concludes that the presumption of innocence under item 2 of Art. 6 of the Convention is a universally recognized principle of the rule of law, according to which guilt of the defendant can only be established by a final judgment of the court. However, the Convention leaves it to the national legislature to determine what the proof of guilt includes and the procedural rules for proving guilt of the defendant.

The disputed provisions of Art. 343, para. 2 of the Criminal Code and Art. 343a, para. 2 of the Criminal Code do not create preconditions for violation of the presumption of innocence within the meaning of the Convention, which is why they are not inconsistent with Art. 6, paragraph 2 of the Convention and the claim in this regard must be rejected.

The last decision is related to the right of the accused and the victim to appeal the suspension of the pre-trial investigation made by the prosecutor before the court. The proceedings were initiated by a request of the Supreme Prosecutor.

The court finds that the right of the defendant and the victim to appeal the suspension of the pre-trial investigation by the prosecutor before the court guarantees the balance between their rights in the criminal proceedings as well as the functions and the powers of the public prosecution. Undeniably, the right of the accused to appeal the suspension of the criminal proceedings is a legislative development of the constitutional principles such as the right to legal defence (Article 56 and 122 (1) of the Constitution) and the presumption of innocence.”

Finally, I would like to conclude my presentation by briefly examining the nature of the presumption of innocence seen from the perspective of the Bulgarian criminal legislation and practice. The right to be presumed innocent is a legal right of the accused in a criminal trial. The burden of proof is on the prosecutor to prove the guilt of the accused where the court makes the final determination. The State must prove that the crime was committed and the defendant was the one who committed the crime. The defendant is not obliged to testify, to present evidence, or to call witnesses. Lastly, the fact that a defendant refuses to testify could not be used against them.



***THE PRESUMPTION OF INNOCENCE  
PRINCIPLE AND ITS APPLICATION IN  
THE CONSTITUTIONAL REVIEW IN  
INDONESIA***

***Syukri ASY'ARI  
Achmad DODI HARYADI***

***CONSTITUTIONAL COURT OF  
INDONESIA***





## THE PRESUMPTION OF INNOCENCE PRINCIPLE AND ITS APPLICATION IN THE CONSTITUTIONAL REVIEW IN INDONESIA

*Syukri ASY'ARI\**

*Achmad DODI HARYADI \*\**

### I. INTRODUCTION

The principle of presumption of innocence is the principle that applies in the field of criminal law that is the right for a suspect or defendant to be considered innocent until there is a court decision that has permanent legal force. This principle applies universally wherever, whenever, to anyone. As in international law, this principle was framed in various forms, whether in statutes, declarations, agreements or mutual agreements between various countries with different legal system characteristics.

The development of this idea, and the fulfillment of the protection, and the guarantee of the human rights is one of the main factors in the acceptance of the principle of presumption of innocence in various parts of the world. One of them was on December 10<sup>th</sup>, 1948, the United Nations General Assembly issued the Universal Declaration of Human Rights (UDHR) that includes the basic human rights and freedoms, including the ideals of people who are free to enjoy civil and political freedom. This freedom can be achieved by creating conditions where everyone can enjoy civil and political rights that are set under international legal instruments. Specifically, with regard to the principle of presumption of innocence, Article 11, paragraph (1) UDHR mentioned that, *“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”*

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Afterwards after a long debate, the UN Human Rights Commission succeeded in completing the draft Covenant. After the discussions article by article, at the end the UN General Assembly through Resolution No. 2200 A (XXI) authorized the International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights on December 16<sup>th</sup>, 1966 and valid on March 23<sup>rd</sup>, 1976. The International Covenant on Civil and Political Rights (ICCPR) aims to reinforce the basic human rights in the civil and political fields listed in the UDHR so that they become legally binding provisions and the elucidation includes other relevant subjects. The Covenant itself consists of preamble and articles covering of 6 chapters and 53 articles (see *icjr.or.id*).

Regarding to the principle of presumption of innocence regulated in Article 14, paragraph (2) of the ICCPR which states, *"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"*. The ICCPR was ratified through the Republic of Indonesia Law Number 12 Year 2005 concerning Ratification of the International Covenant on Civil and Political Rights on October 28<sup>th</sup>, 2005.

In addition, the principle of presumption of innocence is also stated in Article 66 paragraph (1) of the Rome Statue of the International Criminal Court, which load the presumption of innocence as it follows: *"Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law"*. Moreover it is also regulated in Article 40, paragraph 2, letter b, point (i) of the Convention on the Rights of the Child which states, *"To this end and having regard to the relevant provisions of international instruments, States Parties shall in particular ensure that: ... (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (i) To be presumed innocent until proven guilty according to law."*

Indonesia, as a state of law, also upholds the protection and fulfillment of human rights by formulating provisions in the 1945 Constitution of the Republic of Indonesia (1945 Constitution) as a state constitution, which contains the spirit of the principle of presumption of innocence as, among other things, in the following articles:



## **Chapter X Citizens and Habitants**

### *Article 27*

*(1) All citizens shall be equal before the law and in government and shall uphold the law and government without exception.*

## **Chapter XA Human Rights**

### *Article 28D*

*(1) Every person shall be entitled to recognition, guarantee, protection, and equitable legal certainty as well as equal treatment before the law.*

### *Article 28G*

*(1) Every person shall be entitled to protection of his/her own person, family, honor, dignity, and property under his/her control, as well as be entitled to feel secure and be entitled to protection against threat of fear to do or omit to do something being his/her fundamental right.*

### *Article 28I*

*(1) The right to life, the right to remain free from torture, the right to freedom of thought and conscience, the right to freedom of religion, the right not to be enslaved, the right to be treated as an individual before the law, and the right not to be prosecuted under a retroactive law are human rights that cannot be limited under any circumstance whatsoever.*

...

*(5) To uphold and protect human rights in accordance with the principles of a democratic and law-based state, the implementation of fundamental human rights is to be guaranteed, regulated, and laid down in laws and regulations*

### *Article 28J*

*(1) Each person has the obligation to respect the fundamental human rights of others while partaking in the life of the community, the nation, and the state.*

*(2) In exercising his rights and liberties, each person has the duty to accept the limitations determined by law for the sole purposes of guaranteeing the recognition and respect of the rights and liberties*





*of other people and of satisfying a democratic society's just demands based on considerations of morality, religious values, security, and public order.*

Indonesia has also included provisions regarding the principle of presumption of innocence in various laws, including the Law of the Republic of Indonesia Number 39-year 1999 concerning Human Rights and the Law of the Republic of Indonesia Number 4-year 2004 concerning Judicial Power. Article, 18 Paragraph (1) of Law Number 39-year 1999 concerning Human Rights states, *"Every person who is arrested, detained, and prosecuted because they are suspected of committing a criminal offense has the right to be presumed innocent until he has been proven legally guilty in a trial and given all legal guarantees needed for his defense, in accordance with the provisions of the legislation."* Whilst Article 8 of Law Number 48 Year 2009 concerning Judicial Power states, *"Everyone who is suspected, arrested, detained, prosecuted, or confronted before a court must be considered innocent before a court ruling states his guilt and has obtained permanent legal force."*

It is also regulated in General Explanation number 3, letter c, of Law Number 8 year 1981 concerning Criminal Procedure Code, which states, *"Therefore this law which regulates national criminal procedural law, must be based on philosophy/ life perspective of the nation and the principle of the nation, then it shall be a must in the provisions of the article or paragraph material reflected in the protection of human rights and the obligations of citizens as described earlier, as well as the principles that will be mention next. The principle that set the protection of the nobleness of the value of the human dignity that placed in the Law on the Basic Provisions of Judicial Power that is, Law Number 14-year 1970 must be enforce in and with this law. The principles include: "Every person whose is suspected, arrested, detained, prosecuted and or confronted before a court hearing must be considered not guilty until a court ruling states his guilt and obtained permanent legal force."*

Based on the provisions both international law and national law, as explicitly formulated in a number of laws above, it is clear that the principle of presumption of innocence only applies in the field of criminal law, specifically in the framework of due process of law. More specific, the principle is actually relate to the burden of proof



videlicet the obligation to prove is charged with law enforcement, while the defendant is not burdened with the obligation to prove his innocence, except in certain cases namely the principle of inverse proof (*omgekeerde bewijslast*) has been fully adopted. Furthermore, in terms of the Indonesian Constitution, it is considered that the principle of presumption of innocence is a right that has been guaranteed by the 1945 Constitution, especially those implicitly mentioned in Article 28D paragraph (1) which states, “*Every person shall be entitled to have the right to recognition, security, protection, and equitable legal certainty as well as equal treatment before the law.*” Therefore, in settling cases of judicial review in the Constitutional Court of the Republic of Indonesia, the principle was used several times as the basis for constitutionality on reviewing a norm. This paper will try to describe the application of the principle in the completion of the judicial review in the Constitutional Court of the Republic of Indonesia.

## II. THE PRINCIPLE OF PRESUMPTION OF INNOCENCE IN THE VIEWS OF EXPERTS AND LEGAL PRACTITIONERS IN INDONESIA

One of the principles of law that is very urgent and fundamental in criminal law is the principle of presumption of innocence. This principle emphasizes that in every criminal proceedings for the sake of upholding the law must be hold based on the principle of presumption of innocence. The presumption of innocence is a universally recognized principle.

There are two important things to note from the definition of the presumption of innocence. First, the presumption of innocence only applies in criminal acts. Second, the principle of presumption of innocence is essentially a matter of burden of proof: it is not up to the defendant to prove his/her innocence but rather to the State, represented by the public prosecutor, to prove that the defendant is indeed guilty, by proving all the elements of criminal acts charged, at the court hearing (Ahmad, 2004: 58 and 2005: 58).

According to Bambang Poernomo, the criminal case process through the principle of presumption of innocence has the virtue of giving priority to human rights guarantees for suspects or innocent



defendants who obtain a careful and gradual legal judgment (Bambang, 2000: 82). Everyone must be presumed innocent until proved guilty in a public, independent and honest trial. These human rights are one of the basic principles in law enforcement mandated by the Indonesian Criminal Procedure Code (KUHAP).

Moreover, Mardjono Reksodiputro as quoted by Lilik Mulyadi said that the elements of the presumption of innocence are the main principle of the protection of citizens' rights through a due process of law, which includes at least 1) protection against arbitrary acts by state officials; 2) the fact that the court has the right to determine whether or not the defendant is guilty; 3) that the court hearings must be open (must not be confidential); and 4) that the suspects and defendants must be guaranteed to be able to full defend themselves (Lilik, 2004: 276).

As mentioned above, the principle of presumption of innocence is positioned in the centre of the principle of the protection of citizens' rights through due process of law, which includes at least the following points (Komariah, 1987: 284):

1. The protection against arbitrary actions from the government;
2. The court has the right to determine whether the accused is guilty or not;
3. The courts session must be open (must not be confidential); and
4. The suspects and the defendants must be guaranteed to be able to defend themselves to the fullest.

Furthermore, Siswanto Sunarso argues that consideration of presumption of innocence in the examination of a suspect or defendant means that: 1) the suspect rights position and dignity must be respected with fair treatment; 2) the examination may not force the suspect to give an answer, moreover, that confession can obscure or mislead the trail of the investigated case; and 3) the judge must act fairly and wisely as possible, in the sense that it is not influenced by subjective elements, either directly or indirectly regarding to the defendant's self (Siswanto, 2005: 187). In this perspective, the meaning and existence of the principle of presumption of innocence in the criminal justice system essentially determines the whole process of implementing



criminal procedural law implemented in a balanced manner. This is in line with Kaligis opinion that although the purpose of law enforcement is to defend and protect the needs of society, law enforcement must not sacrifice the rights and dignity of the suspect/defendant. In contrary, protecting the dignity of the suspect/ defendant must not sacrifice the needs of the community. Law enforcement officials must be able to put the principle of balance outlined in the Criminal Procedure Code so as not to sacrifice both interests protected by law (Kaligis, 2006: 374).

Therefore, in the corridor of criminal procedure law, the principle of presumption of innocence must be the main guideline in treating suspects or defendants suspected from committing criminal offenses.

It means that, in the implementation of law enforcement, the human rights inherent in suspects and defendants shall not be restricted. The Criminal Procedure Code itself has placed the suspects or defendants in a position that must be treated in accordance with noble humanitarian values.

### **III. IMPLEMENTATION OF THE AUTHORITY OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA**

The Constitutional Court of the Republic of Indonesia as one of the authorities exercising judicial power in Indonesia, beside the Supreme Court of the Republic of Indonesia as determined by Article 24C, Paragraph (1) and Article 10, Paragraph (1) of the Republic of Indonesia Law Number 8-year 2011 regarding Amendment of Law Number 24-year 2003 concerning the Constitutional Court (MK Law) and Article 29, Paragraph (1) of the Republic of Indonesia Law Number 48-year 2009 concerning Judicial Power. The Constitutional Court of the Republic of Indonesia has been given the authority to adjudicate at the first and last resort and its decisions are final; it has been also vested with the power to examine the laws which are contrary to the 1945 Constitution; to decide upon disputes over the authority of state institutions whose authority is granted by the 1945 Constitution; to decide upon the dissolution of political parties; and to decide on disputes over the results of general elections, as well as providing



decisions on the opinion of the House of Representatives regarding alleged violations by the President and / or Vice-President.

Since its establishment in 2003 until now, the Constitutional Court of the Republic of Indonesia has exercised its three powers, such as the authority to conduct a judicial review (PUU), the approval of state agency authority (SKLN), and disputes over the results of general elections (PHPU). As for the two other authorities, namely the authority to decide upon the dissolution of political parties and to decide in the process of dismissing the President and / or Vice-President during his term, up to now have never been exercised. Both of these authorities have never been exercised due to the fact that there has been no request on these two authorities submitted to the Constitutional Court of the Republic of Indonesia, yet.

Then in its progress, the Constitutional Court of the Republic of Indonesia also has the authority to adjudicate the cases of the Dispute over the Regional Election Results (PHP Kada). However, this authority is temporary hence since the Constitutional Court of the Republic of Indonesia issued Decision Number 97/PUU-XI/2013 dated May 19<sup>th</sup>, 2014 which states that the authority of the Constitutional Court of the Republic of Indonesia to adjudicate PHP Kada is only temporary until the special judicial body that handles disputes over election is formed.

#### **IV. THE APPLICATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE IN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA JUDICIAL REVIEW**

Judicial review of the 1945 Constitution is a legal process that can only be carried by the Constitutional Court of the Republic of Indonesia after an application has been submitted by a party or an individual that consider that their constitutional rights / and / or authority impaired by the enactment of a law. The petitioner as mentioned in Article 51 Paragraph (1) of the Constitutional Court Law includes:

1. An individual Indonesian citizen;
2. Customary law community unit as long as it is still alive and in accordance with the development of the community and the principles of the Unitary State of the Republic of Indonesia as stipulated in the law;



3. Public or private legal entity; or
4. State institutions.

As for having legal standing other than as one of the four above, the Constitutional Court of the Republic of Indonesia since its Decision Number 06/PUU-III/2005 dated May 31<sup>st</sup>, 2005 and Decision Number 11/PUU-V/2007 dated 20<sup>th</sup> of September 2007 which is still followed, has specified the requirements to become an applicant in submitting an application for judicial review of the 1945 Constitution, namely:

- 1) The applicant's rights and/or authorities granted by the 1945 Constitution;
- 2) The constitutional rights and/or authorities considered by the Petitioner impaired by the application of the law petitioned;
- 3) The constitutional impairment must be specific and actual or at least potential which according to logical reason that will certainly occur;
- 4) There is a causal link between the intended loss and the application of the contested law;
- 5) There is a possibility that with the granting of the petition, the constitutional impairment as argued will no longer occur.

The legal position or the legal standing, as well as the authority of the Court to adjudicate an application submitted, must be prove in advance by the applicant and considered separately by the Constitutional Court of the Republic of Indonesia. If the Constitutional Court of the Republic of Indonesia considers that the petition is a judicial review of the 1945 Constitution and the applicant has the legal standing to submit the application because it meets the requirements to become an applicant, the Constitutional Court of the Republic of Indonesia will examine, consider, and decide upon the principal of the petition or case. On the contrary, if the petition does not constitute a judicial review of the 1945 Constitution and the applicant does not have the legal standing, then the Constitutional Court of the Republic of Indonesia will reject the application as inadmissible. Concerning the subject matter of the petition, if it is reasonable then the verdict states it is granted by stating that it contradicts with the 1945 Constitution and



has no legally binding force. Conversely, if it is groundless, the verdict states that the petition of the applicant declined.

Since its establishment in 2003 until December 17<sup>th</sup>, 2018 based on the 2018 Annual Report, the Constitutional Court of the Republic of Indonesia has received or registered 1.236 PUU cases and 1.199 cases have been decided (Kepaniteraan dan Sekretariat Jenderal Mahkamah Konstitusi, 2018: 13). Below are some decisions of the Constitutional Court in which it analyzes the scope of the principle of presumption of innocence:

**A. Decision on Case Number 004/PUU-II/2004 (concerning the constitutionality of tax appeal requirements)**

The petitioner in this case argues that one of the conditions for filing an appeal can be made if the amount owed has been paid in the amount of 50% (fifty percent) as specified in Article 36 paragraph (4) of Law Number 14 of 2002 concerning Tax Courts violating the principles of proof especially the presumption of innocence as guaranteed by the 1945 Constitution. Regarding this, the Constitutional Court of the Republic of Indonesia explained that the Tax Court is not a criminal court that decides whether a person is guilty according to criminal law, but determines the implementation of the correct tax law rules. Therefore, the principle of presumption of innocence in the criminal sense is irrelevant in tax court. The obligation to pay 50% is not based on the verdict criminal guilty or a fine, but as payment of a portion of the taxpayer's tax debt and at the same time is a condition for filing an appeal right. With this decision, the Constitutional Court of the Republic of Indonesia has placed the principle of presumption of innocence limited only to the criminal justice system.

**B. Decision on Case Number 024/PUU-III/2005 (concerning the constitutionality of temporary dismissal of regional heads with the accused status)**

The Petitioner in this case questioned the enactment of the provisions concerning the temporary dismissal from the position of regional head for being a defendant as stated in Article 31 paragraph (1) of Law Number 32 Year 2004 concerning Regional Government (Regional Government Law) and its Elucidation. According to the Petitioner,



the aforementioned provision has impaired his constitutional rights as guaranteed in the 1945 Constitution, one of which is the right to be treated innocent until a court decision has permanent legal force. According to the Court, the Petitioners' argument, which qualifies temporary dismissal as actions or provisions that contradict the presumption of innocence is inappropriate. Because the principle of presumption of innocence only applies in the field of criminal law, specifically in the framework of due process of law, while the temporary dismissal from the post of regional head is an administrative act. Thus, in this Decision the Constitutional Court of the Republic of Indonesia emphasized that the principle of presumption of innocence was not a prerequisite for the administrative action in the form of temporary dismissal of certain positions. In principle, a temporary dismissal is not the same as imposing a sentence, so there is no need for what is called conclusive evidence, but enough if there is sufficient initial evidence (presumptive evidence, circumstantial evidence).

**C. Decision Number 012-016-019/PUU-IV/2006 (concerning the constitutionality of the authority of The Corruption Eradication Commission (KPK) to issue an order to cease investigation and prosecution)**

The Petitioners in this case questioned Article 40 of the Law of the Republic of Indonesia.

Number 30 year 2002 concerning the Corruption Eradication Commission stated that the KPK was not authorized to issue a warrant to stop the investigation and prosecution because one of them ignores the presumption of innocence as a legal principle that is universally adhered to and recognized by almost all countries in the world as given and guaranteed by the constitution, namely in Article 27, Paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution. According to the Constitutional Court of the Republic of Indonesia, that KPK does not have the authority to issue a warrant to stop the investigation and prosecution is not exactly opposed to the presumption of innocence because the principle of presumption of innocence is a principle that must be interpreted as an obligation for all parties not to treat a defendant as guilty as long as the judge has not decided yet that the defendant's





guilt. The burden of evidence to prove the accused's guilt lies in the public prosecutor and the defendant is free from the burden of proving that he is innocent, unless the principle of reverse proof has been fully adhered. As long as there is no judge's decision which can makes the defendant guilty, his rights and position as a person who has not been found guilty of committing a crime is guaranteed and protected. This principle still applies regardless of whether or not the provisions of Article 40 of the KPK Law. With this decision, the Constitutional Court of the Republic of Indonesia has adopted the principle of presumption of innocence toward the accused who has not been found guilty by the judge.

**D. Decision Number 133/PUU-VII/2009 (concerning the unconstitutional conditional dismissal of the chairman of KPK permanently)**

This cases was submitted by two leaders from the Corruption Eradication Commission for the period 2007-2011, named Bibit Samad Rianto and Chandra M. Hamzah. The Petitioners submit applications for a constitutional review Article 32 paragraph (1) letter c of Law Number 30 Year 2002 concerning the Corruption Eradication Commission (Law 30/2002) which reads, "*The leader of the Corruption Eradication Commission stopped or dismissed because: a. ...; b. ...; c. be accused for committing a crime*". Basically, in this case, the Petitioners submit two things, first, in the provision asking the Court to order the Police or the Prosecutor's Office not to proceed criminal cases that entice the Petitioners to court or order the President not to issue a permanent dismissal for the Petitioners until there is a decision of the Constitutional Court of the Republic of Indonesia in the case of judicial review of Law 30/2002. Second, in the main petition, the Petitioners asked MKRI to cancel Article 32 paragraph (1) letter c of Law 30/2002 because it contradicted with the 1945 Constitution.

Concerning to the Petitioners' petition for provision, the Court considered that the issuance of an interim decision (provision) in this case was needed to prevent the possibility of impairing the Petitioners' constitutional rights if they were dismissed (permanently) by the President whilst they were accused, even though the legal basis



or article of the law concerning the dismissal was being tested its constitutionality by the Petitioners in MKRI. While pertaining to the subject matter of the petition, the Court considers the provisions tested by the Petitioners to be a form of punishment or sanction, even though the giving and imposing of sanctions or sentences must first be through from a criminal court decision in the indicted case. Thus, in order that the Petitioners' constitutional rights remain respected, protected, and fulfilled, and the temporary dismissal of the KPK Leaders who are determined as suspects provides a balance between maintaining the smooth implementation of the duties and authority of the KPK and the protection of the human rights of citizens who become KPK Leaders then according to the MKRI, the Petitioner's petition is legal according to the law in part.

Through this decision, the Constitutional Court of the Republic of Indonesia has adopted the principle of presumption of innocence by stating that no one can be punished (in this context, being permanently dismissed from his position) before a court ruling has permanent legal force. Because, Article 32 paragraph (1) letter c of Law 30/2002 is contrary to the Constitution and negates the principle of due process of law that requires an honest, fair and impartial judicial process.

**E. Decision on Case Number 152/PUU-VII/2009 (concerning the constitutionality of temporary dismissal for the members of the House of the Representatives of Indonesia (DPR) as a defendant)**

The petitioner in this case was the member of the 2009-2014 DPR, Achmad Dimiyati Natakusumah, who conducted a constitutionality review of Article 219 of Law Number 27 of 2009 concerning the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council and the Regional People's Representative Council (Law MD3). In essence, the Petitioner argued that the provisions that organize the temporary dismissal of the DPR members who he was against the presumption of innocence and the principle of equality before the law as guaranteed in the 1945 Constitution. MKRI's opinion that the temporary dismissal of the DPR member which the defendant does not contradict with the



presumption of innocence or the 1945 Constitution. Although the temporary termination can be categorized as the limitation of rights, according to the MKRI, restriction of the rights or freedoms of a person is made possible by the existence of Article 28J paragraph (2) of the 1945 Constitution that confirm the limitation of the rights can still be carried out proportionally in accordance with other goals or interests that are solely intended to guarantee the recognition and respect for the rights and freedoms of others. The relation of Article 28J of the 1945 Constitution with the norms of Article 219 of Law 27/2009 tested is to maintain the principles of balance between the protection of the right to the presumption of innocence and the protection of the interests of public office held by the Petitioner. If there is a member of the DPR as a defendant and continue to carry out their duties in the status of defendant, it will undermine the position of the council in the eyes of the people because it cannot maintain the credibility and morality of its members. In this decision, the Constitutional Court of the Republic of Indonesia wants to emphasize that the application of the presumption of innocence has been balanced with the constitutionality of the temporary dismissal of public office, in this case as a member of the DPR.

**F. Decision on Case Number 77/PUU-XIII/2014 (concerning the constitutionality of evidence by the defendant that his wealth is not the result of a criminal act)**

The Petitioner for this case was the Chairman of the Constitutional Court of the Republic of Indonesia from the period April to October 2013, Akil Mochtar, whose questioned the norm of proof by the defendant on the judge's order that his assets were not originated or related to criminal acts, one of it was related to bribery [vide Article 77 and Article 78 paragraph (1) of the Law of the Republic of Indonesia Number 8 Year 2010 concerning Prevention and Eradication of Money Laundering]. Related to the constitutional review of the two provisions, the Constitutional Court of the Republic of Indonesia emphasized that reverse proof is permissible in the case of gratification considered as giving bribes. In this decision, the Constitutional Court of the Republic of Indonesia also negated the pretext of presumption of innocence presented by the Petitioner in order to prioritize and pursue legal



certainty, expediency, and justice.

**G. Decision on Case Number 71/PUU-XIV/2016 (concerning the constitutionality of the temporary dismissal of the newly inaugurated head of regional as the accused defendant)**

The applicant in this case was the Governor of Gorontalo for the 2012–2017 period, Hi. Rusli Habibie, questioned several provisions in Law Number 10 Year 2016 concerning Second Amendment to Law Number 1 Year 2015 concerning Establishment of Government Regulations in lieu of Law Number 1 of 2014 concerning Election of Governors, Regents, and Mayors to Become Laws (UU Pilkada), one of it is the provision on the temporary dismissal of the governor and/or deputy governor who was just appointed because of the status of the defendant as regulated in Article 163 paragraph (7) and paragraph (8) of the Pilkada Law. According to the Petitioner, this provision has impaired his rights as an elected candidate for governor so that it contradicts the 1945 Constitution, especially in getting equal treatment before the law and fair legal certainty. According to the Court, as fit to the principle of presumption of innocence, a person who is a defendant is not necessarily guilty even though there is also the possibility that he is guilty. Thus, someone who holds the status of the defendant is in between the possibility of innocence and guilty, therefore there is a legal need to provide an opportunity for the person concerned to defend himself before a judge or court. Moreover, for the governor and /or deputy governor who has just been appointed, the dismissal of his position is carried out as a form of equality before the law. The dismissal decided temporarily as a form of presumption of innocence against the said officials.

This decision confirms that the Constitutional Court of the Republic of Indonesia has placed the principle of presumption of innocence in a balanced manner with the due process of law. Because on the one side, the inauguration of candidates for governor and /or deputy governor elected through a democratic process. In other words, they remain to respect the principles of democracy. Whilst on the other hand, justifying administrative action to temporary dismiss the said official to undergo the legal process until there is a decision from a court with a permanent legal force.



## **H. Case Decision Number 4/PUU-XVI/2018 (concerning the constitutionality of detention)**

The Petitioner in this case questioned the enforcement of the provisions regarding detention as stated in Article 7 Paragraph (1) letter d, Article 11, and Article 20 Paragraph (1) and Paragraph (2) of the Indonesia Criminal Procedure Code because according to the Petitioner these provisions deprived him from his liberty and violate his human rights, so that it contradicts with the 1945 Constitution. Regarding the issue of detention, the Constitutional Court of the Republic of Indonesia explains that because it involves the deprivation of liberty of a person, the detention must go through a strict (limitative) and prudent requirements, moreover the detention must place the suspect or defendant in the position who is not necessarily proven guilty (the principle of presumption of innocence) accompanied by consideration from the investigator or public prosecutor for circumstances that raise the concerns if the suspect or defendant will escape, damage or eliminate the evidence and /or will repeat the crime. This decision confirms that the Constitutional Court of the Republic of Indonesia has placed the principle of presumption of innocence is not absolute because the suspect and the defendant can be held in detention constitutionally, even though the essence is different from the punishment that must be in a court decision which has a permanent legal force.

## **V. CONCLUSION**

In the corridor of criminal law, the principle of presumption of innocence must be the main guideline in treating suspects or defendants suspected from committing criminal act. That is, in the implementation of law enforcement, the human rights inherent in suspects and defendants must not be restricted. The suspect or defendant are in a state that necessitate to be treated in accordance with human rights values. As a fundamental principle in criminal law, the application of the principle of presumption of innocence must be carried out in a balance and proportional manner between protecting individual independence on the one hand and deprivation of the rights of individual perpetrators on the other hand.

The decisions of the Constitutional Court of the Republic of



Indonesia that make the principle of presumption of innocence as one of the basic constitutionality of a norm shows the recognition that this principle is so fundamental in the legal system in Indonesia which must be respected by all parties in the system of law enforcement and as to fulfill the human rights. Based on the application of the principle of presumption of innocence in judicial review in the Constitutional Court of the Republic of Indonesia, there are several important things that can be concluded, as follows:

- 1) The presumption of innocence is limited to the criminal justice system.
- 2) The principle of presumption of innocence is not a prerequisite for the imposition of administrative measures in the form of temporary dismissal of certain positions, in this case, members of the DPR and regional heads. On the other hand, the termination of public official permanently is unconstitutional because it is against the presumption of innocence principles.
- 3) The principle of presumption of innocence applies to defendants who have not been found guilty by a judge.
- 4) The principle of presumption of innocence is not absolute in the sense that the suspects and defendants' constitutional detention can be carried out, even though the essence is different from the punishment that must ordered by a court in a decision which has the permanent legal force.
- 5) In the case of gratification which is considered as giving bribes, the principle of presumption of innocence can be negated in order to prioritize and pursue legal certainty, expediency, and justice, because in this context the evidence used is the presumption of guilty principles.



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***PRESUMPTION OF INNOCENCE:  
PHILIPPINE PERSPECTIVE***

***Ramon Paul HERNANDO***

***SUPREME COURT OF THE  
PHILIPPINES***







## PRESUMPTION OF INNOCENCE: PHILIPPINE PERSPECTIVE

Ramon Paul L. HERNANDO\*

### I. PRESUMPTION OF INNOCENCE, DEFINED

The Philippines' criminal justice system implements the principle of "presumption of innocence". This means that in every criminal case in the Philippines, the accused is presumed innocent unless his guilt is proven beyond reasonable doubt.<sup>1</sup> Thus, since the accused enjoys the presumption of innocence, he is entitled to acquittal unless his guilt is shown beyond reasonable doubt.<sup>2</sup> In *People of the Philippines v. Carlito Claro y Mahinay* (2017)<sup>3</sup>, the Philippine Supreme Court pronounced on what 'proof beyond reasonable doubt' entails:

*"Requiring proof of guilt beyond reasonable doubt necessarily means that mere suspicion of the guilt of the accused, no matter how strong, should not sway judgment against him. It further means that the courts should duly consider every evidence favoring the accused, and that in the process, the courts should persistently insist that accusation is not synonymous with guilt; hence, every circumstance favoring the accused's innocence should be fully taken into account."*  
(Emphasis on the Original)

Similarly, in *Nacnac v. People of the Philippines* (2012)<sup>4</sup>, which cites *People of the Philippines v. Mejia* (1997)<sup>5</sup> the Supreme Court of the Philippines further explained the concept of proof of guilt beyond

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\* Justice, Supreme Court of the Philippines.

1 *People of the Philippines v. Zafra Maraorao y Macabalang*, G.R. No. 174369, June 20, 2012.

2 *People of the Philippines v. Carlito Claro y Mahinay*, G.R. No. 199894, April 5, 2017.

3 *People of the Philippines v. Carlito Claro y Mahinay*, G.R. No. 199894, April 5, 2017, citing *People of the Philippines v. Gregorio Mejia*, G.R. Nos. 118940-41 and G.R. No. 119407, July 7, 1997, 275 SCRA 127, 155.

4 G.R. No. 191913, March 21, 2012, 685 PHIL 223-235

5 *People of the Philippines v. Gregorio Mejia*, G.R. Nos. 118940-41 and G.R. No. 119407, July 7, 1997, 275 SCRA 127, 155.



reasonable doubt in order to uphold the principle of presumption of innocence:

*“Every circumstance favoring the accused’s innocence must be duly taken into account. The proof against the accused must survive the test of reason. Strongest suspicion must not be permitted to sway judgment. The conscience must be satisfied that on the accused could be laid the responsibility for the offense charged. If the prosecution fails to discharge the burden, then it is not only the accused’s right to be freed; it is, even more, the court’s constitutional duty to acquit him.”*

## II. HISTORY OF HOW “PRESUMPTION OF INNOCENCE” WAS INTRODUCED TO THE PHILIPPINE CRIMINAL JUSTICE SYSTEM

The requirement in the Philippines’ criminal proceeding wherein the guilt of the accused must be established beyond reasonable doubt, stems from American origin.<sup>6</sup> In the recent case of *People of the Philippines v. Carlito Claro y Mahinay* (April 2017)<sup>7</sup>, the Supreme Court of the Philippines cited the United State case of *In Re Winship* (397 U.S. 358, 362-365):

*“The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.[...]”*

*The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man*

<sup>6</sup> *People of the Philippines v. Carlito Claro y Mahinay*, G.R. No. 199894, April 5, 2017.

<sup>7</sup> G.R. No. 199894, April 5, 2017.



*for commission of a crime when there is reasonable doubt about his guilt. [...] Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.’ To this end, the reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.’*

*Moreover, use of the reasonable-doubt standard is indispensable to the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law is not diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual dealing with his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.*

*Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” (Citations Omitted)*

### **III. PHILIPPINE LAWS IMPLEMENTING THE PRINCIPLE OF “PRESUMPTION OF INNOCENCE”**

#### **A. The Constitution of the Philippines**

The principle of “presumption of innocence” is guaranteed by the Philippine Constitution, which is the fundamental law of the country. It was enshrined as early as the 1935 Philippine Constitution and remained as part of the fundamental law when it was amended in the 1973 and 1987 Philippine Constitution.



1935 Constitution	1973 Constitution	1987 Constitution
<p>Article III: Bill of Rights</p> <p>SECTION 1. (1) <u>No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.</u> [xxx] (17) <u>In all criminal prosecutions the accused shall be presumed to be innocent until the contrary is proven,</u> and shall enjoy the right to defense by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses in his behalf. (Underscoring supplied)</p>	<p>Article IV: Bill of Rights</p> <p>SECTION 19. <u>In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proven,</u> and shall enjoy the right to defense by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustified. (Underscoring supplied)</p>	<p>Article III, Bill of Rights</p> <p>SECTION 14. (1) <u>No person shall be held to answer for a criminal offense without due process of law.</u> (2) <u>In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proven,</u> and shall enjoy the right to defense by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable. (Underscoring supplied)</p>

The *Bill of Rights* under the Philippine Constitution guarantees certain rights to every person accused of a crime, among them are the right of the accused to due process of law and the right of the accused to be presumed innocent until the contrary is proven. The foregoing Constitutional guarantee is enforced under the revised Rules of Court of the Philippines.



## B. The Revised Rules of Court of the Philippines

The Rules of Court of the Philippines incorporates the rules concerning the protection and enforcement of constitutional rights, and the rules concerning the practice and procedure in all Philippine courts, among others. Thus, it implements the principle of “presumption of innocence”, specifically under the provisions of the Rules of Criminal Procedure and Rules on Evidence.

### 1. Revised Rules of Criminal Procedure in Philippines’ Rules of Court

Rule 115 of the Revised Rules of Criminal Procedure under the Philippines’ Rules of Court implements the constitutional guarantee of presumption of innocence. The relevant provision reads as follows:

*“Rule 115: Rights of Accused*

*SECTION 1. Rights of accused at the trial.- In all criminal prosecutions, the accused shall be entitled to the following rights:*

*(a) To be presumed innocent until the contrary is proven beyond reasonable doubt.*

*[...]”*

In line with the foregoing right of the accused, Philippine jurisprudence emphasizes that in all criminal proceedings in the Philippines, the prosecution bears the burden to establish the guilt of the accused beyond reasonable doubt, as held in the cases of *Maamo v. People* (2016),<sup>8</sup> *People v. Mendoza y Estrada* (2014),<sup>9</sup> and *People v. Belocura y Perez* (2012)<sup>10</sup>, among others.

Consequently, in order to prove the guilt of the accused, the prosecution must rely on the strength of its own evidence, and not on the weakness of the evidence of the defense/accused.<sup>11</sup> In the case of *Patula v. People*<sup>12</sup>, the Supreme Court of the Philippines pronounced:

8 G.R. No. 201917, December 1, 2016.

9 G.R. No. 192432, June 23, 2014, 736 PHIL 749-771.

10 G.R. No. 173474, August 29, 2012, 693 PHIL 476-504.

11 *People v. Pantallano*, G.R. No. 233800, March 6, 2019; *See also Arriola v. People*, G.R. No. 217680, May 30, 2016, 785 PHIL 895-910.

12 G.R. No. 164457, April 11, 2012, 685 PHIL 376-411.



*"[...] in all criminal prosecutions, the Prosecution bears the burden to establish the guilt of the accused beyond reasonable doubt. In discharging this burden, the Prosecution's duty is to prove each and every element of the crime charged in the information to warrant a finding of guilt for that crime or for any other crime necessarily included therein. The Prosecution must further prove the participation of the accused in the commission of the offense. In doing all these, the Prosecution must rely on the strength of its own evidence, and not anchor its success upon the weakness of the evidence of the accused. **The burden of proof placed on the Prosecution arises from the presumption of innocence in favor of the accused, which is no less than the one the Constitution has guaranteed.** Conversely, as to his innocence, the accused has no burden of proof, that he must then be acquitted and set free should the Prosecution not overcome the presumption of innocence in his favor. In other words, the weakness of the defense put up by the accused is inconsequential in the proceedings for as long as the Prosecution has not discharged its burden of proof in establishing the commission of the crime charged and in identifying the accused as the malefactor responsible for it."* (Citations Omitted) (Emphasis supplied)

## 2. *Revised Rules on Evidence in the Philippines' Rules of Court*

Similarly, Rule 133 of the revised Rules on Evidence, implements the principle of presumption of innocence. The relevant provision reads as follows:

### *"Rule 133: Weight and sufficiency of Evidence*

*SECTION 2. Proof beyond reasonable doubt.- In a criminal case, the accused is entitled to an acquittal, unless his guilt is shown beyond reasonable doubt. Proof beyond reasonable doubt does not mean such a degree of proof as, excluding possibility of error, produces absolute certainty. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind."*

In view of the foregoing provision, it is settled within the Philippine criminal justice system that the burden is on the prosecution to prove the accused's guilt beyond reasonable doubt, not on the accused to



prove his innocence.<sup>13</sup> The requirement that the accused's guilt be proven beyond reasonable doubt is an enforcement of the guarantee of the Philippine Constitution that an accused has a right to due process of law and the right to be presumed innocent until the contrary is proven. Should the prosecution fail to discharge its burden, it follows as a matter of course, that an accused must be acquitted.<sup>14</sup> In the case of *Daayata v. People of the Philippines*<sup>15</sup>, the Supreme Court of the Philippines pointed out that the quantum of proof required in criminal cases charges the prosecution the responsibility of establishing moral certainty or "a certainty that appeals to a person's conscience".

Thus, in the case of *Daayata v. People of the Philippines*<sup>16</sup>, which reiterates the pronouncement of the Supreme Court of the Philippines in *Raul Basilio Boac v. People*<sup>17</sup> and *People v. Ganguso*<sup>18</sup>, the Court held:

*"An accused has in his favor the presumption of innocence which the Bill of Rights guarantees. Unless his guilt is shown beyond reasonable doubt, he must be acquitted. This reasonable doubt standard is demanded by the due process clause of the Constitution which protects the accused from conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged. The burden of proof is on the prosecution, and unless it discharges that burden the accused does not even need to offer evidence in his behalf, and would be entitled to an acquittal. Proof beyond reasonable doubt does not, of course, mean such degree of proof as, excluding the possibility of error, produce absolute certainty. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind. The conscience must be satisfied that the accused is responsible for the offense charged."*

Consequently, since in the criminal justice system of the Philippines, the quantum of evidence for conviction of an accused is that which produces moral certainty in an unprejudiced

13 *Daayata v. People*, G.R. No. 205745, March 8, 2017, 807 PHIL 102-120.

14 *Daayata v. People*, G.R. No. 205745, March 8, 2017, 807 PHIL 102-120.

15 G.R. No. 205745, March 8, 2017, 807 PHIL 102-120.

16 G.R. No. 205745, March 8, 2017, 807 PHIL 102-120.

17 *Raul Basilio Boac v. People of the Philippines*, G.R. No. 180597, November 7, 2008, 591 PHIL 508-523.

18 G.R. No 115430, November 23, 1995, 250 SCRA 268, 274-275.





mind, that the accused is guilty beyond reasonable doubt, then if the evidence is susceptible of two interpretations, one consistent with the innocence of the accused and the other consistent with his guilt, the accused must be acquitted.<sup>19</sup> Thus, in *People v. Cruz y Tecson* (2014)<sup>20</sup>, the Supreme Court reiterated its findings in *Yadao v. People of the Philippines* (2006)<sup>21</sup>, which in turn cites *People of the Philippines v. Manambit* (1997)<sup>22</sup>, *People of the Philippines v. Vasquez* (1997)<sup>23</sup> and *People of the Philippines v. Batidor* (1999)<sup>24</sup>:

If the evidence is susceptible of two interpretations, one consistent with the innocence of the accused and the other consistent with his guilt, the accused must be acquitted. The overriding consideration is not whether the court doubts the innocence of the accused but whether it entertains a reasonable doubt as to his guilt. **If there exist even one iota of doubt, this Court is “under a long standing legal injunction to resolve the doubt in favor of herein accused-petitioner.”**

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19 *People v. Manambit*, G.R. Nos. 72744-45, April 18, 1997, 338 PHIL 57-105.

20 G.R. No. 194234, June 18, 2014, 736 PHIL 564-581.

21 *Yadao v. People*, 534 Phil. 619, 640 (2006).

22 G.R. Nos. 72744-45, April 18, 1997, 338 PHIL 57-105.

23 345 Phil. 380, 399 (1997).

24 362 Phil. 673, 681-682 (1999)..

***THE PRESUMPTION OF INNOCENCE  
IN THE SUPREME CONSTITUTIONAL  
COURT OF PALESTINE***

***Abdalrahman A. A. ABUNASER***

***CONSTITUTIONAL COURT OF  
PALESTINE***





## THE PRESUMPTION OF INNOCENCE IN THE SUPREME CONSTITUTIONAL COURT OF PALESTINE

*Abdalrahman A. A. ABUNASER\**

The Palestinian law system is a complex system. This system dates back to the Ottoman period and the Islamic heritage, and many of the laws of that period are still in force such as the ones concerning the personal status and or publications like the journal of justice judgment.

During different period as the British Mandate, which has a comprehensive legal system including all different approaches with colonial policies; the Jordanian rule in the West Bank; the Egyptian administration in Gaza; the Israeli occupation; the Palestinian National Authority and the recognition of the State of Palestine as an observer state in the United Nations in 2012 different law systems were adopted. Sometimes they applied their policies through laws, especially in colonial period such as the British mandate and Israeli occupation. Today, the legal system is overshadowed by international human rights law and international humanitarian law.

The Palestinian law system is based on the Declaration of Independence of 1988, the Basic Law of 2003 and its amendments in 2005 and the Ordinary Law System. Subordinate regulation attributes power of the Supreme Constitutional Court, in the Basic Law, Article 103 which states:

*“The Supreme Constitutional Court shall be constituted by law and shall consider:*

- a) The constitutionality of laws, legislations or regulations, [etc.];*
- b) Interpretation of the texts of the Basic Law and Legislation.”*

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\* Judge, Supreme Constitutional Court of Palestine.



Accordingly the Supreme Constitutional Court Law was issued.

Article 2 of the Basic Law, entitled “Rights and Freedoms” contains many articles that emphasize personal freedoms, human rights and fundamental rights. The articles refers to personal rights during arrest, legal treatment of an accused and the presumption of innocence, the principle of no crime charged or punishment except situations given in a legal text. Concerned articles are:

***“Article 10***

- 1. Fundamental human rights and liberties shall be protected and respected.*
- 2. The Palestinian National Authority shall work without delay to become a party to regional and international declarations and covenants that protect human rights.*

***Article 11***

- 1. Personal freedom is a natural right, shall be guaranteed and may not be violated.*
- 2. It is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law. The law shall specify the period of prearrest detention. Imprisonment or detention shall only be permitted in places that are subject to laws related to the organization of prisons.*

***Article 12***

*Every arrested or detained person shall be informed of the reason for their arrest or detention. They shall be promptly informed, in a language they understand, of the nature of the charges brought against them. They shall have the right to contact a lawyer and to be tried before a court without delay.*

***Article 13***

- 1. No person shall be subject to any duress or torture. Accused and all persons deprived of their freedom shall receive proper treatment.*
- 2. All statements or confessions obtained through violation of the*



*provisions contained in paragraph 1 of this article shall be considered null and void.*

#### **Article 14**

*An accused person is considered innocent until proven guilty in a court of law that guarantees the accused the right to a defense. Any person accused in a criminal case shall be represented by a lawyer.*

#### **Article 15**

*Punishment shall be personal. Collective punishment is prohibited. Crime and punishment shall only be determined by the law. Punishment shall be imposed only by judicial order and shall be applied only to actions committed after the entry of the law into force."*

Since the Basic Law lays down the rules and regulations on which the system of government is based, it regulates the public authorities and their functions. It also determines public rights and freedoms and sets out the basic guarantees for their protection. The rules of the Basic Law are at the highest with the Supreme law of the legal structure of the State. The State must abide by it in its legislation, its jurisdiction and its executive powers.

The Basic Law has been keen to protect public freedoms to ensure personal freedom that is related to the individual since its existence is a natural right that shall be guaranteed and may not be violated. It associated with the presumption of innocence and the ordinary legislator shall not violate the constitutional rules and their guarantee for those freedoms, and converse doing is contrary to the constitutional legitimacy.

The Supreme Constitutional Court, in its constitutional appeal No. 8 of 3, submitted the order to the Supreme Constitutional Court to be present in circumstances that are suspicious in violation of Article 389/5 of the Penal Code No. 16 of 1960, which states: "*Whoever is found roaming in or near any property, in any road or public street, in a place adjacent to them, or in any other public place at a time and circumstances which concludes that he exists for an unlawful or improper purpose*", in violation of Article 15 of The Basic Law, which stipulates, "*Punishment shall be personal. Collective punishment is prohibited. Crime and punishment*



*shall only be determined by the law. Punishment shall be imposed only by judicial order and shall apply only to actions committed after the entry into force of the law”, and violation of article 14 of the Basic Law, which states that “an accused person is considered innocent until proven guilty in a court of law that guarantees the accused the right to a defense. Any person accused in a criminal case shall be represented by a lawyer” and violation of article (A/11), which states: “Personal freedom is a natural right, shall be guaranteed and may not be violated”.*

Fair trial control must commit to a set of values that guarantee the accused a minimum level of protection that cannot be derogated from. These rules, although originally procedural, apply them in criminal proceedings and throughout their phases necessarily affect their outcome. The origin of innocence as a primary rule imposed by instinct and necessitated by the facts of things, a rule highlighted by the Basic Law in Article 14 of it, confirming what was decided by Article 11 of the Universal Declaration of Human Rights and Article 6 of the European Convention on Human Rights.

In this regard, the Supreme Constitutional Court considers that the origin of innocence extends to every individual, whether a suspect or an accused, as a fundamental rule of the accusatory system - recognized by all laws - that does not guarantee the protection of the guilty from punishment, but to avoid punishment for the individual whenever the criminal incident has been uncertainty. The presumption of innocence of the accused represents a fixed origin in relation to the criminal charge in terms of the evidence and not the type or amount of the penalty prescribed. This applies to criminal proceedings at all stages and throughout their proceedings. Thus, there is no way to refute the origin of innocence without the evidence of persuasive strength assertiveness and certainty, beyond any doubt.

The presumption of innocence and the preservation of personal freedom from any aggression against them are guaranteed by the Basic Law in Articles 14 and 11. The legislature may not derive any legislation that violates or detracts from the jurisdiction of the judicial authority in the investigation commissions from the commission of the crime in its pillars, namely the material and moral elements. In the field of the Supreme Constitutional Court’s consideration of



what is stated in Article 389/5 of the Penal Code of 1960 contrary to the provisions of Articles 20, 14 and 11 of the Basic Law; whereas the Supreme Constitutional Court has the duty to safeguard human rights and to defend the principle of separation of powers, the Court ruled that the contested text was unconstitutional.

This principle is one of the fundamental principles of the human rights system contained in the Universal Declaration of Human Rights of 1948 and the International Covenants of 1966. Article 10 of the Basic Law affirms that fundamental human rights and liberties shall be protected and respected. This system is an integral part of the Palestinian law system and this was confirmed by the Supreme Constitutional Court in case No. 12 of the year 2 of the Supreme Constitutional Court. In its decision, it affirmed international agreements on domestic legislation in line with the national, religious and cultural identity of the Palestinian people. In addition to in Judicial Application No. 2 for the year 3, "interpretation" of respect for human rights and fundamental freedoms in a manner that does not contradict the national, religious and cultural identity of the Palestinian people.

Moreover, the system of criminal laws affirms the presumption of innocence. Article 206/2 of the Code of Criminal Procedure No. 3 of 2001 states that *"If the evidence is not found against the accused, the court shall acquit him"*.

As Article 207 states that *"the judgment shall be based only on evidence which discussed at the hearing in public before the adversaries"*.

These provisions demonstrate that the presumption of innocence exists and can be refuted with incontrovertible evidence and it will discuss in a public hearing before the litigants. Any decision by any court violating the law is invalid, since the presumption of innocence of the criminal charges and the guarantee of its effectiveness by procedural means are closely related to the right to defense, including the right of the accused to face the evidence described by the prosecution in order to prove the crime and the right to deny it by means, according to law.

Since the intention of man at the very depth of his own are inconceivable to be a place of criminalization, the physical external





acts of conscious will and the associated consequences of criminalized that the Public Prosecutor's Office must establish evidence of the crime attributed to the accused in every corner of its staff and in relation to each incident necessary for its execution; otherwise, the origin of innocence is not destroyed as one of the bases of the concept fair trial.

Each crime has a material element of an act or omission which has occurred in violation of a legal provision and the establishment of a causal relationship between the act and the criminal consequence. Besides that, material element, the moral element must have led to a conscious will, and this conscious will is required by civilized nations in their laws in require in their criminalization as a cornerstone of crime.

It should be mentioning that the Israeli occupation is used in confronting the Palestinian people what is known as administrative detention is the imposition of penalty on persons without charge, without evidence and without the possibility of the defense to have access to such evidence of such punishment. This constitutes a serious violation of international human rights law and the international humanitarian law system and constitutes a serious crime in accordance with the International Criminal Court Act. The international community and legal forums around the world have been called upon to denounce these Israeli practices and to work for stopping these serious violations of the foundations of the law and the human justice system.

**LEGAL OUTCOMES OF PRESUMPTION  
OF INNOCENCE\***

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\* *English translation of the original text is provided by the courtesy of the Directorate of International Relations of the Turkish Constitutional Court. It has no binding effect. Please consult the original text or its author if necessary.*





## LEGAL OUTCOMES OF PRESUMPTION OF INNOCENCE

Dr. Hatice Derya ORMANOĞLU\*

### I. INTRODUCTION

Existence of certain principles to be observed during the exercise of criminal procedure that leads to gross interferences with the fundamental rights and liberties is crucial in order for a state to be qualified as a democratic and constitutional state in the pursuit of human rights.

“The presumption of innocence”, which means that, upon being charged with an offence, a person shall be considered innocent until proven guilty by a court order, is a principle enshrined both in the European Convention on Human Rights (“the Convention”), to which Turkey is also a party, and the Constitution. The presumption of innocence is provided for in Article 6 § 2 of the Convention as an element inherent in the right to a fair trial. In the Constitution, it is enshrined among the core rights in Article 15 titled the suspension of the exercise of fundamental rights and freedoms and in Article 38 regarding offences and penalties.

The European Court of Human Rights (“the ECHR”) defined the term, presumption of innocence, under its judgment of *Barberà, Messegué and Jabardo v. Spain* as follows: “The presumption of innocence is a principle that requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged. The burden of proof is on the prosecution and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.”<sup>1</sup>

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1 S. İnceoğlu (2018), *Adil Yargılanma Hakkı- Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi-4*, Ankara: Avrupa Konseyi Ankara Program Ofisi, p. 295.



The uses such as “presumption of innocence” and “presumption of not guilty” in expressing this concept indicates the lack of terminological consistency. Dönmezer<sup>2</sup>, Gölcüklü<sup>3</sup>, Feyzioğlu<sup>4</sup>, Üzülmöz<sup>5</sup>, Okuyucu-Ergün<sup>6</sup> use the term presumption of not guilty, while Yenidünya<sup>7</sup>, Centel and Zafer<sup>8</sup>, Ünver ve Hakeri<sup>9</sup>, Atlıhan<sup>10</sup> use the term presumption of innocence.

Where we review the relevant international instruments so as to determine which term is preferred, it is observed that that the term “innocence” is commonly preferred. As a matter of fact, the expression “*presumed innocent*” is used in Article 6 § 2 of the Convention<sup>11</sup> that is available on the ECHR’s official website and in the translated text of the Convention on the website of the Ministry of Justice, contains the expression of “*suç ile itham edilen herkes, suçluluğu yasal olarak sabit oluncaya kadar masum sayılır*”<sup>12</sup> [Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law], where the concept of “innocence” is preferred. As it is the case with the Convention, Article 14 titled “right to a fair trial” of the United Nations Covenant on Civil and Political Rights reads as “*Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.*”<sup>13</sup>, which points out that the term

2 S. Dönmezer (1998), “*Suçsuzluk Karinesi Üzerine Düşünceler*, Prof. Dr. Nurullah Kunter’e Armağan”, İstanbul: İstanbul University, Faculty of Law, p. 66 et seq.

3 F. Gölcüklü (1994), “*Avrupa İnsan Hakları Sözleşmesi’nde Adil Yargılanma*”, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, V.49, E.3, p. 220.

4 M. Feyzioğlu (1999), “*Suçsuzluk Karinesi: Kavram Hakkında Genel Bilgiler ve Avrupa İnsan Hakları Sözleşmesi*”, Ankara Üniversitesi Hukuk Fakültesi Dergisi, V.48, E. 1-4, p. 135 et seq.

5 İ. Üzülmöz (2005), “*Türk Hukukunda Suçsuzluk Karinesi ve Sonuçları*”, Türkiye Barolar Birliği Dergisi, E. 58, p. 41 et seq.

6 G. Okuyucu -Ergün (2012), “*Suçsuzluk Karinesi: Alice Harikalar Diyarında*”, Ankara Barosu Uluslararası Hukuk Kurultayı 10-14 January 2012, Ankara, p. 39 et seq.

7 A. C. Yenidünya (2004), “*Avrupa İnsan Hakları Sözleşmesi ve Masumiyet Karinesi*”, Güncel Hukuk, E. 5, p. 20-21.

8 N. Centel ve H. Zafer (2008), “*Penal Procedure Law*”, İstanbul: Beta Yayınevi, p. 147.

9 Y. Ünver ve H. Hakeri (2011), “*Penal Procedure Law*”, Ankara: Adalet Yayınevi, p. 22.

10 Ö. Atlıhan (2004), “*Avrupa İnsan Hakları Sözleşmesi Sisteminde Adil Yargılanma Hakkının Temel Unsuru Olarak Masumiyet Karinesi*”, Erzincan Hukuk Fakültesi Dergisi, C.8, E.3-4, p. 291 et seq.

11 For the text in English, please see “*Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law*”, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (Date accessed: 08.10.2019).

12 [http://www.inhak.adalet.gov.tr/inhak\\_bilgi\\_bankasi/aihs\\_ekprotokoller/aihs.pdf](http://www.inhak.adalet.gov.tr/inhak_bilgi_bankasi/aihs_ekprotokoller/aihs.pdf), (Date accessed: 08.10.2019).

13 For the text in English, please see “*Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.*”, <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>, (Date accessed: 08.10.2019) As you can

“innocent” is preferred. However, although the concept of innocence is used in Article 11 of the United Nations Universal Declaration of Human Rights formulated in English, the expression of “presumed innocent” is preferred in certain interpretations, while the expression of “presumed not guilty” in some other interpretations. Considering the national texts, we can see that the term “lack of guilt” is preferred as understood from the expression of “*No one shall be considered guilty until proven guilty in a court of law.*” as set out in Article 38 § 4 of the Constitution.

Preferring the term “lack of guilt”, Feyzioğlu suggests that upon formation of the accused status in the process of criminal procedure, the preventive measures, which cannot be taken against those who are in the capacity of an accused person, will become applicable under certain circumstances; and that it will be hard to explain the reason of taking a severe measure, such as detention, against a person that is presumed innocent.<sup>14</sup> At this point, the most important condition of detention is the availability of concrete evidence that underpin the strong criminal suspicion, as specified in Article 100 of the Code of Criminal Procedure (“the CCP”). In the light of this consideration, a person subject to a detention order is not innocent; however, as he can neither be considered guilty, then he is in limbo of guiltiness and innocence.<sup>15</sup>

In the light of the clarifications made in this context, we can say that preferring the concept “lack of guilt” instead of “innocence” will be more advisable from the standpoint of explaining the grounds of preventive measures to be taken against a person charged with a criminal offence as well as in order not to describe him as guilty.

## II. CONCEPTUAL FRAMEWORK

According to the presumption of not guilty that became prevalent in the Continental Europe System through the Declaration of the Rights of Man and of the Citizen released in France on 26 August 1789<sup>16</sup>, a

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see, the English text uses the term “innocence”, while the term “not guilty” is preferred in the Turkish translation thereof.

14 Feyzioğlu (1999), p. 137-138.

15 Ibid 9.138. Preferring the concept of “presumption of innocence” instead of “presumption of not guilty”, Centel and Zafer explain, in the first place, that being an accused is a specific status and then express that the presumption ensures that an accused is not treated as a guilty as he is neither innocent, nor guilty.

16 Feyzioğlu (1999), p. 135.



conviction, under a final judgment, is a prerequisite in order to hold a person guilty and implement penal sanctions against him. There should be a personal conviction, free of any suspect, in order to convict a person.<sup>17</sup>

Since a person, charged with a criminal offence, will not be considered as guilty from the very beginning thanks to the presumption of not guilty, which, as a right, is closely interrelated with the right of defence, then the latter right will then make sense. The proceedings aim at revealing the material fact on the basis of the presumption of not guilty. Presumption of not guilty and right of defence are enshrined both in the Constitution and in the ECHR's case-law as the extensions of one another.<sup>18</sup>

Certain provisions of the Code of Criminal Procedure no. 5271 are the extensions of presumption of not guilty. We can give as an example the following provisions of the CCP which safeguards presumption of not guilty, Art. 157 whereby the confidentiality of investigation is prescribed; CCP, Art. 183 whereby the use of sound and video recorders inside a courthouse and courtroom is banned, and in cases where an acquittal decision is issued at the end of the trial and adjudicating the case, use of the expression "*in cases where the commitment of the offence by the accused has not been found established*" instead of acquittal on lack of evidence in Art. 223/E.

Given the manner in which the Constitution and the Convention regulate the presumption of not guilty, it can be observed that the Constitution has an expression that is not merely binding upon the judicial bodies, but also upon all public authorities. According to the Constitution, no criminal charge is sought as a condition to benefit from the protection granted by virtue of presumption of not guilty.<sup>19</sup>

In the context of the terminological issue, Feyzioğlu also discusses whether the presumption of not guilty is a presumption or not and accordingly explains that the presumption of not guilty does not involve the deduction of the existence of another incident based on an incident,

17 Dönmezer (1998), p. 68.

18 Feyzioğlu (1999), p. 140.

19 Y. Yıldırım (2016), *Anayasa Mahkemesi Uygulamasında Adil Yargılanma Hakkı (Ceza Hukuku Boyutu)*, Türkiye Adalet Akademisi Dergisi, E. 26, p. 352.

which is presumed to exist.<sup>20</sup> That is because, the deduction of the existence of another incident based on an incident, which is presumed to exist, is a presumption and is used as a means of proof. There are also people that opt to express the legal nature of presumption of not guilty as a fundamental right that arises from presuming a person not guilty.<sup>21</sup>

Yüce builds the presumption of not guilty upon a person's right to humane treatment.<sup>22</sup> Dönmezer; on the other hand, describes the presumption of not guilty as the basic principle of law.<sup>23</sup>

According to another opinion, the presumption of not guilty refers to the right of not being treated as an offender until proven guilty.<sup>24</sup> Defining this presumption as an inviolable right, Üzülmöz refers to reflections of the presumption of not guilty in the Constitution and emphasizes that the presumption of not guilty is amongst the core rights which may not be infringed even in cases where the exercise of fundamental rights and liberties is suspended in part or as a whole.<sup>25</sup>

Like Article 15 titled "Suspension of the exercise of fundamental rights and freedoms" of the Constitution, the Convention also embodies core rights in its Article 15 § 2.<sup>26</sup> Article 15 titled "Derogation in time of emergency" of the Convention sets forth that "*In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*" Thereafter, paragraph 2 refers to the core area where it is set forth that "*No derogation from Article 2, except in respect of deaths resulting from*

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20 Feyzioğlu (1999), p. 139.

21 Quoted by Feyzioğlu from Mc Cormic (1999), p. 139; P.J. Schwikkard (1998), "*The Presumption of Innocence: what is it?*" South African Journal Criminal Justice Issue 11, p. 396. <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/soafcrimjll&id=410> (Date accessed: 09/10/2019).

22 T. T. Yüce (1988), "*Sanığın Savunması ve Korunması Açısından Ceza Soruşturmasının Ümanist İlkeleri*", Türkiye Barolar Birliği Dergisi, E. 1, p. 161.

23 Dönmezer (1998), p. 67.

24 F. C. Schroeder; F. Yenisey; Peukert (1999), "*Ceza Muhakemesinde 'Fair Trial' İlkesi*", İstanbul: İstanbul Barosu Cmuk Uygulama Servisi Yayınları, p. 44.

25 Üzülmöz (2005), p. 44.

26 K. Gözler (2011), "*Anayasa Hukukunun Genel Esasları Ders Kitabı*", Bursa: Ekin Basım Yayın Dağıtım, p. 425.





*lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision."*

It is understood from this statement that neither the right to a fair trial nor, in this context, the presumption of not guilty is included among the rights falling under the scope of the core area within the framework of the Convention. In the wake of this consideration, we can suggest that the Constitution of 1982 offers a broader safeguard than the Convention as it enumerates the presumption of not guilty among core rights.<sup>27</sup>

Despite being enshrined in the Constitution, presumption of not guilty is also a requirement of the principle of the state of law. It can also be considered as one of the subsidiary elements of this principle. That is because, another requirement of the principle of the state of law is the provision of necessary safeguards with respect to crimes and punishment, along with the legal certainty of citizens.

Although the concept of "criminal offence", which is included in Article 6 § 2 of the Convention whereby the presumption of not guilty is set forth, is used in technical terms, the ECHR is not bound by the domestic legislation of the High Contracting States when determining the crimes falling under the scope of the criminal law.<sup>28</sup> In this context, these States may criminalise any act as they deem advisable, provided that they consider the rights and freedoms set out by the Convention. In addition to the criminalisation of an act under the criminal law, the States may also introduce administrative offences. However, the qualification of an act by a state with an aim to contravene the ECHR's examination constitutes a breach of the Convention.<sup>29</sup>

In the case of *Engel and Others v. the Netherlands*,<sup>30</sup> the ECHR set out certain principles for determination as to whether the criminal charge falls into criminal law or into disciplinary law. These are<sup>31</sup>:

27 Üzülmez (2005), p. 45.

28 Yenidünya (2004), p. 21-22.

29 Feyzioğlu (1999), p. 146.

30 " ... If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction to satisfy itself that the attribution of a disciplinary offence nature to an act does not improperly encroach upon the criminal.", *Engel and Others/ the Netherlands*, B. No 5100/71, 08/06/1976, O. Doğru (2004), "İnsan Hakları Avrupa Mahkemesi İçtihatları I". Istanbul: Legal Yayınevi, p.137 et seq.

31 Feyzioğlu (1999), p. 146-147.

- In what area the statutory provision, whereby the act is regulated, is introduced (domestic law); i.e., whether it falls within the scope of the criminal law, disciplinary law, or both.
- Nature of the act.
- Severity of the sanction to be imposed in consequence of an investigation.

Also in the case of *Öztürk v. Germany*, which is similar to above-mentioned *Engel and Others* case,<sup>32</sup> the ECHR made an evaluation of administrative offence - criminal offence, and by reference to the case of *Engel and Others*, determined that although the fine of DM 60, which was imposed on the applicant that gave rise to an accident via reckless driving, and DM 13 for court expenses, (imposed according to the Administrative Offences Law and Highway Traffic Law, Highway Traffic Regulations) fell within the scope of administrative offences under the German law, they were of criminal nature within the meaning of Article 6 of the Convention in consideration of the aforesaid criteria.<sup>33</sup>

According to the ECHR's case-law, the time or manner of accusation, or the authority that makes the accusation does not matter in order to refer to a criminal charge. Since having a suspicion about a person, or ordering his arrest, detention, or taking similar preventive measures against that person due to criminal suspicion, and launching preliminary investigation against her will have a significant bearing on the status of that person, thereby constituting an accusation.<sup>34</sup> Article 6 § 2 of the Convention enshrining the presumption of not guilty contains the expression of "*everyone charged with a criminal offence*".

The review of the wording of Article 6 of the Convention leads to confusion that right to a fair trial is applicable only at the prosecution stage. However, the ECHR deals with the concept of accused independently from the domestic legislation under its case-law, and the right to a fair trial has; thus, a broad range of application.<sup>35</sup> Also

32 *Öztürk v. Germany*, no. 8544/79, 21/02/1984. Doğru (2004), p. 663 et seq.

33 Yenidünya (2004). p. 22; Doğru (2004), p. 663 et seq.

34 Gölcüklü, F. and Gözübüyük, Ş. (2007), "*Avrupa İnsan Hakları Sözleşmesi ve Uygulanması, Avrupa İnsan Hakları Mahkemesi İnceleme ve Yargılama Yöntemi*", Ankara: Turhan Kitabevi, p. 275.

35 H. Karakehya (2008), "*Avrupa İnsan Hakları Sözleşmesi'nin 6. maddesi (Adil Yargılama Hakkı) Bağlamında Ceza Muhakemesi'nde Duruşma*", Ankara: Savaş Yayinevi, p. 248.



within the meaning of the Code of Criminal Procedure, the capacity of accused person emerges upon the admission of indictment; i.e., upon the commencement of the prosecution. But, the concept of accused person is addressed independently from the domestic legislation under the ECHR's case-law.<sup>36</sup>

As specified in the ECHR's case-law, where a legal action is taken against a person, he will be in principle provided with the safeguards offered by the Convention, regardless of whether or not there is an accusation against him.<sup>37</sup>

Also within the meaning of Article 6 of the Convention, there must be a criminal charge so as to benefit from the presumption of not guilty. However, the criminal charge does not imply the bringing of a criminal action; i.e., launch of a prosecution. The concept of criminal charge should also be dealt with independently from the domestic legislation.<sup>38</sup> A criminal action does not necessarily need to be brought so as to refer to a criminal charge. That is because, the purpose of Article 6 of the Convention, where the right to a fair trial is enshrined, is to safeguard the defence rights. Therefore, should the acts and actions conducted by public authorities on the basis of a criminal suspicion have a material impact on a person<sup>39</sup>, then the person will be entitled to benefit from Article 6 of the Convention.<sup>40</sup>

Presumption of not guilty has a meaning that is binding also upon investigating authorities as, in the broadest sense, the protection mechanism will start functioning upon gaining the status of accused person.<sup>41</sup> There are people suggesting that applicability of the presumption of not guilty, which does not apply only to the prosecution stage, but also to the investigation stage, is limited to the adjudication stage of the prosecution process.<sup>42</sup>

36 H. Karakehya (2014), "*Çeza Muhakemesi Hukuku I*". Ankara: Savaş Kitap ve Yayınevi, p. 102.

37 *König v. Germany*, B. No: 2122/64, 27/06/1968, Karakehya (2014), p. 102.

38 Üzülmez (2004), p. 47.

39 According to the case-law of the ECHR, the circumstances that should be considered as a criminal charge yet they have a material impact on the status of a person are, in addition to bringing an action, the circumstances of body search, domiciliary visit, and workplace search. Cited from Gomien et al. by Feyzioğlu (1999), p. 145.

40 Feyzioğlu (1999), p. 145.

41 Üzülmez (2004), p. 47.

42 S. Donay (1982), "*İnsan Hakları Açısından Sanığın Hakları ve Türk Hukuku*", İstanbul: İstanbul Üniversitesi Yayınları, p. 115 et seq.



In consideration of the ECHR's case-law, it has been observed that the ECHR has changed its case-law regarding the proceedings where the presumption of not guilty applies. Within the scope of its former case-law, the ECHR noted that the presumption was applicable only to the judge deciding on the merits of a case and did not apply the rule requiring compliance with presumption during the preliminary investigation. It has later decided that the presumption of not guilty is applicable before all public authorities.<sup>43</sup> In the case of *Allenet de Ribemont v. France*, the ECHR held that the proclamation by the Minister of Internal Affairs and a police officer, who was involved in the investigation, of the applicant as a criminal through a press conference held subsequent to the applicant's detention and prior to the bringing of a criminal action was in breach of the presumption of not guilty.<sup>44</sup> Likewise, in the case of *Ürfi Çetinkaya v. Turkey*, the ECHR found a violation of the presumption of not guilty due to the news published in the newspapers where the applicant was indicated as a drug trafficker.<sup>45</sup>

In the scope of another judgment delivered in the case of *Krause v. Switzerland*, the ECHR expressed that the presumption of not guilty was applicable to all types of criminal actions but was not confined only to the criminal action. As required by the presumption of not guilty, the public officials are obliged to refrain from treating persons as if they were guilty unless and until they are finally found guilty by a court.<sup>46</sup> According to the ECHR, presumption of not guilty must be observed both during the conduct of a criminal proceedings against a person charged with a crime and also during trials held in connection with a criminal proceedings should a decision other than conviction is delivered.

Among the judgments, whereby the ECHR indicates that the presumption of not guilty is applicable during the entire process of the proceedings as from the moment of accusation, rather than being applicable only during the final stage of a criminal action, are those

43 Üzülmöz (2005), p. 49; Gölcüklü and Gözübüyük (2007), p. 296.

44 Feyzioğlu (1999), p. 149; Gölcüklü and Gözübüyük (2007), p. 296.

45 *Ürfi Çetinkaya v. Turkey*, no. 1986/04.

46 Feyzioğlu (1999), p. 149.



rendered in the cases of *Minelli v. Switzerland*, *Lutz v. Federal Republic of Germany* and *Agosi v. the United Kingdom*.<sup>47</sup>

In the context of proceedings where presumption of not guilty is applicable, we need to address the circumstances where the action is not considered on its merits and the related cases. In the case of *Minelli v. Switzerland*, the case was dismissed for being time-barred without considering the merits thereof; however, the court expenses were ordered to be covered by the accused. In this case, the ECHR found a violation of the presumption of not guilty.<sup>48</sup>

As an example of cases that are closely interrelated with the principal case, we can mention action for damages filed due to unfair detention within the scope of a criminal action, where the accused person was detained but finally acquitted. The ECHR is of the opinion that the dismissal of an action for damage in such a case does not amount to the violation of presumption of not guilty unless it is based on such grounds that imply criminality.<sup>49</sup>

In its judgment of *Dicle and Sadak v. Turkey*, the ECHR noted that presumption of not guilty was applicable also where a re-trial was ordered and that the use of the term “convicted” during retrial would violate the presumption of not guilty.<sup>50</sup>

While the *Englert* judgment of the ECHR may be shown as an example where it found no violation of presumption of not guilty upon dismissal of an action for compensation filed subsequent to acquittal upon detention, the case of *Sekanina*, which is based on the fact that the existing suspicion was not refuted, as an example of judgments finding a violation of the presumption of not guilty.<sup>51</sup>

### III. LEGAL OUTCOMES OF PRESUMPTION OF GUILTLESSNESS

In the context of the Convention and as expressed in the Constitution, presumption of not guilty has various outcomes. Being amongst

47 Gölcüklü and Gözübüyük (2007), p. 296.

48 Feyzioğlu (1999), p. 150; Gölcüklü and Gözübüyük (2007), p. 296; Schroeder and Others (1999), p. 50.

49 Feyzioğlu (1999), p. 152.

50 Yıldırım (2016), p. 357.

51 Feyzioğlu (1999), p. 153-154.



the subsidiary principles of right to a fair trial, presumption of not guilty is dealt with in the doctrine amongst the principles that govern the criminal procedure. However, the conclusion will be the same regardless of whether it is considered as a penal procedure principle or as a principle inherent in the right to a fair trial.<sup>52</sup>

The ECHR has established certain criteria in order for presumption of not guilty to be functional in real terms. These criteria are specified in the cases of *Barbara*, *Messegue*, and *Jabardo*. Accordingly<sup>53</sup>,

- When launching a trial process, the trial judges must not show a prejudiced approach that the accused committed the crime alleged.
- The burden of proof must rests on the prosecutor, rather than the accused.
- The accused must be informed of the action to be brought so that he can have a possibility to easily prepare his defence statement.
- When in doubt, it must be in favour of the accused.

The presumption has legal outcomes such as the burden of proof assessment, in *dubio pro reo* principle, the right to remain silent, requirement to observe reasonable time in detention, and unlawfulness of conviction in the case of using in trial the evidence obtained via prohibited interrogation method.<sup>54</sup>

### **A. Burden of Proof Assessment and the Claimant's Obligation to Prove His Allegation in the Criminal Procedure**

Although the Convention does not contain any explicit provision on the burden of proof, the gap here has been filled by means of the ECHR's case-law. Presumption of not guilty and burden of proof are closely interrelated concepts. In the context of burden of proof, the accused is not under the obligation of furnishing proof. However, the person claiming that the accused should be punished must prove his claim. The accused is not obliged to prove his innocence,<sup>55</sup> and the

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52 Üzülmöz (2005), p. 56.

53 Feyzioğlu (1999), p.148.

54 Dönmezer (1998), p. 68 et seq.; Üzülmöz (2005), 57 et seq.

55 Gölcüklü and Gözübüyük (2007), p. 151. Centel explained in the context of burden of proof that the penal procedure is not subject to the rule that the claimant proves her/his allegation by



judge will not be bound by evidence furnished by parties as the goal of the criminal procedure law is to reveal the material fact.<sup>56</sup> Since, in the penal procedure, the State exercises its penalization authority by means of criminal actions, it is the prosecutor who will file criminal actions and bear the burden of proof.<sup>57</sup> The principle of ex officio examination, a liability of the judge in the penal procedure, and the rule for the prosecutor to collect evidence that is not only against the accused but also in favour of him, do not imply that the burden of proof does not exist in the penal procedure. The ECHR has also set forth in its judgments that the burden of proof rests on the subject which is the prosecution.<sup>58</sup>

As required by Articles 26, 32, 41, and 69 of the CCP, burden of proof is accepted in resolving the secondary disputes such as the challenging of a judge, expert, court clerk and request for reinstatement (*restitutio ad integrum*).<sup>59</sup>

As a consequence of burden of proof, the principle of *in dubio pro reo* and right to remain silent emerge. Concerning the determination of burden of proof, it should not be concluded that the trial must be conducted on the basis of a single consideration. An accused may exercise his right to remain silent or may refute the allegations against him by furnishing such evidence that will prove his innocence.<sup>60</sup> The accused cannot be held liable to prove as a consequence of burden of proof, but the claimant must prove the guilt of the accused. However, it appears that laws include presumptions that certain de facto circumstances indicate that the material elements of an offence have occurred.<sup>61</sup>

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contrast with the civil proceedings. In this context, where a subject of proceedings fails to prove a fact, then no outcome will emerge against her/him. As an example of this, if a prosecutor alleges in the bill of indictment that a crime was committed and fails to produce satisfactory evidence to prove her/his allegation, then the accused will not be directly acquitted, but the court will have to evaluate it. Centel and Zafer (2008), p. 651.

56 Sharing the opinion of Centel and Zafer, Kuntel also expresses that the penal procedure does not have any rule involving demonstration of allegation by the claimant as it is the case with civil proceedings. He suggests that there is no burden of proof concept yet the judge can research evidence. N. Kunter et al. (2010), "*Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*", Istanbul: Beta Basımevi, p. 1342.

57 M. Feyzioğlu (2002), "*Vicdani Kanaat*", Ankara: Yetkin Yayınevi, p.160.

58 Feyzioğlu (2002), p. 161.

59 Centel and Zafer (2008), p. 651.

60 Üzülmöz (2005), p. 57.

61 Dönmezer (1998), p. 70.



We see that in some cases, where it is hard for a prosecutor to duly adduce evidence, exemptions are introduced in connection with the presumption of not guilty. The European Commission of Human Rights has acknowledged that certain presumptions could be set out, provided that they remain within reasonable limits and do not violate the accused's right of defence. The ECHR set these fundamental principles in its *Salabiaku* judgment of 1988.<sup>62</sup> Quite a few narcotic drugs were seized in a cases that the person named Salabiaku had been clearing through customs and, as a result of proceedings, the person concerned was convicted pursuant to the French Customs Code's Article 392 § 1 whereby only the simple or objective act of possessing prohibited materials while passing through customs without the obligatory existence of wrongful intention or negligence is penalized. Thereupon, Salabiaku brought this conviction before the ECHR by alleging that he was convicted on the basis of an "almost irrebuttable presumption of guilt" and that this was in violation of Article 6 § 2 of the Convention. The French government submitted a defence statement to the extent that Article 392 § 1 of the Customs Code, on which the conviction judgment is based, envisages a presumption of liability, rather than the presumption of guiltiness and that Article 6 § 2 of the Convention refers to the concept of being charged with a criminal offence; therefore, the presumption of liability introduced under 392 § 1 may not be considered as an accusation, and; therefore, it may not be addressed in the context of presumption of not guilty. Considering this distinction made by France as relative, the ECHR held that the presumption of not guilty had been applicable to this case and also expressed that every legal system could adopt legal and factual presumptions which would not contravene the Convention as long as they remained within reasonable limits.<sup>63</sup> The ECHR has introduced certain criteria whereby the presumptions of guiltiness will not violate the Convention. Accordingly, the presumption of guiltiness that is envisaged in a given case must not violate the accused's right of defence and where there are legal and factual presumptions, the accused must always be given an opportunity to refute them; in other words, the

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62 Dönmezer (1998), p. 71.

63 Dönmezer (1998), p. 71-72; Feyzioğlu (1998), p. 156.





accused's right of defence must not be restricted. The reasonable limits will not be deemed exceeded where the judge has an absolute judicial discretion to enable an accused to benefit from suspicion, where it is deemed that the force majeure would remove the liability, and where the right of defence is not violated.<sup>64</sup>

## B. The principle of *In Dubio Pro Reo*

In order to convict an accused, the presumption of not guilty must be eliminated; i.e., it must be duly concluded that the accused has committed the offence in question. However, to acquit an accused, it is not necessary to reveal his innocence; rather, it will be sufficient to understand that he is not guilty. In the cases where a suspicion cannot be rebutted, the suspect will benefit from the suspicion and he will be acquitted.<sup>65</sup> As the presumption of not guilty involves all stages of proceedings, the suspect is supposed to benefit every suspicion that emerges throughout proceedings.<sup>66</sup>

All elements that will demonstrate the accused's guilt must be put

64 Üzülmöz (1998), p. 59.

65 Feyzioğlu (2002), p. 184. Üzülmöz (2005), p. 61-62. The "principle of accused benefits from the suspicion", which is expressed in Latin as "in dubio pro reo" as an extension of presumption of innocence (not guilty), is one of the significant principles of criminal procedure law at a universal scale. The fundamental condition of convicting an accused for a criminal offence is contingent upon the demonstration of the criminal offence with such certainty that leaves no room for any suspicion. No judgment can be delivered by construing the suspicious and unprovable incidents and allegations against the accused. Penal conviction must be based on conclusive and explicit evidence, rather than a probability. Such evidence must not permit any suspicion and other kind of being even theoretically. Convicting an accused on the basis of even a high a probability amounts to the adjudication without revealing the truth as the most important purpose of criminal procedure. Wherefore, yet there is no conclusive and convincing evidence above suspicion according to the dossier scope that the accused instigated for wilful murder the accused A.A., who instigated the accused A.C. to murder the victim M.A., delivering a judgment to penalize the accused for a criminal offence, the elements of which did not exist, only on the basis of presumptive opinions instead of acquittal is unlawful. Court of Cassation, Assembly of Criminal Chambers' verdict dated 06.03.2010 and no. E.2011/1-345 K.2012/73, <http://www.kazanci.com/kho2/ibb/giris.htm> (Date accessed: 09.10.2019). Other verdicts where the principle of *in dubio pro reo* is referred to; Court of Cassation, Assembly of Criminal Chambers' verdict dated 11.06.2013 and no. E.2013/9-241 K.2013/293. <http://www.kazanci.com/kho2/ibb/giris.htm> (Date accessed: 09/10/2019). Court of Cassation, Assembly of Criminal Chambers' verdict dated 04.10.2011 and no. E.2011/10-159 K.2011/202. <http://www.kazanci.com/kho2/ibb/giris.htm> (Date accessed: 09.10.2019). Court of Cassation, Assembly of Criminal Chambers' verdict dated 15.04.2014 and no. E.2012//2-1498 and K.2014/188. <http://www.kazanci.com/kho2/ibb/giris.htm> (Date Accessed: 09.10.2019).

66 J. A. Seife. (1934), "The Presumption of Innocence", Journal of the American Institute of Criminal Law and Criminology, V. 25, E.1 p. 60.

[http://heinonline.org/HOL/Page?handle=hein.journals/jclc25&div=12&start\\_page=53&collection=journals&set\\_as\\_cursor=10&men\\_tab=srchresults#](http://heinonline.org/HOL/Page?handle=hein.journals/jclc25&div=12&start_page=53&collection=journals&set_as_cursor=10&men_tab=srchresults#) (Date accessed: 09.10.2019).

forth; otherwise, the accused will benefit from the suspicion. Thus, the conviction of an accused without proving his guilt is prohibited.<sup>67</sup> Also in the cases where an acquittal decision is delivered, there must be no suspicion whether the criminal offence in question was committed or not. Therefore, the acquittal decision is delivered not due to lack of evidence but on the ground that the act, which is attributed to a perpetrator, is not proven.<sup>68</sup> This type of an acquittal decision is not of a determinant nature; rather, it is only the reflection of presumption of not guilty. However, in cases where a person brings an action for compensation due to the alleged unlawfulness of his detention, it will not be lawful to discuss the acquittal decision by reviewing the allegations put forth against that person within the scope of an action where he was involved as an accused.<sup>69</sup>

Personal conviction is to be reached to deliver a conviction decision. No conviction decision can be delivered on the basis of assumptions unless there is an explicit and conclusive evidence.<sup>70</sup> Reaching to a personal conviction is; on the other hand, strictly contingent upon the elimination of suspicion; i.e., overcoming of suspicion.<sup>71</sup> Each occasion, where the personal conviction criterion is not satisfied, will be constructed in favour of the accused. While Articles 19 and 38 § 4 of the Constitution lay the foundation of the principle of *in dubio pro reo*, the provision of Article 223 (e) that the acquittal decision shall be delivered where “*it has not been proven that the criminal offence charged was committed by the accused*” lays the legal foundation of Article 5

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67 During the proceedings conducted in connection with the administrative fine imposed in consequence of the stubble burning act on the agricultural field owned by the applicant, “... the examination done in the agricultural land did not reveal any finding in connection with the person that set the stubble on fire. Considering the fact no report or denunciation was filed by the applicants, who own the lands where the stubble was set on fire, regarding the stubble burning act, the court made use of the factual presumption that the stubble burning act was committed by the property owners. In other words, the burden of proof was not attributed to the claimant, but to the applicant. By virtue of the said presumption, the applicants that had faced a criminal charge were automatically treated as guilty. On the other hand, the Court’s assumption that the misdemeanour was committed is conclusive.” On these grounds, it was adjudged that the presumption of not guilty had been violated regarding the applicants. *Ahmet Altuntaş and Others*, no. 2015/19616, 17/05/2018.

68 Üzülmöz (2005), p. 62.

69 Schroeder and Others (1999), p. 44.

70 Court of Cassation, Assembly of Criminal Chambers’ verdict dated 14.12.2010 and no. E.2010/9-88 K.2010/255, Okuyucu Ergün (2012), p. 46-47.

71 Feyzioglu (2002), p. 192.



and 6 § 2 of the Convention.<sup>72</sup> Also under the judgments delivered by the Turkish Constitutional Court within the scope of individual application, it is first stated that a person will be deemed innocent unless there is a finalized conviction decision and it is then explained that the suspension of the pronouncement of the judgment amounts to the fact that there has been a personal conviction for the actual commitment of the criminal offence by the accused, but that such a conviction has a conditional legal outcome that a new criminal offence should not be intentionally committed.<sup>73</sup>

The principle of *in dubio pro reo* should not be considered to be limited only to the acquittal decisions. For example, where the suspicion about the existence of an attenuating circumstance is not rebutted, the attenuating circumstance must be considered to exist and applied in favour of the accused.<sup>74</sup> If, besides the suspicion of the existence of mitigating circumstances, there are suspicions regarding the penalization circumstances, the accused will also benefit therefrom.<sup>75</sup>

### C. Right to Remain Silent

Another outcome of the presumption of not guilty is the right to remain silent. Within the meaning of the outcome of the presumption of not guilty, the right to remain silent implies the inability to use the silence of an accused as evidence and presumption of guiltiness against him.<sup>76</sup> The right to remain silent is set forth in Article 147 € of the CCP as "*He shall be informed of his lawful right to refrain from making any statement about the charges pressed.*"

Also in the case of the exercise by the accused of her right to remain silent only in the certain phase of proceedings instead of exercising the same as a whole or her refraining from responding to certain questions while answering the others, the right to remain silent must not bear legal consequences against him.<sup>77</sup> We should further note

<sup>72</sup> Feyzioğlu (2002), p. 196.

<sup>73</sup> *Kürşat Eyol*, no. 2012/665, 13/06/2013 <http://kararlaryeni.anayasa.gov.tr/BireyselKarar/Content/e08d8d79-a271-4e65-a530-11d828eec3f0?wordsOnly=False> (Date accessed: 11/10/2019).

<sup>74</sup> Ö. Tozman (2007), "*Suçsuzluk Karinesi: Türk Hukukundaki Sonuçları*", *Erzincan Üniversitesi Hukuk Fakültesi Dergisi*, V.11, E. 3-4, p. 328.

<sup>75</sup> Feyzioğlu (2002), p. 194.

<sup>76</sup> Dönmezer (1998), p. 69.

<sup>77</sup> Üzülmöz (2005), p. 60.

that the German law considers the accused's partial exercise of right to remain silent and, also, partially responding to questions, as a sign of guilt.<sup>78</sup> There are also persons who are of the opinion that the consideration of partial exercise of right to remain silent as a sign of guilt complies with the Convention.<sup>79</sup>

The fact that an accused has exercised her right to remain silent will not prevent the application of certain preventive measures against him. That is because, a suspect or an accused is obliged to undergo a physical examination. Although the consent of a suspect or an accused is not sought to undergo a physical examination, nor can he be forced to contribute thereto actively.<sup>80</sup> Introducing the arrangement concerning the physical examination to be applied where a suspect or an accused does not consent by virtue of regulations within the scope of the CPP impairs the principle of lawfulness.<sup>81</sup> Physical integrity is protected under Article 17 of the Constitution. Accordingly, a person's physical integrity may not be violated except under medical necessity and in cases prescribed by law and shall not be subjected to scientific or medical experiments without his consent.

The ECHR has so far delivered quite a few judgments that the conduct of physical examination and taking tissues and samples against the consent of a suspect or an accused does not breach the right to remain silent. The ECHR stated that in its judgment of *Saunders v. United Kingdom* that taking blood, urine, and tissue samples against the accused's consent is different from taking statement by force and will not be therefore in breach of the right to remain silent.<sup>82</sup> Similarly,

78 Dönmezer (1998), p. 69; Üzülmöz (2005), p. 60.

79 Schroeder and Others (1999), p. 44

80 C. Şahin and N. Göktürk (2015), "*Ceza Muhakemesi Hukuku II*" (4th Edition), İstanbul: Seçkin Yayıncılık, p. 58. Pursuant to Article 18 of the Physical Examination Regulations, the relevant Chief Public Prosecutor's Office are authorized to take required actions where a suspect or an accused does consent to physical examination or to sampling despite the satisfaction of all conditions sought under the legislation.

81 Ö. Apış (2012), "*Ceza Muhakemesi Hukukunda Şüpheli/Sanığın Beden Muayenesi ve Vücutundan Örnek Alınması*", Marmara Üniversitesi Hukuk Araştırmaları Dergisi, V.18, E. 1, p. 283; P. Aksoy İpekçioğlu (2013) "*Vücuttan Örnek Alma İşleminin Hukuki Niteliği ve Anayasaya Uygunluğu*", Prof Dr. Nur Centel'e Armağan, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, V.1, E. 2, p. 1170.

82 S. İnceoğlu (2013), "*İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı. Kamu ve Özel Hukuk Alanlarında Ortak Yargısal Hak ve İlkeler*", İstanbul: Beta Yayınevi, p. 277; Ç. K. Aydın (2010), "*Adil Yargılanmanın Bir Unsuru Olarak "Susma Hakkı"*", Türkiye Barolar Birliği Dergisi, E. 91, p. 168.



within the scope of *Cartledge v. United Kingdom* judgment, the Court adjudged that taking a blood sample from the applicant by force and using the same as evidence do not violate the right to remain silent.<sup>83</sup>

Upon an application filed with the allegation that the accused exercised the right to remain silent, which was used against the suspect, the ECHR concluded in the case of *John-Murray v. the United Kingdom* that the right to remain silent is amongst the principles of international law and inherent in the right to a fair trial. When discussing whether using the accused's preference to remain silent during interrogation against him violated the right to a fair trial or not, the ECHR stated that all circumstances of the case; i.e., the concrete case at the moment when the suspect remained silent, must be assessed. In this context, the ECHR concluded that the suspect's preference to remain silent throughout the proceedings must not be considered as a presumption of guiltiness.<sup>84</sup>

Also in the case of *Funke v. France*, a person being prosecuted for allegedly committing smuggling refrained from delivering the evidentiary documentation, which he had been supposed to deliver to officers under the customs legislation. He was penalized in consequence of this refrainment and; thereupon, the ECHR held a trial and; accordingly, the Court adjudged that the request by the customs officers for the delivery of evidence, the existence of which was estimated by them and which they failed to seize, by the person under criminal suspicion and the refrainment of such person to deliver the same had constituted a violation of the right to a fair trial resulted from the violation of the right to remain silent and right to refrain from assisting one's own conviction.<sup>85</sup>

#### **D. Observation of Reasonable Time Requirement in Detention**

Although an accused is presumed innocent until he is proven guilty, preventive measures may be taken against him until a conviction

<sup>83</sup> İnceoğlu (2013), p. 278.

<sup>84</sup> Gölcüklü ve Gözübüyük (2007), p. 294. "Again according to the ECHR, the right to remain silent is applicable to the trial of all types of criminal offences and general interest does not justify the violation thereof. However, the existing evidence can be collected by force independently from the suspect's will. For example, a blood sample can be taken from a person and presumption of not guilty, refrainment of granting one's consent, and the right to remain silent will not prevent this." Üzülmöz (2005), p. 61.

<sup>85</sup> Gölcüklü and Gözübüyük (2007), p. 293-294.



decision is delivered, which will not be in breach of the presumption of not guilty as the suspect is, at this stage, in limbo of guiltiness and innocence. However, the preventive measures applicable at this stage must conform to the legislation so that the presumption of not guilty is not violated.<sup>86</sup>

With reference to the fact that detention is a preventive measure under the Turkish law, the CCP specifies under Article 102 the detention periods. When establishing the period to be spent in detention, the CCP makes a distinction as to the offences falling or not falling within the scope of the assize court.<sup>87</sup> Accordingly, the maximum detention period is one year for the matters that do not fall within the jurisdiction of assize courts. This one-year period may be extended for an extra period of six months in compulsory cases by giving the justification thereof. The maximum detention period is two years for the matters that fall within the jurisdiction of assize courts. This period may be extended in compulsory cases and the extension period may not be longer than three years in total and, for the offences that are enumerated in Turkish Penal Code's Book Two, Chapter Four, Sections Four, Five, and Seven and for the offences that fall within the scope of the Anti-Terror Law no. 3713 dated 12/4/1991, the detention period may be five years in total.

Given the arrangement made under the CCP for detention periods, allowing for an extension of the detention period, which is normally two years, in cases falling within the jurisdiction of assize courts, is criticized both in technical terms and also in terms of the violation of the presumption of not guilty for going beyond merely being a protective measure as a detention period.<sup>88</sup>

Also according to the Constitutional Court, the reasonableness of a period, during which a suspect is detained, must be considered based on the circumstances of every specific case. Continuation of detention can be found reasonable only where there is an actual general interest that outweighs the right to personal liberty and security as safeguarded

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86 Üzülmöz (2005), p. 62-63.

87 M. Feyziöglü ve G. Okuyucu -Ergün (2010), "*Türk Hukukunda Tutuklulukta Azami Süre*", Ankara Üniversitesi Hukuk Fakültesi Dergisi, V. 59, E. 1, p. 41.

88 Feyziöglü and Okuyucu- Ergün (2010), p. 43.



by Article 19 of the Constitution in spite of the presumption of innocence.<sup>89</sup>

Everyone that is arrested or detained according to the conditions that are envisaged in Article 5 § 3 (c) of the Convention must be brought promptly before a judge or other officer authorized by law to exercise judicial power; the person is entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

The reasonable time this is referred to in Article 5 of the Convention needs to be clarified. The reasonable time is also the period to be spent in detention and involves two obligations. One of them is to promptly bring the accused before a *judge* or other officer authorized by law to exercise judicial power for the review of a detention process and to comply with the reasonable detention time. In this respect, any the violation falls within the scope of Article 5 of the Convention.<sup>90</sup> However, the conclusion of proceedings within a reasonable time is different from the reasonableness of period spent in detention and is provided for under Article 6 of the Convention. According to the ECHR, a case can continue for a long period as long as there are just causes, and Article 6 will not be violated in such a case. Where; however, the accused is placed in detention beyond reasonable time within the scope of the same case, Article 5 § 3 of the Convention will be deemed to have been violated.<sup>91</sup>

However, we should note that the detention periods beyond reasonable time will, as set out in the ECHR's case-law, lead to the violation of Article 6 § 2 of the Convention whereby the presumption of innocence is provided for, along with Article 5 § 3. Under its judgment delivered in the case for *Neumeister*, the ECHR adjudged that detention periods beyond reasonable time would violate the presumption of innocence. In consideration of the connection between presumption of not guilty and reasonable time spent in detention, the detention cases

89 Yıldırım (2016), p. 352. *Murat Narman*, no. 2012/1137, 02/07/2013 <http://kararlaryeni.anayasa.gov.tr/BireyselKarar/Content/ba6980c4-170b-4f98-828c-00bac0236770?wordsOnly=False> (Date accessed: 10.10.2019).

90 Gölcüklü and Gözübüyük (2007), p. 236.

91 Fezyioğlu (1999), p. 154.



above reasonable time are considered as a type of penalty imposed prior to conviction by virtue of a finalized decision. The issue if reasonable time in detention has been exceeded or not is evaluated according to the particular circumstances of each concrete case and scope and complexity of the action concerned.<sup>92</sup>

In the established practice of the Court, the following criteria are to be taken into consideration in determination of the reasonable period:<sup>93</sup>

- Duration of the period during which the person is deprived of his freedom;
- Nature of the imputed offence and the potential sentence to be imposed in case of conviction;
- What are the material, moral, and other impacts of the deprivation of freedom on the accused;
- The accused's attitudes;
- Way and manner of conducting the investigation; and
- What are the actions taken by the relevant judicial authorities.

A detention period considered to exceed the reasonable time as a result of an assessment made according to the aforesaid criteria will violate the presumption of not guilty as it will turn into a conviction.

Another aspect of detention that needs to be pointed out in the context of reasonable time is the difference between the Turkish law and ECHR's case-law in qualifying the period of detention during the period of appeal. In assessing the reasonable time spent in detention, the ECHR includes the period that passes until a decision delivered by a court of first instance but does not include the period spent in detention until the finalization of the decision.<sup>94</sup> However, the period spent in detention, will, at the appellate stage, be examined in terms of the right to a fair trial that is set out under Article 6 of the Convention in the context of the assessment as to whether the decisions ordering

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92 Feyzioğlu (1999), p. 155.

93 Feyzioğlu (1999), p. 155.

94 M. Özen and Others (2010), "*Avrupa İnsan Hakları Mahkemesi Kararları Işığında Türk Hukukunda Azami Tutukluluk Süresinin Hesaplanmasına İlişkin Değerlendirmeler*", Ankara Barosu Dergisi, V. 68, E. 4, p. 184-185.





detention and continued detention are justified and whether the proceedings lasted for a length period.<sup>95</sup>

### **E. Refusal of Unlawfully Obtained Evidence (Evidence Restrictions)**

When considered in the constitutional context and in connection with the Convention's principles, the guilty must be proven on the basis of the lawfully obtained evidence. The Convention does not contain any provision on evidence restrictions and leaves this matter to the domestic legislation. That is to say, the refusal of unlawfully obtained evidence must be banned under the domestic legislation rules.<sup>96</sup> The limits imposed under the criminal procedure over the processes of obtaining evidence and assessment thereof constitute the evidence restrictions. It is prohibited to assess the evidence the obtainment of which is banned.<sup>97</sup>

Article 206 § 2 of the CCP enumerates the evidence to be refused as follows: "*Evidence that needs to be produced shall be refused in the following cases: a) where the evidence has been obtained unlawfully; b) Where the incident intended to be proven with the evidence has no impact on the judgment; and c) where the request regarding the evidence is filed only with an aim to lengthen the proceedings.*" Again under Article 148 of the CCP, the prohibited methods of statement-taking and interrogation are provided for. It is prescribed that the statement of a suspect or an accused must be based on his free will and; further, the physical and mental interventions such as ill-treatment, torture, administration of a drug, tiring, deception, using force or threatening, and use of certain means are banned. Besides, it is also set out that unlawful benefits may not be promised and the statements obtained via unlawful methods may, even made on free will, not be taken into consideration.

According to Article 217 § 2 of the CCP, an imputed offence may be proven with any kind of evidence that is lawfully obtained. This provision means that no judgment may be delivered on the basis

<sup>95</sup> Özen and Others (2010), p. 185.

<sup>96</sup> Schroeder and Others (1999), p. 254; As there is no common practice in Europe for the assessment of unlawfully obtained evidence and as the Convention lacks regulations on the admissibility of evidence, the matter of the assessment of evidence is left to the domestic legislation. İnceoğlu (2013), p. 288.

<sup>97</sup> Şahin and Gökürk (2015), p. 88.

of unlawfully obtained evidence.<sup>98</sup> There are two different systems regarding the prohibition on the consideration of unlawfully obtained evidence. According to the first system that is called as absolute prohibition on consideration, none of the unlawfully obtained evidence may be taken into consideration. According to the second system that is called as relative prohibition on consideration, some of the unlawfully obtained evidence may be taken into consideration, while some may not.<sup>99</sup> According to the Turkish legal system, the system of the absolute prohibition on consideration has been adopted in terms of unlawful evidence both under the Constitution and also the CCP.<sup>100</sup> The absolute prohibition on consideration of evidence as set forth under Article 38 of the Constitution has been inserted therein by virtue of the amendment made in 2001 under the Law 4709.<sup>101</sup>

Since, regarding the presumption of not guilty, the expression that a criminal offence needs to be lawfully proven is included, the procedural laws of the States that are parties to the Convention have importance. However, according to the case-law of the ECHR, the evidence obtained by means of *torture and ill-treatment* cannot be taken into consideration. Although the prohibition of torture and ill-treatment is set forth under Article 3 of the Convention, this Article does not establish any provision whether the evidence obtained by means of torture will be considered when delivering a judgment. However, in noting through its case-law that the evidence obtained by means

98 H. Karakehya (2016), "*Ceza Muhakemesinde Maddi Gerçeğin Tespiti*". Ankara: Savaş Yayınevi, p. 85.

99 According to the Anglo-Saxon legal system, the consideration of unlawfully obtained evidence is prohibited absolutely. The purpose of such a prohibition is not to protect the accused's right; quite the contrary, it aims at disciplining the law enforcement personnel. From time to time, this rule gives rise to congestions during proceedings. By contrast with the Anglo-Saxon legal system, the legal system of Continental Europe aims at protecting the individual rights and freedoms; thus, the evidence that do not impair the rights of a suspect or an accused, but that have been unlawfully obtained may be considered evidence. Namely, the legal system of Continental Europe has relative prohibition on consideration. Karakehya (2016), p. 83; Centel and Zafer (2008), p. 656.

100 Under the amendments made in 1992 to the Law of Criminal Procedure, the absolute prohibition on the consideration of unlawful evidence was introduced to the Turkish legal system. M. Koca (2000), "*Ceza Muhakemesinde Hukuka Aykırı Delillerin Değerlendirilme Yasağı*", Erzincan Üniversitesi Hukuk Fakültesi Dergisi, V.4, E. 1, p. 123.

101 Karakehya (2016), p. 85; Since the arrangement on evidence restrictions relate to the law of proceedings, the insertion thereof in Article 38 of the Constitution "Principles Relating to Offences and Penalties", which addresses the substantive criminal law, is criticized. D. Soyaslan (2003), "*Hukuka Aykırı Deliller*", Erzincan Üniversitesi Hukuk Fakültesi Dergisi, V. 7, E. 3-4, p. 9-10.



of torture cannot be taken into consideration, the ECHR relies on the expression “lawful demonstration of a criminal offence” worded in the scope of presumption of innocence.<sup>102</sup>

In the case of *Shenk v. Switzerland*, the ECHR tried the applicant for the attempted criminal offence of instigation to kill intentionally, and the applicant was ultimately convicted. The applicant’s penal conviction<sup>103</sup> was, although there was other evidence too, based on the tape records that were handed over to the police following the recording of talks between the applicant and the person instigated by him secretly. These records were played and listened before the court too. Also according to the law of Switzerland, a judicial decision is sought for wiretapping that amounts to an interference with personal rights and privacy of communication. However, the ECHR held that the benefit in revealing the material fact in murder was above the benefit in protecting the applicant’s personal rights; and that the right to a fair trial had not been violated. It further emphasized that the applicant had not raised any allegation as to the forgery of tape records during the trial conducted under domestic legislation; and that the tape records had not been the sole evidence relied on in delivering the judgment of conviction.<sup>104</sup>

In connection with the prohibitions with respect to the consideration of unlawful evidence in the scope of presumption of innocence, we cannot say that the ECHR explicitly acknowledges the violations of the right to a fair trial. However, the Court had addressed the issue of evidence obtained through the methods in breach of the prohibition of torture and ill-treatment and concluded that the right to a fair trial was violated.<sup>105</sup> In the light of all of these explanations, we can say that the Turkish law has more such regulations that offer more protection in both the constitutional context and also in the context of the penal procedure *vis-a-vis* the ECHR’s denial of absolute prohibition of consideration. The principles that are set forth by the domestic legislation and that offer more protection than the Convention must have been complied with in order to conclude that a trial in a given case was fair.

102 Schroeder and Others (1999), p. 36.

103 Schoeder and Others (1999), p. 114.

104 Schroeder and Others (1999), p. 254-256.

105 İnceoğlu (2013), p. 288.



#### IV. CONCLUSION

The presumption of not guilty that is protected under the Constitution and international instruments is an element inherent in the right to a fair trial. Being crucial in terms of the right of defence, the achievement of the principle's intended function is important. The presumption of not guilty would still be the prerequisite of legal certainty principle in the context of the principle of state of law, if it had not been explicitly enshrined under the constitution.

We observe the use of different terms in doctrine regarding the presumption of not guilty, which means that no person can be deemed guilty and subject to penal sanctions unless and until his guilt is proven by a finalized decision. However, the use of the term "presumption of not guilty" instead of the term "presumption of innocence" will be advisable as the preventive measures, which are to be taken against a person being faced with a criminal charge until a final judgment is delivered, are explained and as the person, who is under a criminal suspicion, is referred to as neither innocent nor a criminal during the process of proceedings.

The presumption of not guilty becomes effective from the moment when a person undergoes judicial procedures by reason of a criminal suspicion. In order to benefit from the protection offered by the presumption of not guilty principle, it is not necessary that a prosecution be initiated. This is an implication of the consideration by the ECHR of the criminal charge independently from domestic legislation. When assessing a case in terms of the right to a fair trial, the ECHR is not bound by domestic legislation also with respect to the question whether an act is defined as a criminal offence within the meaning of disciplinary law or criminal law, and it has established fundamental criteria in this regard.

In the Code of Criminal Procedure and Criminal Code, there are many provisions concerning this fundamental principle, which is set forth under the Constitution with an aim to functionalize the presumption of not guilty.

Being safeguarded under the Constitution and international instruments and binding not only upon judicial authorities but also



upon third persons along with all official entities, including the press, the presumption of not guilty has certain outcomes which are as follows: resting the burden of proof upon prosecutors, the right to remain silent, *in dubio pro reo* principle, the violation of presumption of not guilty in cases where the reasonable time in detention is exceeded, and prohibition on the consideration of unlawful evidence.

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***THE PRESUMPTION OF INNOCENCE  
IN THE LIGHT OF THE CASE LAW OF  
THE CONSTITUTIONAL COURT OF  
GEORGIA***

*Gvantsa LASHKHIA*

***CONSTITUTIONAL COURT OF  
GEORGIA***





## THE PRESUMPTION OF INNOCENCE IN THE LIGHT OF THE CASE LAW OF THE CONSTITUTIONAL COURT OF GEORGIA

*Gvantsa LASHKHIA\**

### I. INTRODUCTION

According to the Article 31 of the Constitution of Georgia, basic constitutional procedural rights, including presumption of innocence, are guaranteed. Particularly, as stated by the Paragraph 5 of the Article 31 of the Constitution of Georgia, *“a person shall be presumed innocent until proved guilty, in accordance with the procedures established by law and the court’s judgment of conviction that has entered into legal force”*. Pursuant to the Paragraph 6 of the same Article, *“no one shall be obliged to prove his/her innocence and the burden of proof shall rest with the prosecution”*. The Paragraph 7 of the Article 31 of the Constitution of Georgia stipulates that *“a decision to commit an accused for trial shall be based on a reasonable belief, and a judgment of conviction shall be based on incontrovertible evidence. Any suspicion that cannot be proved in accordance with the procedures established by law shall be resolved in the defendant’s favor”*. Accordingly, the Constitution of Georgia enshrines the presumption of innocence, guarantees an independent and impartial justice and protects the accused from conviction if the latter is not based on the legal grounds. The above-mentioned three provisions create for individuals’ constitutional basis for the full enjoyment of the right of presumption of innocence.

The presumption of innocence applies throughout all stage of a criminal proceedings (not only does at the trial stage, but at the pre-trial stage of the criminal prosecution and investigation, as well) and implies that the guarantee applies to all persons, regardless their citizenship or other status. The Paragraph 5 of the Article 31 of the

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Constitution of Georgia literally states that only individuals (“people”), but not legal entities are protected under the presumption of innocence. The Constitutional Court of Georgia has not solved any cases related to the above-mentioned issue, but as far as the Criminal Code of Georgia provides for possibility of criminal liability of a legal person, the presumption of innocence may be extended to the legal entities by a virtue of the Paragraph 1 of the Article 34 of the Constitution of Georgia, which specifies that the fundamental human rights referred in the Constitution of Georgia, in terms of their contents, shall also apply to the legal persons.

The presumption of innocence obliges all state authority, *inter alia*, the court to refrain from making preliminary findings, since the burden of proof rests with the prosecution, guilt of the person must be proven by the prosecution and any doubts should be resolved in favor of the accused. At the same time, it does not exclude the possibility of the State authorities to inform the public of the criminal proceedings, but this must be done very carefully so as not to violate the presumption of innocence.

In terms of procedural safeguards in the context of a criminal trial itself, the presumption of innocence imposes requirements in relation to the evidentiary process, evidentiary rules, distribution of the burden of proof, admissibility of evidence, evidentiary requirements and assessment process of evidence, as well as legal presumptions of fact and law, the privilege against self-incrimination, etc.

However, the presumption of innocence, as declared by the case-law of the Constitutional court of Georgia does not normally apply in the absence of a criminal charge against a person.

## II. CASE-LAW ANALYSIS OF THE GEORGIAN CONSTITUTIONAL COURT’S APPROACH TO THE RIGHT TO THE PRESUMPTION OF INNOCENCE

**Judgment of the Constitutional Court of Georgia “The Public Defender of Georgia v. the Parliament of Georgia”, 11 July, 2011, № 3/2/416**

**Issue:** The constitutionality of imposition of an obligation to pay fine to a legal representative of an insolvent convicted minor.



**The Facts:** The Public Defender of Georgia challenged the constitutionality of the regulation, which stated that if a convicted person was minor and insolvent the court would impose the payment of the fine to which he was sentenced, on his or her parent, custodian or guardian. The Public Defender of Georgia considered that imposition of a duty to pay a fine on the legal representative of the convicted insolvent minor, whereas there was no blameworthy act committed by her/him, represented punishment for the criminal law purposes and type of imposition of criminal liability; The public defender of Georgia stated that in the criminal law person could be found guilty only by the final judgment of conviction of the court. At the same time, in the process of making the judgment, a court necessarily assessed what was an unlawful act committed by a person, whether her/his actions were blameworthy and this was a way the court ordinarily made a judgment. Conversely, in line with the disputed regulation the punishment was imposed not on the person who has committed an unlawful act and was found guilty by the final judgment of conviction of the relevant court, but on his/her legal representative. In the opinion of the Public Defender of Georgia, it was mentioned that the disputed regulation violated the principle of individualization of punishment and contradicted to presumption of innocence.

### **The judgment of the Constitutional Court of Georgia:**

The Constitutional Court of Georgia pointed out that in the present dispute the Constitutional Court of Georgia was not required to give full interpretation of the right to the presumption of innocence. However, it indicated that the presumption of innocence was the guiding principle of criminal law, which, *inter alia*, implied that everyone should be treated on the bases of presumption that they were innocent, until the due process was conducted and the judgment of conviction was adopted by the relevant court which confirmed his/her guilt. Therefore, it was impermissible to consider a person as an offender without due process. In order to find out whether the presumption of innocence was violated, the Constitutional Court of Georgia considered that it was necessary to be first ascertained whether or not a legal representative of convicted insolvent minor was recognized as an offender. Only



afterwards it was possible to evaluate to find out whether the state was obliged to protect the guarantees of presumption of innocence.

The Constitutional Court of Georgia declared that contested regulation did not cause the legal representative of convicted insolvent minor to be found guilty, to be considered as offender and to be posed to criminal liability. It explained that imposition of obligation to pay the sentenced fine instead of the convicted insolvent minor should not be considered as identical to imposition of fine, in the sense of criminal legislation. Otherwise it would be necessary that state action contained elements and purposes of imposition of criminal liability. It was noteworthy that when the payment of fine, to which convicted insolvent minor was sentenced, was imposed on their legal representative, the state action did not reflect the goals of imposition of criminal liability-punishment (to restore justice, to prevent new crime and to socialize offender) on the parent, custodian or guardian, nor were additional legal elements of criminal liability present.

The Constitutional Court of Georgia noted that according to the disputed regulation it was only minor who was convicted for commission of unlawful and guilty act and fair punishment in criminal case was determined only for minor. Her/his legal representative was not subject of criminal prosecution at any stage of criminal proceedings, the legal representative of convicted insolvent minor was not transformed into the party of the criminal legal relationship and was not considered guilty in any action prohibited by criminal legislation of Georgia. Moreover, from legal perspective, only the final conviction judgment against the person proved that crime was committed. A judgment of conviction was adopted against the minor and no legal consequence were applied to his/her legal representative, which followed from the conviction judgment (criminal records, crime relapse, etc.). At the same time, if a legal representative of a convicted insolvent minor could not pay the fine (despite the fact that case would be fallen under the Law of Georgia “*on enforcement proceedings and will be subjected to the coercive enforcement measures on property*”), punishment imposed on minor – fine, would be subtitled by other punishment – community service day fine, restriction of liberty or imprisonment;



Therefore, the Constitutional Court of Georgia considered that disputed regulation was fully compatible with presumption of innocence.

**Judgment of the Constitutional Court of Georgia “Citizens of Georgia: Lili Telia, Archil Meparidze, Guram Tokhadze, Sergo Gogitidze and Rostom Bolkvadze v. The Parliament of Georgia”, 13 July, 2005, №2/5/309,310,311**

**Issue:** (a) The Constitutionality of confiscation of unlawful and unreasonable property through administrative proceedings; (b) The Constitutionality of the transfer of burden of proof of legality and reasonableness of property to the defendant.

**The Facts:** Pursuant to the disputed regulations confiscation of unlawful and unreasonable property was subject to review through the administrative law proceedings and in the process of considering the case of seizure of unlawful and unreasonable property the person was obliged to prove the legality of his/her property. The claimants considered that the issue of seizure of unlawful and unreasonable property belonged to the field of criminal law. Therefore, an important constitutional principle – the presumption of innocence – was violated in the course of administrative proceedings. Simultaneously, the claimants argued that the impugned regulation was unconstitutional also with the circumstance that the prosecutor’s lawsuit was based on reasonable suspicion that the property had been obtained illegally.

With respect to the distribution of burden of proof, the claimants argued that in the process of considering the case of seizure of unlawful and unreasonable property through administrative proceedings the person was obliged to prove the legality of his/her property. Due to imposition of a burden of proof to claimants, they considered that there was violated of Paragraph 6 of the Article 31 of the Constitution of Georgia, which provided that no one shall be obliged to prove his/her innocence.

**The judgment of the Constitutional Court of Georgia:**

According to the judgment of the Constitutional Court of Georgia, Paragraph 5 of the Article 31 of the Constitution of Georgia “establishes





*the conditions for a person to be found guilty of a criminal offense*". Therefore, in order to violate the presumption of innocence, it was necessary to impose criminal liability on the person.

The Constitutional Court of Georgia stated that the impugned regulation could not be assessed with respect to Paragraph 5 of the Article 31 of the Constitution of Georgia. From its point of view after separation of the process of seizure of unlawful and unreasonable property from criminal proceedings and the filing of a lawsuit in administrative proceedings, the issue concerned purely to the property related administrative-legal dispute. The officials were required to prove the legality of the property in their possession and its justification and by no means did it discussed as the issue of guilt or innocence of these persons. The Constitutional Court of Georgia emphasized that in the disputed administrative litigation, the prosecutor represented the state as a protector of his property interests, not a state prosecutor. Therefore, the Constitutional Court of Georgia found that the impugned provisions did not concern the presumption of innocence.

In the same case, the claimants also substantiated the unconstitutionality of the impugned provisions on the ground that the lawsuit of prosecutor was based on reasonable suspicion that the property had been obtained illegally. The Constitutional Court of Georgia pointed out that the existence of suspicion, itself, did not mean a definitive solution of a particular issue and it was merely a ground for filing a lawsuit, moreover, the Georgian legislation, in order to find the lawsuit well-founded, provided for the prosecutor's obligation to present relevant evidence.

The Constitutional Court of Georgia shared the approach of the European Court of Human Rights and separated the presumptions of fact and of law. The Constitutional Court of Georgia indicated that the presumption is the general principle of law and in addition to the criminal law, given the peculiarities of the field of law, it applies to other fields, as well. Since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Constitution of Georgia, as well as by the European Convention on Human Rights. The Constitutional Court of Georgia ascertained that the application



to a court in order to establish the fact of the origin of property did not preclude the observance of the principle of presumption of innocence, the impugned regulations did not provide the liability for criminal offenses, but for the property nature administrative-legal disputes. In the mentioned case, representatives of authority were not obliged to prove their innocence, but they were merely obliged to justify only the fact that the property in their possession was acquired by lawful means. At the same time, if administrative lawsuit of prosecutor was upheld, the criminal prosecution was initiated, which was to be conducted in accordance with the principles of criminal law (including the presumption of innocence).

The Constitutional Court further explained the essence of the imposition/transfer of the burden of proof to the suspected person in process of seizing unlawful and unreasonable property and stated that *“in the absence of fault of representatives of authority, a person who knows his/her area of business better than others was more likely to provide the necessary evidence than a prosecutor. In any case, further the court is obliged to evaluate the evidence presented or to prove the guilt or innocence of the person”* and at the same time it indicated that *“the transfer of the burden of proof to the suspected person did not imply that the suspected person had no opportunity to prove the opposite of the facts”*.

In view of all the foregoing arguments, the Constitutional Court of Georgia rejected the applicants' constitutional complain.

**Judgment of the Constitutional Court of Georgia Citizen of Georgia “Zurab Mikadze v. The Parliament of Georgia”, 22 January, 2015, №1/1/548**

**Issue:** The constitutionality of the standards of admissibility of indirect [hearsay] evidence, the constitutional standards of accusation and conviction on the basis of indirect [hearsay] evidence.

**The Facts:** In accordance with the section 2 of the Article 13 of Criminal Procedure Code of Georgia it was established that confession made by accused, if it was not proved by additional evidence, was not sufficient for delivering judgment of conviction. The judgment of conviction should be based only on unity of corroborated, clear and



convincing evidence which prove the guilt beyond reasonable doubt; The Section 1 of the Article 169 of the Criminal Procedure Code of Georgia stipulated that the ground for issuing a criminal charge was the unity of the evidence collected during the investigation which was sufficient for establishing probable cause that the crime was committed by accused individual.

The claimant indicated that in accordance with the disputed regulations a person might be charged with a crime and be convicted not as a result of incontrovertible evidence, but based on two hearsays, as unity of corroborated evidence. The Claimant considered that charging a person with a crime and convicting him/her based on merely two hearsays contradicted guarantees established by Paragraph 7 of the Article 31 of the Constitution of Georgia, which states that *“a decision to commit an accused for trial shall be based on a reasonable belief, and a judgment of conviction shall be based on incontrovertible evidence. Any suspicion that cannot be proved in accordance with the procedures established by law shall be resolved in the defendant’s favor”*. The Claimant also underlined that for adopting a conviction judgment, evidence should be corroborated, clear and convincing and unity of evidence should be presented. Main shortcoming of this provision was that it did not mention constitutional standard of *“incontrovertibility”* of evidence. The claimant indicated that according to the same logic even deceit could be clear and convincing and corroborated and could become the basis for a judgment of conviction.

### **The judgment of the Constitutional Court of Georgia:**

The Constitutional Court of Georgia at the first stage of resolving a presented constitutional complaint, defined the scope of protection of Paragraph 7 of the Article 31 of the Constitution of Georgia and indicated that

*“Mentioned constitutional provision represents one of the basis of a rule of law state and strengthens well established principle in dubio pro reo which is important for avoidance of conviction of an innocent person. According to this principle it is intolerable to convict individual based on doubtful accusations. ... The principle to impose punishment only based on incontrovertible evidence constitutes*



*guarantee against conviction of innocent person as a result of arbitrariness and/or mistakes of public officers. The state based on the rule of law implies existence of legal system according to which acts of prosecution implemented against an individual – accusation in crime and imposition of punishment shall be conducted based on adequate standards”.*

At the same time, in order to accomplish the above-mentioned legitimate interests, the Constitutional Court of Georgia considered it necessary to provide the person with solid procedural guarantees. During the proceedings involving imposition of punishment, individuals shall not be the object of legal proceeding, but shall be armed with defense mechanism, required by the right to a fair trial.

The Constitutional Court of Georgia indicated that all above-mentioned was also related to the principle of presumption of innocence. It was established that the constitutional provision stating that “*any suspicion that cannot be proved as provided for by the law shall be resolved in favor of the accused*” created an important guarantee for protection of the accused person....” The Constitutional Court of Georgia explained that comprehensive exercise of right to a fair trial and procedural guarantees have crucial importance within the proceedings involving imposition of punishment. Therefore, the authority conducting criminal prosecution, whose main task was investigation and prevention of a crime, should be armed by legislation with effective as well as clearly formulated, foreseeable legal mechanisms necessary for effectual investigation, which would essentially preclude possible mistakes or risks of arbitrariness during the criminal prosecution. The legislation has to prescribe minimal guarantees which would rule it out the use of possibly false, dubious evidence against the accused person.

The Constitution of Georgia unequivocally established that only incontrovertible evidence might become basis for accusation and further conviction of an individual. The Constitutional Court of Georgia stated that the Constitutional standard of incontrovertibility referred not only to inadmissibility of dubious evidence but also included requirement that facts and circumstances important for the criminal case should be confirmed by the reliable source and should be



based on information which was adequately verified. The information received from evidence should incontrovertibly refer to the factual circumstance for proving of which evidence was presented. The Constitution of Georgia required that the person having the relevant authority should use only such evidence which are considered to be incontrovertible for proving the guilt of an individual.

Therefore, within the present dispute the Constitutional Court of Georgia had to be assessed whether it was possible based on the disputed provisions to bring criminal charge against an accused and render a judgment of conviction based on evidence which was not incontrovertible, whether possibility to use hearsay as an evidence involved risks of violation of constitutional rights, as well as the risk of delivering of a judgment of conviction based on dubious, forged or controvertible evidence. The Constitution of Georgia had to be assessed whether criminal procedure legislation contained sufficient guarantees ensuring that commission of crime by an individual should be proved beyond controversy. In order to answer these questions it was necessary to define the essence and meaning of hearsay in the criminal proceeding.

The Constitutional Court of Georgia explained that every evidence, which becomes the ground for accusation or judgment of conviction, might be subject of disagreement. Generally, evidence acquired during investigation was subject to different evaluation and dispute between the parties. On different stages of criminal prosecution parties were entitled to inspect validity of evidence, factual and legal circumstances, which confirmed or disproved connection of the accused person to the crime committed. At the same time, a hearsay was a less trustworthy evidence and had many risks. Since a source of information was a person who did not appear in the court, the court had no opportunity to evaluate his/her disposition and attitudes towards events in question. It was true, that law required identification of the source of the information, but it failed to specify how the source can be properly verified. Besides, warning the witness about the liability for perjury, which was an important safeguard to ensure trustworthiness of the testimony, was not effective tool in this case, since the person, who has testified was not able to confirm the trustworthiness.



Further, the Constitutional Court of Georgia stated that in accordance with the Criminal Procedure Legislation of Georgia, the situation was aggravated by the fact that hearsay could be used even when an eyewitness (whose words were the basis of hearsay) appeared himself/herself in the court and testified. There was a possibility to use several hearsays to prove the same fact and the law even allowed a double hearsay (when even the source of information named by the witness, had not witnessed the fact himself/herself).

The Constitutional Court of Georgia determined that automatic admission of hearsay was not justified. However, it also noted that hearsay could be used in particular cases, if an objective reason existed, which would make it impossible to interrogate the very person, whose words were basis for hearsay and when this was required by the interests of justice (e.g. when there is a threat of intimidation of witness). The most important aspect was that, in each case, the trial court was obliged to evaluate the arguments brought by the body in charge of criminal prosecution to justify the use of hearsay.

The disputed provisions established a general rule of admissibility of a hearsay and its application was admissible even if there was no necessity for it stemming from the interests of justice. There was a high probability, that the effect of a hearsay on the court and on the jury would be stronger, than it was allowed by its limited trustworthy nature, the use of a hearsay carries with itself the risk of creating a false impression with regards to guilt of a person.

Therefore, the normative content of the disputed norms, which allowed to found judgment of conviction or indictment on a hearsay, was declared unconstitutional.



***PRESUMPTION OF INNOCENCE IN  
CROATIAN CONSTITUTIONAL LAW***

***Helena MAJIĆ***

***CONSTITUTIONAL COURT OF  
CROATIA***







## PRESUMPTION OF INNOCENCE IN CROATIAN CONSTITUTIONAL LAW

Helena MAJIĆ\*

### I. INTRODUCTION

Article 28 of the Constitution of Republic of Croatia (hereinafter: the Constitution) reads as follows: “*Everyone is presumed innocent and may not be held guilty of a criminal offence until such guilt is proven by a final court judgment.*”

According to the Sections IV and V of the Constitutional Act on the Constitutional Court of the Republic of Croatia regulating the jurisdiction of the Constitutional Court and the rules of procedure before it, Article 28 of the Constitution serves a purpose of a legal basis for a constitutional review *in abstracto* (on the motion of individuals, institutions or *proprio motu*) and constitutional review *in concreto* instituted by an individual complaint against decisions of State bodies.

Compared to the structure of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention), Article 28 is an autonomous provision, distinct from the right to fair trial which has been guaranteed by Article 29 of the Constitution. It can be observed both as a constitutional principle, commonly in the review in *abstracto* cases, and an individual right to be presumed innocent usually examined by the Constitutional Court in the review in *concreto* cases. Latter distinction has a practical meaning because, as it will be argued further in this paper, presumption of innocence as a constitutional principle may be applicable to the proceedings other than those formally classified in domestic law as criminal or misdemeanour proceedings.

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Article 28 of the Constitution has been implemented in Article 3 of the Criminal Procedure Act and Article 48 of the Misdemeanour Act, together with the *in dubio pro reo* principle. However, the question whether the *in dubio pro reo* principle is a constitutionally protected principle closely linked to the presumption of innocence remains unanswered, as it will be argued further in the context of the case law of the European Court for Human Rights (hereinafter: the ECtHR).

Apart from the domestic legal order, the presumption of innocence is furthermore guaranteed by two major international agreements to which the Republic of Croatia is a Signatory Party: the Convention<sup>1</sup> and the Charter of Fundamental of the European Union (hereinafter: the Charter), latter being an integral part of the Lisbon Agreement<sup>2</sup> (the Treaty on the European Union and the Treaty on the Functioning of the European Union).

According to the structure of Article 6 of the Convention, the presumption of innocence has been understood as a procedural guarantee of the right to a fair trial. Article 6.2 of the Convention, which provided for the right to be presumed innocent, together with the ECtHR's case law, is directly applicable in the proceedings before domestic ordinary courts, as the Constitutional Court has interpreted in cases No. U-III-5807/2010 (*M. L.*), U-III-2073/2010 (*E. Š. and M. D. Š.*) and U-III-3304/2011 (*Vanjak*). Pursuant to Article 134 of the Constitution, international treaties to which the Republic of Croatia is a Signatory Party have primacy over domestic law. In the case No. U-III-2864/2016 (*Đomlija*), despite the lack of explicit acknowledgment thereto, the Constitutional Court has nevertheless implied that due to the interpretative method it has adopted, the Convention has primacy over the Constitution in the hierarchical order of legal sources in the Republic of Croatia.

Article 48.1 of the Charter provides for a provision equivalent to the Article 6.2 of the Convention. Thus, the European Union (hereinafter: the EU) has a legal basis for enacting the legislation covering different

1 Entered into force in the Republic of Croatia on November 5, 1997.

2 Entered into force in the Republic of Croatia on July 1, 2013., by virtue of the Treaty on Accession of the Republic of Croatia to the European Union.



aspects of the presumption of innocence with respect to its exclusive competence and the competences shared with the Member States. Therefore, the EU has already enacted Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (hereinafter: Directive on the presumption of innocence).

Wherever a national court applies EU law or a national law that has implemented EU law, it has to be interpreted in accordance to the Charter. If the case before it raises concerns as to incompatibility of the impugned provision with the Charter, national courts as well as constitutional courts, shall seek for a preliminary ruling from the Court of Justice of the EU (hereinafter: the CJEU) pursuant to Article 267 of the Treaty on the Functioning of the EU. They are exempted from this duty only if the issue raised before them had already been interpreted by the CJEU (*acte clair* and *acte éclairé* doctrine). In the latter situation, following the CJEU's doctrine on the primacy of EU law, national courts will directly apply the EU law according to the interpretation provided by the CJEU.<sup>3</sup> The question of primacy and direct applicability of EU law in Croatian legal order was, however, addressed by 2013 constitutional amendments. Article 141.c of the Constitution provides for national courts' obligation to protect individual rights based on the EU's *acquis communautaire*.

According to Article 52.3 of the Charter, the meaning and scope of the fundamental rights guaranteed by the Charter shall be the same as those laid down by the Convention. However, this provision shall not prevent the EU from providing a standard of protection higher than the one provided in the case law of the ECtHR. The latter meaning that the Constitutional Court is first obliged to verify standards of protection provided for in the case law of both the Strasbourg and the Luxembourg Court, and then shall apply the international agreement providing for higher standards.<sup>4</sup>

3 See, for example, the CJEU's cases *COSTA v. ENEL*, *Simmmenthal*, *Van Gend en Loos* and *Defrenne*

4 See, for example, with respect to asylum and the right to an effective remedy, *X,Y v. Staatssecretaris van Veiligheid en Justitie*.



## II. CONSTITUTIONAL REVIEW IN ABSTRACTO - LEADING CASES ON PRESUMPTION OF INNOCENCE

### **NOS. U-I-107/1995, U-I-366/2000: ARTICLE 174.1 OF THE DEFENCE ACT : *ex lege* termination of civil service in defence sector due to the indictment or ongoing criminal proceedings**

In its decision of June 19, 2002, the Constitutional Court has established that while it was in force, the provision of Article 174.1 of the Defence Act (Official Gazette of the Republic of Croatia Narodne novine, Nos. 74/93 – revised text, 57/96, 31/98, 78/99 and 16/01), in the part referring to the provision of Article 173.1 point 2 of that law, was not in conformity with Article 28 and Article 30 of the Constitution.

The disputed provision read as follows:

*“The employment of a civil servant in the Ministry of Defence shall be terminated by force of law if he ceases to fulfil the special requirements in Articles 42 and 173 of this Law.”*

In their proposals, the applicants claimed that Article 173.1 point 2 of the Defence Act prescribed that a person employed in the Ministry of Defence had to fulfil, in addition to the requirements provided by law for civil servants, also the requirement that no investigation had been started against him, and that no criminal proceedings were ongoing against him for crimes against professional duty, life and body, against public powers and crimes against the armed forces, and for crimes committed for gain or for base instincts.

Considering Article 174.1 of the Defence Act, the applicants conclude that the employment of a civil servant in the Ministry of Defence shall terminate by force of law even when an investigation has been started against him, or if criminal proceedings have been instituted against him for the crimes determined by the law.

In the applicants’ opinion, the disputed provision leads to termination of employment by force of law although starting an investigation, or ongoing criminal proceedings for certain crimes, do not mean that the person against whom the proceedings are in progress will be finally sentenced.



The Constitutional Court asserted that the basic principle regulating the approach to persons accused of a crime is provided for in Article 28 of the Constitution that establishes the presumption of innocence, i.e. the constitutional rule whereby everyone is presumed innocent and may not be considered guilty of a crime until his guilt has been proved by a final court sentence. Pursuant to the above constitutional provision, a person may be considered guilty of a crime only after the judicial sentence has become final.

In modern penal systems, it is not enough for the act perpetrated to be illegal for the criminal offender to be punished. Thus the criminal law of the Republic of Croatia requires, in addition to the objective fact that an act violating a legally protected value has been committed, also the establishment of the perpetrator's culpability as the subjective element of responsibility for a crime. To establish culpability, it is necessary to start from the perpetrator as a person and establish whether the unlawful act may subjectively be attributed to the perpetrator. Without establishing culpability, there can be no responsibility for the act committed, and this excludes the possibility of penal sanction, in accordance with the principle *nullum crimen nulla poena sine culpa*. The culpability of the criminal offender may exclusively be established in criminal proceedings that have ended in a final convicting judicial sentence.

Article 30 of the Constitution prescribes that finally sentenced persons may lose their acquired rights or have these rights restricted, or that they may be banned from acquiring certain rights, when this is required for the protection of the legal order.

A person who has been finally sentenced and who has served his penalty is equal to all other persons in respect to requirements necessary for retaining or acquiring rights prescribed by law. In cases when serious and especially dishonourable crimes have been committed, which the law recognises as such and in connection with which a convicting final judicial sentence has been passed, the final court judgement may affect the loss of acquired rights or a ban on acquiring the right to perform certain kinds of work, but only for a



limited time period and when this is required for the protection of the legal order in the manner provided by law.

On this occasion, we consider it necessary to emphasise that the ban on performing offices, activities or duties was regulated by the provisions of the criminal code of the Republic of Croatia (now Article 73 of the Criminal Code, Narodne novine, No. 110/97). The ban entails that an individual may not perform certain activities independently or for anyone else, nor instruct others on how to perform the banned activities. However, this measure may only be pronounced together with the penalty, for the duration of a legally established time period.

The Constitution does not recognise the possibility of pronouncing a preventive ban on performing an activity. Furthermore, the penal order of the Republic of Croatia does not recognise the possibility of prescribing any ban of this kind by force of law, without first establishing the offender's culpability in the manner provided by law.

It emerges from all the above that the fact of starting an investigation, or of ongoing criminal proceedings, in themselves, should not be a reason for terminating employment by force of law. By prescribing termination of employment by force of law, that is by undertaking certain objective activities with the purpose of punishing the criminal offender, in which the decision to terminate employment is merely declaratory in character, is not in accordance with the constitutional guarantees contained in Article 28 and Article 30 of the Constitution.

The legal regulation prescribed in Article 174.1 of the Defence Act then in force, despite the specific position of civil servants in the Ministry of Defence, linked termination of employment with circumstances independent of the person's established responsibility and culpability for violating legally protected values, which is contrary to the constitutionally determined presumption of innocence. The above legal regulation also infringed the constitutionally established conditions under which a person may be stripped of existing rights or banned from acquiring certain rights only as the consequence of a final and convicting judicial sentence for committing a crime.



**NO. U-I-3676/2015: ARTICLE 30.4 OF THE HUNTING ACT - presumption of innocence in connection to the right to property and the rule of law principle**

On the proposal of several hunting societies and associations, the Constitutional Court instituted proceedings for the review of the compliance of Article 30.4 of the Hunting Act (hereinafter: Act) with the Constitution, and repealed it by a decision of February 9, 2016, in the part that read: »provided that in the previous period no statements of claim were filed for the misdemeanour offences referred to in Article 96.1 subparagraphs 1, 2, 3, 5, 7, 9, 10, 11, 13, 14, Article 97.1 subparagraphs 1, 2, 3, 4, 5, 6, and Article 98.1 subparagraphs 6, 7, 10, 11, 12, 13 of this Act«.

In the first three paragraphs, Article 30 of the Act regulates the manner and conditions for concluding a lease contract for common hunting grounds, and the impugned Article 4 (in conjunction with the non-impugned Article 5) regulates the mechanism of extending such a contract.

According to the legal regulation for the extension of a lease contract for common hunting grounds, a hunting-land lessee must file a request for the extension of the contract with the county, or the City of Zagreb, at the earliest in the previous hunting year, and at the latest 120 days before the contract expires. The decision to extend the contract is made by the competent county or City of Zagreb authority (hereinafter: competent authorities) within 90 days before the expiration of the contract. The competent authority may extend the contract for the same period (10 hunting years), previously obtaining the consent of the competent ministry to the filed request, provided that in the previous period no statements of claim were filed against that hunting-land lessee (applicant) for the listed misdemeanour offences (see the first sentence of this summary).

The proponents considered that Article 30.4 of the Act was not in conformity with Articles 4 (principle of separation of powers), 14.2 (equality of all before the law), 28 (presumption of innocence) and 29.1 (right to a fair trial) of the Constitution.





When deliberating whether the proponents' proposal was well-founded, the Constitutional Court found that Articles 3 (rule of law) and 28 (presumption of innocence) of the Constitution were applicable in this case.

By examining the legitimacy of the goal that the legislator pursued by amending the impugned part of Article 30.4 of the Act, the Constitutional Court established that the Government, as the proponent of the amendment to the Act, failed to offer any explanation of the reasons for the proposed amendment. The Court found this unacceptable also because this was not just a technical amendment. This was a structural, normative intervention that significantly changes the very scope of the mechanism of extending a lease contract for common hunting grounds, both in terms of the extent of the authority of the competent authorities to make decisions of public interest about this in specific cases, and in terms of the objective legal possibility of applying this mechanism in practice.

The impugned legal condition for extending the lease contract for common hunting grounds in effect prohibits the competent authorities from giving consent or from extending a lease contract unless this condition is fulfilled.

Specifically, the legislator separated the fact that an indictment proposal for a misdemeanour offence has been preferred against a hunting-land lessee (applicant) from the criterion for assessing the expediency and appropriateness of extending a contract from the aspect of public interest and the specific circumstances of each particular case. The legislator raised the very existence of a statement of claim for a misdemeanour offence against a hunting-land lessee (applicant) to the level of an absolute and blanket legal barrier for issuing consent or for extending the lease contract on the lease of common hunting grounds to that hunting-land lessee, notwithstanding the fact that the competent court had not yet rendered a final judgment to establish whether the misdemeanour liability of the hunting-land lessee, for which the indictment proposal was preferred, existed or not.

It can be concluded that the competent authorities must proceed in the same manner (that is, not to allow the lease of common hunting



grounds) either if the person has committed a misdemeanour offence or if an indictment proposal has been preferred against this person for a misdemeanour offence. This means that the legislator has equalised the legal consequences of preferring an indictment proposal for a misdemeanour offence against a hunting-land lessee by third persons, with the legal consequences that are derived from the fact that the offender actually committed the misdemeanour offence established by a final and effective court judgment (by which a misdemeanour sanction was imposed).

The Constitutional Court held that, by doing so, the legislator opened up the possibility of abusing the impugned part of Article 30.4 of the Act. This is most evident in situations where third persons prefer unfounded indictment proposal for misdemeanours against hunting-land lessees, since, just by preferring such an indictment proposal, a hunting-land lessee is »eliminated« from the procedure of extending his or her lease contract on common hunting grounds.

For the above reasons, the Constitutional Court held that the impugned legal condition prescribed by Article 30.4 of the Act, the fulfilling of which is also connected with a blanket legal prohibition of extending a lease contract for common hunting grounds, is not in conformity with Article 3 of the Constitution in the part that refers to the rule of law as the highest value of the constitutional order.

Furthermore, the presumption of innocence, referred to in Article 28 of the Constitution, is prescribed by the Misdemeanour Act as the fundamental determinant of misdemeanour law. As long as such general legal rules on the nature of misdemeanour offences are in force, the Constitutional Court holds that the effects of an indictment proposal for a misdemeanour offence must not be equalised with the legal effects of a final and effective court decision on the (proven) guilt of a hunting-land lessee for a committed misdemeanour offence. Therefore, the existence of an indictment proposal for a misdemeanour offence against a hunting-land lessee (applicant) cannot be raised to the level of an absolute and blanket legal prohibition to issue consent to such a hunting-land lessee or to extend his or her lease contract on common hunting grounds. Namely, as long as there is no final and



effective court judgment on the established misdemeanour liability of the hunting-land lessee (applicant), the existence of an indictment proposal for a misdemeanour offence against him or her must be and must remain only one of the criteria used by the competent authorities to assess the expediency and appropriateness of extending the lease contract with that hunting-land lessee from the aspect of the protection and promotion of public interest, all in the light of the particular circumstances of each specific case.

For the above reasons, the Constitutional Court held that the impugned legal condition for the prohibition of extending a lease contract for common hunting grounds, prescribed by Article 30.4 of the Act, was also not in conformity with Article 28 of the Constitution.

**NO. U-I-448/2009: ARTICLE 342.2 OF THE CRIMINAL PROCEDURE ACT: does duty of disclosure fall under the scope of application of Article 28 (right to be presumed innocent) or under Article 29.1 of the Constitution (equality of arms as a procedural safeguard of the right to a fair trial)**

A law firm, four lawyers and one natural person submitted proposals for the institution of proceedings to review the conformity with the Constitution of more than 150 articles, or their separate paragraphs, points, sentences or parts of sentences within specified paragraphs and points, of the Criminal Procedure Act of 2008 and its amendments of 2009 and 2011 (hereinafter: CrPA).

The Constitutional Court decided on all the proposals in one proceeding, in which, due to the extensive nature of the impugned provisions, the decision was delivered separately from the ruling. In the decision, sixty provisions or parts of provisions of the CrPA were repealed, including the impugned Article 342.2 CrPA.

Pursuant to Article 342.2 CrPA, the state attorney must enclose with the indictment only the list of evidence at his or her disposal, which he or she does not intend to present before the court, but which proves the innocence or the lesser degree of guilt of the defendant or which represents mitigating circumstances. The state attorney is subject to disciplinary action for abuse of position or lack of compliance with Article 342.2 CrPA.



A fair balance between the state attorney as the prosecutor and the defence of the defendant may not be achieved without the legal obligation of the state attorney to enclose with the indictment all evidence obtained during the investigation and thus to present all evidence to the defence and to the court.

The right to examine this list held by the defendant and his or her counsel upon request (Article 141.3 of the Rules of Procedure of the State Attorney's Office) does not seem sufficient in this sense.

Therefore, Article 342.2 CrPA in the part reading: "*if they may indicate the defendant is innocent or may indicate a lesser degree of guilt of the defendant or may present mitigating circumstances*" does not ensure equality of arms, in a constitutionally acceptable sense, within the meaning of Article 29 of the Constitution and Article 6 of the Convention.

This means that the list of all the collected evidence and documents, recordings and other files that may be used as evidence within the meaning of Article 141 of the Rules of Procedure of the State Attorney's Office must be delivered to the court together with the indictment, *ex officio*. By repealing paragraph 2 of Article 342 CrPA in the part reading: "*if they may indicate the defendant is innocent or may indicate a lesser degree of guilt of the defendant or may present mitigating circumstances*", then Article 342.2 CrPA fulfils this constitutional purpose.

The latter case was seminal with respect to the Constitutional Court's finding of difference in the scope of application of Articles 28 and 29 of the Constitution. As it can be concluded from above, the duty of disclosure has been observed as a procedural requirement of the right to a fair trial and the principle of equality of arms. The Constitutional Court thus found that Article 28 of the Constitution which guarantees the right to be presumed innocent was not applicable *ratione materiae* in the instant case.



### III. CONSTITUTIONAL REVIEW IN CONCRETO - LEADING CASES ON PRESUMPTION OF INNOCENCE

#### U-III-2026/2010 (J. M.): PREJUDICIAL STATEMENTS BY HIGH-RANKING PUBLIC OFFICIALS - VIOLATION (implementation of the ECtHR's judgment in the case of *Peša v. Croatia*, no. 40523/08)

In its decision of June 30, 2011, the Constitutional Court found that the prejudicial statements of the highest-ranking officials of the Republic of Croatia, published in the media from 17 to 22 June 2007, have violated the applicant's right to be presumed innocent under Article 28 of the Constitution. The Court further declared in the operative part of the decision, since it is not competent to award compensation of damages to the applicant according to the positive Constitutional Act on the Constitutional Court, that the applicant may claim damages for the violation of his constitutional right in civil law proceedings before an ordinary court.

#### *The impugned statements*

The applicant was arrested, detained and charged for bribery and abuse of authority, the offences he allegedly had committed as a member of the board of director of the Croatian Privation Fund, a public institution.

On 17 June 2007, an article under the title "Bribery in the Croatian Privatisation Fund - six arrested" was published in J. l. The following statement by the Head of the Police was quoted in the article:

*"To have coffee with you and allow you into the game, into making deals for purchasing CPF property, a sum of 50 thousand euros was required in payment," said M. B., the Head of the Police ..."*

In the column "Reactions", in the same number of J. l., the following was published:

*"S. M.: the CPF is the centre of corruption. Before the news of the arrests in the CPF had reached the media, President M. sharply attacked the Fund in his speech at the Igman Initiative Conference.*

*- The CPF is the centre of corruption in Croatia, the hardware of corruption. We do not know where the software is, we have only*



*reached the hardware and we will crush it – said President M. He demanded criminal proceedings against those who used their positions in the privatisation process to ensure material gain for themselves and others.”*

On 17 June 2007, an article under the title “They took Millions of Euros” was published in the national daily “24 sata”, quoting the following statement of the State Attorney:

*“Just for listening to you, that is to say having a coffee with you, they asked for 50,000 euros.”*

On 17 June 2007 the following appeared in V. I.:

*“To a journalist’s question about who had named the action ‘M’, B. said that the deputy D. N. had given the name, and that the action had really been carried out in a masterly fashion, but that a better name would have been, said B., the three tenors... D. C., head of the Anti-Corruption and Prevention of Organised Crime Office, said that it was a case of an amazing amount of illegal activities. The Anti-Corruption and Prevention of Organised Crime Office, the Security and Intelligence Agency and the police used all kinds of measures. What was the amount of the total damage for the State (...)”*

On 17 June 2007, an article under the title “Agents Break-up CPF Heads’ Corruption Chain with 800,000 Planted Euros” was published in S. D. The article says:

*“Who is who: from the canzona to investment funds. (...) However, J. M., vice-president for legal affairs, is the absolute recorder in length of vice-presidential office...*

*(...) M.: The reckoning is yet to begin ... ‘The centre of corruption’, the hardware of corruption, is the Privatisation Fund (...)’.”*

On 17 June 2007, the following appeared in the N. I., under the title “Privatisation Fund to be Abolished”:

*“The Privatisation Fund will no longer exist. Prime Minister I. S. made this public at an extraordinary press conference called about the M. action, saying that this action is spectacular, but that things will not stop there, that the struggle against organised crime, corruption*



*and bribery will continue. - Since these are high-ranking officials, some of whom have been in the Fund for as long as 17 years (...)*

On 18 June 2007, the daily "24 sata" brought the article entitled "Greatest Corruption Scandal". Again the following statement of the State Attorney was quoted:

*"J. M. has been in the Fund for 17 years and has weathered all changes. (...)*

*The State Attorney M. B. said that the investigation showed the suspects were ravenously greedy. Just for initiating any conversation about business they asked for 50,000 euros, for coffee, as they said."*

The same long article also said the following:

*"The police arrested the three tenors (as B. called them), M., G. and P., in the M. action."*

On 21 June 2007 the following quotation from a statement given by Prime Minister I. S. was published in V. 1.:

*"There was organised crime in the Privatisation Fund,' said Prime Minister I.S. 'The three vice-presidents did not necessarily participate in each project of the Fund but it is probable that each of them acted together with a number of other individuals and in that sense it is possible to talk about organised crime."*

On 22 June 2007, an article under the title "President M.: The Three Tenors will get an Orchestra" was published in J. 1. The relevant part of the article states as follows:

*"Z. - The investigation of corruption will be extended to other institutions; it is not enough to deal with the Croatian Privatisation Fund only. It is the centre of corruption, but extends further like an octopus. The M. action is only one of the leads to follow, and there will be more. The melody is known and is now practised and the parts are allocated. The three tenors will be supplied with an orchestra, said President M. ..."*

### ***The Constitutional Court's assessment***

The Constitutional Court finds it necessary to recall the statement of reasons of the *Peša v. the Republic of Croatia* judgment (application



no. 40523/08, of 8 April 2010) in which the European Court of Human Rights (hereinafter: the European Court) found that there had been a violation of the applicant's right to the presumption of innocence. This means that there had been a violation of Article 6 para. 2 of the Convention. The Constitutional Court notes that these were criminal proceedings in the same case as the one that is the subject of these constitutional proceedings, publicly known as the "M." affair.

In respect of the violation of the presumption of innocence, the European Court recalled its earlier case-law in the statement of reasons of the above judgment, stating:

*"(a) General principles*

*The Court reiterates that the presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of the fair criminal trial that is required by paragraph 1 (see Deweer v. Belgium, 27 February 1980, Series A no. 35, § 56, and Allenet de Ribemont v. France, 10 February 1995, Series A no. 308, § 35). Article 6 § 2, in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings (see Khuzhin and Others v. Russia, no. 13470/02, § 93, 23 October 2008, and Matijašević v. Serbia, no. 23037/04, § 45, ECHR 2006-X). It prohibits the premature expression by the tribunal itself of the opinion that the person "charged with a criminal offence" is guilty before he has been so proved according to law (see Minelli v. Switzerland, 25 March 1983, Series A no. 62) but also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority (see Allenet de Ribemont, cited above, § 41; Daktaras v. Lithuania, no. 42095/98, §§ 41-43, ECHR 2000-X; and Butkevičius v. Lithuania, no. 48297/99, § 49, ECHR 2002-II).*

*The freedom of expression, guaranteed by Article 10 of the Convention, includes the freedom to receive and impart information. Article 6 § 2 cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary*





*if the presumption of innocence is to be respected (see *Allenet de Ribemont*, cited above, § 38, and *Karakaş and Yeşilirmak v. Turkey*, no. 43925/985, § 50, 28 June 2005).*

*The Court has considered that in a democratic society, it is inevitable that information is imparted when a serious charge of misconduct in office is brought (see *Butkevičius*, cited above, § 50).*

*A fundamental distinction must be made between a statements that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question. The Court has consistently emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence (see *Daktaras*, cited above, § 41; *Böhmer v. Germany*, no. 37568/97, §§ 54 and 56, 3 October 2002; and *Nešřák v. Slovakia*, no. 65559/01, §§ 88 and 89, 27 February 2007). It has also asserted the importance of respect for the presumption of innocence during press conferences by State officials (see *Butkevičius*, cited above, §§ 50-52; *Lavents v. Latvia*, no. 58442/00, § 122, 28 November 2002; and *Y.B. and Others v. Turkey*, nos. 48173/99 and 48319/99, §§ 49-51, 28 October 2004). Nevertheless, whether a statement of a public official is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made (see *Adolf v. Austria*, 26 March 1982, §§ 36-41, Series A no. 49). In any event, the opinions expressed cannot amount to declarations by a public official of the applicant's guilt which would encourage the public to believe him or her guilty and prejudge the assessment of the facts by the competent judicial authority (see *Butkevičius*, cited above, § 53). (...)"*

*"(b) Application of these principles in the present case*

*The Court acknowledges that the applicant held an important position in a State agency dealing with privatisation of all State-owned property and that his activities were of great interest to the general public. At the time of the alleged offence, the highest State officials, including in particular the State Attorney and the Head of the Police, were required to keep the public informed of the alleged offence and*



*the ensuing criminal proceedings. However, this duty to inform the public cannot justify all possible choices of words, but has to be carried out with a view to respecting the right of the suspects to be presumed innocent.*

*The Court is also mindful that the statements at issue were made only a day (in the case of the Head of the Police and the Attorney General) and four days (in the other cases) following the applicant's arrest. However, it was particularly important at this initial stage, even before a criminal case had been brought against the applicant, not to make any public allegations which could have been interpreted as confirming his guilt in the opinion of certain important public officials (see, mutatis mutandis, Butkevičius, cited above, § 51).*

*The Court notes that in the present case, the impugned statements were made by the State Attorney, the Head of the Police, the Prime Minister and the State President in a context independent of the criminal proceedings themselves. The Court shall now proceed by examining separately each of the statements by the persons concerned.*

*The Court notes that the Head of Police was quoted as having said that "just to ... allow you into the game, into making deals for purchasing CFP property, a sum of 50,000 euros was required in payment", a statement which referred to the already arrested vice-presidents of the CPF. The State Attorney was quoted as having said that "the suspects were ravenously greedy. Just for initiating any conversation about business they asked for 50,000 euros."*

*The Court cannot accept the Government's arguments that the applicant's name had not been mentioned and that at the time, the identity of suspects had not been known. The Court notes that the applicant was arrested on suspicion of having taken bribes in his capacity as one of the vice-presidents of the CPF on 16 June 2007 and that therefore the impugned statements by the Head of the Police and the State Attorney, published on 18 June 2007 in an article concerning the alleged criminal activities of highly positioned employees of the CPF, clearly referred, inter alia, to the applicant.*



*The statements of the Head of the Police and the State Attorney were not limited to describing the status of the pending proceedings or a “state of suspicion” against the applicant but were presented as an established fact, without any reservation as to whether the act of taking bribes had actually been committed by the suspects, one of whom was the applicant.*

*As to the statement by the Prime Minister, the Court notes that he asserted that there had been organized crime in the CPF and while he conceded that the three vice presidents might have not participated in each project, he also implied that they had been involved in the organised crime. The Court notes that it is clear that this statement also concerned the applicant since he was one of the three vice-presidents of the CPF and the impugned statements referred to the criminal activity in connection with which the applicant had been arrested.*

*As regards the impugned statement of President Mesić, the Court notes that he named the CPF as the centre of corruption and implied that the three tenors had been a part of it. Although he used metaphorical terms, it is clear that the expression “three tenors” referred to the three arrested vice-presidents of the CPF, one of whom was the applicant. The Court considers that the wording of the impugned statement goes further than just saying that the applicant was a suspect as regards charges of corruption. The expressions used put a certain label on the three vice-presidents of the CFP, implying that they had been part of the corruption in the CPF.*

*The Court considers that those statements by public officials amounted to a declaration of the applicant’s guilt and prejudged the assessment of the facts by the competent judicial authority. Given that the officials in question held high positions, they should have exercised particular caution in their choice of words for describing pending criminal proceedings against the applicant. However, having regard to the contents of their statements as outlined above, the Court finds that their statements could not but have encouraged the public to believe the applicant guilty before he had been proved guilty according to law.*

*The above findings are also applicable to the instant case. The Constitutional Court finds that the statements quoted in point 12*



*of the statement of reasons of this decision violated, with reference to the applicant of the constitutional complaint, fair proceedings in the case and “undermined public confidence in the judiciary” (see the European Court in the case of Times Newspaper, § 63). That is to say, the quoted statements of the high-ranking officials of the Republic of Croatia directly refer to the applicant of the constitutional complaint and they undoubtedly touch on the applicant’s guilt in the proceedings which had at that time just begun, and also in the further course of the criminal proceedings.*

*In the opinion of the Constitutional Court, in the quoted statements, in their usual context, the above high-ranking officials of the Republic of Croatia influenced the impartiality of the bodies of criminal proceedings with respect to the applicant. Therefore, the applicant’s guarantee of the presumption of innocence under Article 28 of the Constitution and Article 6 para. 2 of the Convention was violated.”*

**U-III-4149/2014 (SANADER) – NO VIOLATION: whether the parallel arbitration proceedings could have influenced the criminal court’s finding of the applicant’s guilt**

*Facts and complaints*

The applicant was found guilty and sentenced by a final judgment for allegedly having committed a criminal offence against official duty by accepting a bribe, described and punishable under Article 347(1) CC/1997.

According to the criminal court’s judgment (which was quashed by this decision of the Constitutional Court), in early 2008 the applicant, in the capacity of a prime minister, and Z. T. H., chairman of the board of the Hungarian oil company MOL, agreed in Zagreb that for the amount of EUR 10 million (EUR 10,000,000.00) he would use his best efforts to bring about the conclusion of an Amendment to the (2003) Shareholders’ Agreement relating to INA, by having the Republic of Croatia ensure for MOL a majority interest in INA and conclude an agreement on the exclusion of gas operation from INA in the part causing losses to INA, which would be assumed in full by the Republic of Croatia. The criminal court held that the Government thus adopted a decision against the interests of the Republic of Croatia, because



the concluded contracts resulted in the dependence of a company of special interest for the Republic of Croatia on a foreign legal person.

In parallel to the criminal proceedings, the State Attorney's Office, representing the State, instituted arbitration proceedings for the annulment of the shareholders' agreement in question. In his constitutional complaint, among many other alleged violation of his constitutional rights, the applicant also complained under Article 28 of the Constitution that the parallel arbitration proceedings and the possible outcome of it have prejudiced the criminal court's finding of the applicant's guilt.

### *Findings and assessment of the Constitutional Court*

In terms of the arbitration procedure in the PCA Case No. 2014-15 before the Geneva Arbitral Tribunal further to the complaint filed by the Republic of Croatia against MOL of 17 January 2014, the data which were provided to the Constitutional Court by the competent ministry show that the statement of claim of the Republic of Croatia is directed at declaring null and void the Main Contract on Gas Operation of 30 January 2009 and the First Amendment to the Shareholders' Agreement INA-MOL of 30 January 2009, which is not the subject matter of the judicial criminal proceeding against the applicant or of the proceedings before the Constitutional Court.

The subject matter of this decision of the Constitutional Court is not a review of the conformity of the concluded contracts (the contract between INA and MOL of 17 July 2003, the First Amendment to the Shareholders' Agreement INA-MOL of 30 January 2009, the Main Agreement on Gas Operation of 30 January 2009, and the First Amendment to the Main Agreement on Gas Operation of 16 December 2009) with the applicable Croatian laws and other legislation, rules and benchmarks of the European Union and the European standards in the field of national and international commercial law and other related legal fields.

Decisions by national courts, including those by the Constitutional Court, cannot in general have an impact on arbitration proceedings initiated or conducted by the Republic of Croatia in the field of international commercial law. It is a general principle that arbitral



tribunals are not bound by final judgments of national courts, or decisions issued by national constitutional courts, because such judgments and decisions are regarded as facts by arbitral tribunals. Such tribunals examine matters in the case before them on their own.

For the same reasons and *vice versa*, it cannot be established that the parallel arbitration proceedings could have influenced the criminal court's finding of the applicant's guilt. The Constitutional Court cannot speculate as to the possible future effects that the forthcoming judgment to be delivered in arbitration proceedings could produce on the criminal proceedings to be resumed after the Constitutional Court has quashed the impugned conviction for other reasons. It follows that the applicant's complaints thereto are of speculative nature only.

It must be emphasized that, after the Constitutional Court's decision to quash the impugned criminal courts' decision due to other violations of the Constitution, the applicant's case is still pending before the criminal courts. The above presented analysis of the part of the decision where the Constitutional Court has not found a violation of the applicant's right to be presumed innocent, and which has become final to that extent, does not prejudice the outcome of the proceedings before ordinary courts or the proceedings that the applicant may initiate subsequently before the Constitutional Court, nor does it proclaim on the finding of the applicant's guilt in any way.

**No. U-III-1831/2002 (M.Ć.) - NO VIOLATION: whether the fact that the concurrent criminal proceedings were discontinued precludes the Ministry of Interior from terminating the applicant's civil service on the grounds and circumstances for which the applicant was previously charged**

*Facts and complaints:*

The applicant submitted a constitutional complaint against the judgment of the Administrative Court of the Republic of Croatia upholding the decision of the Ministry of Interior to terminate the applicant's civil service starting from December 12<sup>th</sup> 1995. The applicant was employed as a civil servant in the Ministry of Interior, Special Police Unit. According to Art. 75a. para. 1. of the Internal Affairs Act, his civil service was terminated by the decision of the Ministry of Interior of



December 8<sup>th</sup> 1995. The latter was, however, quashed by the judgment of the Administrative Court of July 1999 due to the insufficient reasons as to the termination of civil service.

Art. 75a. para. 1. of the Internal Affairs Act reads as follows:

*“The civil service of an employee, for whom his superior has established that he had not performed the service with due diligence, or had disabled the Ministry of Interior in performing its tasks by violating the laws on functioning of the Ministry of Interior, shall be terminated.”*

In December 1999, the Ministry of Interior rendered a new decision in which it was established that there had been a detention order against the applicant and that he had been charged on a reasonable suspicion of committing a criminal offense of espionage according to Art. 111. of the Basic Penal Code committed during the “organized military insurgency” against the Republic of Croatia. However, due to the Amnesty Act (General Pardon Act 1996.), the Military Court in Zagreb discontinued the criminal proceedings against the applicant by October 1996.

According to the interpretation of the Ministry of Interior, Art. 75a. of the Internal Affairs Act does not require a criminal liability of the civil servant in question to be finally determined in criminal proceedings as a prerequisite for termination of civil service. For Art. 75a. of the Internal Affairs Act to come into play, it will suffice if the lack of due diligence or violation of laws on functioning of the Ministry of Interior was determined in disciplinary proceedings, regardless of the fact that the criminal proceedings were later discontinued due to the Amnesty Act.

In its new judgment, the Administrative Court concluded that the Ministry of Interior has elaborated its decision according to the legal opinion the Court had presented in its earlier judgment quashing the previous decision on termination of civil service.

The applicant complained that the decision of the Ministry of Interior violated his right to be presumed innocent since he was pardoned for the criminal offense in question. Thus, the Ministry of Interior could not have relied on criminal charges that were brought against him as



a ground for termination of civil service, especially since the criminal proceedings were discontinued and his criminal liability was not established by a final court decision.

He also alleged that the mere suspicion that he has committed a criminal offence does not mean that the legal prerequisites for termination of civil service, provided for in Art. 75a. of the Interior Affairs Act, were fulfilled.

### *The Constitutional Court's assessment*

In the proceedings instituted pursuant to Article 62 of the Constitutional Act on the Constitutional Court, the Constitutional Court, in principle, does not deal with errors in facts, nor does it assess the evidence. For these reasons, the Court's assessment on whether there was a violation of the rights guaranteed by the Constitution is, in principle, based on the facts determined in the course of proceedings conducted by the bodies which have deliberated the impugned decision.

The Constitutional Court notes that the impugned decision on termination of civil service was not based on an allegation that the applicant had committed the criminal offence for which he was charged, but on the mere fact that he was detained by a court order and that he was prosecuted for espionage committed during "organized military insurgency".

Therefore, the Constitutional Court points out that Article 75a. of the Internal Affairs Act has a distinctive preventive function which must take into account a specific nature of the civil service in internal affairs. Therefore, it cannot be concluded that the Ministry of Interior and the Administrative Court have erred arbitrarily in their assessment of behaviour of the civil servant in question when they have concluded that the demonstrated lack of due diligence on behalf of the applicant violated the laws designed to enable the proper functioning of the Ministry of Interior within the meaning of Article 75a. of the Internal Affairs Act.

The Constitutional Court was therefore satisfied that the Ministry of Interior had established all the facts relevant for termination of the civil service according to the law. The applicant had an access to a





court competent to review the impugned decision of the Ministry. The court proceedings were accompanied by the procedural requirements necessary for the applicant to argue the unlawfulness of the impugned decision and thus represented an efficient legal remedy for review of lawfulness.

#### IV. PRESUMPTION OF INNOCENCE IN DETENTION PROCEEDINGS

**U-III-3585/2014 (B. B.) AND U-III-1566/2016 (Biočić et al.):  
Implementation of the ECtHR's judgment in the case of *Perica Oreb v. Croatia*, No. 20824/09**

##### *ECtHR's case law*

In the *Perica Oreb* case, the ECtHR found a violation of Article 6.2 of the Convention in the detention proceedings where the applicant's detention was ordered and later on continued on the ground of risk of reoffending.

The applicant argued that the domestic courts had violated the presumption of innocence because in their decisions ordering and extending his detention, they had repeatedly stated that the defendants had engaged in trafficking in illegal drugs, showing persistence and resolve in committing the criminal offence in question. Furthermore, the national courts had repeatedly stated that there was a risk of reoffending because he had already been convicted of the same offences. However, there was no final conviction against him. They had also considered the fact that two other sets of criminal proceedings were pending against him as a relevant factor in assessing the risk of his reoffending, thus implying that he was guilty of the offences that were the subject of those two sets of proceedings.

The ECtHR reiterated that the presumption of innocence under Article 6 will be violated if a judicial decision or, indeed, a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proved according to law. It suffices, in the absence of a formal finding, that there is some reasoning suggesting that the court or the official in question regards the accused as guilty, while a premature expression by the tribunal itself of such an opinion will inevitably run afoul of the said presumption.



The ECtHR further argued that only a formal finding of a previous crime, that is, a final conviction, may be taken as a reason for ordering pre-trial detention on the ground that someone has previously been convicted. To consider the mere fact that there are other, separate and still pending, criminal proceedings against the person concerned as a conviction would unavoidably imply that he or she was guilty of the offences that were the subject of those proceedings.

This is exactly what happened in the present case where the national courts repeatedly stated that the applicant had already been convicted of similar offences even though his criminal record clearly indicated that he had not been convicted of any offences. Furthermore, they also considered the fact that parallel criminal proceedings were pending against him as a relevant factor in assessing the risk of his reoffending and considered that that fact showed a lack of conformity of his lifestyle with the laws, thus implying that he was guilty of the offences that were the subject of those proceedings. They thus, in the ECtHR's opinion, repeatedly breached the applicant's right to be presumed innocent in the said separate proceedings pending concurrently.

#### *The Constitutional Court's case law*

According to the ECtHR's reasoning in the *Perica Oreb* case, the Constitutional Court further found a violation of the right to be presumed innocent in the case of *B. B.*, where the order for continuing the applicant's detention on the ground of risk of reoffending was based on the criminal court's finding of an ongoing investigation against the applicant in the parallel criminal proceedings, and in the case of *Biočić* where the detention order was based on the fact that the applicant was indicted for a criminal offence in the parallel proceedings, but was not finally convicted.

#### *The CJEU's case law*

In the case of *Emil Milev* (C-310/18 PPU) the Specialised Criminal Court, Bulgaria (hereinafter: the referring court), had initiated a preliminary reference procedure before the CJEU and raised several interesting questions with respect to the procedural guarantees in the process of determining the reasonable suspicion in detention proceedings, in light of the Directive on presumption of innocence.



It argued that decisions as to whether pre-trial detention should continue constitute ‘preliminary decisions of a procedural nature’, within the meaning of the second sentence of Article 4(1) of Directive on presumption of innocence, but that they also display certain characteristics of decisions ‘on guilt’, referred to in the first sentence of that provision. Accordingly, the referring court is also uncertain as to the scope of its review of the principal incriminating evidence and the extent to which it must give a clear and specific reply to the arguments put forward by the accused, in the light of aspects of the rights of the defense referred to in Article 10 of Directive 2016/343 and Article 47(1) of the Charter. Last, it seeks to ascertain whether the fact that recital 16 of that directive states that a preliminary decision of a procedural nature ‘could contain reference’ to incriminating evidence means that that evidence may be the subject of adversarial argument before the court or that the latter may only mention that evidence.

Therefore, the referring court submitted the following questions for a preliminary ruling:

*“(1) Is national case-law according to which the continuation of a coercive measure of “pre-trial detention” (four months after the accused’s arrest) is subject to the existence of “reasonable grounds”, understood as a mere “prima facie” finding that the accused may have committed the criminal offence in question, compatible with Article 3, the second sentence of Article 4(1), Article 10, the fourth and fifth sentences of recital 16 and recital 48 of Directive 2016/343 and with Articles 47 and 48 of the Charter?*

*Or, if it is not, is national case-law according to which the term “reasonable grounds” means a strong likelihood that the accused committed the criminal offence in question compatible with the abovementioned provisions?*

*(2) Is national case-law according to which the court determining an application to vary a coercive measure of “pre-trial detention” that has already been adopted is required to state the reasons for its decision without comparing the incriminating and exculpatory evidence, even if the accused’s lawyer has submitted arguments to that effect — the only reason for that restriction being that the judge must preserve his impartiality in case that case should be assigned to*



*him for the purposes of the substantive examination —, compatible with the second sentence of Article 4(1), Article 10, the fourth and fifth sentences of recital 16 and recital 48 of Directive 2016/343 and with Article 47 of the Charter?*

*Or, if it is not, is national case-law according to which the court is to carry out a more detailed and specific examination of the evidence and to give a clear answer to the arguments put forward by the accused's lawyer, even if it thus takes the risk that it will be unable to examine the case or deliver a final decision on guilt if the case is assigned to it for the purposes of the substantive examination, — which implies that another judge will examine the substance of the case — compatible with the abovementioned provisions?''.*

In his opinion of August 7, 2018, the Advocate General Wathelet recommended the CJEU to apply the ECtHR's standards on presumption of innocent in detention cases, as well as the principles developed under Article 5 of the Convention, therefore arguing that the Directive on presumption of innocence is applicable in the present case and should be interpreted, according to Article 52 of the Charter, in light of the standards set by the ECtHR.

However, in its judgment of September 19, 2018, the CJEU departed from the Advocate General's opinion, finding that the Directive on presumption of innocence is not applicable to detention proceedings conducted by Member States' national courts. It advanced on the argument that the Directive on presumption of innocence confines itself, in accordance with recital 10 thereof, to establishing common minimum rules on the protection of procedural rights of suspects and accused persons, in order to strengthen the trust of Member States in each other's criminal justice systems and thus to facilitate mutual recognition of decisions in criminal matters. Accordingly, in the light of the minimal degree of harmonization pursued therein, the Directive on presumption of innocence cannot be interpreted as being a complete and exhaustive instrument intended to lay down all the conditions for the adoption of decisions on pre-trial detention.

The latter findings of the CJEU, however, are debatable due to Article 2 of the Directive which explicitly pronounces that the latter is applicable at all stages of the criminal proceedings, from the moment



when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive.

According to the settled case law of the ECtHR, such as the aforementioned *Perica Oreb* case, the presumption of innocence is applicable to detention proceedings due to the autonomous concept of “a charge” inherent to the Convention. It seems, though, that the CJEU does not employ with such a concept in its case law and thus does not assume detention proceedings to be criminal proceedings within the meaning of Article 2 of the Directive on presumption of innocence.

Since the right to be presumed innocent is also a fundamental human right guaranteed by both the Convention and the Charter, the *Emil Milev* case has raised a serious question whether the standard of protection afforded to the right to be presumed innocent by the case law of the CJEU is equivalent to the standard set by the ECtHR with respect to the rebuttable presumption of equivalent protection established in the ECtHR’s *Bosphorus* case law.<sup>5</sup>

Therefore, the Constitutional Court, at least for now, is precluded from finding EU law to be applicable in detention proceedings, but remains bound by the applicability of Article 6.2 of the Convention in detention proceedings as it was interpreted in the *Perica Oreb* case.

#### V. THE IN DUBIO PRO REO PRINCIPLE AND THE PRESUMPTION OF INNOCENCE AFTER THE CASE OF *AJDARIĆ V. CROATIA* (NO. 20883/09)

In the *Ajdarić* case, the applicant complained that he was convicted of three counts of murder solely on the basis of hearsay evidence of a witness suffering from emotional instability and histrionic personality disorder and that the conviction was completely arbitrary and ran contrary to the guarantees of a fair trial, the right to be presumed innocent and the principle of the equality of arms.

The ECtHR noted that the applicant was convicted of three counts of murder motivated by personal gain and sentenced to forty years’

<sup>5</sup> See, for example, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, No. 45036/98.



imprisonment solely on the basis of evidence given by S.Š. The national courts expressly stated that there had been no other evidence implicating the applicant in the murder of three persons at issue. The ECtHR further noted that the credibility of the latter witness was seriously impaired due to the psychiatric examination establishing that his personality had emotionally unstable and histrionic characteristics and therefore compulsory psychiatric treatment of the witness was recommended. Furthermore, the ECtHR pointed out that, as an undisputed fact, the witness in question altered his testimony several times in the course of proceedings, and the testimonies given were contradictory. The witness also had a personal dispute with the applicant and was himself involved in the circumstances for which the applicant was charged and eventually convicted.

The ECtHR then approached the applicant's case from the Article 6.1 of the Convention, implementing its general principles on the right to a reasoned decision in criminal proceedings. Given its assessment that the national courts did not address the issues raised by the applicant as to the credibility of the witness in question and discrepancies in his testimonies, the ECtHR found that the domestic courts' decisions were not adequately reasoned. It therefore concluded that the national courts did not observe the basic requirement of criminal justice that the prosecution has to prove its case beyond reasonable doubt and were not in accordance with one of the fundamental principles of criminal law, namely, *in dubio pro reo*.

Even though the *Ajdarić* case was mentioned in the ECtHR's "Guide on Article 6 (criminal limb)", as an example of finding a violation of the right to be presumed innocent<sup>6</sup>, in the present case the Chamber found no reason to examine the application under Article 6.2 of the Convention, as it had explicitly pointed out. Furthermore, from the reasoning above, we cannot conclude that the *in dubio pro reo* principle was found to be a general legal principle protected under the Convention, such as the rule of law, for example. Most likely because the latter would lead the ECtHR to assessing the evidence on its own motion, thus overstepping the boundaries of the principle of

<sup>6</sup> See p. 62, available at [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_criminal\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf).



subsidiarity. Therefore, in the circumstances of the present case, the ECtHR refrained its review on observing whether the national courts have observed their duty to provide sufficient and relevant reasons for convicting the applicant.

*That concludes my presentation.*

*PRESUMPTION OF INNOCENCE*

*Emile ESSOMBE*

*CONSTITUTIONAL COUNCIL OF  
CAMEROON*







## PRESUMPTION OF INNOCENCE

Emile ESSOMBE\*

### I. INTRODUCTION

Gérard CORNU,<sup>1</sup> a French jurist (1926-2007), defines “innocence” as the absence of guilt. By deduction, presumption of innocence is the legal fiction which holds that a person suspected to have committed an offence is a mere addressee of the said allegations, until the Prosecution proves its case beyond (reasonable) doubt and, a Court of Law, after due process, declares the accused guilty. In that regard, the suspicion leveled does not automatically make the accused guilty, and the (rebuttable) presumption that he has not committed the offence, does not *ne varietur* make him as well “innocent” *per se*.

Another Scholar<sup>2</sup> with the Common Law approach considers presumption of innocence to be a “*rule of proof and a shield against punishment*”, maintaining the accused person safe from arbitrary sentences.

From the Roman Law perspective, one may say that presumption of innocence focuses more on the burden of proof, lying on the Prosecution, while under the Common Law, the same is a “body armor” against abuses from the power.

Apparently contradictory, these definitions are complementary, as presumption of innocence, shield against wanton punishments or a strict ritual for proof remains an undisputable and a vital safeguard to human rights in a criminal lawsuit.

There is a school of thought which attributes presumption of innocence to the “*genuine doubt*” that a “*good judge*” shall express

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1 *Vocabulaire juridique*, PUF, 7<sup>e</sup> édition, 2005, P483.

2 François QUINTARD-MORENAS, *The presumption of innocence in the French and Anglo-American Legal Traditions*, *The American Journal of Comparative Law*, 2010, p109.



to avoid arriving at a rushed, unsubstantiated and embarrassing decision. In that vein, following the reasoning of MERLIN,<sup>3</sup> BERGEL<sup>4</sup> has asserted that at the end of a trial, “*there shall be no doubt again*”, and in case the same subsists, it must be interpreted in favor of the accused, essence and genesis of the Latin maxim *in dubio pro reo*.

Nowadays, most Constitutions have, at least in their Preambles, adopted the core rules which form the Human rights “package” relating to the Rule of Law and a fair and speedy trial whose main aim is to oust tyranny from the management of the People’s rights in the society in general and before the Courts in particular.

The case of Cameroon on the issue is very peculiar, due to its colonial history past. Cameroon was proclaimed a German Protectorate on July, 14 1884. After the First World War, Germany was defeated by Britain and France who agreed to partition the territory into two. The partition was recognized by the League of Nations which conferred a mandate on Britain and France to administer Cameroon.

With the birth of the United Nations in 1946, the two parts became trust territories. Article 9 of the Mandate Agreement under the League of Nations, reenacted in articles 4 and 5 of the Trusteeship Agreement under the United Nations with Britain and France respectively, authorized the translocation of foreign laws into Cameroon.

Britain had already colonized nearby Nigeria and through that connection, translocated the English common Law to her own territory – British Cameroons. Thus, English laws applicable in Nigeria were merely extended to British Cameroons by virtue of Sections 10, 11 and 15 of the Southern Cameroons High Court Law of 1955.

France on its part had instituted French Civil Law system in its own territory by virtue of articles 1 and 2 of the French decree of 16<sup>th</sup> April 1924.

On the 1<sup>st</sup> January 1960, the French administered territory gained independence and on October 1, 1961 the British Trust Territory of Southern Cameroons reunified with “La République du Cameroun”

3 M. MERLIN, *Répertoire Universel et raisonné de jurisprudence*, 4<sup>e</sup> édition, Paris, 1812, T.4, p.385.

4 Jean-Luc BERGEL, *Méthodologie juridique*, PUF, 2001, coll. Thémis droit privé, p.404.



to form the Federal Republic of Cameroon and the two territories respectively became the Federal States of West and East Cameroon.

By 1964, law commissions were set up and their work culminated only with the enactment of Law N° 65/LF/24 of 12<sup>th</sup> November 1965 and Law N° 67/LF/1 of 12<sup>th</sup> June 1967 on the Penal Code.

Criminal procedure thus relied only on foreign laws. As a result, the “Code d’Instruction Criminelle” derived from the French ordinance of 17<sup>th</sup> February 1938 and its subsequent amendments were applicable in the former French Cameroon while the Criminal Procedure Ordinance Chapter 43 of the revised editions of the laws of the Federal Republic of Nigeria 1958 was applicable in the former British Southern Cameroons.

This made Cameroon a country with a bi-jural system of Justice where the two Systems of Law mentioned above cohabit<sup>5</sup> in civil and commercial matters.<sup>6</sup> In criminal matters, the Common Law and the Civil Law have merged into a *sui generis* System of Law,<sup>7</sup> which is a combination of both systems, with the predominance of the Anglo-Saxon legal tradition.<sup>8</sup>

If presumption of innocence guarantees to the suspect, the defendant and the accused persons procedural rights whose violations are sanctioned by the nullification of the investigation or the trial as the

5 In the North West and South West Regions of the country, formerly under British Administration, the Common Law applies, while the Continental or Civil Law is applicable in the rest of the Regions, formerly under French Administration. It must be recalled that prior to the First World War, Kamerun as it was then called, was a German colony, entrusted to the Allies by the League of Nations (ancestor to the United Nations Organization) after Germany was defeated. Although two Trustee Territories eligible to autonomy, Cameroon (under British and French Administrations) was administered like a colony. The “colonial masters” did “import” their domestic laws and regulations.

6 It should be noted that for the purely business matters, a supranational legislation is applicable in the whole country. By virtue of the Treaty of Port-Louis of the 17 October 1993, some African countries (Benin, Burkina Faso, Cameroon, Chad, Central Africa Republic, Comoros, Congo, Equatorial Guinea, Gabon, Guinea Bissau, Ivory Coast, Mali, Niger, Senegal, Togo), having French Language in common (except Guinea Bissau, a former Portuguese colony), did institute the Organization for the Harmonization of Business Law in Africa. Better known under the French acronym OHADA, the Organization has over the years, produced Uniform Acts, with precedence over domestic Laws, in Commercial Companies and Economic Interest Groups, Accounts of Enterprises, Arbitration, General Commercial Law, Contract on the Carriage of Goods by Road, Simplified Recovery Procedures and Enforcement Measures, Securities Law and Collective Proceedings for Clearing of Debts. This treaty has been amended at Quebec in Canada on the 17<sup>th</sup> October 2008.

7 Law n° 2005/007 of 27th July 2005 on the Criminal Procedure Code.

8 The accusatorial system, preaching « equal weapons” between the accused and the prosecution, the presumption of innocence, the right to bail etc... has been adopted, to the detriment of the inquisitorial system, which was inherited from France.



case may be,<sup>9</sup> it is also incumbent on the Legal Department to establish the guilt of the accused.<sup>10</sup>

*A contrario*, an accused who pleads any fact in justification of an offence or to establish his criminal irresponsibility, shall have the burden of proving it.<sup>11</sup>

Nonetheless, the suspect who is presumed innocent can be detained while awaiting trial, granted bail upon fulfillment of strict conditions, re-arrested when need arises or, as the case may be, compelled within specific conditions, to undergo a DNA test, an identification parade etc...

The question therefore remains how to maintain the scale of justice balanced, in a situation whereby coercive measures such as police or remand in custody may be decided by the Legal Department, reputed to be “*one of the parties*” during the various stages of the criminal justice chain. The worry is more accurate in the accusatorial system where the “*equality of weapons*” is a sacro-saint principle.

How are these restrictions of the freedom of movement, with emphasis on preventive detention, compatible with the constitutional right to be presumed innocent until the guilt is unambiguously established in Court?

An attempt to provide an answer to these pre-occupations shall call for an analysis of the rationale of the principle of the presumption of innocence on the one hand (I) and its limitations in practice (II) on the other hand.

## **II. THE PRINCIPLE OF PRESUMPTION OF INNOCENCE**

The principle of presumption of innocence is enshrined both in supranational conventions and the domestic Laws.

### **A. International Instruments**

A proper understanding of this principle requires a distinction between the instruments adopted under the United Nations Organization (A) and Regional Covenants adopted in Africa (B).

<sup>9</sup> See sections 3, 5, 100, 116 of the Criminal Procedure Code (CPC).

<sup>10</sup> See sections 8, 128 and 307 of the same code.

<sup>11</sup> See section 309 CPC.



## 1. Instruments adopted under the United Nations (UN)

After the devastating consequences of the First and Second World Wars, the United Nations Organization<sup>12</sup> was created, with the mission of “*saving succeeding generations from the scourge of war...*” and to “*reaffirm faith in the fundamental human rights, in the dignity and worth of the human person...*” and finally “*to promote social progress and better standards of life in larger freedom*”.<sup>13</sup>

On the basis of this well spelt out agenda and in connection to the dignity and more freedom for mankind, the UN did adopt the Universal Declaration of Human Rights<sup>14</sup> (section 11(1)<sup>15</sup> and the International Covenant on Civil and Political Rights<sup>16</sup> (section 14(2)).<sup>17</sup>

These two provisions relating to presumption of innocence specifically attributing the “*onus probandi*” of the offences allegedly committed to the “*Accuser*”, if made universal, have a long historical background. Known in Babylon,<sup>18</sup> Egypt,<sup>19</sup> under the Constitution of Emperor Antonin,<sup>20</sup> the Constitutions of Emperors Gratian, Valentinian and Theodose,<sup>21</sup> in England<sup>22</sup> and most recently in America<sup>23</sup> and in France,<sup>24</sup> the initial essence of presumption of innocence has been to put an end to the excesses noted in the past. In fact, especially during the Antiquity, between the public clamor leading to the arrest of an alleged offender and his presentation before the “*judge*”, when the

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12 The treaty creating this organization was signed in San Francisco (USA) on the 26th June 1945 and entered into force on the 24 October 1945.

13 See the Preamble of the UN Charter.

14 Resolution 217 A (II) of 10th December 1948.

15 “*Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to a public trial at which he has all the guarantees necessary for his defense*”

16 Resolution A/RES/2200 A (XXI) of 16<sup>th</sup> December 1966.

17 “*Everyone charged with a criminal offence shall have the right to be presumed guilty until proved guilty according to law*”.

18 Code of Hammurabi (1792-1750 B.C).

19 A Decree signed by King Ptolemy (118 B.C) prohibited the arrest of persons for debts and instructed civil servants to escort offenders before appointed judges, who could sentence them without a trial.

20 Justinian Code, 212.

21 Whereby all accusers could only bring an accusation sustained by reliable witnesses.

22 The Magna Carta of 1215 and the Prison Act of 1877.

23 Section 8 of the Declaration of Right of the State of Virginia of 12 June 1776 and, subsequently, the Constitution of the United States of America of the 17<sup>th</sup> September 1787, specifically the 6<sup>th</sup> Amendment adopted in 1791).

24 The Declaration of Rights of 1789.



suspect was not stoned to death, those who coincidentally reached the competent authority, at best saw the “sentence” of the crowd confirmed. Coupled with the immediate execution of the penalties pronounced, rarely other than the death sentence, the trial in which no decent treatment was given the accused was a masquerade. Between the accusation and the confirmation of the charge by a sentence, the person concerned actually moves along with his “guilt”. Presumed guilty, the offender had the herculean task of proving his innocence. This state of affairs was more accurate when people in authority or the Sovereign himself was a victim.

The provisions of the Declaration and the Covenant mentioned supra, signed and ratified by most countries worldwide, although receiving various interpretations and implementations, remain an indispensable remedy to arbitrary and baseless accusations.

## 2. African Regional Conventions

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights have been received as supranational enactments in many African countries<sup>25</sup> as part of applicable laws within the territory. However, due to their ethnical diversities and the corresponding cultural specificities, the African Union did adopt its own instruments, with implications on Human as a whole and the presumption of innocence in particular.

The African Charter on Human and People’s Rights<sup>26</sup> (ACHPR) and the African Charter on the Rights and Welfare of the Child<sup>27</sup> (ACRWC) are the two main regional instruments bearing on the topic in issue.

Under section 7 of the ACHPR, *“every individual shall have the right to have his cause heard. This comprises... (b) the right to be presumed innocent until proved guilty by a competent court or tribunal...”*

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25 In Cameroon for instance, it is stated in the preamble of the Constitutional Law n° 96/6 of the 18<sup>th</sup> January 1996 as amended by Law n° 2008/1 of 14<sup>th</sup> April 2008, that the People affirm their “attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations...”.

26 Adopted in Nairobi (Kenya) on the 27<sup>th</sup> June 1981.

27 Adopted in July 1990.



Section 17(2)(i) of the ACRWC) states that every child<sup>28</sup> accused of having infringed penal laws committed “shall be presumed innocent until duly recognized guilty”.

These provisions are of two important interests.

On the one hand, although they look superfluous or redundant with regard to the instruments adopted by the United Nations and integrated in most African Countries as part of their domestic regulations, there was a need to re-iterate the same with emphasis. Some of the UN treaties relating to human rights, apart from lacking sufficient dissemination among Judicial Actors, have also been handled with suspicion especially in the 1990s, when the liberal wind of “democratization” blew and disturbed the “peace” enjoyed by some regimes styled non-democratic.

On the other hand, previewing a specific text on the presumption of innocence for a child is necessary in an environment where armed conflicts involving children as actors or victims are very common, and the juvenile justice system is likely to take proper charge, if not embryonic, at times non-existent, a situation rendering the implementation of domestic laws questionable.

## **B. National Instruments**

In Cameroon, in line with the hierarchy of norms as developed by Hans KELSEN,<sup>29</sup> the Constitution (1) is the main source of rights and obligations and, for the procedural criminal law, the Criminal Procedure Code (2).

### **1. The Constitution**

In the preamble of the Constitution of the 18<sup>th</sup> January 1996 as amended, the People of Cameroon “*declare that the human being, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights*” and “*every accused person is presumed innocent until found guilty during a trial conducted in strict compliance with the rights of defense*”.

<sup>28</sup> Section 2 defines a child to be “*every human being below the age of 18 years*”.

<sup>29</sup> Charles EISENMANN, *Théorie pure du droit*, L.G.D.J., 2010, p267.





To exclude any doubt or ambiguity as to the value and the applicability of the rights listed under the preamble, section 65 of the same Law states that *“the Preamble shall be part and parcel of this Constitution”*.

The question is whether or not, a litigant whose constitutional right<sup>30</sup> to presumption of innocence has been tampered with, could have his case heard and determined by the Constitutional Council which, under section 46 of the Fundamental Law, *“shall have jurisdiction in matters pertaining to the Constitution”*.

The answer to this question is no. The mode of institution of actions before this High Jurisdiction does not give room for such litigations. Under section 47(2) of the same law, matters may be referred to the Constitutional Council by the President of the Republic, the President of the National Assembly, the President of the Senate, one-third of the Members of the National Assembly or the Senate and, whenever the interests of their Regions are at stake, the Presidents of Regional Councils.

Apart from settling disputes arising during the parliamentary, presidential elections and the regularity of referendum operations, the Constitutional Council is the *“organ regulating the functioning of the institutions”*<sup>31</sup> and as such, is not opened to private lawsuits.

One is founded to ask if the potential ground of unconstitutionality of a measure violating the presumption of innocence could be challenged before a trial court. This other stance is doubtful, because the courts with original jurisdiction lack *locus standi* to examine the constitutionality of laws and by extension, their potential wrongful application. For now, the exception or objection of unconstitutionality is not part of the Cameroonian legal system.

Nonetheless, the courts with original jurisdiction remain the main pillars of the judicial structure charged with the protection of the rights of the defense in general, and the presumption of innocence in particular. In that regard, although they cannot adjudicate on actions relating to the potential unconstitutionality or measures infringing

<sup>30</sup> That is laid down or consecrated by the Constitution.

<sup>31</sup> Section 46 *in fine* of the 1996 Constitution.



the presumption of innocence, these courts can cancel such measures, annul the proceedings or, when so provided by law, award damages to the victims.<sup>32</sup>

## 2. The Criminal Procedure Code

Section 8 states that *“any person suspected of having committed an offence shall be presumed innocent until his guilt has been legally established in the course of a trial where he shall be given all necessary guarantees for his defense”*.

This same section concludes, with apparent repetition that *“the presumption of innocence shall apply to every suspect, defendant and accused”*.

It should be pointed out that under the Cameroonian judicial system, the appellations suspect,<sup>33</sup> defendant<sup>34</sup> and accused<sup>35</sup> are the three names under which an offender is referred to, depending on the level or the judicial actor before who he finds himself. The lone precision is that in principle, all matters start with a preliminary investigation,<sup>36</sup> and, for felonious offences requiring further and farfetched findings, a compulsory preliminary inquiry<sup>37</sup> and the trial proper.<sup>38</sup> If this vital right is said to be granted to “accused persons”, there would have been a risk of seeing some actors interpreting it to be the exclusive rights of those standing trial. This stance, if not closed by the precision, might have defeated the purpose, in the sense that trying to guarantee the presumption of innocence (during the trial) after negating it during the police investigation and the preliminary inquiry, would have been unproductive and contradictory.

The fear expressed is justified because, if Parliament enacts laws, the Courts, by their proper implementation and sane interpretation, give them life and concrete meaning in the eyes of citizens.

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32 Sections 236 and 237 of the CPC.

33 During police investigation.

34 Before the Examining Magistrate or Inquiry Judge.

35 At the trial court.

36 Conducted by Judicial Police Officers.

37 Which, under section 142(3) of the Criminal Procedure Code, is conducted by a Judge, called an Examining Magistrate.

38 In open court, when enough evidence exists to sustain the prosecution.



### III. PRACTICAL LIMITATIONS OF PRESUMPTION OF INNOCENCE

No right, irrespective of its value or importance to mankind,<sup>39</sup> is absolute. The presumption of innocence which is one of the main privileges keeping suspects out of the reach of arbitrary and wanton punishments may be impacted by some other procedural (A) and substantial (B) exigencies necessary to a fair trial in some specific offences.

#### A. Procedural Exigencies

The environment of a pre-trial and the Court session are irradiated by measures and decisions which, to a certain extent, are threats to the presumption of innocence. These peculiar events likely to challenge the presumption of innocence *prior* to the trial proper are decisions restricting the freedom of movement of the accused, namely the police custody (a) and the remand on awaiting trial (b).

##### 1. Police custody

As far as police custody is concerned, **section 118(1)** of the Criminal Procedure Code, police custody “*shall be a measure whereby, for purposes of criminal investigation and the establishment of the truth, a suspect is detained in a judicial police cell, wherein he remains for a limited period<sup>40</sup> available to and under the responsibility of a judicial police officer*”.

Under **section 137(1)** of the Criminal Procedure Code, “*the State Counsel<sup>41</sup> shall direct and control the operations of the Officers and Agents of Judicial Police*”. Section 128(1) of the same law makes the Legal Department, having a State Counsel at its helm, “*the principal party in a criminal trial before the court and shall always be represented at such trials under pain of rendering the entire proceedings and the decision null and void*”.

How then can one (principal) party, presumably “equal” to the other protagonist (under trial), be arrested, detained, interrogated, eventually granted bail and even re-arrested by his (strange) “*alter*

<sup>39</sup> Including the right to life which can be legally tampered with, like in the case of an execution for a death sentence, not enforceable in Cameroon, but still valid in some countries worldwide.

<sup>40</sup> In principle, 48 hours renewable once by the State Counsel.

<sup>41</sup> District Attorney in the American Legal Tradition.



ego” when the need arises, without any breach on the right to “equal weapons”, as well material to a fair trial or, at minimal, shaking the scale of justice on one side?

The right to be assisted by a Counsel<sup>42</sup> at the early stage of the findings seems to be the alternate solution to safeguard the rights of the suspects, in the sense of ensuring that he is not called upon to adduce evidence to disprove his guilt which may be implied in the restrictions of the freedom of movement.

## 2. Remand in custody

Suspects escorted before the State Counsel may be, in cases of misdemeanors, remanded into prison custody,<sup>43</sup> for felonious offences sent on awaiting trial by the Examining Magistrate<sup>44</sup> or, in both cases, when a court is seized of the matter.

If the police custody is limited to forty-eight hours renewable once, the remand in custody may expand to six months for misdemeanors and twelve months for felonies. Is this early detention not detrimental to the presumption of innocence and by extension, to the right of the defense?

The remand in custody “*shall be necessary for the preservation of evidence, the maintenance of public order, protection of life and property or to ensure the appearance*”.<sup>45</sup>

From the foregoing, the remand in custody may seek the protection of the suspect’s life, like in some cases of road traffic accidents causing massive deaths, the driver alive, even when not faulty, is detained to avoid the fury of the angry mob of passerby, ready to summons jungle justice by lynching the person “presumed guilty”.

The most interesting reasoning is to know what may be the decision of a Court handling an application by an accused challenging his remand, on account that same is tantamount to infringing his right to be presumed innocent.

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42 Section 122(3) of the CPC.

43 See section 114(1) and 117 *in fine* of the CPC.

44 Section 170(6) of the CPC.

45 Section 218(1) of the CPC.



In a recent case,<sup>46</sup> opposing the People of Cameroon to T.R.E.,<sup>47</sup> a defendant appearing before the Examining Magistrate for forgery under **section 205(1) and (2)** of the Penal Code and cyber criminality under sections 66, 72 and 73 of Law n° 2010/012 of 21<sup>st</sup> December 2010, did apply for bail. The said application was rejected on the 24<sup>th</sup> April 2019 for being “premature”, as filed on the first appearance day, when the findings had not begun.

Dissatisfied with the verdict, the defendant filed an appeal on grounds that the remand in custody contravenes his right to presumption of innocence as laid down under **section 8(1)** of the Criminal Procedure Code.

Although the Legal Department opined otherwise, the Inquiry Control Chambers of the South West Court of Appeal,<sup>48</sup> in a ruling of the 24<sup>th</sup> July 2019,<sup>49</sup> granted bail to the appellant, recalling that the offence for which the latter stood trial wasailable and, above all, he could furnish all the required guarantees to subsequently appear in court.

In comparative law, the stance has been long held by the French *Cour de Cassation*, with the lone option of re-arresting and detaining the defendant *de novo*, in case he jumps bail.<sup>50</sup>

Now adopted by some courts in Cameroon, it could be said that the protection of the right to be presumed innocent is not a legal fiction, even though its scope is narrower when it comes to the commissions of certain offences, without justice being stifled.

## **B. Safeguards Attendant To Specific Offences**

They are offences wherein, once certain ingredients are put together, the presumption of the commission is so high that the burden of proof shifts quasi automatically. This is the case for offences relating to money laundering and financing terrorism (1) and the possession or consumption of psychotropic substances (2).

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46 Unreported.

47 At the High Court of Fako in Buea.

48 Suit n° CASWR/04<sup>CC</sup>/2019.

49 Unreported and final as no party went on appeal to the Supreme Court.

50 Crim. 22 Janvier 1981, Gérard, Grands Arrêts de la Procédure Civile, Dalloz, 7<sup>e</sup> édition, 2011, p389.



## 1. Money laundering and financing of terrorism

Although there is a specific law relating to the repression of acts of terrorism in Cameroon,<sup>51</sup> its finding and that of money laundering are governed by a Sub-Regional regulation<sup>52</sup> emanating from the six member States of Central Africa Community (CEMAC).<sup>53</sup>

Terrorism is consonant to the use of violent action on the civilian population with the view of forcing a government to act or achieving political aims, while money laundering refers to the use of the financial institutions and licit activities, to insert ill-gotten wealth into the financial system.

For some scholars,<sup>54</sup> money laundering, assimilated to illicit earnings, is another version of corruption wherein the burden of proof shifts from the prosecution to the accused.

It should be recalled that under **section 307** of the Criminal Procedure Code, the Legal Department has the duty to adduce evidence in support of the allegations leveled against the suspect, the defendant or the accused. But for money laundering and the funding of terrorism, when the visible wealth or the investments of someone are in total disproportion as compared to his legitimate incomes or, when the financial transactions (transfer or reception of funds) effected of are incompatible with his professional situation, so much doubt is raised as to the origin and the destination of the money.

In these cases, the financial institutions involved are bound to signal the transactions to the National Agency of Financial Investigations,<sup>55</sup> which upon findings, seizes the competent State Counsel.

Under **section 40** and **43** of the said community instrument, the State Counsel can on the one hand, write to the bank, opposing to the transaction under scrutiny for 48 hours renewable, without the knowledge of the suspect, or, through a motion *ex parte*, have the

51 Law n° 2014/028 of 23<sup>rd</sup> December 2014 to suppress acts of terrorism.

52 Instrument n° 01/03/CEMAC/UMAC/CM of the 04<sup>th</sup> April 2003 as amended in 2010.

53 These States are: Cameroon, Central Africa Republic, Chad, Congo, Equatorial Guinea and Gabon.

54 Marc Stéphane José MGWA NDJIE, *La présomption d'innocence à l'épreuve de la consécration de l'infraction d'enrichissement illicite*, Revista de derecho y Ciencias Sociales, Num 9, 2015, pp 29-47

55 Mandatorily created by the instrument mentioned supra in each CEMAC member States.



account completely frozen by a ruling delivered by the Court hearing urgent applications. And once frozen, the account cannot be released to the owner without the opinion of the State Counsel. In other words, the deposit of an unusual huge sum into an account of someone with modest incomes, with the use of fake identity or address etc... is a call for concern. The suspect is therefore the person to justify the genuineness of his actions or omissions.

These special steps which, without cancelling the presumption of innocence, but have for security reasons, attributed special investigative powers to the Legal Department as well as shifting the burden of proof on the accused, are necessary, even if contested by the Apostles of the unfettered right to be always considered innocent until proven guilty by the accuser.

## 2. Offences relating to psychotropic substances

The possession, consumption and traffic of psychotropic substances in Cameroon<sup>56</sup> are other grounds of limitation of the principle of the presumption of innocence.

Under **section 8** of the material law, the planting of the opium and cocaine trees, as well as Indian hemp is "*prohibited within the national territory*". The same provision equally makes it mandatory to owners of landed properties wherein such prohibited plants are grown, to immediately destroy the same upon discovery.

Consequently, whosoever is found in possession of any of the substances enumerated above, including their by-products, is, with regard to the quantity, a producer, a dealer or a consumer.<sup>57</sup>

It therefore suffices to the Legal Department, to find a suspect in possession of psychotropic substances, or to establish a link or nexus between consignments of the said drugs, for the burden of proof of his "non-guilt" to be shifted to the person incriminated.

## IV. CONCLUSION

Appearing before the Courts, irrespective of the nature of the lawsuit, remains for many a stigma because the picture which

<sup>56</sup> Regulated by Law n° 97/19 of 07<sup>th</sup> August 1997.

<sup>57</sup> Sections 91 to 99 and 102 of the 1997 Law.



litigants, especially the accused depicts (involuntarily) in terms of their honorability and reputation is not enviable. The worry increases in criminal matters whereby many incriminations may lead to the loss of liberty.

For the public therefore, only “criminals”, a sociological terminology referring to “dangerous individuals” are in jail. It is then incumbent on the right to be presumed innocent, which manifestation must be seen from the early hours of the arrest of a suspect and all through the stages of the criminal action, to keep the alleged offenders away from the social reprobation.

This aim, although laudable, remains to a certain extent, idealistic, when the security of the State, the need for protecting the population, the control and prohibition of dangerous goods or substances are concerned.

Behold, due to financial constraints subjecting a majority of African countries to budgetary rationing and, as such, preventing them from investing in priority on detention facilities, the prisons are overcrowded.

It is not rare to see that there is no strict distinction or a separation between the inmates, in terms of convicts and awaiting trials. As a result, anyone found in prison is styled a “criminal”. How would the State therefore guarantee the full observation of the right to be presumed innocent, from the Police Station to the Prison Yard, passing through the Courtrooms, without the suspect, the defendant or the accused feeling the affliction of having to prove himself “not guilty”?

The solution may be to ensuring that the institution of “Justice”, the “*Old and slow Lady*” firmly maintains her “*eyes folded*”, to remain “*impartial and neutral*”, qualities required to protect the “*equality before the Law amongst citizens*”, but with the necessity of operating faster, to lessen the anxiety and burden of the persons (presumed innocent) standing trial. And it shall be justice for all.





*THE PRESUMPTION OF INNOCENCE*

*Jelena MARKOVIĆ*

*CONSTITUTIONAL COURT OF  
MONTENEGRO*





## THE PRESUMPTION OF INNOCENCE

Jelena MARKOVIĆ\*

### I. INTRODUCTION

#### A. Legal framework

A defendant's right to be presumed innocent is one of the cornerstones of the right to a fair trial. Already present in the Declaration of the Rights of Man and Citizen of 1789, the presumption of innocence is today enshrined in Article 6(2) of the European Convention of Human Rights (ECHR), which provides that *"everyone charged with criminal offence shall be presumed innocent until proven guilty according to the law"*. The same principle is also incorporated in Article 14, Paragraph 2 of International Convention on Civil and Political Rights (ICCPR), which reads: *"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"*. In essence, the presumption of innocence means that a person charged with a criminal offence, must be treated and considered as not having committed an offence until found guilty with a final verdict by independent and impartial tribunal.

Montenegro is a State Party both to the ECHR and to the ICCPR, which represent two of the most important instruments in the protection of the presumption of innocence. Moreover, according to the Article 9 of Constitution of Montenegro, confirmed and published international agreements and generally accepted rules of international law shall make an integral legal order, have the supremacy over the national legislation and apply directly when they regulate relations differently than the national legislation.

The presumption of innocence is incorporated into the domestic legislation by Article 3 of Criminal Procedure Codes, and it provides

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that: “A person shall be considered innocent until guilt has been proven by a final verdict”. Paragraph 2 of Article 3 provides that state bodies, media, citizens’ associations, public figures and other persons are obliged to comply with the rules referred to in paragraph 1 of the Article and that their public statements on criminal proceedings in progress do not violate other rules of procedure, the rights of the defendant and the injured party and the principle of judicial independence. The principle is reinforced in paragraph 3 by introduction of the principle *in dubio pro reo*, which refers that if, after obtaining all available evidence and their performance in criminal proceedings, there is only doubt as to the existence of some essential characteristic of the criminal offense, and in the light of the facts on which the application of some provision of the criminal law depends, the court will make a decision more favorable for the defendant.

### **B. Interpretation of the Article 6 of the Convention**

The European Court of Human Rights (the ECtHR)) has examined a number of alleged violations of the presumption of innocence and consequently established standards for the practical application of this presumption. Emphasizing its crucial role within the right to a fair trial, the European Court has clearly spelled out that the presumption of innocence “requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; burden of proof is on the prosecution, and any doubt should benefit the accused”. European Court also hold that the *in dubio pro reo* principle is specific expression of the presumption of innocence.

Paragraph 2 of Article 6 embodies the principle of the presumption of innocence. It requires that the members of court, when carrying out their duties, should not start with the preconceived idea that the accused has committed the offence charged, the burden of proof in on prosecution and any doubt should benefit the accused (*Barbera, Messegue and Jabrado v. Spain*, §77). The presumption of innocence is a procedural guarantee in the context of criminal trial, that imposes requirements in respect of, among others, the burden of proof, legal presumption of facts and law, the privilege against self-incrimination, pre-trial publicity and premature expression, by the trial court or by



other public officials, of defendant guilt. Presumption of innocence is applied throughout the criminal proceedings, regardless of the outcome of the prosecution, and not only the examination of the charge.<sup>1</sup> The presumption of innocence does not apply in the absence of criminal charge against an individual, such as, for instance, concerning the application of measures against an applicant preceding the initiation of a criminal charge against him. On the other hand, the presumption of innocence applies even if the first-instance proceeding resulted in the defendant's conviction when the proceedings are continuing on appeal.<sup>2</sup>

The principle of the presumption of innocence is observed at all stages throughout the entire criminal procedure. If the principle of the presumption of innocence is not respected, especially if the representative of the court does so, the overall idea of fairness of the criminal proceedings remains devoid of any meaning.

## II. LANDMARK JUDGMENTS OF THE EUROPEAN COURT

The European Court found a violation in two landmark cases. In the first case *Mineli v. Switzerland*, the Court found violation that is made by conclusion given by national court and in the other one, *Allen De Ribemont v. France*, the Court found violation of presumption of innocence made by the statement given by public official.

In the case of *Mineli v. Switzerland*, the Court found a violation of the presumption of innocence when a defendant was sentenced to pay court costs and compensation for expenses even though the case had been discontinued on account of time limitation, because the decision of the national Court concluded that in the absence of statutory limitation the case would “*very probably have led to the conviction*” of the applicant. The European court found that the presumption of innocence would be violated if:

*“(...) without the accused having previously been proved guilty according to law and notably, without his having had the opportunity of exercising his rights of defense, a judicial decision concerning him reflects on opinion that he is guilty. This may be so even in the*

1 *Poncelet v. Belgium*, judgement of ECtHR, 20 March 2010, § 50.

2 *Konstas v. Greece*, judgement of ECtHR, 22 July 2010, § 36.



*absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty."*

In the case *Allen De Ribemont v. France*, the European court found that the presumption of innocence is so important that it ruled that this presumption should be respected not only by the judges, but by all public officials. In that regard, the European court has noticed:

*"The Court recalls that the presumption of innocence(...) will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty. In this regard the Court emphasizes the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence."*<sup>3</sup>

In this case, the European court found a violation of the presumption of innocence in the oral statement given by the director of the Paris criminal investigation department during a press conference, in which it was stated that *"haul was complete and the people involved in the case were under arrest"*. France, as responsible State, was therefore found responsible and ordered to pay to the applicant in compensation of pecuniary and non-pecuniary damages caused by the contested statement.

The European Court has in fact deemed the presumption of innocence so important that it has ruled it inappropriate even for the police to make statements implying that an individual is guilty of a crime before the guilt had been established in a due process. The action of judge is, however, of a particular importance since, in addition to their obligation to observe the presumption of innocence, they are also under an obligation to preserve the appearance of impartiality. To maintain public confidence in the fairness of trial, judge must avoid even the appearance of bias versus defendant.<sup>4</sup>

Once an accused has properly been proven guilty, presumption of innocence have no application in relation to allegations made about

<sup>3</sup> *Allent De Ribemont v. France*, judgement of ECtHR, 23 January 2005, § 35 and *Daktaras v. Lithuania*, judgement of ECtHR, 10 October 2000, § 41.

<sup>4</sup> *Kyprianou v. Cyprus*, judgement of ECtHR, 15 Decembar2005, § 120.



the accused's character and conduct as part of the sentencing process, unless such accusation are of such a nature and degree as to amount to the bringing of a new charge within the Convention meaning.<sup>5</sup>

Nevertheless, a person's right to be presumed innocent and to require the prosecution to bear the onus of proving the allegation against him forms part of the general notion of fair hearing under Article 6 paragraph 1 of the Convention which apply to the sentencing procedure.

### **A. Parallel proceedings**

Article 6 paragraph 2 may apply to court decisions rendered in proceedings that were not directed against an applicant as "accused" but nevertheless concerned and had a link with criminal proceedings simultaneously against him or her, when they imply a premature assessment guilt. The presumption of innocence may apply with regard to the court decisions in the extradition proceeding against an applicant if there was a close link between impugned statements made in the context of the extradition proceedings and the criminal proceedings pending against the applicant in the requesting State.

The Court has considered Article 6 paragraph 2 to apply with regard to the statements made in parallel criminal proceedings against co-suspect that are not binding with respect to the applicant, insofar was a direct link between the proceedings against the applicant with those parallel proceedings. The Court explained that even though statements made in parallel proceedings were not binding with respect to the applicant, they may nonetheless have a prejudicial effect on the proceeding pending against him or her in the same way as premature expression of suspect's guilt made by any other public authority in close connection with pending criminal proceedings.

In all such parallel proceedings, courts are obliged to refrain from any statements that may have prejudicial effect on the pending procedures, even if they are not binding. The Court also considered that Article 6 paragraph 2 is applied with regard to the statements made in the parallel disciplinary proceedings against an applicant, when both

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<sup>5</sup> *Geering v. Netherland*, judgement of ECtHR, 1 March 2007, § 43.





criminal and disciplinary proceedings against him had been initiated on suspicion that he had committed criminal offences and where the disciplinary sanction gave substantial consideration to whether the applicant had in fact committed the offences he was charged with in the criminal proceedings<sup>6</sup>.

Article 6 paragraph 2 applies where two sets of criminal proceedings are in parallel pending against the applicant. Considering in one set of proceeding concerning a particular offence that an applicant has committed another offence which is subject to a trial in a parallel set of proceeding, is contrary to the applicant's right to be presumed innocent with respect to that other offence.

### **B. Subsequent proceedings**

The presumption of innocence also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceeding have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence with which they have been charged. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the guaranties of Article 6 paragraph 2 become theoretical and illusory. Once the criminal proceedings have concluded is the person's reputation and the way in which that person perceived by the public.

In defining the requirements for compliance with the presumption of innocence in this context, the Court has made a distinction between cases where a final acquittal judgment has been handed down and those where criminal proceeding have been discontinued. In cases concerning statements made after an acquittal has become final; it has considered that the voicing of suspicions regarding an accused's innocence is no longer admissible. In contrast, the presumption of innocence will be violated in cases concerning statements after the discontinuation of criminal proceedings if, without the accused's having previously been proven guilty according to law and, in particular, without his having had an opportunity to exercise the right of defense, a judicial decision concerning him reflects an opinion that he is guilty.

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<sup>6</sup> *Kemal Coskun v. Turkey*, judgement of ECtHR, 28 March 2017, § 44.



### C. Prejudicial statements

The Article 6 paragraph 2 is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. Where no such proceeding are or have been in existence, statements attributing criminal or other reprehensible conduct are more relevant to considerations of protection against defamation. Whether a statement by a judge or other public authority is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the statements was made. Statements by judges are subject to stricter supervision than those by investigative authorities.<sup>7</sup> With regard to such statements made by investigative authorities, it is open to the applicant to raise complaint during the proceedings or appeal against a judgment of a trial court insofar as he or she believes that the statement had a negative impact on the fairness of the trial. The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in decision on the merits of the accusation.<sup>8</sup> However, once an acquittal has become final, the voicing of any suspicions of guilt is incompatible with the presumption of innocence.<sup>9</sup>

### D. Statements by judicial authorities and public officials

The presumption of innocence will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty.<sup>10</sup> A premature expression of such an opinion by the tribunal itself will inevitably fall short of this presumption.<sup>11</sup>

However, in a situation where the operative part of a judicial decision viewed in isolation is not in itself problematic under Article 6 paragraph 2, but the reasons adduced for it are, the Court has

7 *Pandy v. Belgium*, judgement of ECtHR, 21 September 2006, § 42.

8 *Sekanina v. Austria*, judgement of ECtHR, 20 May 1992, § 30.

9 *Geerings v. Netherlands*, judgement of ECtHR, 1 March 2007, § 49.

10 *Nerattini v. Greece*, judgement of ECtHR, 18 December 2008, § 23.

11 *Garycki v. Poland*, judgement of ECtHR, 6 February 2007, § 66.



recognized that the decision must be read with and in light of that of another court which has later examined it. Where such a reading demonstrated that the individual's innocence was no longer called into question, the domestic case was considered to have ended without any finding of guilt and there was no need to proceed with any hearing in the case or examination of evidence for domestic proceeding to be found to be in accordance with Article 6 paragraph 2.

In the application of provision of the Article 6 paragraph 2 is the true meaning of the statements in question, not their literal form. Even the regrettable use of some unfortunate language does not have to be decisive as the lack of respect for the presumption of innocence, given the nature and context of the particular proceedings. A potentially prejudicial statement cited from an expert report did not violate the presumption of innocence of proceedings in proceedings for a conditional release from prison when a close reading of the judicial decision excluded an understanding which would touch upon the applicant's reputation and the way he is perceived by the public. However the Court emphasized that it would have been more prudent for the domestic court to either clearly distance itself from the expert's misleading statements, or to advise the expert to refrain from making unsolicited statement about the applicant's criminal liability in order to avoid the misconception that questions of guilt and innocence could be any way relevant to the proceedings at hand.

The presumption of innocence may be infringed not only by a judge or court but also by other public authorities. This applies, for instance to the police officials, President of State, Prime minister or Minister of Interior, Minister of Justice, President of the parliament, prosecutor or other prosecution officials, such as investigator. Article 6 paragraph 2 prohibits statements by public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority, but it does not prevent the authorities from informing the public about criminal investigation in progress, but it requires that they do so with discretion. The Court emphasized the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence.



### III. LANDMARK JUDGMENTS OF THE CONSTITUTIONAL COURT OF MONTENEGRO

Constitutional Court of Montenegro is, *inter alia*, entitled to decide in respect of the constitutional appeal due to the violation of human rights and liberties guaranteed by the Constitution, after all effective legal remedies have been exhausted. Within all its jurisdictions Constitutional Court deals with many cases related to criminal justice area, during all stages of criminal proceedings, including detention, from the aspect of human rights, primarily right to fair trial. With relevance to this topic, several judgments regarding presumption of innocence have been delivered:

In Judgment of the Constitutional Court of Montenegro, No UŽ-III 486/13, 28 February 2014:

The Constitutional Court finds, that Appeal Court, in the reasoning of the disputed decision deciding on the extension of detention to the applicant, on the grounds referred to in Article 175, paragraph 1, point 1 of the Code of Criminal Procedure, *inter alia* stated:

*“...Taken into account the duration of the sentence imposed, which certainly is not deprived of influence, and the fact that the accused N.B. committed crime as an accomplice, that is, with several persons, that the crimes were committed on an international scale, and that on that occasion he acquired social connections and acquaintances with persons from other countries (Albania, Croatia, Bosnia), that some of those persons are still at large and can help him and provide refuge in the event of escape, are certainly, which is correctly noted by the first instance court, circumstances that indicate the danger of the escape of the Accused B.N., and justify the extension of the detention pursuant to Article 175, paragraph 1, point 1 of the Criminal procedure code”.*

Therefore, in the disputed decision, the Appeal Court of Montenegro, stated, in advance, that the applicant had committed crimes as an accomplice, although the court verdict finding him guilty of the criminal offenses he was charged with, was not final at the time of the rendering disputed decision.

Accordingly, the Constitutional Court found that Appeal Court of Montenegro violated the presumption of innocence guaranteed by



Article 35 of the Constitution and Article 6, paragraph 2 of the European Convention, stating that “*accused N.B. committed crime as an accomplice*”.

In the judgment of the Constitutional Court of Montenegro, No UŽ-III 464/11, 10 October 2011:

The Constitutional Court in the reasoning of the disputed decision of the Appeal Court of Montenegro, *inter alia*, states:

*(...) “The life situation in which the accused was found, and the certainty that in the subsequent part of the proceedings he would be sentenced for serious criminal offenses he was accused of, and that he would as a consequence lose permanent employment, all indicates that by coming to his place of birth, he would be able to escape using developed social links of his and his family, which all represent the special circumstances that point to the risk of fleeing”.*

The Constitutional Court considered that the Appeal Court of Montenegro, in the disputed decision, found in advance that it is certain that the applicant will in subsequent part of proceedings be convicted of serious criminal offenses he was charged with, before it was proved by law and determined by final court verdict.

The Constitutional Court’s assessment that the Appeal Court of Montenegro, during the decision-making process to extend the detention of the applicant, violated the presumption of innocence guaranteed by Article 35 of the Constitution and Article 6 paragraph 2 of the European Convention, stating “*certainty that in the subsequent part of the proceedings he would be sentenced for serious criminal offenses he was accused of*”, since the term certainty represents inevitability rather than probability.

#### IV. ECtHR JUDGEMENT *MUGOŠA V. MONTENEGRO*

Having in mind overall significance of ECtHR case law, judgments rendered against Montenegro in particular set a standard for national legal system and example for Constitutional Court so that human rights are adequately protected on national level. Their influence goes far beyond individual applications. During the process of enforcement of these judgments, extensive measures were to be taken in order to tackle issues that cause violations of human rights before judicial authorities.



Therefore, principles set out in *Mugoša v. Montenegro* present guidelines to be followed by lower instance courts and Constitutional court as well, for protection of presumption of innocence, especially related to detention.

European Court has found violation of the presumption of innocence by the High Court in case *Mugoša v. Montenegro* (no. 76522/12 judgment of 21 June 2016), which declare itself on the guilt of the Applicant before he was finally convicted (violation of Article 6 paragraph 2 of the Convention). The High Court started, in its order on extension of detention that the applicant “*in an insidious manner and for material gain, deprived X of his life ... by shooting him...*”. Thereby, it had pronounced the applicant’s guilt before it was proved according to law. Subsequent courts failed to rectify this on appeal, including the Constitutional Court. Constitutional Court established opinion that the accused committed the criminal offence and must avoid terms which imply certainty that accused is the perpetrator of the criminal offence.

Measures were taken to harmonize the case-law of national courts in respect of detention orders and detention supervision. Supreme Court of Montenegro and lower instance courts established that in ordering or extending detention the court has to clearly state the existence of reasonable doubt that the accused committed the criminal offence and must avoid terms which imply certainty that accused committed the criminal offence.<sup>12</sup>

The European Court pointed out that the domestic court, in issuing their decision to order detention, used terms which suggested that the accused was guilty even before his guilty was established by the judgment. Court’s judgment in accordance with Article 9 of the Constitution of Montenegro is a source of law in Montenegro, and aim of the judgment was to, in accordance with the obligation taken on by state in ratifying the Convention, prevent further violation of that right. This requires therefore the adequate execution of the Court’s judgment, so its pointed out that in decisions on ordering or extending detention, the courts has to clearly state the existence of reasonable

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<sup>12</sup> Analyses of the judgments of the European Court of Human Rights in respect of Montenegro, November 2018.



doubt that the accused committed the criminal offence and must avoid that imply any certainty that the accused is the perpetrator of the criminal offence.

***PRESUMPTION OF INNOCENCE  
IN THE CONSTITUTION OF  
KAZAKHSTAN***

***Talgat MUSHANOV***

***CONSTITUTIONAL COUNCIL OF  
KAZAKHSTAN***







## PRESUMPTION OF INNOCENCE IN THE CONSTITUTION OF KAZAKHSTAN

*Talgat MUSHANOV\**

### I. INTRODUCTION

My presentation is devoted to one of the fundamental principles in protecting the rights and freedoms of people and citizen, “*presumption of innocence*”, which is divided into three main parts:

1. The international principle of the presumption of innocence;
2. Kazakhstan law enforcement (human rights) practice in this area;
3. The Constitutional Council as a guarantor of compliance with the principles laid down in the Constitution.

### II. THE INTERNATIONAL PRINCIPLE OF THE PRESUMPTION OF INNOCENCE

As is known, human rights and freedoms are one of the key links of the Universal Declaration of Human Rights and the entire modern system of law, as well as legal proceedings, which contribute to increasing access to guarantees of protection of citizens from unlawful and unjustified charges, convictions, restrictions on rights and freedoms.

One of the instruments for the implementation of the protection of rights and freedoms is the international principle of presumption of innocence, which is recognized not only by the above declaration, but also by all important documents in the field of protection of human rights and freedoms, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms November 4, 1950; International Covenant on Civil and Political Rights December

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\* Chief Consultant, Constitutional Council of Kazakhstan.



16, 1966; Resolution 2858 (XXVI) of the UN General Assembly, Human Rights in the Administration of Justice December 20, 1971.

As is known, the Universal Declaration of Human Rights, adopted by the General Assembly in 1948, enshrines the fundamental rights and freedoms such as the right to life, liberty, personal integrity and citizenship, the right to freedom of thought, conscience and religion, the right to work, and so on.

Concurrently, paragraph 1 Article 11 of the Universal Declaration has enshrined the presumption of innocence: *“Everyone accused of committing a crime has the right to be presumed innocent until proved guilty by law through a public trial, in which he is provided with all opportunities for protection”*.

In principle of the presumption of innocence lies the basis of a moral norm in which a person has been considered to be decent until his guilt is proved. The most important aspect in this principle is to consider the accused on the objective side, without affecting personal attitude. It is imperative that the state and society do not consider a citizen to be a criminal, unless otherwise proved and established by the competent judiciary. Since the accusation still needs to be proved, in the opposite case the citizen must be acquitted, or found guilty of a less serious crime.

For example, I would like to cite international practice, namely the practice of the European Court of Justice. In the case of *Alenet de Ribemont v. France* of 14 January 1977, the complainant was one of those arrested for murder. During the investigation of this high-profile case, law enforcement officials held press conferences several times. In one TV press conference, for instance, police officials stated that all persons related to the murder had been arrested and the Complainant had been one of the organizers of the murder. It should be noted that this statement in the media was announced before the court decision. The complainant was later released on 1 March, 1977 and the case against him was dismissed on 21 March 1980.

In light of this case, the European Court noted that these statements made by senior government officials are clearly the same to declaring the applicant guilty. These statements have encouraged the public to



believe in his guilt, and also anticipated the assessment of the facts of the case by a competent judicial authority. In this way, the European law court has concluded that in this case there had been a violation of paragraph 2 Article 6 of the European Convention on Human Rights.

The above international documents have served as the basis for the creation of a set of legislative documents of many countries.

The principle of the presumption of innocence has applied by states that promote democracy. That is to say, these are developed countries of the world whose legal system is at a high level.

In a truly democratic state, adherence to the principle of the presumption of innocence is mandatory and paramount in legal proceedings, showing a respectful attitude to the human person as the highest value of the state.

The Republic of Kazakhstan, as a democratic and legal state, is no exception.

### III. THE PRACTICE IN KAZAKHSTAN

In this part, I propose to get acquainted with the local tangible results of judicial, human rights activities in this area.

Initiated by the First President of the Republic - Elbasy Nursultan Nazarbayev and the Constitution that has been adopted by the people of Kazakhstan at a republican referendum laid the basis for all the rule-making activities of the Republic and all legal acts are strictly based on it.

According to article 13 of the Constitution of the Republic of Kazakhstan, the right of every citizen of the country to recognize his legal personality is indicated and has the right to protect his rights and freedoms by all means not contradicting the law, including the necessary defence and judicial protection of his rights and freedoms. Everyone has the right to qualified legal assistance.

Paragraph 3 article 77 of the Constitution of the Republic of Kazakhstan acts as a mandatory, prejudicial postulate of human rights activities, where the following is uniformly and accurately enshrined. *When applying the law, the judge shall be guided by the following principles:*



1) a person is considered to be innocent of committing a crime until his guilt is recognized by the court judgment that has entered into legal force;

2) no one may be subjected to repeated criminal or administrative liability for the same offense;

3) no one's court jurisdiction, provided for him by law, can be changed without his consent;

4) everyone has the right to be heard in court;

5) laws that establish or strengthen liability, impose new duties on citizens or worsen their situation, do not have retroactive effect. If, after committing the offense, the responsibility for it is cancelled or mitigated by law, the new law shall be applied;

6) the accused is not obliged to prove his innocence;

7) no one is obliged to testify against himself, or his spouse (-s) and close relatives, whose circle is determined by law. Priests are not obliged to testify against those who confided in them at confession;

8) any doubts about the guilt of the person shall be interpreted in favour of the accused;

9) evidence obtained in an unlawful manner is not legally binding. No one can be convicted solely on the basis of his own confession;

10) the application of criminal law by analogy is not allowed.

Therefore, Kazakhstan proclaimed itself a democratic, secular, legal and social state, the highest values of which are people, their lives, rights and freedoms, fully recognizes and complies with universally recognized international principles.

Based on the above principles, a lot of work is currently being done in the country to develop proposals for further improvement of the rule-making activity and legal proceedings in Kazakhstan.

One of the positive changes is the tendency for criminal legislation to transform towards decriminalization and mitigation of criminal punishment.

Thus, the Law of the Republic of Kazakhstan *"On amendments and additions to some legislative acts of the Republic of Kazakhstan on*



*the modernization of the procedural basics of law enforcement activities*” dated December 21, 2017 amended article 14 of the Code of Criminal Procedure of the Republic of Kazakhstan regarding the terms of detention, namely without court sanctions, a person may be detained for a period not exceeding forty-eight hours, instead of the previously provided seventy-two, and a minor - for a period not exceeding twenty-four hours, unless the Code of Criminal Procedure expressly provides for the admissibility of a person’s detention without a court order for a period of not more than seventy-two hours.

Concurrently, the criminal procedural law contains norms that provide guarantees for the protection of a citizen from illegal and unjustified accusations, convictions, restrictions on rights and freedoms.

Article 19 of the Criminal Procedure Code of the Republic of Kazakhstan has stated that everyone shall be presumed innocent until his (her) guilty in committing a criminal offence is not proved in the manner prescribed by this Code and established by a valid court sentence. No one shall be obliged to prove his (her) innocence. Irremovable doubts about the guilt of the suspected, accused, defendant shall be interpreted in their favor. The doubts arising as to the application of criminal law and criminal procedure law shall be decided in favour of the suspected, accused, defendant. Guilty verdict cannot be based on assumptions and must be confirmed by a sufficient set of admissible and reliable evidence.<sup>1</sup>

The principles of the criminal process are the basic legal norms that determine the nature of the criminal process, expressing views on the formation of a procedural order that provides fair justice in criminal matters, protecting the individual, her rights and freedoms, and public interests from criminal encroachments.

In the Republic of Kazakhstan, in the interests of human and civil rights and freedoms, the administration of justice is almost always carried out subject to a number of principles. One of which, just the same, is the principle of the presumption of innocence.

As mentioned above, this principle means that everyone accused of committing a crime is presumed innocent until proved guilty in the

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<sup>1</sup> Article 19 of the Criminal Procedure Code of the Republic of Kazakhstan.



manner prescribed by law and established by a court decision that has entered into legal force.

Extract from the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan

According to paragraph 18 of the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 4 of April 20, 2018, "*On the court sentence*", by virtue of the presumption of innocence and in accordance with article 19 of the CPC a judgment of conviction cannot be based on assumptions and must be supported by a sufficient body of reliable evidence. The text of the sentence must contain a reasoned judgment on the petitions of the parties concerning additional evidence, their relevance, admissibility and reliability, if during the main court proceedings of these petitions the decision has not been taken as a separate decision. All arising versions should be investigated in the case. Existing contradictions between evidence shall be subject to clarification and evaluation. Irremovable doubts about the guilt of the defendant, as well as doubts arising from the application of criminal and criminal procedure laws, shall be interpreted in his favour.<sup>2</sup>

As an example, one can point out the experience of the Judicial Collegium for Criminal Cases of the Supreme Court, which overturned the judicial acts of lower courts on appeal and terminated the proceedings in several criminal offenses.

Arbitrage practice

In 2018, citizens convicted of committing fraud, by a group of persons by prior conspiracy, on a particularly large scale, were sentenced to 5 years' probation.

The Collegium of the Supreme Court acquitted the convicts for the lack of *corpus delicti* in their actions on the following grounds.

The conclusions of the lower court on the guilt of convicted persons for committing a crime are unfounded, since they are based only on the testimonies of those interested in the outcome of the case, in particular on the testimony of the victim and his friend, which contradict the facts of the case and cast doubt on their reliability.

<sup>2</sup> Regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated April 20, 2018 No. 4 "*On the court sentence*".



The Judicial Collegium for Criminal Cases of the Supreme Court of the Republic of Kazakhstan, guided by the principle of the presumption of innocence and interpreting all the doubts in favour of the convicted, agreed with the defence that there were civil-law relations between the convicted and the victim.

On the basis of the collegium set forth by the Supreme Court, the sentence in respect of convicted persons was cancelled, the criminal case was discontinued due to the absence of *corpus delicti* in their actions.<sup>3</sup>

In addition, the principle of the presumption of innocence is an important tool in administrative proceedings.

In accordance with article 10 of the Code of the Republic of Kazakhstan on Administrative Infractions a person in respect of whom, an administrative offense case is initiated, shall be considered innocent until his (her) guilt is proved in accordance with the procedure provided by this Code and established by an effective decision of a judge, body (official), who has examined the case within his (her) own powers. In event of consideration the case of an administrative offense in the procedure of reduced production, as well as on the order for the need to pay a fine, the person in respect of whom an administrative offense case has been initiated, shall be considered innocent until the relevant decision comes into force.

It should be noted that all these processes have a pronounced constitutional and legal nature and are associated with the implementation of the Constitution of Kazakhstan, which determines the development of political, legal, economic and cultural-humanitarian spheres. Accordingly, the measures taken to improve legislation should be understood as the fulfilment of constitutional requirements.

#### **IV. CASE-LAW OF THE CONSTITUTIONAL COURT OF KAZAKHSTAN**

In this final part, let me introduce you to the experience of cultivating constitutional values in the field under study.

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<sup>3</sup> Open source: <https://www.zakon.kz/4979073-verhovnyy-sud-otmenil-sudebnye-akty-po.html>.





Questions of the criminal process, including the administration of justice in criminal matters, in almost all countries are subject to constitutional regulation.

Since its inception in early 1996, the Constitutional Council has considered a whole block of appeals affecting various aspects of criminal proceedings. A number of decisions of the Constitutional Council regulate general issues of criminal procedure law, such as the system of criminal procedure legislation, its effect in time, space and circle of people, the relationship with normative legal acts with greater legal force, and international treaties.

The legal positions of the Constitutional Council have been formulated as part of the consideration of appeals on checking for compliance with the Constitution of laws adopted by the Parliament before they were signed by the Head of State, on the official interpretation of the norms of the Constitution and the submissions of the courts on the recognition of certain norms of the Criminal Procedure Code of the Kazakh SSR and the Code of Criminal Procedure of the Republic of Kazakhstan. They relate to the content of the right to judicial protection, principles of justice, including the principle of the presumption of innocence, measures of procedural coercion, forms of proceedings, jurisdiction of cases, specialization of courts, assessment of evidence and other.

At the proposal of the Supreme Court of the Republic of Kazakhstan, the Constitutional Council checked the constitutionality of part 3 Article 19, presumption of innocence, of the Criminal Procedure Code of the Republic of Kazakhstan, according to which *“fatal doubts about the guilt of a suspect, accused, defendant is interpreted in their favour. In favour of the suspect, the accused, the defendant, doubts arising from the application of the criminal and criminal procedure laws must be resolved”*.

The Constitutional Council did not find any grounds for declaring these norms not relevant to subparagraphs 8) paragraph 3 Article 77 of the Constitution that states *“any doubt about the guilt of the person shall be interpreted in favour of the accused.”* The decision of the Constitutional Council on June 26, 2003 No. 9 stated that the differences between the indicated constitutional norm and the norm of the criminal procedure law are as follows:



- the law is not about *any*, but about *fatal* doubts;
- the provision was added to the law that “*in favour of the accused, doubts arising in the interpretation of the criminal and criminal procedure law must be resolved*”.

According to the Constitutional Council, the norm of the criminal procedure legislation on the interpretation of any doubt in favour of the accused refers only to those doubts that could not be eliminated by the body conducting the criminal process after taking all measures provided for by the law. Therefore, the fact that the CPC refers to fatal doubts does not entail inconsistency of the relevant norm with the provisions of the Constitution. The norm of the Code of Criminal Procedure that “*in favour of the accused must also be resolved doubts arising in the interpretation of the criminal and criminal procedure law*” also complies with the Constitution. This is due to the fact that when developing the criminal procedure law, including the contested norm, the legislator proceeded from the fact that the Constitution establishes the possibility of restricting human rights and freedoms only by law and only in exceptional cases.<sup>4</sup>

Another striking example of the role of the Constitutional Council in regulating general issues of criminal procedure law is the resolution of the Constitutional Council of the Republic of Kazakhstan dated January 24, 2007 №1 “*On the verification of the constitutionality of the first part of Article 109 of the Code of Criminal Procedure of the Republic of Kazakhstan on appeal from the West Kazakhstan Regional Court*”.

The Constitutional Council has received an appeal from the regional court regarding the rights of individuals to appeal in court the decisions of the bodies of inquiry, investigation, and the prosecutor to institute criminal proceedings (Article 109 of the Code of Criminal Procedure of the Republic of Kazakhstan).

Having studied the issue on the merits, the Constitutional Council has established that it follows from the contents of the first part of article 109 of the Code of Criminal Procedure that a person may appeal to a court against a limited range of procedural decisions, including

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<sup>4</sup> Constitutional Control in Kazakhstan: The Doctrine and Practice of Adoption of Constitutionalism: the Monograph/under the editorship of I.I. Rogov, V.A. Malinovsky. – Almaty: Raritet, 2015.



a decision to institute criminal proceedings. However, it does not contain norms that directly prohibit appeal of a decision to institute criminal proceedings in court and thereby limit the constitutional right of a person and citizen to judicial protection.

Thus, the Council has decided that the procedural decision to institute criminal proceedings, expressed in the form of a decision, is the legal basis for initiating a preliminary investigation or inquiry. Moreover, this decision not only generates the relevant procedural legal relations but may also result in the restriction of the rights and freedoms of a person and a citizen in connection with subsequent proceedings in a criminal case. In such cases, not providing the person against whom the decision to institute criminal proceedings has been issued with the possibility of immediate judicial appeal prevents the restoration of his rights and freedoms in court, and also violates the principle of the presumption of innocence.

At the same time, when examining a complaint against a decision of a criminal prosecution body to institute criminal proceedings, the court should not predetermine issues that, in accordance with the Criminal Procedure Code, may be subject to judicial review when resolving a criminal case on the merits. In this case, the scope of the judicial review should be limited to clarifying issues of compliance with the law, governing the initiation of criminal proceedings.<sup>5</sup>

The Constitutional Council has emphasized the important role of constitutional review in the criminal procedure, and as a result, on the basis of its decision, relevant amendments were made to the CPC regarding the constitutional right of a person and citizen to judicial protection.

Along with this, the Constitutional Council of the Republic of Kazakhstan, taking into account the fact that in order to observe the rights and freedoms of citizens enshrined in both international documents and the Constitution, not only impeccable implementation of the norms of the law is necessary, but also the legal education of citizens, constantly promotes the Constitution Of the Republic of

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<sup>5</sup> The resolution of the Constitutional Council of KR of January 24, 2007 N 1 “About check of constitutionality of part of the first article 109 of the Criminal procedure code of the Republic of Kazakhstan on the address of the West Kazakhstan regional court”.



Kazakhstan and the principles of modern constitutionalism with the aim of forming among citizens a constitutional culture, knowledge, understanding and respect for the Constitution of the Republic of Kazakhstan, the values embodied in it, the principle memory and norms.

## V. CONCLUSION

In conclusion, I would like to note that focusing on the interests and rights of every citizen of the country, with a special focus on observing the presumption of innocence, is a key feature of our legislation. A citizen must have an unlimited right to protect his freedom and life. This requires the presence of appropriate conditions, both at the system level and at the level of everyday life, as well as the willingness of the state to take responsibility for the right, justice and freedom of every citizen.



*PRESUMPTION OF INNOCENCE*

*Aisuluu AITYMBETOVA*

*CONSTITUTIONAL CHAMBER OF THE  
SUPREME COURT OF THE  
KYRGYZ REPUBLIC*





## PRESUMPTION OF INNOCENCE

*Aisuluu AITYMBETOVA\**

Let me, on behalf of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, greet the participants of the Summer School and express gratitude to the organizers for the invitation and success of the previous schools, which over the years improved not only interaction between members of the Association of Asian Constitutional Courts and Equivalent Institutions, but also have become a good platform to discuss topical issues on constitutional justice.

Before starting my presentation, let me briefly tell you about the history of establishment of constitutional justice in the Kyrgyz Republic and activities of the Constitutional Chamber.

The first steps to create a mechanism to protect the Constitution were made at the times of “perestroika” before the collapse of the USSR and the independence of the Kyrgyz Republic. Kyrgyzstan became one of the first former USSR republics created the highest judicial body for the constitutional oversight – the Constitutional Court of the Kyrgyz SSR. This day became the starting point for the constitutional justice in the Kyrgyz Republic.

The Constitution 1993 of independent Kyrgyzstan has defined the place and role of the judiciary in general and in particular of Constitutional Court, and laid the foundations of the judicial and legal reform in the country.

Changes in the socio-political and legal spheres of the country (April 7, 2010) entailed the reorganization of the system of public authorities, including the termination of the activities of the Constitutional Court. On June 27, 2010 the referendum was held, which adopted the new

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Constitution. In line with this Constitution, a new constitutional oversight institution established, i.e. the Constitutional Chamber of the Kyrgyz Republic.

Perhaps, the name of the authority of constitutional control of our country misleads you, but its very unusual designation “The Constitutional Chamber of the Supreme Court” was a political consensus when the new version of the Constitution was adopted.

However, despite this, the Constitutional Chamber remains the highest judicial authority, independently exercising constitutional control through constitutional legal proceedings.

Compared with the previous authority of constitutional control - the Constitutional Court, the powers of the Constitutional Chamber are significantly curtailed, but the main function of implementing of constitutional justice, is saved.

So, today Constitutional Chamber shall:

- declare unconstitutional laws and other regulatory legal acts in the event that they contradict the Constitution;
- conclude on the constitutionality of international treaties not entered into force and to which the Kyrgyz Republic is a party;
- conclude on the draft law on changes to the Constitution.

The Constitutional Chamber exercises abstract constitutional review, on the sense that the subject of constitutional proceedings is regulatory legal acts or its separate norms, which are applicable to a wide range of people and are not related to a specific case.

At the same time, it should be noted that abstract control in our republic is combined with concrete control. Since the Constitution enshrined the right of every person to challenge the constitutionality of a law or another regulatory legal act in case he/she believes that these acts violate rights and freedoms recognized in the Constitution.

Undoubtedly, abstract kind of control provides more citizens the opportunity to protect their rights through the constitutional justice. From the moment of formation (1 July, 2013), Constitutional Chamber has decided 93 cases.



Presumption of innocence is one of the most important universally recognized principles of justice, observance of which provided by the majority of international documents and national legislation.

According to article 11 of the Universal Declaration of Human Rights, everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

Provision similar in meaning and content contained in Article 14 of the International Covenant on Civil and Political Rights states that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

The above-mentioned international treaties are the part of the legal system of the Kyrgyz Republic and their regulation on the principle of presumption of innocence are reflected in the national legislation.

Thus, in accordance with Article 26 of the Constitution of the Kyrgyz Republic, presumption of innocence one of the important principles of justice. Its legal essence lies in the fact that the accused person can be found guilty only if his or her guilt is established in accordance with the law and his/her guilt was ascertained by a court verdict having entered into force. Under Article 29 (part2) of the Constitution no one should prove his/her innocence and any doubts in respect of culpability shall be interpreted for the benefit of the accused. Thus, the burden of proof of guilt in criminal case shall be on the accuser.

The presumption of innocence rejects the accusatory bias in all forms of its manifestation and serves as an important guarantor of the defendant's right to defense. The accused is vested with the right to defend himself against the charge against him precisely because he is presumed innocent until the sentence comes into legal force. The presumption of innocence exempts the accused from the obligation to prove his innocence, prevents the re-evaluation of the accused's consciousness and acts regardless of whether he pleads guilty, and serves as a guarantee for the accused from unfounded accusation and conviction. The requirements of the presumption of innocence about the undoubted evidence of the charge and the interpretation



of fatal doubts in favor of the accused aim state bodies to objectively, impartially establish the circumstances of the case, without which a justified and fair decision of the case by the court is impossible.

In order to comply with the fundamental constitutional principle of the presumption of innocence, the Constitution of the Kyrgyz Republic provided that, in the event of violation of this principle shall serve a basis for the compensation of material and moral damage through a court.

The constitutional principle of the presumption of innocence was further developed in Article 17 of the Criminal Procedure Code. In accordance with this principle, the findings of the investigator, the body of inquiry and the prosecutor regarding the guilt of the person in respect of whom the investigation was completed are not binding on the court. The court is the only body that is authorized on behalf of the state to take an appropriate decision and enshrine it in a sentence. The guilt of the defendant is established precisely by the guilty verdict, since the acquittal expresses the complete refusal of the state to prosecute. Moreover, acquittal on any of the grounds provided for in Article 340 of the Criminal Procedure Code means recognition of the innocence of the defendant and entails his full rehabilitation.

Constitutional chamber in practice considered 2 cases, concerning the presumption of innocence and I will tell you about them in detail.

On March 4, 2015, the Constitutional Chamber considered the case on verification of the constitutionality of Article 325 of the Criminal Procedure Code of the Kyrgyz Republic (release of the defendant from custody).

This Article provided for the immediate release of the defendant upon the entry into force of the sentence, in the case of acquittal, as well as the decision of the guilty verdict without sentencing or release from serving the sentence, or probation, or condemnation to punishment, not related to deprivation of liberty, or termination of criminal proceedings.

According to the applicant, the contested provision violates the right to freedom and the presumption of innocence, since the verdict of



the court of first instance enters into legal force and is subject to appeal after the expiration of the appeal period. In this connection, he asked to recognize as unconstitutional the normative provision of this Article, expressed by the words "upon the entry into force of the sentence."

In its decision, the Constitutional Chamber indicated that detention is a measure of procedural coercion and cannot be regarded as a measure of responsibility, since it is used not for committing a crime, but to prevent the accused (defendant) from committing procedural violations. The application to acquitted person of such a measure of restraint as detention in custody, when legal grounds for acquittal are dropped, is a disproportionate and unjustified restriction of the constitutional right to liberty and security of person. Since the acquittal, according to Article 316 (part 2) of the Criminal Procedure Code, means that the defendant is declared not guilty, the court thereby states that the circumstances that served as the basis for the election as a preventive measure were dropped. Moreover, the moment the acquittal comes into legal force is predetermined by the right of the other party to appeal the court decision; however, it should not have decisive value in deciding whether to cancel the preventive measure, based primarily on the priority of the constitutional right to freedom and personal inviolability. The detention of an acquitted person, as a legal consequence of an acquittal, significantly limits the constitutional rights and freedoms of the individual, causing harm to them, the replenishment of which is no longer possible in the future.

Based on the goals and objectives of the criminal procedure legislation, the procedure for criminal cases should provide protection from unjustified charges and convictions, from unlawful restriction of the rights and freedoms of a person and a citizen, and in the event of unlawful accusation or conviction of an innocent, its immediate and complete rehabilitation contributing to strengthening law and order, crime prevention, the formation of a respectful attitude to law. The deprivation or restriction of the constitutional right to freedom and personal inviolability of a citizen found not guilty by a court verdict contradicts the conceptual foundations of constitutional and criminal procedural legislation.



In this regard, the Constitutional Chamber recognized the contested norm unconstitutional expressed by the words “upon the entry into force of the sentence”, in the part concerning the acquittal, contrary to Article 24 (part 1) and Article 26 (part 2) of the Constitution of the Kyrgyz Republic.

The second decision of the Constitutional Chamber was made on June 25, 2014 concerning the constitutionality of the provisions of Article 308-1 of the Criminal Code of the Kyrgyz Republic (illegal enrichment), according to which the inability to reasonably explain a significant increase in the assets of a public official exceeding his/her legal income entails criminal liability.

According to the applicant, the contested norms put officials in an unequal position with other citizens who have committed a criminal offense, violate the principles of equality and the presumption of innocence and openly place the burden of proving their innocence to official contrary to the requirements of Article 26 (part 2) of the Constitution, which expressly states that no one should prove his/her innocence, and relieves the accuser from performing duties for proving guilt in a criminal case entrusted to him by Article 26 (part 4) of the Constitution.

The Constitutional Chamber justified its decision by the following conclusions: The contested norms of the Criminal code are the result of the activities of state bodies to implementing the provisions of the UN Convention against Corruption in national legislation, which shall be the constituent part of the legal system of the Kyrgyz Republic.

The offence (*corpus delicti*) under consideration is one of the corruption phenomena that in accordance with the Convention threaten to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law.

The subjects of this crime are officials holding a responsible position. Establishment of service relations of civil servants is caused by specifics of public service, therefore, the civil servant voluntarily accepts restrictions with his status, and fulfills the relevant requirements that



does not entail restriction or violation of constitutional rights of this citizen.

The process of justification or proof by an official of the origin of his/her assets must be carried out outside the criminal proceedings and is part of his obligations as an official. The need to prove the origin of their assets as a public servant's obligations arises from his other obligation - to declare his income, property and property obligations, the purpose of which is to identify and prevent corruption violations.

Any action by the investigating authorities should take into account the principle of presumption of innocence and collect evidence of the guilt of the accused in accordance with the law. In this sense, the burden of proof, despite the subject of the crime, lies with the investigating authorities, and testimony - is a right, not an obligation, of the accused. A different understanding of the content of Article 308-1 of the Criminal Code would be contrary to the constitutional provisions on the presumption of innocence.

Therefore, the Constitutional Chamber decided that the contested provisions of the Criminal Code providing for criminal liability of public officers, not contrary to the constitutional principles of the presumption of innocence and equality before the law and the courts.

In conclusion, I would like to note that, despite on short time, the Constitutional Chamber has considered important issues of political and social life. At the same time, the Constitutional Chamber, also with particular attention to the practice of the constitutional courts of other states, examines the legal positions they have developed on all matters that are in the field of judicial constitutional review.

Let me once again express my gratitude to the Constitutional Court of the Republic of Turkey for the invitation and opportunity to participate in this event. We wish great success to all the participants of the Summer School.



*PRESUMPTION OF INNOCENCE*

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## THE PRESUMPTION OF INNOCENCE

*Fatma ŞENOL BEDEVİ\**

It is a great honour to have been invited to address such a distinguished audience.

The presumption of innocence is enshrined in all proper democracies and legal systems and recognised correctly as a golden thread or a pillar of criminal law. But the presumption of innocence is not easy. It requires us to presume something that will not always prove to be true. Yet this is a challenge we accept as the benefits outweigh the costs.

Members of the public have always had a sense of fairness towards an accused individual, recognising that without the presumption of innocence, they could one day find themselves on the receiving end of injustice.

However the attitude of law-makers and judges is of crucial importance. The presumption of innocence in the Turkish Republic of Northern Cyprus is set in place by the constitution and the judgements of the Supreme Court.

The judiciary in North Cyprus is composed of a two-tier Court Structure. The lower courts known as District Courts or Trial Courts and the higher court known as the High Court or the Supreme Court. North Cyprus is divided into 6 districts and each district has its own court. There are also Assize Courts in 3 Districts. The Supreme Court is located in the capital city Nicosia and acts as the Appeal Court for both criminal and civil cases, the Administrative Court and the Constitutional Court. North Cyprus practices Anglo Saxon System of law as opposed to Continental System of law.

Presumption of innocence before the law is one of the fundamental principles of our Constitution which states under Article 18 (4) that;

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*“Every person charged with an offence shall be presumed innocent until proven guilty according to law.”*

According to the Constitution of the Turkish Republic of Northern Cyprus, international agreements duly put into effect have the force of law. The European Convention on Human Rights is part of the domestic law of the TRNC and the High Court has clearly emphasized this position in many cases before it.

The Constitutional Court stated in its decision 24/2002 that, the ECHR is part of the TRNC's domestic law but the Court also emphasized that the Convention should be applied equally as the Constitution and should not be given primacy. Therefore, article 6(2) of the Convention which says *“everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”* is a protected right under our Constitution as well.

North Cyprus inherited many elements of its legal system from Britain, including the presumption of innocence.

The Criminal Code (Laws of Cyprus Chapter 154) and the Criminal Procedure Law (Chapter 155) are the key pieces of legislation governing the regulation of Criminal Justice. The Criminal Code contains definitions, details and punishments for various kinds of offences where as The Criminal Procedure Law lays down the procedures to be followed during arrests, investigations and proceedings. Briefly, in Criminal cases, the trial process must adhere to the norms of a fair trial. The presumption of innocence operates throughout the trial.

Under our Criminal Law the main elements of presumption of innocence are that the burden of proof is on the prosecution, proof must be beyond reasonable doubt, the right of silence, the detention of an arrested person must be for a reasonable time and the prohibition of illegally obtained evidence.

When we look at the High Court judgements relating to the above principles, we find that the presumption of innocence starts from the moment of arrest through to the end of the trial. Therefore, as soon as a person is accused of a crime, all concerned should be guided by the presumption of innocence.



The detention of a person against his will and without a lawful arrest is considered both unlawful and a serious interference with the citizen's constitutional right to liberty. Article 16 (2) of the Constitution contains an exhaustive list of the situations whereby interference with a person's right of liberty may be effected and it can only be done by statute. Parliament is bound by the Constitution and the list contained therein.

The High Court judgement 67/2002, states clearly that the arrest of a person relates to the freedom and human rights of persons and *"the conditions of arrest of a country demonstrates its level of civilisation. In a civilised country which respects human rights, a person can be arrested where necessary and kept in detention for the necessary duration only. Arresting a person unnecessarily and keeping him/her for an unnecessary length of time harms not only that person but the whole country as well."*

The burden of proof is at all times on the prosecution. If at the end of the trial, the court is not certain beyond reasonable doubt of the guilt of the accused, he/she must be acquitted. The defendant does not need to prove his innocence. The defendant benefits from reasonable doubt as a result of presumption of innocence (High Court judgement 6/2013).

However as the court pointed out in the same judgement as it was laid down in the Criminal Appeal case 29/1973, in certain limited situations the onus of proof is put on the defendant and in such situations the standard of proof is balance of probabilities rather than beyond reasonable ground.

As mentioned above, the right of silence is an accepted part of the presumption of innocence. In accordance with the judges' rules the investigation officer can not, once he decided to charge the accused, ask any questions about the crime in question without first cautioning him. Once the suspect has begun a confession, he must be cautioned at the first opportunity. In other words, due to the presumption of innocence and the right of silence an accused can not be forced to give a statement incriminating himself. The caution is nothing but a reminder to the suspect of his right to silence. Similarly a defendant before a court can not be forced to give evidence.



The Criminal Procedure Law contains measures which come close to laying down the right to silence of a defendant in the same way as Article 6 of the Convention. However in the same way as the European Court has interpreted Article 6 as including the right to remain silent as part of a fair trial, our domestic courts apply the right to silence in practice.

Finally, the presumption of innocence should encapsulate the inadmissibility of illegally obtained evidence quashing any convictions based on such evidence. Our domestic courts come close to this position without actually laying it down as law as can be seen in the High Court decision 23-33/2016.

The challenge for us domestically in Cyprus as well as globally for all of us and for our law- makers, is to work towards preventing violations of human rights including the presumption of innocence and incorporating compensation and dropping charges or quashing a conviction where necessary.

There is an old argument relating to capital punishment, which states that it is better to set free one thousand guilty people than to hang one innocent person, which may be translated as it is better to set some guilty people free than to punish innocent people. We must therefore, apply presumption of innocence and the due process of law without hesitation or prejudice. This is necessarily the best result and that's why presumption of innocence, although not easy, is so crucial.

*PRESUMPTION OF INNOCENCE  
PRINCIPLE*

*Hyun Gui KIM  
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*CONSTITUTIONAL COURT OF KOREA*





## PRESUMPTION OF INNOCENCE PRINCIPLE

*Hyun Gui KIM\**

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### I. INTRODUCTION

The presumption of innocence is the norm that criminal defendants or suspects are presumed innocent until the guilty verdict is confirmed. The criminal defendant here is a party in the criminal case. The presumption of innocence as a constitutional principle, therefore, refers to presumption of innocence guaranteed to a criminal defendant in criminal proceedings, especially in the preparation and proceeding of criminal trials.

Broadly speaking, presumption of innocence is a norm that one should not be considered guilty while presumed innocent. Therefore, it is forbidden to impose any form of disadvantages created as an effect of guilty recognition on criminal defendants. Such disadvantages are not limited to criminal sanctions, such as deprivation of physical liberty or property, but may include non-criminal sanctions.

### II. KOREAN CONSTITUTIONAL LAW SECTION 27 (4)

The principle of presumption of innocence was first established in our constitution in 1980 (Article 26, paragraph 4, 8<sup>th</sup> Amendment). When the infamous Yushin Constitution lost its effectiveness in October 26, 1979, as a result of the assassination of the former president, Park Jung-hee and the demolishing of the Yushin regime, amending the existing authoritarian constitution into the democratic constitution was in progress. According to the record of the amendment discussion opened to the public, presumption of innocence was adopted from the 'National Assembly version', amongst many others. Finally, after

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several twists and turns, the 1980 Constitution formally guaranteed presumption of innocence for the first time in Korea. And the current Constitution, 9<sup>th</sup> Amendment, also states the same provision.

Following the footsteps, The Criminal Procedure Act Chapter 3, Section 1 Trial Preparation and Trial Procedure, Article 275-2, states that *“The defendant shall be presumed to be innocent until he/she is finally adjudged to be guilty.”* This regulation was introduced on December 18, 1980 as an amendment to the Criminal Procedure Act.

According to the discussion record of the constitution amendment committee of the National Assembly, the reason presumption of innocence is enacted in the Constitution is that *“our society does not follow the principle of the presumption of innocence, although it has to be obeyed whether formally stated or not”*. According to this document, it was common for judges to treat defendants or even suspects as guilty. The criminal procedure of the Republic of Korea has overcome this dark past and has moved on to the present through the amendment of the constitution and the decisions of the Constitutional Court.

### III. THE QUESTION OF ADMISSIBILITY

Let us go through this problem with an example. Let's say there is a defamation case. It is common that criminal procedure and civil procedure are on the move simultaneously. Even if a criminal trial is acquitted, it is possible that a civil trial for the same case facts is concluded as illegal and therefore the accused is liable for damages. Usually, a civil case comes after a criminal case, but sometimes a civil case can be declared before a criminal case. In such cases, liability for damages caused by defamation can be recognized even though the criminal trial has not yet found conviction of guilt for the defamation. But that does not violate the presumption of innocence principle guaranteed in the Constitution of Korea. Even if it is based on the same facts as the criminal case, the civil case and the criminal case are independent from each other, and the principle of the presumption of innocence which is applied to the criminal procedure is not admissible to the civil case.

Apart from the finalization of guilty conviction in criminal proceedings, it is also possible to impose administrative sanctions



for other legal purposes through due process. For example, in the case of public officials or teachers committing sexual harassment or sexual violence, Equal Employment and Support for Work-Family Reconciliation Act, Article 12 prohibits sexual harassment, and Article 14 provides the employer with a duty to take measures against him, whether the act constitutes a sex crime or not. In such a case, the disciplinary penalties such as expulsion or dismissal can be disposed by the disciplinary commission, based on the disciplinary charges grasped by the commission, separate from the criminal charges or prosecution. In principle, the presumption of innocence principle for the criminal procedure is not applied to such disciplinary measures.

A legal process for identifying and sanctioning criminal law violations is primarily intended to achieve a certain legal purpose, separate from that of criminal trial process. Formal court proceedings, such as criminal, civil, administrative and impeachment trials, respectively have own values and objectives of fairness. However, this does not mean that presumption of innocence applied only to the criminal procedure. It means that the principle which is applied to specific criminal procedure cannot be admitted to other legal processes.

#### **IV. PROHIBITION OF PENALTY UNTIL PROVEN GUILTY**

Criminal procedure is a process of determining whether a person is found guilty or not guilty in violation of criminal law. However, any penalties imposed with an assumption that there is a criminal liability verified may violate the presumption of innocence principle. The principle of presumption of innocence prohibits the imposition of “disadvantages as a result of conviction of guilt” against the accused or defendants in the area other than criminal procedure before the conviction is finalized.

For example, criminal defendants can be detained before conviction. This is called pre-trial detention or detention pending judgement. Pre-trial detention is not a punishment as a result of guilty conviction. It is a temporary measures by investigation authority or the court, in order to secure the whereabouts of criminal suspects who allegedly committed a crime. But if you think it is a disadvantage from guilty presumption, it may seem like it violates the presumption of innocence principle. As



a result, there are a lot of dispute on the matter of the violation of the presumption of innocence principle, regarding the pre-trial detention.

The phases which the presumption of innocence applies may be categorized in accordance with the steps of criminal proceedings. These categories are (1) criminal suspects, (2) criminal defendants, and (3) those found guilty of charges (at the first and appeal trials). And there are prohibited disadvantages as the effect of guilty conviction in each phases. For example, (1) the facts of suspected crime cannot be made public (Article 126 of the criminal law). (2) Some treatments given to criminal defendants with pre-trial detention can be banned. (3) Some provisions which states compulsory removal from position or suspension of teachers, public officials, lawyers, etc. who were sentenced to more than one year of confinement in the first or second trial has been questioned at the Constitutional Court of Korea, as adjudication on the constitutionality of statutes cases

#### **V. PUBLICATION OF THE FACTS OF SUSPECTED CRIME**

The fact that the prohibition of disadvantages is associated with the presumption of innocence principle means that the presumption of innocence is not only a procedural guarantee but also protects the freedom and rights of the people. The Constitutional Court held that it is infringing the right to personality for the respondent to permit taking pictures of the complainant who was handcuffed at the police station during the police investigation, corresponding to the request for coverage by the press (2012Hun-Ma652, March 27, 2014). In this case, the court determined whether the aforementioned measure violated the principle of presumption of innocence with strict judicial scrutiny.

#### **VI. PRE-TRIAL DETENTION AND 'INVESTIGATION WITHOUT DETENTION' PRINCIPLE**

The Constitutional Court has applied proportionality test with strict scrutiny to regulations violating the right of a defendant or a suspect, such as extending the period of pre-trial detention, with an assumption that the defendants or suspects will be sentenced to detention. The Constitutional Court of Korea derives the principle of investigation and trial without detention (Art. 198 para.1 of Criminal Procedure Act) from the presumption of innocence principle (90Hun-ma824, April 1,



1992). And the Constitutional Court of Korea has achieved substantive protection regarding cases of the extension of detention, inclusion of pre-trial detention period, and the treatment of suspects with detention pending judgement.

The Criminal Procedure Act sets a limit on pre-trial detention period for up to 30 days. The Constitutional Court of Korea held that former National Security Act article 19 which approved an exceptional pre-trial detention period up to 50 days for the violation of the act is unconstitutional because this allows such extensions to some minor offense, such as Article 7 (Praise, Incitement), without stating any exception (90Hun-Ma82, April 4, 1992; 96Hun-Ga8, June 26, 1997).

The Constitutional Court held that forcing the detainees to wear inmate uniforms violates the presumption of innocence, violating the principle of proportionality in Article 37 (2) of the Constitution (97Hun-Ma137, etc., (consolidated), May 27, 1999). Also, the Court found Article 298 (i) and (ii) of Restraint and Protection Work Rules which in principle require use of restraints on inmates in prosecutorial interrogation rooms and continue such use even when prosecutors require release from the restraints, and the use of restraints according to the provisions violate the principle of presumption of innocence, and therefore unconstitutional (2004Hun-Ma49, May 26, 2005).

## VII. REMOVAL FROM POSITION AND SUSPENSION

The Constitutional Court found unconstitutional the statutes which state that private school teachers and public officials must be removed from position when prosecuted regardless of the seriousness of the charges or the existence of guilty conviction (93Hun-Ga3, July 29, 1994; 96Hun-Ga12, May 28, 1996), because they do not comply with the principle of proportionality for the freedom of occupation and violate the presumption of innocence principle.

However, the Constitutional Court also held that it is not a violation of the principle of proportionality if such removal was given with consideration of specific and individual circumstances (2004Hun-Ba12, May 25, 2006). The fact that the removal was a discretionary disposition does not mean that it is not a 'disadvantage as an effect of the guilty conviction', because a decision of person with authority for



appointment does not constitute a due process. However, the purpose of the removal from the position penalty is to prevent possible dangers that can be caused by letting the official with criminal charges handle public affairs. And the purpose of letting the authorities decide is to “*consider the specific and individual circumstances and decide the appropriate measure in accordance with the purpose of the provision.*” Therefore, disadvantage as an effect of guilty conviction can be allowed in exceptional cases, when it is proved to be proportional to the public interest.

***PRESUMPTION OF INNOCENCE AS  
DEVELOPED BY THE CASE-LAW OF  
THE CONSTITUTIONAL COURT OF  
THE REPUBLIC OF KOSOVO***

***Dukagjin ABDYLI  
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***CONSTITUTIONAL COURT OF  
KOSOVO***





## PRESUMPTION OF INNOCENCE AS DEVELOPED BY THE CASE-LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

*Dukagjin ABDYLI\**

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### I. INTRODUCTION

The Constitutional Court of the Republic of Kosovo plays an important role in building rule of law and protecting human rights. In essence, amongst other important duties, that is why the Court exists. The Constitutional Court has entered to its 10<sup>th</sup> judicial year. As a leading institution with a mandate to conduct constitutional review analysis, it has been vested with the authority to act as the final interpreter of the Constitution as well as an arbiter of the compliance of the laws with the Constitution.

Throughout this period, Constitutional Court of Kosovo has delivered more than 1390 decisions, with 75 judgments found a violation of the Constitution. In deciding cases, be that in the area of human rights, the Constitutional Court of Kosovo follows and applies international instruments and treaties which are directly applicable in Kosovo, in accordance with Article 22 of the Constitution.<sup>1</sup> Among such instruments, the Constitution provides for a direct applicability

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1 See Article 22 of the Constitution. Article 22 [Direct Applicability of International Agreements and Instruments] Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions: (1) Universal Declaration of Human Rights; (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (3) International Covenant on Civil and Political Rights and its Protocols; (4) Council of Europe Framework Convention for the Protection of National Minorities; (5) Convention on the Elimination of All Forms of Racial Discrimination; (6) Convention on the Elimination of All Forms of Discrimination Against Women; (7) Convention on the Rights of the Child; (8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.





of the European Convention on Human Rights (“ECHR”) and its Protocols – which is constantly used in the case-law reasoning endorsed by the Constitutional Court. In accordance with Article 53 of the Constitution, the Constitutional Court of Kosovo, and all other regular courts in Kosovo, are obliged to interpret human rights and fundamental freedoms guaranteed by the Constitution, in line with the decisions of the ECtHR.<sup>2</sup> As a result, in vast majority of decisions issued by the Constitutional Court, the case-law of the ECtHR plays a pivotal role in the references used. In many cases that require more profound research, the Constitutional Court also refers to opinions and other documents produced by the Venice Commission.

This presentation as an outset will focus on three main points:

1. The Constitution of Kosovo and the application of ECHR in the Legal System of Kosovo;
2. The presumption of innocence in the Legal System of Kosovo;
3. Case-Law of the Kosovo Constitutional Court dealing with presumption of innocence;

## **II. THE CONSTITUTION OF KOSOVO AND THE APPLICATION OF ECHR IN THE LEGAL SYSTEM OF KOSOVO**

The Rule of Law and Human Rights are both interdependent and interlinked. A strong rule of law regime would not be effective or conducive to a sustainable democracy if it didn’t transmit a protection and promotion of human rights. Moreover, the rule of law itself encompasses various inalienable human rights, such as the right to equal treatment before the law and the right to a fair trial. Both the ECHR and the European Court of Human Rights (ECtHR) have defined standards on not only primary concepts such as equality and non-discrimination, but similarly on pre-trial detention and the presumption of innocence.

The Constitution of the Republic of Kosovo follows a strong regime of domestic incorporation of international law. While Kosovo is not yet a member of the United Nations (UN) or the Council of Europe, it has accorded constitutional rank to the provisions of eight international human rights instruments, including:

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2 See Article 53 of the Constitution.



- the Universal Declaration of Human Rights (UDHR)  
- the European Convention on Human Rights (ECHR) and  
- the Council of Europe Framework Convention for the Protection of National Minorities (Framework Convention on Minorities). Furthermore, Article 53 of the Kosovo Constitution requires that all human rights be interpreted consistently with the case-law of the European Court of Human Rights (ECtHR).<sup>3</sup>

One should add here that the fundamental rights enumerated in the ECHR are already part of the Constitution of Kosovo, but binding Kosovo to ECHR had the additional effect of tying Kosovo's human rights regime to the human rights patterns of the Strasbourg regime of human rights.<sup>4</sup>

In this regard, it is important to emphasize that for building rule of law, even Constitutional Court have an obligation to strictly follow the Constitution. Even if Constitutional Courts serve as the final arbiter for the interpretation of the Constitution, they themselves are also bound by the Constitution as a public authority.

The fact that Constitutional Courts have the monopoly of final interpretation of the Constitution – does not mean that they are above the law, above the Constitution. To the contrary, they must abide strictly the rules crafted for them and make sure that the doctrine of separation of powers is respected at all times.

### III. PRESUMPTION OF INNOCENCE IN THE LEGAL SYSTEM OF KOSOVO

A very important constitutional guarantee that safeguards the individual liberty of individuals concerns the right to a fair trial. This right includes certain constitutional guarantees and rights whose purpose is to guarantee the individual a fair, unbiased and impartial trial. Procedural safeguards guaranteeing fair trial are particularly important in criminal sanctions proceedings, and include:

3 Article 53 of the Constitution: [Interpretation of Human Rights Provisions] *Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.*

4 Paul de Hert, Fisnik Korenica, "The New Kosovo Constitution and Its Relationship with the European Convention on Human Rights: Constitutionalization "Without" Ratification in Post-Conflict Societies", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 76 (1), pg. 154.



- 1) the right to a lawful court;
- 2) the right to judicial protection;
- 3) the presumption of innocence;
- 4) the right to appeal.

The presumption of innocence is one of the most important guarantees of legal certainty in criminal law and an integral part of fair trial. Under this presumption, everyone is presumed innocent of the offense until proven guilty by a final court decision. The essence of the presumption is that the prosecutor bears the burden of proving the criminal offence and the criminal liability of the accused.

This understanding is enshrined by the European Convention for the Protection of Human Rights and Fundamental Freedoms, which mandates that anyone charged with a criminal offense be presumed innocent until proven guilty according to law. Such a provision is also contained in the Constitution of the Republic of Kosovo in Article 31 paragraph 5. This means that the presumption of innocence protects the accused from the obligation to prove his innocence in court. The main principle of this right is that the person criminally charged is entitled to the privileges of the principle in *dubio pro reo*.

*The Constitution of the Republic of Kosovo*

*Article 31 [Right to Fair and Impartial Trial]*

...

*5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.*

Besides the Constitution of the Republic of Kosovo, the presumption of innocence as a fundamental guarantee is foreseen also under Criminal Procedure Code of Kosovo which stipulated as following:



### **Criminal Procedure Code of Kosovo No. 04/L-123**

#### **Article 3 Presumption of Innocence of Defendant and *In Dubio Pro Reo***

1. Any person suspected or charged with a criminal offence shall be deemed innocent until his or her guilt has been established by a final judgment of the court.

2. Doubts regarding the existence of facts relevant to the case or doubts regarding the implementation of a certain criminal law provision shall be interpreted in favor of the defendant and his or her rights under the present Code and the Constitution of the Republic of Kosovo.<sup>5</sup>

The presumption of innocence is for the benefit of the defendant and serves as a balance for his equality with the authorized plaintiff. The presumption of innocence is a legal presumption that deals with the factual situation, which has not been proven and, as such, temporarily relieves the probationary process until proven otherwise. In this sense, it has a relative character. The presumption of innocence thus limits and facilitates the probation process, because the defendant who uses the presumption is not obliged to present evidence of the fact that he is the subject of the probation.

#### **IV. CASE-LAW OF THE KOSOVO CONSTITUTIONAL COURT DEALING WITH PRESUMPTION OF INNOCENCE**

The Constitutional Court case-law indicates that more than 90% of the constitutional referrals originated from individuals on matters involving human rights. In scrutinizing the Constitutional Court's case-law, it is evident that ECtHR jurisprudence has been indispensable in that Court's adjudication.

As for the case-law of the Constitutional Court regarding independence of the judiciary in Kosovo, there are a few decisions which are very important in this aspect. This contribution will provide a concrete example stemming from the constitutional justice

<sup>5</sup> Criminal Procedure Code of Kosovo No. 04/L-123 (Official Gazette of the Republic of Kosovo, No. 37, 28 December 2012, Pristina, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2861>).



litigation in the Republic of Kosovo in order to show how our Constitutional Court has contributed to the rule of law, protection of human rights and presumption of innocence.

In an individual case (Case No. KI104/16, *Applicant Miodrag Pavić*)<sup>6</sup>, the Applicant submitted a referral with the Constitutional Court requesting protection of his right to a fair trial as guaranteed by Article 31 of the Constitution in connection with Article 6 of the ECHR. The Applicant challenged decisions of the Court of Appeals of the Republic of Kosovo (hereinafter, the Court of Appeals) and the Supreme Court of the Republic of Kosovo (hereinafter, the Supreme Court). The Applicant complained that the judgment of the Court of Appeals modified the judgment of the Basic Court which had acquitted the Applicant from the charge of having committed a criminal offence of accepting bribes under Article 343 (2) of the Criminal Code of the Republic of Kosovo (hereinafter, the CCK).

The gist of the Applicant's complaint was that the Court of Appeals found him guilty and sentenced him to a year of imprisonment without summoning him to the hearing session; especially taking into account the fact, that the Basic Court had acquitted him from the charge of having accepted bribery. The Applicant had also complained and maintained before the Supreme Court, that the Court of Appeals should have informed him or his representative about the session in which he was found guilty and sentenced to one year imprisonment. The Supreme Court for its part, inter alia, held that: "*since the accused is not found guilty by the Basic Court, the Court of Appeals as a second instance court was under no obligation to notify him about the session*". The Applicant then, after having exhausted all legal remedies and in compliance with the principle of subsidiarity, submitted a constitutional referral with the Constitutional Court. Before the Constitutional Court, the Applicant maintained that criminal proceedings instituted against him were made in breach of Article 390 (1) of the Criminal Procedure Code of the Republic of Kosovo (hereinafter, the CPCK), because he, as the accused party, was not notified about the session of the Court

<sup>6</sup> See Constitutional Court of the Republic of Kosovo, Case No. KI104/16, *Applicant Miodrag Pavić*, Judgment of 7 August 2017.



of Appeals and, thus, was denied to present his arguments in favor of his innocence and potentially influencing the outcome of the case. According to the Applicant, he should have been summoned by the Court of Appeals because the court in question determined matters of guilt or innocence without him being informed or present.

The Constitutional Court, for its part, first determined and was satisfied that the Applicant is an authorized party, has exhausted all legal remedies and has submitted his referral within the four (4) months legal deadline<sup>7</sup>. The Constitutional Court further considered that the Applicant's referral was not inadmissible on any other grounds, and thus, declared the referral admissible and ripe for review on the merits. Bearing in mind that Article 53 of the Constitution enjoins that human rights and fundamental freedoms guaranteed by the Constitution shall be interpreted consistent with the court decisions of the ECtHR, the Constitutional Court relying on the well-established case-law of the ECtHR noted that: (i) the fairness of proceedings is assessed on the basis of the proceedings as a whole; and that, (ii) the requirements a fair hearing in principle imply the right of the parties to be in person at the trial and that this right is closely linked to the right to an oral hearing and the right to follow the proceedings in person. The Constitutional Court summarized that a right to an oral hearing at the appellate proceedings is not absolute as per the ECtHR case law. One is generally not required when the appellate proceedings only involve a review on points of law. Whether one is required when the proceedings involve a review of both points of law and fact, depends on whether an oral hearing is necessary to ensure a fair trial. However, when the appellate proceedings involve an assessment of guilt or innocence, an oral hearing is required to ensure a fair trial. The Constitutional Court recalled that in the case under review (Case No. KI104/16), the Court of Appeals made a determination of the Applicant's guilt or innocence, and declared the Applicant guilty, modifying the Judgment of the Basic Court which previously, had found the Applicant innocent.

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<sup>7</sup> Article 47 of the Law on the Constitutional Court of the Republic of Kosovo Law No. 03/L-121 stipulates that individuals may submit referrals with the Constitutional Court only after having exhausted all legal remedies provided for by law.



The Constitutional Court noted that, in the Applicant's case, the following questions needed to be answered: (1) whether the Court of Appeals called upon to examine the case as to the facts and the law; (2) whether the Court of Appeals was called upon to make a direct assessment of the evidence given in person by the accused; and, (3) whether the Court of Appeals was called upon to make a full assessment of the issue of guilt or innocence.

The Constitutional Court noted that, in the case under review, the Applicant had been acquitted of all charges in first instance (the Basic Court), and that, the Court of Appeals was called upon to examine all aspects of the facts and the law and make a full assessment of the issue of guilt or innocence. Therefore, the Constitutional Court considered that, in order to reach a finding of guilt, the Court of Appeals would have needed to make a direct assessment of the evidence given in person by the Applicant for the purpose of proving that he did commit the act allegedly constituting a criminal offence. The Constitutional Court went on to state that, in such circumstances, it was not possible for the Court of Appeals to make such a full assessment without making an assessment of the evidence given in person by the Applicant. Moreover on this point, the Constitutional Court, by making use of the principle of "fair balance" in the context of criminal proceedings held that it is the responsibility of the competent court to summon the accused party (the Applicant), and that, this situation cannot be attributed to the Applicant.

A very crucial aspect of Case No. KI104/16, which was noted by the Constitutional Court, is that the Court of Appeals did not remand the case for a fresh trial before the Basic Court, but rather, decided to modify the judgment of the Basic Court by finding the Applicant guilty of having accepted bribes and sentenced him to one year imprisonment. Because of that finding, the Constitutional Court held that in accordance with Article 392.2 of the CCPK, the Court of Appeal was under legal obligation to summon the Applicant to the hearing session.

In conclusion, the Constitutional Court found that, by not summoning the Applicant to be present at the session of the Court of



Appeals at which his guilt was determined, the Applicant was denied the opportunity to defend himself from the accusations against him. As a consequence, the Constitutional Court found that there has been a violation the Applicant's right to a fair trial for the criminal offences of which he is charged, as guaranteed by Article 31 of the Constitution in connection with Article 6 of the ECHR.

As a final note, we would like to add that in the above-elaborated case (Case No. KI104/16), the Constitutional Court, even though not explicitly but nevertheless in substance, has held that the presumption of innocence also protects individuals who have been acquitted of a criminal charge. Without protection to ensure respect for the acquittal, the guarantees of Article 31 of the Constitution in connection with Article 6 of the ECHR could risk becoming theoretical and illusory as opposed to practical and effective.





*PRESUMPTION OF INNOCENCE*

*Datin Fadzlin Suraya binti MOHD SUAHA*

*FEDERAL COURT OF  
MALAYSIA*





## PRESUMPTION OF INNOCENCE

*Datin Fadzlin Suraya binti MOHD SUAHA\**

The fundamental principle underlying the criminal justice system in Malaysia is that an accused person is innocent until proven guilty. This presumption of innocence is the hallmark of Malaysian criminal jurisprudence. In effect, it is the duty of the prosecution to prove its case beyond reasonable doubt.

The presumption of innocence principle is derived from Latin maxim "*Ei incumbit probatio qui dicit, non qui negat*" which means the burden of proof is on the one who declares, not on one who denies. Simply put, when the prosecution charged a person for a particular crime, it is the duty of the prosecution to prove it. Until it is done, that person is presumed innocent.

Article 5(1) of the Malaysian Federal Constitution embodies the presumption of innocence, which places upon the prosecution a duty to prove the guilt of the accused beyond reasonable doubt. Article 8(1) of the Constitution which provides that all persons are equal before the law and entitled to the equal protection of the law mandates that a balance must be struck between the public interest and the right of an accused person.

This principle of presumption of innocence and the prosecution must prove its case beyond reasonable doubt is a common law principle of England which Malaysia had adopted. This principle was clearly defined by House of Lords in *Woolmington v. Director of Public Prosecutions* [1935] All ER Rep 1 (House of Lords) where it was held:

*"Throughout the web of the English criminal law one golden thread is always to be seen — that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of*

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\* Head of Research Unit (Criminal), High Court of Kuala Lumpur, Malaysia.



*insanity and subject also to any statutory exception... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

Perhaps the Malaysian equivalent of **Woolmington** is the judgment of Azmi SCJ in **Mohamad Radhi Bin Yaakob v Public Prosecutor [1991] 3 MLJ 169**. His Lordship said as follows:

*"It is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. To earn an acquittal at the close of the case for the prosecution under s 173(f) or s 180 of the Criminal Procedure Code, the court must be satisfied that no case against the accused has been made out which if unrebutted would warrant his conviction (Munusamy v PP [1987] 1 MLJ 492). If defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt."*

In fact, in Malaysia, the presumption of innocence is an integral part of the criminal justice system. This principle is well codified in our CPC and the Evidence Act. The CPC provides as how criminal trial is to be conducted. Under the CPC, a criminal trial is a two-stage process. The first stage is the prosecution's case. The Public Prosecutor must adduce evidence to establish a prima facie case against the accused on the charge preferred against him. This is provided for under section 180 of the CPC which provides as follows:



***“180. Procedure after conclusion of case for prosecution.***

*When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.*

*If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.*

*If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.*

*For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.”*

If the Court at the end of the prosecution’s case finds that the prosecution has not proved a prima facie case against the accused, the Court will acquit and discharge the accused. If the Court finds that a prima facie case has been established, then the accused will be called to enter for his defence.

Once the defence is called, the accused is given three options. He can either elect to give sworn evidence in the witness box; to give unsworn statement from the dock; or to remain silent. These options are provided under section 173 (ha) of the CPC.

It is established principle that when the Court rules that a prima facie case had been made out against the accused and the accused then chose to remain silent, the logical conclusion would be that the accused will be found guilty. Prima facie really means that a case had been established against the accused, which if rebutted would warrant a conviction.

If the accused decides to give evidence from the dock (unsworn statement) his statement will carry less weight when the court considers its defence. This is because he will not be subjected to cross-examination by the prosecution.

However, when the accused elects to give evidence on oath, he will be subjected to cross-examination by the prosecution and the duty



of the Court to make a finding at the end of the prosecution's case whether the accused's defence could be believed. If the Court believes the defence's story, he will be entitled to an acquittal. Even if the Court does not believe his story, the next step is for the Court to consider whether the defence story has cast a reasonable doubt against the prosecution's case. If it does, the accused is also entitled to an acquittal.

A clear guidance on how a trial judge should approach a case is found in the classical case of *Mat V. PP* [1963] 1 MLJ 163 where Suffian J (later Lord President of Malaysia) laid down five steps:

*“(a) If you are satisfied beyond reasonable doubt as to the accused's guilt*

***Convict***

*(b) If you accept or believe the accused's explanation*

***Acquit***

*(c) If you do not accept or believe the accused's explanation. Do not convict but consider the next steps*

*(d) If you do not accept or believe the accused's explanation and that the accused' explanation does not raise in your mind a reasonable doubt as to his guilt*

***Convict***

*(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt*

***Acquit.”***

It can be seen from the above, a person is innocent until the prosecution has proved its case beyond reasonable doubt. It means, from the moment a person is charged for an offence, he is presumed to be innocent. However, it is trite law that proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. Denning J in *Miller v. Minister of Pensions* [1947] 2 All ER 372 described the standard of proof required in a criminal case in the following words:

*“Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it*



*admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt but nothing of that will suffice."*

The above principle had been the guarding principle for the Malaysian Courts. It simply means that proof beyond a reasonable doubt is proof that leaves the Court firmly convinced of the accused's guilt. It is not proof with absolute certainty. The law does not require proof that overcomes every possible doubt. But, if at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by the prosecution or the accused, the accused is entitled to an acquittal.

It is trite law that burden of proof lies throughout the trial on the prosecution. The concept of reasonable doubt is fundamental in the Malaysian criminal justice system. Whether the prosecution has proved its case beyond reasonable doubt depends upon the existence or otherwise in the evidence adduced before the court. It is a question of fact that the Court has to determine at the conclusion of the trial with great care after taking into consideration the entire factual matrix and the circumstances prevailing in the case. This is stipulated under section 182A of the CPC which reads:

***"182A. Procedure at the conclusion of the trial.***

*At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.*

*If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.*

*If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal."*

The above principle has long been decided by the Malaysian Courts. (See *Saminathan & Ors v. Public Prosecutor* [1955] 1 MLJ 121; *Public Prosecutor v. Datuk Harun Hj Idris* [1977] 1 MLJ 180; *Dato Sri Anwar bin Ibrahim v. Public Prosecutor & Another Appeal* [2013] 2 MLJ 293).





In *Balachandran v PP* [2005] 1 CLJ 85, the Federal Court discussed the question when the issue of reasonable doubt arises in the context of a criminal trial:

*“As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s182A (1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt”.*

Thus, unless and until the prosecution has proved its case against the accused, he is presumed to be innocent.

In Malaysia, the presumption of innocence is also well stipulated in the Evidence Act 1950. In particular, sections 101 and 102 provide that in a criminal case it is for the prosecution to prove the guilt of the accused person. In *Nagappan a/l Kuppusamy v. Public Prosecutor* [1988] 2 MLJ 53), Hashim Yeop A Sani, SCJ (as he then was) delivering the judgment of the Court held:

*“Section 101 of the Evidence Enactment throws the burden on the prosecution to prove the guilt of the accused. His Lordship further stated that nowhere in the Enactment is there any suggestion that that burden ever shifts. Section 105 merely says that if the accused seeks to establish certain circumstances the burden of proving those*



*circumstances is upon him. In order to discharge the burden of proof which the prosecution has undertaken, it has to prove every ingredient which goes to make up the offence charged”.*

At the same time, the presumption is now regarded as being part of the Federal Constitution as recognised in the a recent case of ***Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 5 CLJ 780 (Federal Court)**; namely Article 5(1) Federal Constitution:-

*It has been declared as well by this court that the fundamental principle of presumption of innocence, long recognised at common law, is included in the phrase ‘in accordance with law’ (see Gan Boon Aun at paras 14-15).*

However, there are exceptions to the general rule that an accused bears no onus of proof. In some offences, the burden of proof shifted to the defence. This was recognized by the Federal Court in ***Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12**. Jeffrey Tan FCJ noted the following exceptions to the presumption which can be noted as follows:

Firstly, section 103 of the Evidence Act provides that ‘the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person’.

Secondly, section 105 of the Evidence Act provides ‘when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances’.

Thirdly, section 105 of the Evidence Act provides ‘when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances’.



It is also common to find in Malaysia a reverse onus clause, where an Act provides that a particular fact is presumed or deemed to exist 'unless the contrary is proved', as in the Malaysian Anti-Corruption Commission Act 2009, Customs Act 1967, Police Act 1967, Arms Act 1960, and Dangerous Drugs Act 1952, to name just a few, is also an exception to the general rule that an accused bears no onus of proof.

The often given justification for interference with the onus of proof is necessity and the legitimate aim of the legislation in the public interest. Except that interference with the onus of proof could run afoul of the presumption of innocence. Yet at the same time, there is the interest of the community at large to be protected. Three decisions of the House of Lords, namely *R v Lambert* [2001] UKHL 37, *R v Johnstone* [2003] UKHL 28; [2003] 3 All ER 884 and *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2005] 1 All ER 237, provide much valuable guide to resolve that dilemma.

In dealing with interference with the presumption of innocence, Malaysian Courts follow the guidelines imposed by **Lambert**, **Sheldrake** and **Johnstone**. These, as distilled, can be said to be as follows:

- (a) presumptions of fact or of law operate in every legal system;
- (b) it is open to states to define the constituent elements of an offence, even to exclude the requirement of mens rea;
- (c) when a section is silent as to mens rea, there is a presumption that mens rea is an essential ingredient: The more serious the crime, the less readily will that presumption be displaced;
- (d) the overriding concern is that a trial should be fair: The presumption of innocence is a fundamental right directed to that end;
- (e) there is no prohibition against presumptions in principle, but the principle of proportionality must be observed. A balance must be struck between the general interest of the community and the protection of fundamental rights. The substance and effect of presumptions adverse to an accused must not be greater than is necessary and must be reasonable;



(f) the test to be applied is whether the modification or limitation pursues a legitimate aim and whether it satisfies the principle of proportionality;

(g) reasonable limits take into account the importance of what is at stake and maintain the rights of the defence;

(h) the mischief at which the Act is aimed and the ease or difficulty that the respective parties would encounter in discharging the burden are important factors;

(i) it is justified to make it for the accused to prove matters which the prosecution would be highly unlikely to be able to know and which it might be difficult, if not impossible for them to rebut;

(j) relevant to reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption;

(k) the test depends upon the circumstances of the individual case. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case;

(l) the task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence; and

(m) security concerns do not absolve member states from their duty to observe basic standards of fairness.

However, the exceptions above are to be never treated as relieving the prosecution from discharging its duty. The Federal Court recently in *Alma Nudo Atenza* was clear on this when it stated:-

*“But it is not to say that in such instance the prosecution is relieved of its burden to establish the guilt of an accused beyond reasonable*



*doubt. In other words, it is widely recognised that the presumption of innocence is subject to implied limitations (see A-G of Hong Kong v Lee Kwong-Kut [1993] AC 951 at p 968). A degree of flexibility is therefore required to strike a balance between the public interest and the right of an accused person."*

The Federal Court also noted the danger of allowing too many exceptions abroad that will have an effect eroding the presumption of innocence. It was held as follows:

*"[113]InState v Coetzee [1997] 2 LRC 593 the South African Constitutional Court speaking through Sachs J provided clear justification on the need to do the balancing enquiry between safeguarding the constitutional rights of an individual from being 'convicted and subjected to ignominy' and heavy sentence and 'the maintenance of public confidence in the enduring integrity and security of the legal system'. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into scales as part of the justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jerking, housebreaking, drug-smuggling, corruption ... the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relics status as a doughty defender of rights in the most trivial of cases.*

*[114]Hence, this is where the doctrine of proportionality under art 8(1) becomes engaged".*

The Federal Court finally restated the law on the presumption of innocence as follows:

*"To summarise, the following principles may be discerned from the above authorities:*

*(a) art 5(1) embodies the presumption of innocence, which places upon the prosecution a duty to prove the guilt of the accused beyond a reasonable doubt;*



(b) *the presumption of innocence is not absolute. A balance must be struck between the public interest and the right of an accused — art 8(1);*

(c) *a statutory presumption in a criminal law, which places upon an accused the burden of disproving a presumed fact, must satisfy the test of proportionality under art 8(1). The substance and effect of the presumption must be reasonable and not greater than necessary;*

(d) *the test of proportionality comprises three stages:*

(i) *there must be a sufficiently important objective to justify in limiting the right in question;*

(ii) *the measure designed must have a rational nexus with the objective; and*

(iii) *the measure used which infringes the right asserted must be proportionate to the objective;*

(e) *factors relevant to the proportionality assessment include, but are not limited to, the following:*

(i) *whether the presumption relates to an essential or important ingredient of the offence;*

(ii) *opportunity for rebuttal and the standard required to disprove the presumption; and*

(iii) *the difficulty for the prosecution to prove the presumed fact;*

(f) *a significant departure from the presumption of innocence would call for a more onerous justification”.*

There have been instances when Malaysian Courts have struck down laws or decisions which infringes upon the presumption of innocence.

For instance, in *Lim Guan Eng v. Public Prosecutor and another appeal* [2018] 1 MLJ 433 (Court of Appeal), the courts were confronted with a defence statement which an accused person must hand to the prosecution under Section 62 of the Malaysian Anti-Corruption Commission Act 2009. The Court of Appeal ruled the provision to be unconstitutional as it infringes on the right of an accused person who



cannot adduce further evidence after his defence statement is put in while no such restriction is imposed on the prosecution:

*“It was contended by the appellants that since the appellants/accused are required to comply with s 62 before the commencement of the trial and before the prosecution commence their case, there is a reversal in the burden or standard of proof. Not only that, there is a displacement of the **presumption of innocence** of the accused before the prosecution prove their case against the accused. This will lead to an unjust trial.*

*[15] Moreover, the appellants are not able to comply with the requirements of s 62 since the prosecution has not disclosed their entire case at that stage except to reveal some of the documents that would be tendered as part of the prosecution’s evidence pursuant to s 51A(1)(b) of the CPC.*

*[16] Since our decision turned on the provisions of s 51A of the CPC vis a vis s 62 of the Act, it behoved us to lay out the manner how s 51A was included into the CPC. Section 51A of the CPC was added to the CPC vide the Criminal Procedure Code (Amendment) Act 2006 (Act 1274) which came into force on 7 September 2007 (PU (B) 322/2007). It is as follows:*

#### **51A Delivery of certain documents**

*(1) The prosecution shall before the commencement of the trial deliver to the accused the following documents:*

*(a) a copy of the information made under section 107 relating to the commission of the offence to which the accused is charged, if any;*

*(b) a copy of any document which would be tendered as part of the evidence for the prosecution; and*

*(c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.*

*(2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.*

*Subsequently, s 51A of the CPC was amended vide the Criminal*



*Procedure Code (Amendment) Act 2012 (Act 1423) (which came into force on 1 June 2012 (PU (B) 190/2012)) which incorporated sub-ss (3)-(5). These inclusions allow for documents to be admissible even where there is non-compliance with sub-s (1) with certain conditions. The present s 51A is as follows:*

*51A Delivery of certain documents*

*(1) The prosecution shall before the commencement of the trial deliver to the accused the following documents:*

*(a) a copy of the information made under section 107 relating to the commission of the offence to which the accused is charged, if any;*

*(b) a copy of any document which would be tendered as part of the evidence for the prosecution; and*

*(c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution. (2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.*

*(3) A document shall not be inadmissible in evidence merely because of non-compliance with sub-section (1).*

*(4) The Court may exclude any document delivered after the commencement of the trial if it is shown that such delivery was so done deliberately and in bad faith.*

*(5) Where a document is delivered to the accused after the commencement of the trial, the Court shall allow the accused —*

*(a) a reasonable time to examine the document; and*

*(b) to recall or re-summon and examine any witness in*

*(c) relation to the document.*

*[17] The inclusion of sub-ss (3)-(5) of s 51A of the CPC was as a result of the Federal Court case of Dato' Seri Anwar bin Ibrahim v Public Prosecutor [2010] 2 MLJ 312, where it was held that s 51A of the CPC is mandatory; see per Abdull Hamid Embong FCJ (delivering judgment of the court) (as he then was) para 28, p 324:*





*[28]Section 51A of the CPC (A 1274/06) is new. It provides for a mandatory obligation on the part of the prosecution to supply to an accused person the first information report made under s 107 of the CPC, a copy of any document which would be part of the prosecution's case and any statements of facts favourable to the defence, (with a safeguard on public interest consideration) ...*

*[18]We agreed with the submission of the appellants that the prosecution is now protected by s 51A(3) of the CPC in that a document shall not be inadmissible merely because of non-compliance of sub-s (1), but that there is no such equivalent provision in s 62 of the Act when it comes to the rights of the accused/appellants. As such, we were in agreement with the appellants' submission that s 62 of the Act is in breach of arts 5(1) and 8(1) of the Constitution as it subjects the appellants who are charged for offences under the Act to an unfair and onerous burden which is not subjected to the prosecution. In other words, where the prosecution is able to bolster its case by tendering further evidence after the commencement of the trial, by virtue of s 51A(3) of the CPC, the appellants/accused are on the face of s 62 of the Act, precluded from tendering further evidence once the trial has commenced".*

The Federal Court in *Alma Nudo Atenza* meanwhile had to decide on the constitutionality of Section 37A Dangerous Drugs Act 1952 that allows for the usage of two or more presumptions. The Court was of the view that the usage of double presumptions in particular section 37(d) (on possession) and section 37(da) on trafficking imposes a legal burden on the accused person thus violating the presumption of innocence guaranteed under the Federal Constitution:

*"Hence, for the above reasons we are of the view that s 37A prima facie violates the presumption of innocence since it permits an accused to be convicted while a reasonable doubt may exist.*

*[142]Next to consider is whether the incursion into the presumption of innocence under art 5(1) satisfies the requirement of proportionality housed under art 8(1).*



### *Proportionality and s 37A*

[143] *The first stage in the proportionality assessment is to establish whether there is a sufficiently important objective to justify the infringement of the right, in this case the right to presumption of innocence. The legislative objective in inserting s 37A is to overcome the problem of the prosecution failing to prove the element of trafficking as defined in the DDA. Drug trafficking has been a major problem in the country. It needs to be curbed. One way is to secure convictions of drug traffickers which can be considered a sufficiently important objective and one which is substantial and pressing.*

[144] *The second stage of the inquiry is to consider whether the means designed by Parliament has a rational nexus with the objective it is intended to meet. The effect of s 37A, as elaborated above, is to shift the burden of proof to an accused on the main elements of possession, knowledge, and trafficking, provided that the prosecution establishes first the relevant basic facts. It is at least arguable that the resulting ease of securing convictions is rationally connected to the aim of curbing the vice of drug trafficking. Bearing in mind that the validity of individual presumptions are not in issue in the present appeals, it is not necessary for us to analyse the rational connection between custody and control on one hand and possession and knowledge on another, or the connection between possession and trafficking (see *R v Oakes* at para 78).*

[145] *The third stage of the inquiry requires an assessment of proportionality. It must be emphasised any restriction of fundamental rights does not only require a legitimate objective, but must be proportionate to the importance of the right at stake.*

[146] *The presumptions under sub-ss 37(d) and (da) relate to the three central and essential elements of the offence of drug trafficking, namely, possession of a drug, knowledge of the drug, and trafficking. We have already discussed this point earlier in this judgment. The actual effect of the presumptions is that an accused does not merely bear an evidential burden to adduce evidence in rebuttal of the presumptions. Once the essential ingredients of the offence are presumed, the accused is placed under a legal burden to rebut the presumptions on a balance of probabilities. In our view it is a grave erosion to the presumption of innocence housed in art 5(1) of the FC”.*



Reverting to the exceptions to the presumption of innocence, it is to be noted that, as with most cases, there are exceptions to the rule. As stated earlier, section 106 of the Evidence Act 1950 may reverse the onus on the accused where the existence of that fact is particularly in his knowledge. A more specific instance of this is section of the Dangerous Drugs Act 1952. It reads as follows:

*“36. It shall not be necessary in any proceedings against any person for an offence against this Act to negative by evidence any licence, authorization, authority, or other matter of exception or defence, and the burden of proving any such matter shall be on the person seeking to avail himself thereof”.*

The whole idea of having such a provision (usually known as a statutory exception), is for cases where the proof of the fact is much easier on the accused than it is on the prosecution. If the simple tendering of that evidence exculpates the accused, then it would make better sense to have him prove it rather than have the prosecution disprove and discount all the other possibilities such that the only conclusion is the accused person’s guilt.

This point is aptly illustrated by Abdul Wahab Patail J in *Jonaidi Mansor v. Public Prosecutor* [2002] 1 CLJ 761 who, in explaining the rationale behind section 36 of the Dangerous Drugs Act, said as follows:

*“That the appellant is not a person who is authorised under ss. 4 and 5 of the Dangerous Drugs Act 1952 is stated by s. 36 Dangerous Drugs Act 1952 to be not a matter the burden of which is upon the prosecution to prove...*

*That the appellant did not know how the dangerous drugs cannabis came to be in his bag, that it could have been placed into the bag by other persons is part of the defence case. PW4, PW5 and PW6 who were in the car with the appellant at the time the drugs were found, gave evidence for the prosecution they did not place any such drugs in the bag. It is not, and it has never been for the prosecution to prove how the dangerous drugs came to be in the bag. All that the law requires, in utter common sense, is that such persons as may have access to the bag are excluded.*



*Since the narrative of the prosecution case is that the dangerous drugs cannabis was found in the bag in the car... the prosecution had fully discharged that burden by calling PW6, PW7 or PW8 who were present when the bag was found in the car, that they did not place the dangerous drugs cannabis into the bag. That other persons may have access to the bag and could have placed the dangerous drugs in the bag in the appellant's room is the appellant's defence. It is not for the prosecution to prove that the appellant's mother, brother, niece or friends did not place the dangerous drugs in the bag in the appellant's room. That burden is clearly upon the appellant, and he must so prove, in view of the application of s. 37(d), on a balance of probabilities."*

Section 36 of the Dangerous Drugs Act is not too dissimilar in principle to section 106 of the Evidence Act 1950. Gordon-Smith AG JA in explaining section 106 had this to say:

*"The second illustration to the section [Illustration (b) to section 106 of the EA] also specifically applies both to civil and criminal case and casts on a person the proof of shewing that he is qualified to do some act which, but for such qualification, is prohibited. This section and others of a similar nature codify what is and has been for years the English law in this respect. Supposing a man is prosecuted in England for carrying a gun, or shooting game without a licence, it would be absurd to attempt to produce every postmaster or sub-postmaster in England (who are authorised to issue such licences) to prove that the accused had not been issued with the necessary licence. The burden is, of course, on the accused to negative the averment of being unlicensed, by producing his licence".*

## CONCLUSION

In summary, the presumption of innocence is, in Malaysia, a constitutionally protected right. It serves to protect innocent people in consonance with the rule of law. However, the presumption is not completely inflexible and does recognize, on the basis of certain justifiable cases provided by law, the accused does indeed bear the onus of proving certain facts. The fulcrum lies in finding where the justice of the case lies.



On the issue of needing to draw a fair balance between the interests of the accused on the one side and the State's on the other, the former Chief Justice, Raja Azlan Shah pertinently remarked as follows on the occasion of his elevation to the Bench in 1965:

*"I shall endeavour to do justice, not only to the accused but also to the State. Lest we forget, justice not only means the interests of the accused but also the interests of the State".*

This had been widely accepted by the Malaysian Courts. But the principle of presumption of innocence is still entrenched in the Malaysian criminal jurisprudence.

***PRESUMPTION OF INNOCENCE AND  
CRIMINAL PROCEDURE LAW OF  
MONGOLIA***

***Munkhbolor LKHAGVA***

***CONSTITUTIONAL COURT OF  
MONGOLIA***





## PRESUMPTION OF INNOCENCE AND CRIMINAL PROCEDURE LAW OF MONGOLIA

*Munkhbolor LKHAGVA\**

### I. INTRODUCTION

“Presumption of Innocence” is an important subject not only for the law of criminal prosecution, but also civil and administrative cases for protecting human rights. In this article, I am going to discuss briefly how the presumption of innocence has been stated on our Constitution and Criminal Procedure Law and how our Constitutional Court applied this principle in practice.

One of the principles that ought to be followed in all phases of criminal prosecutions is the presumption of innocence. This fundamental principle shall be applied with other principles in every phase of inquiry, investigation and court proceedings.<sup>1</sup>

Regarding this issue, scholars have defined the presumption of innocence in their work as “... *All the other principles of the criminal prosecutions are somehow based on this principle, without this presumption none of the other principles can be fully implemented, they just become a mere thing, an empty declaration. Therefore, the presumption of innocence is the most important principle in the criminal prosecution as a guarantee of their implementation while being applied in parallel with other principles*”.<sup>2</sup>

The presumption of innocence is one of the most important guarantees for denying evidence that was previously established as being inexorably true or one-sided, and for abrogating someone

\* Legal Consultant, Constitutional Court of Mongolia.

1 Zumberelkham D., *Presumption of Innocence in Criminal Procedure Law of Mongolia*, Ulaanbaatar, 2005, p.94.

2 Kasumov Ch.S., *Presumption of Innocence in Soviet Law*, Baku: Elm, 1984





punishable on unfounded grounds prosecuting as defendant, imposing punishment on others in criminal cases.<sup>3</sup>

Accordingly, modern criminal prosecution is unimaginable without the presumption of innocence.

## II. THE PRESUMPTION OF INNOCENCE IN THE CONSTITUTION AND THE OTHER RELATED LAWS OF MONGOLIA

Some scholars believe that the historical legal acts of our country have been reflected one of the important elements of the presumption of innocence – prohibition of giving testimonies through force. For example, one of the first Mongolian state lawyer, Shikhikhutug, who lived in the beginning of the XIII century, resolved the case in accordance with the following principle: *“Not allowed to oppress an accused person. It is important to note that the suspected shall not confess in committing the crime because of his or her fear. Do not be afraid. Just tell the truth.”*<sup>4</sup>

Looking at this fact, elements of the principles have been recorded in our historical legal acts. It should be noted, however, that the presumption of innocence have not been specifically defined in the legal resources until the democratic Constitution of Mongolia got into force.<sup>5</sup>

The current Constitution of Mongolia was adopted in 1992 and this law provides a clear overview of the presumption of innocence at first time in our country. Specifically, article 16 part 14 of the Constitution states that *“Right to compile a complaint through an appeal to protect such rights if he considers that the rights or freedoms as prescribed by the laws of Mongolia or by the international treaties have been violated; and shall have the right to be compensated for the damage illegally caused by others; right not to testify against oneself, his family or parents and children; right to defend himself; right to receive legal aid; right to have the evidence examined; right to a fair trial; right to be tried in his own presence; right to appeal against the court decisions, right to request a pardon. Demanding for or compelling to*

3 Bat-Erdene B., Bayasgalan G., Criminal Procedure Law of Mongolia, Ulaanbaatar, 1996, p.57.

4 Badarchit S., Shikhikhutug - First State Attorney of the Mongolia, Awake Magazine, 1990, No.39 /39/, p.62 (cited).

5 Zumberellkham D., Presumptions of Innocence in Criminal Procedure Law in Mongolia, Ulaanbaatar, 2005, p.56.



*or using the force to testify against oneself shall be prohibited. Every person shall be presumed innocent until proved guilty by the court<sup>6</sup> through the due process of law. ...”.*

It provides citizens with the right to be presumed innocent until proven guilty according to the law, and has that any officials conducting the prosecution must adhere to this law. Proved by the court means that the court shall determine whether the defendant is guilty or not through judicial examination based on adversarial litigation between prosecuting and defending parties with equal rights.

Furthermore, the international treaties that are ratified or accessed by Mongolia, shall be effective as the domestic legislation and the international treaties to which Mongolia is a Party shall fulfill the obligations under them in good faith.<sup>7</sup> Therefore, Mongolia has the obligation to fulfil the norms of innocence set out on the international treaties that are ratified or accessed by Mongolia, for example, article 11 section 1 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly states that *“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense”*<sup>8</sup> and article 14 section 2 of the International Covenant on Civil and Political Rights, ratified on 18th November 1974 by Mongolia<sup>9</sup> stipulating that *“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”*.<sup>10</sup>

The legal guarantees are there to ensure these principles are reflected in number of other laws in Mongolia, such as the Criminal Procedure Law of Mongolia,<sup>11</sup> the Law on Courts of Mongolia, the Law on Crime Prevention, the Law on the Arrest and Detention of the Suspect and Accused.

6 Article 47 section 1 of this act provides that *“The judicial power shall be exercised exclusively by the courts of justice”*.

7 Article 10 section 2 and 3 of the Constitution.

8 General Assembly resolution 217 A (III) of 10 Dec. 1948; Compilation, vol. I, p.1.

9 Signed on 5 January 1968.

10 United Nations, Treaty Series, vol.999, p.171; Compilation, vol. I, p.20.

11 Criminal Procedure Law of Mongolia, *“The State Information”* bulletin № 23, 2017.



### III. THE PRESUMPTION OF INNOCENCE AND SOME OF THE CHALLENGES IN THE CRIMINAL PROCEDURE LAW OF MONGOLIA

After the adoption of the democratic Constitution of Mongolia, the presumption was first added to the Criminal Procedure Law of Mongolia on 28 March 1994 and since then has been further clarified in the newly adopted laws of criminal procedure. The implementation of the principles will depend directly on how well recorded the concept of the presumption of innocence is in the laws of criminal procedure.

The new Criminal Procedure Law (hereinafter referred to as “CPL”) enforced in 2017, has the following norms:

- No one shall not be deemed guilty of committing a crime until a judgement of a court is issued;<sup>12</sup>

- Investigator, prosecutor and court are prohibited to demand the suspect, accused or defendant to prove their innocence by themselves. The accused has the right to refuse to give testimony. The accused shall not bear the duty to give testimony against himself or to prove his involvement in a crime or other circumstances of a crime. It is forbidden to coerce an accused to testify against himself;<sup>13</sup>

- If there is a doubt in guilt of a suspect, accused or defendant, or interpretation or application of the Criminal Law<sup>14</sup> and this Law even though all evidence relevant to the case were considered, these shall be settled in favor of the suspect, accused or defendant;

- A decree of conviction shall be issued only if during the course of the court hearing the guilt of the defendant in committing the crime is proved;<sup>15</sup>

- “Confession of the accused and defendant” alone shall not be the ground of a court decision to prove the accused or defendant’s guilt of committing the crime;<sup>16</sup>

12 Article 1.15 section 1 of the CPL.

13 Article 1.7 section 4 of the CPL.

14 Criminal Law of Mongolia, “The State Information” bulletin №7, 2016.

15 Article 7.4 of the CPL.

16 Article 1.15 section 2 of the CPL.



- Only evidence examined during the judicial session and court hearing may become the ground for a court decision.<sup>17</sup> (An investigator, prosecutor and court shall evaluate all the evidence in their entirety in order to determine which the evidence is relevant to a case and which was obtained according to law, and if there is sufficient evidence for reviewing and resolving the case.<sup>18</sup> If there is justification to *doubt* the significance or relevance of the evidence to a case in the course of examination, a court decision cannot be grounded on such evidence. The court shall examine through court hearing the evidence presented in the case and decide which of them could be the ground of a court decision.<sup>19</sup>

Thus, a court shall issue a decree of acquittal in instances when one's guilt is not proved in committing the crime.

The criminal procedure law regulates a relationship between participants, such as witnesses, suspects of committing the crime set forth in the Criminal Law and his or her relationship with the state bodies, called courts, prosecutors, institutions to administer inquiries and investigations,<sup>20</sup> and each subject of the relationship has certain rights and obligations.<sup>21</sup> Doctor of Law, Mr. Zumberellkham, in his article about the presumption of innocence in criminal jurisdiction of Mongolia clearly defines the powers of the officials conducting the criminal proceedings: *"The inquiry officer, investigator, and prosecutor consider the accused is guilty expresses only his or her opinion. They must prove that they are right. However, if the court acknowledges this opinion through its decision, the defendant's guilt of committing the crime is officially proved since the court decision took effect. ..."*<sup>22</sup>

In this article will not discuss participants of criminal prosecution called an accused, defendant, convict, who has right to be presumed innocent as well as the state officials, such as investigator, prosecutor, judge, who have duty to act in accordance to the presumption of

17 Article 36.2 section 4 of the CPL.

18 Article 16.3 section 8.3 of the CPL.

19 Article 16.1 section 8 of the CPL.

20 Article 6.1 of the CPL.

21 Narangerel C., *Criminal Law of Mongolia*, Ulaanbaatar, 1999, p.5.

22 Zumberellkham D., *Presumptions of Innocence in Criminal Procedure Law in Mongolia*, Ulaanbaatar, 2005, p.79.



innocence when conducting criminal proceedings. Their rights and responsibilities are stated in the laws.

Let us further discuss a participant of criminal prosecution called “suspect”, who has the right to be presumed innocent in committing the crime when conducting criminal proceedings.

- One of the participant who has the right to be presumed innocent - Suspect

The subject who has the right to be presumed innocent shall be broadly referred to as “every person” and, in narrow - the people involved in the crime such as suspects. For example, the right of a person to be considered innocent shall be violated by making an announcement through public media as if he was guilty of an offense when the person was not even identified as a suspect in connection with a crime. Whereas, in cases where a person involved in the crime being prosecuted as a suspect is illegally accused as his guilt in committing the crime has been proved, the right to be presumed innocent is violated in that criminal prosecution.

Since 1963, the Mongolian criminal procedural laws used to have the term “suspect”, and which person could be identified as a suspect and what his rights were clearly written in that law.

However, in accordance with article 1.4 section 1.3 of the CPL, enforced since 2017, a “suspect” is one of the **participants** in criminal prosecution, and it states that a person becomes a suspect officially since the summoning of the accused from the investigation authority in order to introduce a decree of prosecuting as an accused<sup>23</sup>. Until receiving the news to introduce the decree of accusation, a suspected person’s rights and obligations are not clearly stated in the law. In other words, the word “suspect” had not been properly defined and a person could be called as a witness and then changed to a suspect without really knowing.

According to the CPL, a witness means a person who knows the significant circumstances of a crime and the witnesses are obliged to state the facts of their case. A witness is obliged to give a true and correct testimony regarding the case. If a witness obstructed the criminal

<sup>23</sup> Article 31.2 of the CPL.



proceedings, deliberately giving false testimony or avoiding to give a testimony he shall be imposed a criminal liability in accordance with the Criminal Law.

In this regard, the clause of the CPL, which lodged the condition that he can be considered as an accused due to his own testimony as a witness, is most likely to violate the presumption of innocence set out in the Constitution of Mongolia, the Universal Declaration of Human Rights<sup>24</sup>, the International Covenant on Civil and Political Rights<sup>25</sup> as well as the CPL provisions itself.

The uncertainty of the provisions of the law is still present, and taking a witness testimony from a suspect is a serious violation of the fundamental rights, stated in article 16 part 14 of the Constitution of Mongolia, which says *“Right to compile a complaint through an appeal to protect such rights if he considers that the rights or freedoms as prescribed by the laws of Mongolia or by the international treaties have been violated; ... right not to testify against oneself ...; right to defend himself; right to receive legal aid ... Demanding for or compelling to or using force to make one testify against oneself shall be prohibited. Every person shall be presumed innocent until proved guilty by the court through the due process of the law. ...”*.

On this regard, Doctor of Philosophy Mrs. Unurmaa B., the Director of Institute for Studying the Causes and Conditions of a Crime of the Training and Research Center of the General Prosecutor's Office, prescribed clearly that the dispute for determining the legal status of the participants as “a suspect” whose rights and duties are not uncertain, even if they are a main participant of a criminal prosecution, is not an issue of whether or not they are to be considered as a suspect or to pass a decree to identify a suspect in the proceeding. It shows that a suspect, who is giving a witness testimony even though he is being a main participant of the criminal proceeding, is responsible for proving his innocence by himself. This is breaching article 1.7 section 4 of the CPL, which states that court, prosecutor, investigator is prohibited to require a suspect, accused or defendant to prove his innocence by himself.<sup>26</sup>

<sup>24</sup> Article 11 section 1 of the Declaration.

<sup>25</sup> Article 14 section 1 and section 3.g of the Fact.

<sup>26</sup> Unurmaa B. (PhD), Comparison of the Regulations for ‘Non-Participant’ Participants or ‘Suspects’ in the Criminal Procedure Law of Mongolia with the Regulations in Germany,



In relation to the above provisions of the CPL, two citizens (advocates) have been referred to the Constitutional Court. Specifically, according to the CPL, *“a witness is any person who knows the significant circumstances for resolving the criminal case”*<sup>27</sup> and the new CPL omits the condition, that our former Criminal Procedure Law had, which stated, *“A witness is a person not involved in the crime”*<sup>28</sup>. The plaintiffs are arguing that this broad definition of witness is becoming a prerequisite of breaching the presumption of innocence as prescribed in the Constitution and this dispute is under consideration at this moment.

#### IV. THE PRESUMPTION OF INNOCENCE AND THE PRACTICE OF CONSTITUTIONAL COURT OF MONGOLIA

As I noted above that the clause related to the presumption of innocence is in article 16 part 14 of our Constitution. About one percentage of the total inquiries<sup>29</sup> we received since the establishment of the Constitutional Court of Mongolia asked to review whether clauses of the CPL were violated this article of the Constitution and 1/3 of them were recognized as it inconsistent with the Constitution.

Now I am going to tell about three cases that were adjudicated through our court and amended appropriately by our Parliament.

- Summary of the decision №01 of the Constitutional Court of Mongolia issued on 15 January 2014:

In 2013, the Constitutional Court reviewed the dispute about whether article 342 section 342.1 of the Criminal Procedure Law of Mongolia (2002), which says that the convicted or acquitted person or victim can lodge their complaints to the Supreme Court to review the acquitting or sentencing decrees of the court of appellate instance only through his advocates, violates the constitutional rights to defend yourself, to lodge complaints to the court of appeal and right to appeal

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08 Jan. 2019, official website of Mongolian Lawyers Association <<https://www.mglbar.mn>>, retrieved on 15 Aug. 2019.

27 Article 9.6 section 1 of the Criminal Procedure Law of Mongolia.

28 Article 45 section 45.1 of the Criminal Procedure Law of Mongolia, 2002.

29 According to the Law about the Constitutional Court of Mongolia, **“information” can be submitted by a person/citizen to protect the public’s interest, an “application” – by a person/citizen to protect his/her own interest, and a “request” – by high ranking state officials and organizations, stated by their name in the law.**



against the court decision. It recognized in its decision that the above provisions are inconsistent with article 16 part 14 of the Constitution.<sup>30</sup>

- Summary of the decision №03 of the Constitutional Court of Mongolia issued on 12 April 2017:

In 2017, the Constitutional Court reviewed the dispute about whether the phrase stating “A prosecutor or defense counsel shall have the right to participate in judicial session” of article 349 section 349.1 of the Criminal Procedure Law of Mongolia (2002) violates some provisions article 16 part 14 of our Constitution. In the meantime, article 349 section 349.1 of this law stipulated, “A prosecutor or defense counsel shall only have the right to participate in a judicial session that reviews and resolves a case through supervisory procedure and if such a person has submitted the request it shall be obligatory to allow them to participate.”<sup>31</sup>

Unfortunately, the Constitutional Court adjudicated the dispute on 12 April 2017 and passed conclusion numbered 03 that says, “Did not breach the provisions of the Constitution”.

According to my viewpoint, this provision is likely to be set out in the law in connection with the matters such as the costs of transporting prisoners from prison to prison once the lower court decisions were made as our country has appellate courts, which have jurisdiction over a vast territory. In this global society, I hope that due to the development of e-government, defendants and other participants of the case will be able to participate in any stage of the judicial hearing.

- Summary of the decision №01 of the Constitutional Court of Mongolia issued on 13 March 2019:

In March of this year, our Court reviewed the dispute about whether in the provisions 39.1.4, 39.9, 40.8.1 of the CPL, which states that when the defendant and his defense council compile a complaint against the court decision, the defendant’s status is likely to aggravate through allowing the supervisory court to increase the penalty imposed by the lower instance court, violates the constitutional rights to lodge complaints by the defendant and his defense council to the court of

30 Conclusion №01 of the Constitutional Court of Mongolia issued on 15 January 2014, and it was accepted by the Parliament through its resolution №21 on 23 Jan. 2014.

31 Conclusion №01 of the Constitutional Court of Mongolia issued on 12 April 2017.





appeal, right to defend yourself, right to appeal against the court decision and right to receive legal aid as well.

The CPL regulated the condition: If a complaint lodged against a supervisory court decision, the defendant's status can become aggravated by the supervisory court decision through increasing the penalty imposed by the lower instance court. It creates the fears and precautions to aggravate the penalties already imposed the convictions were increased in some decision of the supervisory court in practice.

By considering the conditions, the Constitutional Court identified that it is likely to cause the negative results of refusing to proceed with a judicial review.

Our Court concluded in its decision that above-mentioned provisions of the CPL are inconsistent with article 16 part 14 of the Constitution, that is stipulated "*A citizens have a right to appeal against the court decision*", and article 19 section 1 of the Constitution, stated "*The State is accountable to the citizens for the creation of ... legal ... guarantees for ensuring the human rights and freedoms, ... and to restore such infringed rights for their exercise*".

This decision was accepted by the Parliament of Mongolia and made changes to the provisions of the CPL on 25 April 2019.

Therefore, our Court has been fulfilling its obligation to ensure the presumption of innocence, protect human rights as guaranteed by the Constitution through its decisions.

## V. CONCLUSION

To conclude the fundamental principle that serves as a guiding principle in all stages of criminal proceeding with other principles is the presumption of innocence.

Anyone charged with a criminal offence has the right to be presumed innocent until proved guilty by the court in accordance with the law. How well these human rights are accurately implemented in reality depends on whether the necessary provisions are comprehensively written in the laws, whether there is a possibility to implement these norms in a manner strictly consistent with them and how closely the



implementation is carried out between the authorities, and whether the implementation is monitored etc.

Once the presumption of innocence is properly reflected in the law and enforced accordingly and consistently, it will ensure human rights guaranteed by the principle.

Finally, I want to emphasize the importance of the Constitutional Court to ensure and strengthen this guarantee for protecting human rights and the Mongolian Constitutional Court has proved that its impact to promoting human rights in the country through its judgements.



*PRESUMPTION OF INNOCENCE*

*Kyaw ZEYA*

*CONSTITUTIONAL TRIBUNAL OF THE  
REPUBLIC OF MYANMAR*





## PRESUMPTION OF INNOCENCE

*Kyaw ZEYA\**

### I. INTRODUCTION

**The presumption of innocence has various definitions but with a common theme, as follows:**

Presume means that you take something for granted as being true depending on how certain you are. Presumption usually involves a higher level of certainty and is used in situations where someone makes an educated assessment beyond reasonable doubt, based on proof or evidence.

Presumption refers to a belief on the balance of probabilities or beyond reasonable doubt -depending on the case at hand - that a case has been proven or not.

The presumption of the innocence of the defendant in a criminal action in Anglo-Saxon jurisprudence, places upon the prosecution the burden of proof of the defendant's guilt.

The presumption of innocence is a legal principle that centres on the notion that a defendant is innocent of a crime, unless the prosecution can prove guilt. This legal principle relieves the defendant of the burden of proving his innocence.

In criminal law, the prosecutor must prove any charges made against a defendant, beyond reasonable doubt. In practice, if jurors in a trial had any reasonable doubt that the defendant committed the charge(s) against him or her, they cannot convict.

The presumption of innocence is a cardinal principle of Myanmar's justice system. It is the prosecution's burden to prove guilt beyond

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\* Director, Procedural and Research Department, Constitutional Tribunal of the Union of Myanmar.



reasonable doubt. Without the presumption of innocence principle, the prosecution would not have to prove guilt, and a defendant would be denied his right to due process. Essentially, the defendant's presumption of innocence places the burden of proof on the prosecution.

## II. PRACTICAL USAGE

Article 7 of the Universal Declaration of Human Rights declared as follows:

*"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."*<sup>1</sup>

In accordance with the above-mentioned article, everyone has equal protection of the law. Thus, everyone can enjoy the benefits of the principle, the presumption of innocence.

The Constitution of the Union of Myanmar- in section 21(a) -prescribes as follows:

*"Every citizen shall enjoy the right of equality, the right of liberty, and the right of justice, as prescribed in this Constitution."*<sup>2</sup>

Myanmar recognizes the presumption of innocence. We practice that principle in the Myanmar judicial system.

In the Myanmar Evidence Act, the burden of proof is prescribed in sections 101 to 104.<sup>3</sup> The following are important issues:

- (a) Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

Illustration: A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime.

- (b) The burden of proof as to any particular fact lies with the person who requests the Court believe in its existence unless, it is

1 Article 7 of the Universal Declaration of Human Rights.

2 Section 21(a) of the Constitution of the Union of Myanmar.

3 Sections 101 to 104 of the Evidence Act, 1872.



provided by any law, that the proof of that fact shall lie on any other particular person.

Illustration: A prosecutes B for theft and submits to the Court to believe that B admitted the theft to C. A must prove the admission.

In criminal cases, the following principles should be followed:

- (a) A person accused of an offence is presumed to be innocent until he is proven to be guilty.
- (b) If there is a reasonable doubt of the guilt of an accused person, he is entitled to the benefit of that doubt and cannot be convicted on that count.
- (c) 'It is better that several guilty persons should escape than that one innocent person should suffer.'

In the Myanmar judicial system, criminal cases are divided into two kinds, summons cases and warrant cases: summons cases are cases relating to an offence punishable with imprisonment for a term not exceeding six months; warrant cases include all cases other than summons cases.<sup>4</sup>

A summary of the procedure of the trial of summons cases is as follows:<sup>5</sup>

- (a) Firstly, the particulars of the offence shall be stated to the accused, and he shall be asked if he has any cause to show why he should not be convicted, but it shall not be necessary to frame a formal charge.
- (b) If the accused admits that he has committed the offence, and he shows no sufficient cause why he should not be convicted, the Magistrate shall convict him.
- (c) If the accused does not make such admission, the Magistrate shall proceed to hear the complainant and take all evidence as may be produced in support of the prosecution.
- (d) Then the Magistrate shall proceed to hear the accused and take all such evidence as the accused produces in his defence.

<sup>4</sup> Section 4 (1) (v) and (w) of the Code of Criminal Procedure.

<sup>5</sup> Section 242 to 246 of the Code of Criminal Procedure.





- (e) If the Magistrate finds the accused not guilty, he shall record an order of acquittal.
- (f) The Magistrate may convict the accused of any offence which, from the facts admitted or proved, he appears to have committed.

The following procedure shall be observed by Magistrates in the trial of warrant cases:<sup>6</sup>

- (a) When the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the complainant and take all evidence as may be produced in support of the prosecution, and the accused shall have the right to cross-examine the complainant and the witnesses produced.
- (b) If, upon taking all the evidence of the prosecution, he finds that no case against the accused has been made out of which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.
- (c) The Magistrate may discharge the accused at any previous stage of the case, if he considers the charge is groundless.
- (d) If, when the evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence which the Magistrate is competent to try and could be adequately punished by him, he shall frame in writing a charge against the accused.
- (e) The charge shall then be read and explained to the accused, and he shall be asked whether he is guilty and whether he has any defence to make.
- (f) If the accused pleads guilty, the Magistrate shall record the plea, and may, in his discretion, convict him thereon.
- (g) If the accused refuses to plead, or does not plead or demands to be tried, he shall be required to state forthwith whether he wishes to cross-examine any witness for the prosecution, whose evidence has been taken. If he says that he does so wish, the witnesses named by him shall be called and be cross-examined.

<sup>6</sup> Section 252 to 258 of the Code of Criminal Procedure.



- (h) The accused shall then be called upon to enter his defence. If he enters any written statement, it shall be filed with the record. The accused shall be asked whether he desires to give evidence on his own behalf. If the accused decides to give evidence, his evidence shall next be taken and after his cross-examination and re-examination (if any), the evidence of witnesses for the defence (if any) shall be taken. If the accused declines to give evidence, he shall be examined by the Court before the evidence of the witnesses for the defence is taken. If examined so, cross examination of him will not be allowed.
- (i) In any case in which a charge has been framed, if the Magistrate finds the accused not guilty, he shall record an order of acquittal.
- (j) If the Magistrate finds the accused guilty, he shall pass sentence upon him according to law or send the case to higher court according to law.

In all cases of summons and warrant, the accused is presumed to be innocent at any and every stage of the case before he is convicted. It is presumed that even though he is formally charged, the presumption of innocence principle is to be followed.

### III. CASE STUDIES

In *SeinHlav. Union of Myanmar*<sup>7</sup>, it was asserted as follows:

*“No burden of proof lies upon the accused to prove that he is not guilty. The complainant must prove obviously that the accused committed the crime beyond a reasonable doubt.”*

In *MaungKyimaung v. Union of Myanmar*<sup>8</sup>, it was decided that:

*“The burden can not be changed to the accused to defend himself, if there is an accusation by the complainant only. The burden of proof lies upon the complainant to investigate completely and to prove validity. If this were not the case, malicious persons could easily accuse others and innocent persons will be tired of explaining themselves.”*

<sup>7</sup> 1951, B.L.R (H.C) 289.

<sup>8</sup> 1968, B.L.R (S.C.A) 52.



In *MaungAungShwe v. Union of Myanmar*<sup>9</sup>, the Court concluded:

*Although the related facts are against the accused, it is rare to decide definitely that the killer must only be the accused, not another one. It is true that the accused cannot give satisfactory evidence where he was, when the crime occurred. But the burden of proof does not lie upon the accused to prove that he is not guilty. It is the responsibility of the complainant to prove beyond reasonable doubt that he is guilty. It would support and strengthen the argument for the prosecution side, if a blood-strained sword or other thing relevant to the case was found in the possession of the accused. No such thing nor any money were found when searching the accused. The accused did not try to abscond after the crime occurred. It is not reasonable to conclude that the accused killed the dead person although there are witnesses who saw the accused following the dead person.*

#### IV. UTILITY IN OTHER FIELD

The principle of presumption of innocence can be of use in fields other than in criminal cases. For example, suppose we have to settle problems of our staff at work. If a member of staff infringes the discipline required of his position, he will be punished on the basis of his fault. He should be presumed to be innocent until valid proof is found that he committed the fault in question.

In Myanmar, the principle of the presumption of innocence is the concern of the Constitutional Tribunal's jurisdiction. All Constitutional matters arising in the Constitutional Tribunal shall be considered and be decided in conformity with the Constitution or not.

If a Court in Myanmar has conferred on it the power to settle the individual rights of citizens, the principle of the presumption of innocence will be applied. The Court will consider the matter submitted by the applicant and should pass orders which favour the applicant, only when the facts submitted to the Court are proved that the right of applicant is infringed.

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9. 1965, B.L.R (H.C) 953.



## V. CONCLUSION

The presumption of innocence principle provides and requires a process for the accused. Most all countries in the world accept that principle in the interests of justice and fairness. It is a just and equal principle not only for administering justice in the courts but also for everyone in everyday life.



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## **APPENDIX**

The principle of the presumption of innocence in Myanmar evolves from common law practice prior to and after Myanmar gained independence. It is embedded in the statutory Judicial Principles Chapter II in the Union Judiciary Law (2010), which Principles have their antecedents in the Constitution of the Republic of the Union of Myanmar (2008). These principles are appended here for information:

- (a) To administer justice independently according to law;
- (b) To dispense justice in open Court unless otherwise prohibited by law;
- (c) To guarantee the right of defence and the right of appeal in all cases according to law;
- (d) To support in building the rule of law and regional peace and tranquility by protecting and safeguarding the interests of the people;
- (e) To educate the people to understand and abide by the law and nurture the habit of abiding by the law;
- (f) To cause to settle and complete cases within the framework of law and for the settlement of cases among the public;
- (g) To aim at reforming moral character in meting out punishment to offenders.

***PRAESUMPTIO INNOCENTIAE  
THE PERSON IS NOT GUILTY UNTIL  
THE PROVEN OTHERWISE***

***Shokhrukh MAJIDOV***

***CONSTITUTIONAL COURT OF  
UZBEKISTAN***





## PRAESUMPTIO INNOCENTIAE THE PERSON IS NOT GUILTY UNTIL PROVEN OTHERWISE

*Shokhrukh MAJIDOV\**

First, let me express my sincere gratitude to the organizers of the event and for the opportunity to present my speech.

A large-scale work has been done in the Republic of Uzbekistan aimed to provide reliable guarantee for protecting the rights and freedoms of citizens, firstly, against criminal encroachments, as well as preventing infringement of their honor and dignity, limiting legitimate interests.

The basis of the ongoing judicial reforms laid such constitutional principles as the rule of law, equality of citizens before the law, humanism, justice and the presumption of innocence.

In accordance with Article 26 of the Constitution of the Republic of Uzbekistan, everyone accused of committing a crime shall be presumed innocent until proved guilty by law, through a public trial, in which he is provided with all opportunities for protection. This norm establishes the principle of the presumption of innocence, universally recognized in democratic states.

“Presumption of innocence” means the innocence of a person accused of committing a crime, until his guilt is established by law, through a public trial. This provision of the Constitution is today considered as the fundamental principle of criminal proceedings and is fully consistent with generally recognized norms and principles of international law.

Article 11 of the Universal Declaration of Human Rights stipulates that *“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which*

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*he has had all the guarantees necessary for his defense.*" Article 14 of the International Covenant on Civil and Political Rights enshrines the right of a person accused of a criminal offense to be presumed innocent until proved guilty according to law.

The presumption of innocence is valid from the moment a person is detained until the court's verdict comes into force. A person can only be found guilty by a court's verdict and no other state body has such authority.

The essence of the commented article in this part is to ensure the correct application of the law so that no innocent person is brought to justice and convicted (Article 2 of the Code of Criminal Procedure ("CCP")).

On the territory of the Republic of Uzbekistan, the procedure for criminal proceedings is determined by the Code of Criminal Procedure.

Article 23 of this Code establishes the "presumption of innocence" as an independent principle. This principle means the need to prove the guilt of a person in the manner prescribed by law before the entry into force of a guilty verdict rendered by a court. Prior to the entry into force of a court's sentence, a person shall be presumed innocent. In other words, the state recognizes the guilt and punishment of a person only after the entry into force of a legal, reasonable and fair court sentence.

The principle of the presumption of innocence is a complex, broad-based legal institution, which includes such criminal legal requirements as:

- the right of the accused to defend himself independently or with the help of a lawyer, to raise the question of inviting a witness to the trial, conducting various examinations;

- laying the burden of proof on the side of the prosecution, relieving the accused of the obligation to prove his innocence (Art. 46 CCP), testifying against himself, his close relatives, relieving him of responsibility for giving false testimonies;

- guilty determination must be carried out in strict accordance with the criminal procedure legislation, the violation of which entails a conclusion on the illegality of a person being found guilty;



- while a person has not been convicted by a verdict that has entered into legal force, no one may treat him as a guilty person;

- to testify on the accusation, as well as to provide evidence is a right and not an obligation of the accused, i.e. he may refuse to testify or not provide evidence of his innocence, which cannot become the basis for his conviction;

- a guilty verdict cannot be based on assumptions and is decided only on the condition that during the trial the guilt of the defendant of commission of a crime has been proved (Article 463 of the Code of Criminal Procedure);

- the guilty plea of the accused cannot be the basis of the charge, and the conviction requires the collection and formation of the necessary evidence base;

- all doubts about the guilt of the accused, if the possibilities have been exhausted to eliminate them, as well as doubts arising from the application of the law, are resolved and interpreted in favor of the accused (Article 23 of the Code of Criminal Procedure);

- if, as a result of the trial, the prosecutor comes to the conclusion that the data of the judicial investigation indicate the innocence of the defendant, he is obliged to refuse the charge (Article 409 of the Code of Criminal Procedure), etc.

Article 26 of the Constitution of the Republic of Uzbekistan determines that the guilt of a person must be established by law, through a public trial. Publicity of the trial is the backbone of the presumption of innocence. This is due to the fact that publicity as the most important principle of justice makes judicial proceedings transparent, accessible for control by the participants in the process and by the public. This ensures a clear and strict observance by the court of procedural rules and procedures, which is an important guarantee of ensuring the rights of the accused and the legality of the proceedings.

It follows from this that all sentences, rulings and decisions of the court in all cases should be proclaimed publicly, openly. Publicity is considered as the most important factor in ensuring justice in the courts.



Establishing guilt by “lawful order” means strict adherence to all procedural rules and procedures during the trial and at the pre-trial stages of the criminal process. Thus, those arrested or detained are presumed innocent until proved guilty of an offense in the manner prescribed by law and established by a court verdict that has entered into force (Article 7 of the Law on Detention in Criminal Proceedings of 29<sup>th</sup> September 2011).

For these purposes, the accused has the rights to use his native language and translation services; file petitions and challenges; to get acquainted at the end of the preliminary investigation with all the materials of the case and write out the necessary information from it, take copies of the materials and documents at their own expense, or fix the information contained in them in a different form using technical means; file complaints about the actions and decisions of the inquiry officer, investigator, prosecutor and court, and others, which is also an important condition for protecting the rights of the accused, the legality of the criminal case and guaranteeing the constitutional principle of the presumption of innocence (Article 46 of the Code of Criminal Procedure).

In accordance with Article 26 of the Constitution of the Republic of Uzbekistan, each accused is provided with all opportunities for defense.

Article 14 of the International Covenant on Civil and Political Rights establishes that everyone should have sufficient time and facilities to prepare his defense and to communicate for this purpose with a lawyer of his own choosing.

It should be noted that the system of legal support for the practical implementation of constitutional rights enshrined in the commented article, including the right to participate in the criminal process of a defender, has been consistently improved. For example, when adopting the Code of Criminal Procedure of the 22<sup>nd</sup> September 1994, it was determined that “*the suspect has the right to have a lawyer from the moment he announces a decision recognizing him as a suspect or a protocol of detention and meets him in private after interrogation*”. As a result of the consistent improvement of this norm, from the 1<sup>st</sup> January 2009, a procedure is applied in accordance with which: “the defender is



allowed to participate in the case at any stage of the criminal process, and if a person is detained, from the moment his right to freedom of movement is actually restricted”.

In accordance with Article 116 of the Constitution of the Republic of Uzbekistan, the accused has the right to defense. The right to professional legal assistance is guaranteed at any stage of the investigation and legal proceedings. Legal assistance is provided for citizens, enterprises, institutions and organizations advocacy. The organization and procedure for the activities of the bar are determined by law.

In particular, the provision of a suspect, accused and defendant with the right to defense is established in the Code of Criminal Procedure as a separate principle. Article 53 of this Code, in turn, stipulates that *“if a suspect, accused or defendant is detained or under house arrest, the defense lawyer has the right to have private meetings with him without limiting the number and duration of visits without permission from state bodies and officials, responsible for the criminal proceedings”*.

To implement this constitutional principle, the accused must, if necessary, be provided with free defense, an interpreter. Thus, the law establishes that the inquirer, investigator, prosecutor or court in which proceedings of the case are being held has the right to exempt the suspect, accused, defendant in full or in part from paying legal aid (Article 50 of the Code of Criminal Procedure). In these cases, the attorney’s salaries are paid by the state.

If the defendant who does not have a defense lawyer, the floor is not given for a defensive speech, the case is investigated or examined without the assistance of a defense lawyer, when his participation is mandatory under the law, such cases are recognized as significant violations of the norms of the criminal procedure law and constitute grounds for the cancellation or amendment of the sentence (Art. 487 Code of Criminal Procedure).

In conclusion, I would like to note that the current legislation of the Republic of Uzbekistan fully complies with all generally recognized norms and democratic standards in the field of human rights, including the presumption of innocence, and also meets the national interests of our state.



*PRESUMPTION OF INNOCENCE*

*Amer Saleem RANA*

*SUPREME COURT OF  
PAKISTAN*





## PRESUMPTION OF INNOCENCE

*Amer Saleem RANA\**

'Presumption of innocence' is a legal principle traditionally expressed that burden of proof is on the one who declares, not on the one who denies. It is legal right of an accused and also an international human right under Art.11 of United Nations' Universal Declaration of Human Right.<sup>1</sup> The Presumption of innocence is also granted by Art.14 (2) of International Covenant on Civil and Political Rights.<sup>2</sup> Pakistan is party to both Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. Several other regional and international instruments on human rights also grant presumption of innocence to the accused as standard of fair trial. This concept has not been accorded a constitutional status in Pakistan. Though invoked consistently, this concept is rarely analysed and evaluated and its presence is just taken for granted by judicial pundits. Some critics think that it has mystical appearance, serving no useful purpose and only polluting Criminal Jurisprudence with a superfluous concept without any practicability.<sup>3</sup> But others are of the view that Presumption of Innocence is the bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of justice.<sup>4</sup>

Presumption of innocence concept commonly considered having two aspects. Firstly, the treatment of accused throughout the criminal process should be consistent, as far as possible with his/her innocence. In broader sense it means that presumption of innocence

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1 Article 11(1) "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

2 Article 14(2) "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

3 W. LAFAVE & A. SCOTr, CRIMINAL LAW § 8 (1972).

4 Winship-397 US 358-1970.





underpins the whole range of rules intended to ensure fairness to the accused. Secondly, necessary condition for conviction of accused is that State has to prove guilt of accused beyond reasonable doubt. A stronger criticism, however, is that Presumption of Innocence loses virtually all independent significance when it is coupled with the much more fundamental reasonable of doubt instruction. Because the presumption of innocence is given practical effect through the reasonable doubt standard, it is scarcely said to possess any weight of its own.<sup>5</sup> However, this criticism was countered when U.S Supreme Court in *Taylor v. Kentucky*<sup>6</sup> held that a criminal defendant's right to a fair trial is violated whenever the trial judge fails to give a requested presumption of innocence instruction. It was further held by the Court that the presumption of innocence has a 'purging effect' wholly apart from the reasonable doubt instruction.

Before the establishment of British Rule in India, Courts under Muslim rulers were practicing the Islamic Law. Presumption of innocence and proof beyond reasonable doubt were also observed in criminal trials as provided by Islamic law. With the advent of British Rule in united India, Courts were established to administer the legal principles of common law. Viscount Sankey L.C. in *Woolmington v. DPP*<sup>7</sup> introduced the Woolmington Principle that "*throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt*". It guaranteed that the prosecution has to prove its case beyond reasonable doubt. Similarly, in *Brend v. Wood*,<sup>8</sup> Lord Gorrard C.J. said that "*it is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind*". It mandated that unless and until mens rea (guilty mind) of an accused is proved, he shall not be convicted. Lord Diplock, another illustrious English judge, in *Sang*<sup>9</sup> referred to the principle of

5 William F.Fox Jr., *The 'Presumption of Innocence' as Constitutional Doctrine*, p. 254 .

6 436 U.S. 478(1978).

7 [(1935) A.C. 462 at 481].

8 [1946 (L.T. 306 at 307)].

9 [(1980) A.C. 402 at 436].



privilege against self-incrimination or as it was commonly known, ‘the right of silence’ which upholds the right of an accused to be silent, as any answer to police may incriminate him. There are reasons and arguments for placing the burden on the prosecution as it initiates proceedings; it is always easy to prove the positive than the negative; and State has mammoth resources at its disposal for investigation and prosecution.<sup>10</sup> Further, court should not start with the preconceived idea that the accused has committed the offence charged.<sup>11</sup>

Before the birth of Pakistan, in British India, there was tradition of criminal courts to follow these concepts, though imperialistic considerations were paramount in certain important trials of freedom fighters. On attaining independence and after signing the Universal Declaration of Human Rights, Pakistan is continuously endeavouring to incorporate provisions in its laws to meet the standard originally envisioned. Particularly, provisions have been provided in “The Constitution Of The Islamic Republic of Pakistan” (here in after referred as the constitution) as well as in different enactments governing the criminal trial to promote and respect human rights and to take effective measures both in national and international spheres. Further, jurisprudence is gradually developing in Pakistan on the meaning of a ‘fair trial’ which points to a wide interpretation of Article.10-A of the Constitution.<sup>12</sup> For instance, a seven-Member Bench of the Supreme Court<sup>13</sup> interpreted the fundamental right of fair trial. The Court stated that the right to fair trial was a long recognized right, now constitutionally guaranteed and ‘by now well entrenched in our jurisprudence’. The Court added that through Article.10-A, the right had been ‘raised to a higher pedestal; consequently a law, or custom or usage having the force of law, in so far as it is inconsistent with this article shall be void by virtue of Article 8 of the Constitution.<sup>14</sup> The Court opined that the legislature left the term ‘fair trial’ undefined, perhaps intentionally, so as to assign it a universally accepted

10 An Article by Nowsherwan Khan.

11 *Barbera v Spain* (1989) 11 EH RR 360.

12 Article 10.A -*Right to Fair Trial*-For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

13 (PLD 2012 SC 553) *Suo motu case No.4 of 2010*.

14 Article 8-*Laws Inconsistent with or in Derogation of Fundamental Rights to be Void*.



meaning. Article.10-A regarding fair trial is intrinsically linked to and dependent on other fundamental rights guaranteed by the Constitution. Generally, the Constitution gives every citizen the right to be dealt with in accordance with the law, provides for their equality before law and equal protection, gives protection against illegal actions which are detrimental to their life, liberty, body, reputation or property, allows them to do all that is lawful and protects them from being compelled to do anything which the law does not require them to do. More specifically, in the context of a 'fair trial', the Constitution makes provision for protection against illegal deprivation of life and liberty, including safeguards as to arrest and detention which require that an arrested and detained person be informed of the reason for his arrest, have the right to consult and be defended by a counsel of his choice and have the right to be produced before a magistrate within twenty-four hours of his arrest. Moreover, the Constitution provides safeguards against retrospective punishment, double punishment and self-incrimination and upholds the privacy of a person's home, his dignity and protection against torture intended for extracting evidence. While explaining profoundly in a case,<sup>15</sup> the Supreme Court, in the context of declaring the presumption of innocence to be the 'cornerstone of the administration of justice', pointed to the firm acknowledgment by the Courts that the principles of fairness, fair play, justice and equity were embedded in the Constitution well before the right to fair trial was incorporated therein.

It is obvious that presumption of innocence and proof beyond reasonable doubt are the basis on which the edifice of a fair criminal trial is raised. This principle is further elucidated by Supreme Court in recent judgment<sup>16</sup> in the manner

*"It is a well settled principle of law that one who makes an assertion has to prove it. Thus, the onus rests on the prosecution to prove the guilt of accused beyond reasonable doubt throughout the trial. Presumption of innocence remains throughout the case until such time the prosecution on the evidence satisfies the court beyond reasonable doubt that the accused is guilty of the offence alleged*

<sup>15</sup> PLD 2012 SC 664.

<sup>16</sup> PLD 2029 SC 64 (*Asia Bibi v. The State*).



*against him. There cannot be a fair trial, which is itself the primary purpose of criminal jurisprudence, if the judges have not been able to clearly elucidate the rudimentary concept of standard of proof that prosecution must meet in order to obtain a conviction. Two concepts i.e. 'proof beyond reasonable doubt' and 'presumption of innocence' are so closely linked together that same must be presented as one unit. If the presumption of innocence is a golden thread to criminal jurisprudence, the proof beyond reasonable doubt is silver, and these two threads are forever intertwined in the fabric of criminal justice system. As such, the expression 'proof beyond reasonable doubt' is of fundamental importance to the criminal justice: it is one of the principles which seek to ensure that no innocent person is convicted. Where there is any doubt in the prosecution story, benefit should be given to the accused, which is quite consistent with the safe administration of criminal justice."*

Fair trial also depends upon access to justice concept which means that right to have access to justice through independent judiciary as envisaged by the Constitution. It includes the right to have a fair and proper trial, by an impartial tribunal. So it seems that whole range of rules intended to ensure fairness during criminal trial uphold the presumption of innocence concept.

Following are the necessary guarantees of fair trial provided by the Constitution and laws of Pakistan.

Due Process of Law: Article 4 of Constitution of Pakistan ensures the right of an individual to be dealt with in accordance with law and as held by Supreme Court in *Manzoor Elahi Case*<sup>17</sup> may be compared with the 'due process of law' in the American Constitution. The concept stems from the principle of natural justice, which has been loosely employed for centuries as a technical term for procedural fairness.

There are two pillars of natural justice i.e. Right of hearing and Rule against bias. The maxim, *audi alteram partem*-no man shall be condemned unheard- is of universal application as held in *Faridsons v. Pakistan*<sup>18</sup> and *University of Dacca v. Zakir Ahmad*.<sup>19</sup> Second pillar of

17 PLD 1975 SC 66.

18 PLD 1961 SC 537.

19 PLD 1965 SC 90.



natural justice is rule against bias and it is fundamental principle that a man may not be a judge in his own cause. This principle is vividly elaborated in *Anwar v. Crown*,<sup>20</sup> *Farzand Ali* case<sup>21</sup> and *Begum Nusrat Bhutto* case.<sup>22</sup>

The right of Accused to be present at trial: In Constitution of Pakistan, there is no provision expressly providing to the accused a right to be present at his trial; yet in *Mehram Ali* case<sup>23</sup> right of the accused to be present at trial has been treated as an absolute right, for, so held the Supreme Court, the right to access to justice is enshrined in Article 9.

Arrest and detention in custody: Article. 10 of the Constitution provides safeguard against arrest and detention. Section 60, 61 and 81 of Code of Criminal Procedure, 1898, also provide similar safeguards. So an arrested person shall not be detained in custody without being informed, as soon as may be, of the ground of such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. Likewise, an arrested and detained person shall be produced before a Magistrate within a period of 24 hours of such arrest, excluding the time required for journey. Further no person shall be detained in custody beyond this period without the authority of a Magistrate.

Right to Counsel (Art.10) and Right against self-incrimination (Art. 13(b)): There is an intimate relation between the right to counsel and the right against self-incrimination. The view of Article 10(1) and Article 13(b) of the Constitution is reinforced by the provisions of Article.14 of the Constitution of Pakistan, which provides:

*“No person shall be subjected to torture for the purpose of extracting evidence”.*

Right to Counsel is also provided by Section 340 (1) of the Code of Criminal Procedure 1898.

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20 PLD 1955 FC 185.

21 PLD 1970 SC 98.

22 PLD 1977 SC 657.

23 PLD 1998 SC 1445.



Judicial Independence and Impartiality: Independence of Judiciary is one of the basic principles of the Constitution of Pakistan. Its preamble declares that it is “*the will of the people of Pakistan to establish an order wherein; among others “the independence of the judiciary shall be fully secured”*. Generally speaking, a court or tribunal which is not independent is not an impartial court or tribunal. The rule that “no one is Judge in his own cause” has received legislative recognition in Section 556 of the Code of Criminal Procedure which prohibits a Judge or Magistrate “to try any case to or in which he is a party or personally interested” except “*with the permission of the court to which an appeal lies from his court*”.

Open Court: Despite all arguments against it, public trial has been found, on the whole, a best security for the pure, impartial and efficient administration of justice and wins public confidence and respect. So under Section 353 of Criminal Procedure Code, the court should be an open court.

All above mentioned constitutional and statutory safeguards ensuring fair trial for an accused find support from the concept of presumption of innocence. But there is a long history of Scholarly criticism on presumption that it is misnomer and no presumption at all in legal sense.<sup>24</sup> Moreover, there is no logical progression from basic fact to ultimate fact is present in this concept. In an 1895 opinion, *Coffin v. United States*<sup>25</sup> the Court used the Presumption in a technical evidentiary sense as “an instrument of proof” that is, as actual “evidence in favour of the accused”. But, Court abandoned the *Coffin* actual evidence concept only two years later in *Agnew v. United States*<sup>26</sup> after scathing criticism by Professor Thayer.<sup>27</sup> However, in *Winship*<sup>28</sup> the US Supreme Court raised the reasonable doubt standard to a matter of constitutional due process. Thereafter, there are noticeable developments in criminal justice systems throughout the world. These developments are based upon significant changes in society. Resultantly, policy and legislation is undergoing enormous changes

24 W.LAFAVE & A.SCOTT, Criminal Law 8(1972).

25 156 U.S. 432 (1895).

26 165 U.S. 36 51-52 (1897).

27 J.Thayer, *A Preliminary Treatise on Evidence*, 647 (1896).

28 397 U.S. 358 (1970).



keeping in view the perception of crime and criminal justice. Question arises, whether such developments have fundamentally challenged the traditional narrative of Presumption of innocence. Derogations from 'Presumption of Innocence' through statutory instruments are termed as 'Statutory Exceptions'. It is interesting to note that unlike America, and countries governed by the European Conventions, 'presumption of innocence' has not been accorded a constitutional status in Pakistan. So placing of burden of proof in certain cases upon the accused is not violative of any Constitutional provision.<sup>29</sup> Even when the right to be presumed innocent appears on its face to be an absolute requirement, it has been held that it does not prohibit rules which transfer the burden to the accused to establish a defence, provided the overall burden of proof remains on the prosecution, nor does it necessarily prohibit presumptions of law or fact provided these are within reasonable limits.<sup>30</sup> In laymen terms, it can be described as 'presumption of guilt'. Undoubtedly, the initial burden of proof lies on the prosecution to prove its case; however this burden shifts (reverse burden of proof<sup>31</sup>) to the accused in certain cases for bringing forthwith any defence. Even Viscount Sankey in *Woolmington*<sup>32</sup> while relying upon the authority of *M'Naghten's case*<sup>33</sup> acknowledged the exceptions to general rule, which place the burden of proof on an accused. The shifting of burden toward accused is illustrated either explicitly, or through necessary implication, that being a matter of interpretation of the provision in question. In certain special circumstances, Article 121 of Qanun-e-Shahadat Order, 1984, expressly places the burden of proof upon an accused. It reads:

*"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Pakistan Penal Code or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances."*

29 Fazal Karim, *The Law of Criminal Procedure*, p. 453.

30 *Brown v. Scott* (2001)2 All ER 97, 105.

31 *Lord Bingham in Sheldrake v. DPP* (2005) 1 All ER 237, 243.

32 [(1935) A.C. 462 at 481].

33 (1843-60) All ER 229.



Chapter 4 of the Pakistan Penal Code comprising sections 76 to 106 contains the General Exceptions within the meaning of Article 121 of the Qanun-e-Shahadat Order. These are exceptions in favour of children, persons of unsound mind and regarding right of private defence. The leading case on the subject is *Safdar Ali v. Crown*.<sup>34</sup> Cornelius J. in his detailed judgment, felt satisfied that “*in cases like the present, there is no material difference between the application of the standard of proof required under Pakistan Law and that which underlies the rule of ‘reasonable doubt’ which obtains in the English Courts. It is undeniable that finally the burden lies upon the prosecution to prove each ingredient of the offence charged, i.e. to support each ingredient by such evidence as would justify action by a prudent man, on the basis that such ingredient is established.*” So in Criminal cases the burden of proof, using the phrase in its strictest sense, is always upon the prosecution and never shifts whatever the evidence may be during the progress of the case. When sufficient proof of the commission of a crime has been adduced and the accused has been connected therewith as the guilt party, then the burden of proof, in another and quite different sense, namely in the sense of introducing evidence in rebuttal of the case for the prosecution is laid upon him. So, Art. 121 of Qanun-e-Shahadat Order, 1984 is interpreted in the manner that it is not for the prosecution to examine all possible defences which might be put forward on behalf of an accused person and to prove that none of them applies. But at the conclusion of all the evidence it is incumbent upon the prosecution to have proved their case.

Justice (R) Fazal Karim observed in his Treatise on Criminal Procedure Law that when an enactment prohibits the doing of an act except in specified circumstances, the accused must, by way of exception to the fundamental rule of the criminal law that the prosecutor must establish every element of the offence charged, prove the existence of the specified circumstances. For example, if the charge is that a person was selling sugar without license, where license was necessary, the burden to prove that he had the license is on the accused and not on the prosecution.<sup>35</sup> But this rule is not based on the premise of special or peculiar knowledge of the accused. “*There is not, and never*

<sup>34</sup> PLD 1953 FC 93.

<sup>35</sup> Fazal Karim, *The Law of Criminal Procedure*.





*has been, a general rule that the mere fact that a matter lies peculiarly within the knowledge of the defendant is sufficient to cast the onus on him. if there was any such rule, anyone charged with doing an unlawful act with a specified intent would find himself having to prove his innocence because if there ever was a matter which could be said to be peculiarly within a person's knowledge it is the state of his own mind".*<sup>36</sup>

Justice (R) Fazal Karim<sup>37</sup> further observed that there are a number of special laws in Pakistan, placing the burden of proof of some facts on, or raising a presumption against, the accused; prominent among them are the Anti-Corruption Law in which receipt of tainted money by the accused shifts the burden on him to explain how he received the money. National Accountability Bureau Ordinance 1999 also places the burden of proof of certain facts on accused.<sup>38</sup> Likewise, Sec 156 of the Customs Act, 1969, provides that where goods specified in clause (s) of Section 2 of the Act were seized in the belief that an act to defraud the Government of any duty was committed, the burden to prove that no such act was committed was on the accused. The accused was held to discharge the initial burden of showing that the goods were neither smuggled nor was their possession unlawful. The overall burden to prove that the accused was guilty remained on the prosecution.<sup>39</sup>

We have seen that presumption of innocence is foundational doctrine, which is universally recognized as one of the central principles of criminal justice. Its importance is evidenced by its position in all international and regional human rights treaties as a standard of fair proceedings.<sup>40</sup> Its enforcement gives confidence and certainty to the administration of justice. The investigation process is a screening process, whereby police and prosecutor, as expert in their fields, reach an early determination of the probable innocence or guilt of the accused. "Probable guilty" does not mean "presumed to be guilty" and same has never been a rule of law. The presumption of guilt would mean that determination of police is final, which it is not. If it were final,

<sup>36</sup> *Lawton LJ in R v. Edwards* (1974) 2 All ER 1085.

<sup>37</sup> *Supra*, p. 458.

<sup>38</sup> *Asfandyar Wali v. Federation* (PLD 2001 SC 607).

<sup>39</sup> *Sikandar A Karim case* (1995 SCMR 387).

<sup>40</sup> Ferry de Jong & Leonie van Lent, *The presumption of innocence as counterfactual principle*.



there would be no need for trial. Under the aegis of the presumption of innocence, the defendant is promoted to the rank of a full and autonomous agent in the proceedings against him, and is enabled to insert his own views and narrative in the criminal law system, which in turn has to hold these views and narratives against itself, before the judgment is finally reached. So we can draw two conclusions from the above discussion. First, the presumption of innocence is firmly connected with the authority of the court or the adjudicating judge. The principle is supposed to contribute to the maintenance of this authority in that it postulates the inherently provisional nature of all dealings that take place before the court's final and authoritative judgment on the defendant's criminal liability. Second, the presumption of innocence is essentially a counterfactual notion. It does not equal a factual presumption. Neither can its meaning be exhaustively captured by any constellation of actually existing regulations or norms that stipulate the conditions under which the principle's aims would be completely realized. The presumption of innocence, in short, functions as a mirror: in it, the court sees, reflected the insight that whatever judgment is reached there will always remain sediment of contingency and hence non-justifiability that sticks to the grounds upon which the judgment is based. Therefore, and to that extent, not only the defendant is brought up for trial, but also the court or the judge himself is himself on trial. In this sense, the presumption of innocence can be understood, as Stevens has aptly put it, the *conscience of criminal proceedings*.<sup>41</sup>

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<sup>41</sup> Cf. J.G.J Rinkes et al. (eds.), *Van apeldoorn's inleiding tot de studie van het Nederlandse recht* (2009), pp. 61-64.



*PRESUMPTION OF INNOCENCE*

*Nattapapim PHATTRANURUKKUL*

*CONSTITUTIONAL COURT OF  
THAILAND*





## PRESUMPTION OF INNOCENCE

*Nattapapim PHATTRANURUKKUL\**

### I. INTRODUCTION

In practice, the accused in a criminal case may suffer from being considered as an offender. No one should be regarded as a convicted offender before they have been tried. An accused person should be treated like everyone else. Hence, the fundamental right to protect the human dignity of an accused of a crime is the Presumption of Innocence. The accused is innocent unless proven guilty. The right to the Presumption of Innocence is not only contained in Article 11 of the Universal Declaration of Human rights (UDHR), but it is also guaranteed in relation to the legal proceedings contained in Article 14.2 of the International Covenant on Civil and Political Rights (ICCPR), to which Thailand is directly bounded as one of the parties.

Moreover, this right is also a legal assumption enshrined in constitution level in Thailand, which is contained in section 29, paragraph 2 of the 2017 Constitution and states that *“A suspect or defendant in a criminal case shall be presumed innocent, and before the passing of a final judgment convicting a person of having committed an offence, such person shall not be treated as a convict.”* This suggests that the Thai Constitution adheres to the principle of the Presumption of Innocence as well as the universal human rights included the UDHR and ICCPR.

This essay focuses on the principle of the Presumption of Innocence in Thailand especially with regard to the Thai Constitution. It will be divided into 4 parts. Firstly, there will be an overview of the principle of Presumption of Innocence and why it is important in a legal context. Secondly, the international law concerning the Presumption

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\* Constitutional Case Officer, Constitutional Court of Thailand.



of Innocence. Thirdly, the provisions of Thai law, which recognize the Presumption of Innocence. Fourthly, the essay critically examines the Constitutional Court Ruling No. 12/2555 in which the Constitutional Court endorsed this principle when it considered whether the provision of the law was contrary to or inconsistent with the Constitution. This ruling will then be discussed. After that, a selection of case summaries regarding the Presumption of Innocence will be given. Finally, a conclusion will follow.

## II. OVERVIEW OF THE PRESUMPTION OF INNOCENCE

### A. General Principle

*"It is better that ten guilty persons escape than one innocent person suffers."* This legal phrase describes the principle of Presumption of Innocence, which is known as Blackstone's Formulation. Moreover, the jurist William Blackstone, states that *"there is hardly anything more desirable in a legal system than a wrongful conviction of an innocent."*<sup>1</sup> The reason for this is that once a sentence had been served by an innocent person, it cannot be erased by any subsequent act of nullification. An innocent person may suffer from a wrongful conviction, for which they will be labelled as an offender. Hence, to assure as far as possible that no court will wrongfully convict an innocent person, an accused person shall be presumed innocent until proven guilty. Additionally, the prosecution will bear the burden of establishing the facts necessary to prove the guilt.<sup>2</sup>

Nevertheless, the Presumption of Innocence is not a presumption in legal sense that an underlying fact is proved, while another presumption fact can be taken as proved. Nor is it a presumption based on probability.<sup>3</sup> By contrast, the principle of Presumption of Innocence is generally equal to every person even before the onset of the investigation and trial and independent of prior conditions including his/her status, criminal evidence or a record of criminal history.<sup>4</sup> It can be seen from this that the principle known as "the assumption

1 Navaz Kotwal, *'Fair trial Manual: A Handbook for Judge and Magistrate'* The commonwealth Human Rights Initiative. (2010). p.1.

2 Ibid., p.2.

3 N. Huntley Holland, Harvey H. Chamberlin. *'Statutory Criminal Presumption: Proof beyond a reasonable doubt?'* (1973), Valparaiso University Law Review, p. 1-2.

4 Rinat Kitai, *'Presuming Innocence'* (2002) 55 OKLA L REV 257, p.264.



of innocence'<sup>5</sup> means assuming any person's conduct upon a given occasion is lawful.

Moreover, both the civil law and traditional common law recognize the Presumption of Innocence, which has two distinct functions as the rule of proof and the shield against punishment<sup>6</sup>. The former gradually stemmed from the rule of proof component by asserting that suspects establish their innocence. Theoretically, the right of the accused is to be considered as an innocent person before conviction. The other function as a shield against punishment before conviction concerns an expansion of the doctrine beyond the courtroom which would destroy the fight against crime. It can be seen that the result of two dimensions of the Presumption of Innocence is not only to guarantee the right to be tried by an impartial jury but also to protect the suspects from being treated as guilty by the society. Nevertheless, the Anglo-American countries tend to apply the Presumption of Innocence as being limited to the rule of proof. On the other hand, the civil law countries, like France apply this principle in both dimensions.

### **B. The Application of the Presumption of Innocence**

All criminal processes are based on the principle that the accused is innocent until proven guilty.<sup>7</sup> The Presumption of Innocence is a fundamental principle in legal systems and a basic right of the accused or the suspect throughout an investigation and trial until a verdict is given. It might be said that such a principle of 'innocence until proven guilty' aims to protect the right of a suspected person. In other words, the defendant in a criminal charge is presumed to be innocent, while the burden of proof of his guilt lies on the prosecution. The duty of the prosecution is not only to prove the probability of guilt in the circumstances, but also to prove that every element of the offence is beyond reasonable doubt.<sup>8</sup>

The extend of the application of the Presumption of Innocence in each country is different. In its narrow sense, the Presumption of Innocence is recognized simply as another way of stating the rule

5 N. Huntley, *supra* note 3.

6 Francois Quintard-Morenas. 'The Presumption of Innocence in the French and Anglo-American Legal Traditions' (2010) 58 *The American Journal of Comparative Law*.

7 Navaz Kotwal, *supra* note 1, p.2.

8 *Ibid.*, p.2.





that the prosecution must prove that the defendant is guilty beyond reasonable doubt. The burden of proof in a criminal case consists of the burden of producing evidence and the burden of persuasion, which must be proven beyond reasonable doubt. On the one hand, Cross and Tapper<sup>9</sup> state that “*when it is said an accused person is presumed to be innocent, all that is meant is that the prosecution are obliged to prove the case against him beyond reasonable doubt.*” On the other hand, the United State (US) Supreme Court has expressed the opinion that the Presumption of Innocence is both merely a restatement of the reasonable doubt standard and that such a principle is a separate principle in itself. However, the two concepts are so closely intertwined that if one is given constitutional stature, it follows that the other could be afforded equal treatment.<sup>10</sup> In other words, the standard of reasonable doubt has been recognized as a fundamental element of due process. It ensures that the Presumption of Innocence is also a dimension of the constitution.

In its widest sense, the Presumption of Innocence could be seen as requiring the treatment of a person charged with an offence as being consistent with innocence. This view supports a basic principle of liberty within the criminal justice system, which extends beyond the trial event itself to the whole criminal justice system and into the process of investigation.<sup>11</sup> It can be seen that the application of the Presumption of Innocence in both senses may require the protection of the rights of the accused and the guarantee of a fair trial for all.

### III. PRESUMPTION OF INNOCENCE IN A GLOBAL CONTEXT

The Presumption of Innocence is the legal right of the accused in a criminal trial as well as a basic principle of human rights, which stems from a belief in human dignity.<sup>12</sup> This principle has been established in documents human rights. It is international law and case studies concerning the Presumption of Innocence. Moreover, many states have agreed with this principle and implemented it in domestic laws which protect the rights of an accused or a defendant, for example:

9 C. Tapper. ‘*Cross and Tapper on Evidence*’ (10<sup>th</sup> edn) Butterworth: London. (2003) p.135.

10 N. Huntley, *supra* note 3. P. 149.

11 Claire Hamilton. *Threats to the Presumption of Innocence in Irish criminal law: an assessment.* (2011) 15*The International Journal of Evidence & Proof* 181. p. 188.

12 Rinat Kitai, *supra* note 4, p.283.



## A. International laws context

### 1. Universal Declaration of Human Rights 1948 (UDHR)

The UDHR is a declaration of essential rights and freedom for all. It was adopted by the General Assembly of the United Nations (UN) on 10 December 1948. Moreover, the UN declaration declares that human rights are universal and should be protected by the rule of law. The Presumption of Innocence was adopted by this declaration and contained in Article 11<sup>13</sup>

*Article 11 (1) "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."*

### 2. International Covenant on Civil and Political Rights 1966 (ICCPR)

ICCPR is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966 and it has been in force since 23 March 1976. This covenant commits its members to respect the civil and political rights of the individual, for instance, the right to life, freedom of religion, freedom of speech, freedom of assembly and rights to due process and fair trial. The ICCPR provide the right of Presumption of Innocence in Article 14-2<sup>14</sup> as follows:

*Article 14-2 "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."*

### 3. The European Convention on Human Rights (ECHR)

It is a regional convention to protect human rights and political freedom in Europe. This Convention enforced these rights on 3 September 1953. All the member states of the Council of Europe are parties to the Convention and the European Court of Human Rights (ECtHR) was established by ECHR. The Presumption of Innocence has been recognized in this Convention as found in Article 6<sup>15</sup> as follows:

*Article 6-2 "Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law"*

13 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23903&LangID=E>.

14 <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

15 <http://www.hri.org/docs/ECHR50.html#C.Art6>.



By the provisions mentioned above, these laws illustrate a similar ideas and concepts, which are that not only the burden of proof in any charges is on the prosecution but also the accused has the benefit of doubt: no guilt can be presumed until the charge has been proved beyond reasonable doubt. It might be said that the Presumption of Innocence represents a basic principle of law as a human right. This suggests that such a law guarantees the rights and liberty of an individual regarding their criminal liabilities. No one should be convicted unless they have been 'charged with a criminal offence'

### **B. Case studies in domestic laws**

There are some case studies in domestic laws as, for instance, in Canada, the United States and the Republic of South Africa. These can be seen below:

#### 1. Canada

The Presumption of Innocence was contained in the Canadian Charter of Rights and Freedoms and the Constitution Act 1982 as follows:

The Canadian Charter of Rights and Freedoms, section 11:

*"Any person charged with an offence has the right*

*(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."*

The Constitution Act 1982, section 1:

*"The Canadian Charter of Rights and Freedoms guarantees the right and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."*

A case study concerning the Presumption of Innocence is shown in the case of *R v. Oakes*.<sup>16</sup> This relevant section states that if the Supreme Court found that the accused was in possession of a drug, they were presumed to be in possession for the purposes of trafficking and unless the accused could convince the court of the contrary, they would be convicted to trafficking. In this case, the accused argued that the

<sup>16</sup> *The Regina v. Oakes* (1986) S.C.R. 103.



provision was contrary to the Presumption of Innocence provided for by section 11(d) and limited the condition of rights under the section 1.

Subsequently, the Canadian Supreme Court illustrated the Presumption of Innocence in such a case briefly by saying that “*The Presumption of Innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. ... It ensures that until the State proves an accused’s guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The Presumption of Innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.*”<sup>17</sup>

## 2. United States

The United States *Bill of Rights* does not precisely contain an enshrined right to Presumption of Innocence, but it has been held that the Fifth and Fourteenth Amendments, warranting a right not to be deprived of life, liberty or property known as ‘due process rights’ includes the Presumption of Innocence.<sup>18</sup> Practically, the American Supreme Court has robustly defended the Presumption of Innocence against legislative interference, including the use of presumptions against the accused.<sup>19</sup>

One example of a case study is the US Supreme Court *Coffin v. United States*,<sup>20</sup> which was an appellate case before the US Supreme Court, when the Court established the Presumption of Innocence of individuals accused of crimes.

In this case, the Court states that “*the principle that there is a Presumption of Innocence in favour of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.... Concluding, then, that the Presumption of Innocence is evidence in favour of the accused, introduced by the law in his behalf, let us consider what is ‘reasonable doubt.’ It is, of necessity, the condition of mind*

<sup>17</sup> *The Regina v. Oakes* (1986) S.C.R. 103, para 29.

<sup>18</sup> Anthony Gray. ‘*Constitutionally Protecting the Presumption of Innocence*’ (2012) 31 *The University of Tasmania Law Review* 1. p.140.

<sup>19</sup> *Ibid.* p. 142.

<sup>20</sup> *Coffin v. United States*, 156 U.S.432 (1895).



*produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself, whereas the Presumption of Innocence is one of the instruments of proof, going to bring about the proof from which reasonable doubt arises; thus one is a cause, the other an effect.... The evolution of the principle of the Presumption of Innocence, and its resultant, the doctrine of reasonable doubt, make more apparent the correctness of these views, and indicate the necessity of enforcing the one in order that the other may continue to exist."*

### 3. The Republic of South Africa

In South Africa law, the presumptions are found in both civil and criminal case.<sup>21</sup> The scope of the Presumption of Innocence is a constitutionally found in Section 35 (3) (h) of 1996 Constitution as follows:

Section 35 (3) (h) *"Every accused person has a right to a fair trial, which includes the right...*

*(h) to be presumed innocent, to remain silent, and not to testify during the proceedings"*.

The South Africa's Constitutional Court represented the case regarding the Presumption of Innocence in *State v. Coetzee*<sup>22</sup>. This case states that in South Africa corporate criminal liability is regulated by the Criminal Procedure Act 1977, Section 332. The Constitutional Court heard a matter in which a reverse onus provision provided in Section 332 (5) was successfully challenged and declared invalid as it violated the accused person of right to Presumption of Innocence.

Basically, the Criminal Procedure Act, section 332 (5) states that *"A director or servant of a corporate body is guilty of an offence committed by the corporate body unless it is provided that such person took no part in the commission of the offence and could not have prevented it."* The court states that these sections make it possible for a presumption of guilt, as opposed to the Presumption of Innocence, to be made against a director or servant of the accused corporation. In other words, if a corporation has been found guilty of having committed a crime, its director or

<sup>21</sup> MH Mthembu. *The Constitutionality of presumption in South African law.* (1998) 31 *The Comparative and International Law Journal of Southern Africa* 213. p.1.

<sup>22</sup> *S v. Coetzee and other* (CCT50/90) [1997].



servant is automatically presumed to be guilty of that crime. The director or servant may have committed a crime unless he or she can prove that they did not take part in the offence. It can be seen from this that section 332 (5) was a violation of the constitutionally guaranteed right to be presumed innocent. This made it possible for an accused person to be convicted even though there could be reasonable doubt that the director or servant was absolutely guilty.<sup>23</sup>

As mentioned above, the Presumption of Innocence has been recognized and applied in different situations that are consistent with the legal system of each country. Nevertheless, there is a similar idea and concept that the law should guarantee the right to Presumption of Innocence. The purpose is to assert this fundamental rights as a human right. Moreover, this principle is one of the fundamental concepts of criminal justice as well as a component of the rule of law generally affirmed in most civilized countries and internationally through the UDHR and the ICCPR of which Thailand is a party. Hence, Thailand has applied the Presumption of Innocence in many domestic laws and in the Constitution. The next section will present the Presumption of Innocence in the context of Thai law.

#### **IV. PRESUMPTION OF INNOCENCE IN A THAI CONTEXT**

Thailand as a party to the United Nations, ratified the Universal Declaration of Human Rights (UDHR) as well as the International Covenant Civil and Political Rights in 1996 (ICCPR), which has been implemented since 1997. Additionally, ideas and concepts of the Presumption of Innocence in each international covenant have been continuously applied as the fundamental rights and liberties of Thai people in the Thai Constitution and other provisions including the Criminal procedure, which are detailed below:

##### **A. Thai Constitutional Context**

Although, the Presumption of Innocence has been acknowledged by UDHR since 1948, Thailand has recognized this principle as a fundamental right and liberty of Thai people for more than seventy years. Interestingly, the Presumption of Innocence was first endorsed

<sup>23</sup> Farisani Dorothy Mmakgwale. 'Corporate criminal liability in South Africa: What does history tell us about the reverse onus provision?' (2017) 23 *Fundamina* 1, p.8.



in the Constitution of the Kingdom of Thailand B.E. 2492 (1949) which – contained the Presumption of Innocence in Section 30<sup>24</sup> as follows:

Section 30 *“The suspect or the accused in a criminal case shall be presumed innocent.”*

According to Section 30 of the 1949 Constitution, so this might be considered to be consistent with the principle in article 11 of UDHR established in 1948, which first recognized the principle of the Presumption of Innocence. It was then also recognized by the 1949 Constitution accordingly. Thus, the Presumption of Innocence has been recognized continuously by previous Thai Constitutions.

At present, the 2017 Constitution of the Kingdom of Thailand recognizes the principle of the Presumption of Innocence by section 29 paragraph 2<sup>25</sup> as follows:

Section 29, paragraph 2:

*“A suspect or defendant in a criminal case shall be presumed innocent, and before the passing of a final judgment convicting a person of having committed an offence, such person shall not be treated as a convict.”*

The intention of the provision provided by Section 29 was to guarantee the right and liberty of the accused or defendant, which is a fundamental human right. Everyone shall be presumed innocent until proven guilty according to the law in order to enhance the justice that protects an innocent person. As a result, an innocent person should not be subject to a criminal punishment unless they have committed an offence. Moreover, the right of the accused or defendant in criminal process to have a speedy, continuous and fair trial aims to safeguard an innocent person from the abuse of power.

The table 1 represents the provision(s) of previous Thai Constitutions since 1949 to the present, which concerning the Presumption of Innocence as below;

<sup>24</sup> The Constitution of the Kingdom of Thailand B.E.2492 (1949).

<sup>25</sup> The Constitution of the Kingdom of Thailand B.E. 2560 (2017).



**Table 1: The provision (s) of Thai Constitutions which concerning the Presumption of Innocence since 1949 to the present**

Thai Constitution (By year)	Provision concerning the Presumption of Innocence		Notation
	Chapter	Section	
1949 Constitution	Chapter 3 Right and Liberty	<b>Section 30</b> "The suspect or the accused in a criminal case shall be presumed innocent Before the passing of a final judgement convicting a person of having committed an offence, such person shall not be treated as a convict"	
1952 Constitution	-	-	No mention
1959 Charter	-	-	Promulgated under military government
1968 Constitution	Chapter 3 Right and Liberty	<b>Section 28</b> "The suspect or the accused in a criminal case shall be presumed innocent Before the passing of a final judgement convicting a person of having committed an offence, such person shall not be treated as a convict"	
1972 Temporary Charter	-	-	Promulgated under military government
1974 Constitution	Chapter 3 Right and Liberty	<b>Section 32</b> "The suspect or the accused in a criminal case shall be presumed innocent Before the passing of a final judgement convicting a person of having committed an offence, such person shall not be treated as a convict"	
1978 Constitution	Chapter 3 Right and Liberty	<b>Section 27</b> "The suspect or the accused in a criminal case shall be presumed innocent Before the passing of a final judgement convicting a person of having committed an offence, such person shall not be treated as a convict"	





<p><b>1991 Constitution</b></p>	<p>Chapter 3 Right and Liberty</p>	<p><b>Section 29</b> "The suspect or the accused in a criminal case shall be presumed innocent Before the passing of a final judgement convicting a person of having committed an offence, such person shall not be treated as a convict"</p>	
<p><b>1997 Constitution</b></p>	<p>Chapter 3 Right and Liberty</p>	<p><b>Section 33</b> "The suspect or the accused in a criminal case shall be presumed innocent Before the passing of a final judgement convicting a person of having committed an offence, such person shall not be treated as a convict"</p>	
<p><b>2006 Interim Constitution</b></p>	<p>-</p>	<p>-</p>	<p>Promulgated under military government</p>
<p><b>2007 Constitution</b></p>	<p>Chapter 3 Right and Liberty</p>	<p><b>Section 39</b> "No person shall be inflicted with a criminal with a criminal punishment unless he has committed an act which the law in force at the time of commission provides to be and offence and imposed a punishment therefore, and the punishment to be inflicted on such person shall not be heavier than that provided by the law in force at the time of the commission of the offence. The suspect or the accused in a criminal case shall be presumed innocent Before the passing of a final judgment convicting a person of having committed an offence, such person shall not be treated as a convict"</p>	<p>This principle was enacted in Specific part as Part 4 Right in Judicial Process)</p>



<b>2017 Constitution</b>	Chapter 3 Right and Liberty	<b>Section 29</b> "No person shall be subject to a criminal punishment unless he or she committed an act which the law in force at the time of commission provides to be an offence and prescribe a punishment therefor, and the punishment to be imposed on such person shall not be of greater severity than that provided by law in force at the time of the commission of the offence.  The suspect or defendant in a criminal case shall be presumed innocent, and before the passing of a final judgment convicting a person of having committed an offence, such person shall not be treated as a convict.  Custody or detention of a suspect or a defendant shall only be undertaken as necessary to prevent such person from escaping."	
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## B. The Thai Criminal procedure

In Thai criminal procedure law, there are two basic stages in criminal proceedings: the pre-trial and the trial. The first stage consists of an investigation, inquiry and prosecution, which are conducted by the police and the public prosecutor. The second stage is the trial which is conducted by a judge. Interestingly, the Presumption of Innocence may imply in the general provisions of the criminal procedure the right to receive a speedy, continuous and fair trial, the right to hire an attorney to represent him/her in a court hearing or trial, which as shown below:

### The Pre-trial stage

#### **Section 7/1<sup>26</sup>:**

*"An arrested person or alleged offender who has been kept in custody or detained shall have the right to notify, in the first instance, his relatives or other persons to whom the arrested person or alleged offender confides the arrest and place of confinement. Moreover, an arrested person or alleged offender shall have the following rights:*

<sup>26</sup> The Criminal Procedure code B.E. 2477 (1934), Section 7/1.



(1) *privately meet and consult with the person who will be his lawyer;*

(2) *allow his lawyer or a person to whom he confides to be present while giving testimony in an inquiry;*

(3) *being allowed to have visitors, or to contact relatives in appropriate manner;*

(4) *receive a treatment in timely manner when having sickness."*

**Article 134<sup>27</sup>:**

*"When the alleged offender is summoned or brought, or voluntarily appears before the inquiry official is the alleged offender, the inquiry official shall ask his/her name, middle name, surname, nationality, parentage background, age, profession, address and place of birth and inform the alleged offender of the fact concerning his commission of a crime alleged, the notify the alleged offender of the charged offence.*

*The alleged offender has the right to a speedy, continuous and fair inquiry.*

*The inquiry official shall offer an opportunity to the alleged offender for a defense against a charge and explanation of the fact to support his defense...."*

*The Trial stage*

**Article 172<sup>28</sup>:**

*"The trial and the taking of evidence shall be conducted in open Court and in presence of the accused person unless there are provision provided otherwise.*

*When the plaintiff or counsel and the accused person are before the Court and if the Court is satisfied with the accused person's identity, the indictment shall be read out and explained to the accused person..."*

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27 The Criminal Procedure code B.E. 2477 (1934), Section 134.

28 The Criminal Procedure code B.E. 2477 (1934), Section 172.

**Article 174<sup>29</sup>:**

*“Prior to the examining of evidence, the plaintiff is entitled to make an opening statement to the Court about the prosecution by setting forth the nature of the indictment and evidence being adduced to prove the guilt of the accused person. The plaintiff shall then adduce the evidence supporting his prosecution....”*

**Article 227 paragraph 2<sup>30</sup>:**

*“Where there is any reasonable doubt as to whether or not the accused has committed the offence, the benefit of doubt shall be granted to such accused.”*

It might be said that the criminal procedure law represents the right of the accused or defendant, which is provided in the criminal process both in the pre-trial and the trial stage. If there is any doubt that the accused has or has not committed any offence, the benefit of doubt shall be granted to the accused, which is known as ‘in dubio pro reo.’ This means that if there is any doubt about whether the case the accused has committed an offence, the benefit of doubt shall be granted to the accused or suspected person. It can be seen from this the benefit of doubt is consistent with the Presumption of Innocence because the prosecution bears the burden of proof of guilt for that offence. Moreover, the burden of proof must be beyond reasonable doubt. No judgment of conviction shall be delivered unless the Court is fully satisfied that an offence has actually been perpetrated and the accused or the defendant has committed that offence.

As mentioned above, these provisions in the Thai context include the Constitution and the Criminal Procedure Law which are similar in concept and consistent with international law as written in article 11 of UDHR, which recognizes the principle of the Presumption of Innocence and also article 14-2 of ICCPR and article 6 of ECHR. It might be said that Thai law, particularly the Constitution, attaches great significance to human dignity, rights, liberties and equality of Thai people in order to guarantee the right to Presumption of Innocence and the rule of law.

<sup>29</sup> The Criminal Procedure code B.E. 2477 (1934), Section 174.

<sup>30</sup> The Criminal Procedure code B.E. 2477 (1934), Section 227 paragraph 2.



Hence, the Constitutional Court of the Kingdom of Thailand has an important role to protect the rights and liberties of the Thai people. The effect of the Constitutional Court's decision is binding on all stage agencies. The next section will discuss the Constitutional Court's ruling concerning the Presumption of Innocence.

## V. THE CONSTITUTIONAL COURT'S RULING CONCERNING THE PRESUMPTION OF INNOCENCE

The Constitutional Court of Thailand is a specialized court of the Kingdom of Thailand, which was first established by the 1997 Constitution. This Court serves as a body which recognizes and protects of the rights and liberties of Thai people in practice through the rulings of the Constitutional Court. This section will discuss the controversial issue regarding the Presumption of Innocence, then a summary of selected rulings concerning this principle will be given and then the impact of this ruling will be discussed.

### A. A landmark case of the Presumption of Innocence in Thailand

The controversial issue regarding the Presumption of Innocence is the presumption of criminal liabilities of a corporation's representative. This landmark case is the Constitutional Court ruling No. 12/2555 (2012)<sup>31</sup>. In this case the principle of the Presumption of Innocence is recognized and guaranteed in Section 39 of 2007 Constitution.

The defendant argued that Section 54 of the Direct Sale and Direct Marketing Act B.E. 2545 (2002) was contrary to or inconsistent with Section 39 paragraph 2, Section 40(5) together with Section 30 of the 2007 Constitution.

Section 54<sup>32</sup> of the Direct Sale and Direct Marketing Act B.E. 2545 (2002) states that;

*"In the case that an offender will be inflicted with punishment according to this Act is a juristic person, a managing director, a manager or any person responsible for the operation of such a juristic person shall also be inflicted with punishment which the law*

31 Office of the Constitutional Court of the Kingdom of Thailand. 'The Constitutional Court Ruling 2012' Bangkok : P.Press, 2017. p.27-31.

32 The Direct Sale and Direct Marketing Act B.E. 2545 (2002), Section 54.



*stipulates for that offence unless he can prove that he has no part in the commission of the offence of that juristic person."*

The issue of such a case was considered by the Constitutional Court as to whether or not Section 54 of the Direct Sale and Direct Marketing Act B.E. 2545 (2002) was contrary to or inconsistent with Section 39 paragraph 2 of the 2007 Constitution.

The Constitutional Court demonstrated that section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002) was a presumption by law, which resulted in a presumption of the defendant's guilt. The plaintiff was not required to show any prior proof of any act or intention of the defendant. The wrongful act of another person was applied as a condition for presuming the defendant's guilt and criminal liability, following from the presumption that if an offender was a juristic person, the managing director, manager or person responsible for the juristic person's operations should also be jointly liable with the juristic person offender, except where it could be proven that he/she had no involvement in the juristic person's offence. The plaintiff was not required to prove any act or intent of the managing director, manager or person responsible for such juristic person's operations that showed conspiracy with the juristic person in the commission of the offence. Therefore, the Court held that this provision, which presumed criminal wrongdoing of the suspect and defendant without any fact or intent to the offence was therefore inconsistent with the rule of law and contrary to or inconsistent with section 39 paragraph 2 of the 2007 Constitution.

Conversely, there is another decision, which was presumption of criminal liability of the corporation representative was neither contrary to nor inconsistent with Section 39 paragraph 2 of the 2007 Constitution. This case is the Constitutional Court Ruling No. 2/2556 (2013),<sup>33</sup> which states that the criminal liability of the corporation representative of a juristic person in Section 158 of the Labour Protection Act B.E. 2541 (1998) was constitutional.

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<sup>33</sup> Office of the Constitutional Court of the Kingdom of Thailand. 'The Constitutional Court Ruling 2013' Bangkok : P.Press, 2016. p.6-8.



The issue in this case considered by the Constitutional Court was whether or not Section 158 of the Labour Protection Act B.E. 2541 (1998) was contrary to or inconsistent with Section 39 paragraph 2 of the 2007 Constitution.

Section 158<sup>34</sup> of the Labour Protection Act B.E. 2541 (1998) reads that;

*“Whereas the offender is a juristic person, if a violation by a such juristic person is due to an order or performance of any person, or neglects an order or, a neglect of a duty as required as a Managing Director or of any person who is responsible for carrying out the business of such a juristic person, such a person shall be penalized according to the provision prescribed for such violation.”*

The Constitutional Court expressed its judgment that this provision was consistent with the general rules of criminal liability, which state that a wrongdoer should be liable for the outcome of an act or omission when there is a provision of law stipulating the offence, and where the act or omission satisfied all the elements of the offence. Furthermore, when a juristic person is alleged to be guilty of a wrongdoing, the prosecution has to prove to the court beyond reasonable doubt that the wrongdoing was caused by an order or silence or action or omission of the managing director or person responsible for the operations of such a juristic person. The prosecution was also under a burden of proof as provided under section 227 of the Criminal Procedure Code. The Court could convict a defendant only where there was certainty of commission of a wrongdoing as prescribed by law. During the court trial or other agencies in the judicial process, the managing director or a person responsible for the operations of the juristic person would be regarded as innocent until a final conviction of a court. Therefore, section 158 of the Labour Protection Act B.E. 2541 (1998) was neither contrary to nor inconsistent with Section 39 paragraph 2 of the Constitution. This case was dissimilar from Section 54 of the Direct Sales and Marketing Act B.E. 2545 (2002) considered in the Constitutional Court Ruling No. 12/2555 (2012).

As mentioned above, a comparison between Ruling No. 12/2555 (2012) and No. 2/2556 (2013) shows that it is not a double standard of consideration in the Constitutional Court. The two ruling are separate

<sup>34</sup> The Labour Protection Act B.E. 2541 (1998), Section 158.



and distinct, although conceptually related. Further, it should be noted that the provision of Section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002) in Ruling No. 12/2555 (2012) is a presumption by law, which results in a presumption of the defendant's guilt. The plaintiff was not required to show any prior proof of any act or intention of the defendant. The burden of proof - that the accused or the defendant shall be innocent unless proved guilty - was the prosecution's duty, however, it was shifted to the representative of a juristic person. It might be said that such provision was not a Presumption of Innocence but a presumption of guilt based on the status of a person, nor was it a presumption of fact, which constituted some element of the offence. These provisions were inconsistent with the rule of law and contrary to or inconsistent with Section 39 (paragraph 2) of the Constitution.

By contrast, Ruling No. 2/2556 (2013) in Section 158 of the Labour Protection Act B.E. 2541 (1998) was not a presumption of guilt of a managing director or a person responsible for the operations of a juristic person from the commencement of the proceedings. The prosecution still had the burden of proving an act or omission of a duty by such a person, that there was an order or silence, or action or omission of a mandatory duty, and that an offence was committed under the Labour Protection Act B.E. 2541 (1998). This provision was consistent with the general rules of criminal liability, which states that a wrongdoer should be liable for the outcome of an act or omission when there is a provision of law stipulating the offence, and where the act or omission satisfied all the elements of the offence. It can be seen that such a provision states the presumption that the representative of juristic person would be regarded as innocent until a final conviction of court. Therefore, such a provision was neither contrary to nor inconsistent with section 39 (paragraph 2) of the Constitution.

However, we can consider the comparison between the Constitutional Court Ruling No.12/2555 (2012) and No. 2/2556 (2013), which shown in Table 2 as follow;





**Table 2 : The comparison between the Constitutional Court Ruling No. 12/2555 (2012) and No. 2/2556 (2013)**

No.	Status	Constitutional Court Ruling No. 12/2555	Constitutional Court Ruling No. 2/2556
	<b>The Title</b>	Whether or not section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002) was contrary to or inconsistent with section 39 paragraph 2 and section 40(5) in conjunction with section 30 of the 2007 Constitution.	Whether or not section 158 of the Labour Protection Act B.E. 2541 (1998) was contrary to or inconsistent with section 39 paragraph 2 of the 2007 Constitution
	<b>The Provision in each section</b>	<b>Section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002)</b> “In case an offender which will be inflicted with punishment according to this Act is a juristic person, <u>a managing director, a manager or any person responsible for the operation of such a juristic person shall also be inflicted with punishment</u> which the law stipulates for that offence unless he can prove that he has no part in the commission of the offence of that juristic person.”	<b>Section 158</b> of the Labour Protection Act B.E. 2541 (1998) “Whereas the offender is a juristic person, <u>if a violation by such juristic person is due to an order or performance of any person, or a neglects order or a neglect of a duty as required as a Managing Director or of any person who is responsible for carrying out the business of such a juristic person, the such person shall be penalized</u> according to the provision prescribed for such violation.”
	<b>The reasons</b>	This provision was <u>a presumption by law which resulted in a presumption of the defendant’s guilt</u> . The plaintiff was not required to show any prior proof of any act or intention of the defendant. The wrongful act of another person was applied as a condition for presuming the defendant’s guilt and criminal liability, following from the presumption that if an offender was a juristic person, the managing director, manager or person responsible for the juristic person’s operations should also be jointly liable with the juristic person offender, except where it could be proven that he/she had no involvement in the juristic person’s offence.	This provision was <u>consistent with the general rules of criminal liability</u> which stated that a wrongdoer should be liable for the outcome of an act or omission when there was a provision of law stipulating the offence, and where the act or omission satisfied all the elements of the offence.



No.	Status	Constitutional Court Ruling No. 12/2555	Constitutional Court Ruling No. 2/2556
	<b>The burden of proof</b>	<u>The plaintiff was not required to prove any act or intent of the managing director, manager or person responsible for such juristic person's operations and the burden of proof was shifted to the representative of juristic person.</u>	<u>The prosecution was also under a burden of proof as provided under section 227 of the Criminal Procedure Code.</u> The Court could convict a defendant only where there was certainty of commission of a wrongdoing as prescribed by law.
	<b>Another reasons</b>	Such provision <u>was not a Presumption of Innocence but a presumption of guilt based on status of a person.</u> Nor was it a presumption of fact which constituted some element of the offense.	During court trial or other agencies in the judicial process, the managing director or a person responsible for the operations of the juristic person <u>would be regarded as innocent until a final conviction of a court.</u>
	<b>The decision</b>	Section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002) <u>was contrary to or inconsistent with section 39</u> paragraph 2 of the Constitution	Section 158 of the Labour Protection Act B.E. 2541 (1998) <u>was neither contrary to nor inconsistent with section 39</u> paragraph 2 of the Constitution
	<b>Conclusion</b>	These provision is inconsistent with the Presumption of Innocence and violated the rule of law	These provision is consistent with the Presumption of Innocence
	<b>The result</b>	These provision was null and unenforceable.	These provision still is enforceable.

## B. The Constitutional Court Ruling concerning the Presumption of Innocence

According to the provision of the 2007 Constitution, which the Presumption of Innocence has been recognized by Section 39 paragraph 2 as well as of the 2017 Constitution, which has been contained by Section 29 paragraph 2. The Constitutional Court has been entrusted the power and duties in adjudicating and ruling the constitutional cases whose the rulings concerning the Presumption of Innocence. For example, the Constitutional Court Ruling No. 5/2556 (2013), 10/2556 (2013), 11/2556 (2013), 19-20/2556 (2013) and No. 2/2556 (2013). As follows;



**1) Ruling No. 5/2556 (2013)**<sup>35</sup> : Whether or not section 74 of the Copyright Act B.E. 2537 (1994) raised a constitutionality question pursuant to section 39 paragraph 2 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007)?

This case in concerning the Presumption of Innocence on Section 39 paragraph 2 of 2007 Constitution. According to the summarized fact, the Ombudsman referred a matter together with an opinion to the Constitutional Court for a ruling on whether or not section 74 of the Copyright Act B.E. 2537 (1994) raised a constitutionality question under section 39 paragraph 2 of the Constitution.

The Court found that section 74 of the Copyright Act B.E. 2537 (1994) was thus a presumption of guilt of a suspect or defendant in criminal proceedings on the basis of a person's status. This was not a presumption of facts constituting certain elements of an offence after plaintiff had proven certain acts relating to the offence alleged to have been committed by the defendant. Moreover, the provision was also inconsistent with the rule of law, where the plaintiff in criminal cases had the burden of proving all the elements of the defendant's commission of an offence. Therefore, Such provision of law, with respect to the presumption of criminal wrongdoing of a suspect or defendant without any finding of any commission or intent of the suspect or defendant in relation to such an offence, was therefore inconsistent with the rule of law and contrary to or inconsistent with section 39 paragraph 2 of the Constitution.

Finally, the Constitutional Court held that section 74 of the Copyright Act B.E. 2537 (1994) was contrary to or inconsistent with section 39 paragraph 2 of the Constitution. The provision was therefore unenforceable under section 6 of the 2007 Constitution.

**2) Ruling No. 10/2556 (2013)**<sup>36</sup> : Section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001) was contrary to or inconsistent with section 39 paragraph 2, section 40(5) and section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007)?

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<sup>35</sup> Office of the Constitutional Court of the Kingdom of Thailand. 'The Constitutional Court Ruling 2013' Bangkok : P.Press, 2016. p.18-20.

<sup>36</sup> Ibid., p.28-30.



This case is concerning the Presumption of Innocence on Section 39 paragraph 2 of 2007 Constitution. According to the summarized fact, the Saraburi Provincial Court may apply such provision of law to a case and there had not yet been a ruling of the Constitutional Court in relation to such provision. The case was in accordance with section 211 paragraph one of the Constitution in conjunction with clause 17(13) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007).

The Court found that Section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001) provided a legal presumption of the defendants' guilt. The prosecution was not required to prove the actions or intent of the defendant from the outset. The wrongdoing of another person was applied as a condition for a presumption of the defendants' guilt and criminal liability. Thus, there was a presumption of the involvement of the managing director, manager or any person responsible for the operations of the juristic person. This section provided for a presumption of guilt of a suspect or defendant in a criminal case on the basis of a person's status. This was not a presumption of facts constituting certain elements of an offence following the plaintiff's proof of certain actions relating to the offence alleged by the defendant. The provision was also inconsistent with the rule of law, which stated that a plaintiff shall bear the burden of proving all the elements of a defendant's offence. Hence, section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001), in relation to the presumption of criminal wrongdoing of a suspect and defendant without a finding that the suspect and defendant had committed or had any in regard to the wrongdoing, was therefore contrary to or inconsistent with section 39 paragraph 2 of the Constitution.

Finally, the Constitutional Court held that section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001) was contrary to or inconsistent with section 39 paragraph 2 of the 2007 Constitution. The provision was therefore unenforceable under section 6 of the 2007 Constitution.

**3) Ruling No. 11/2556 (2013)**<sup>37</sup> : Whether or not section 28/4 of the Entertainment Place Act B.E. 2509 (1996) was contrary to or inconsistent

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<sup>37</sup> Ibid., p.31-33.



with section 39 paragraph 2 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007)?

This case in concerning the Presumption of Innocence on Section 39 paragraph 2 of 2007 Constitution. According to the summarized fact, the Court of Appeal, Region V was going to apply section 28/4 of the Entertainment Place Act B.E. 2509 (1996) to a case and there had not yet been a ruling of the Constitutional Court in relation to such provision. The case was in accordance with section 211 paragraph 1 of the Constitution.

The Court found that Section 28/4 of the Entertainment Place Act B.E. 2509(1996) provided a legal presumption, which resulted in a presumption of the defendant's criminal wrongdoing without the plaintiff's proof of any action or intent of the defendant. The wrongdoing of another person was applied as a prerequisite for the resumption of the defendant's guilt and criminal liability. The plaintiff merely shall prove that the juristic person had committed an offence under this Act and that the defendant was a director, manager or any person responsible for the operations of the juristic person. Then, the presumption was inconsistent with the rule of law, which stated that the plaintiff in a criminal case had the burden of proving a defendant's wrongdoing with respect to all elements of the offence. Moreover, the provisions in such section also drew a person into the criminal justice process as a suspect or defendant, potentially imposing restrictions on such person's rights and liberties, e.g. by arrest or detention without reasonable preliminary evidence of any action or intent relating to the alleged person's wrongdoing. Section 28/4 of the Entertainment Place Act B.E. 2509 (1996) in regard to the presumption of criminal offence of the suspect or defendant without a finding of any action or intent of the suspect or defendant in relation to the offence was therefore inconsistent with the rule of law and contrary to section 39 paragraph 2 in conjunction with section 3 paragraph 2 of the Constitution.

Finally, Section 28/4 of the Entertainment Place Act B.E. 2509 (1996) was contrary to or inconsistent with section 39 paragraph 2 of the 2007 Constitution. The provision was therefore unenforceable under section 6 of the 2007 Constitution.



**4) Ruling No. 19-20/2556 (2013)**<sup>38</sup> : Whether or not section 72/5 of the Fertilizer Act B.E. 2518 (1975) was contrary to or inconsistent with section 39 paragraph 2, section 40(5) and section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007)?

This case is concerning the Presumption of Innocence on Section 39 paragraph 2 of 2007 Constitution. According to the summarized fact, Both applications raise an objection on whether or not section 72/5 of the Fertilizer Act B.E. 2518 (1975) was contrary to or inconsistent with section 39 paragraph 2, section 40(5) and section 30 of the Constitution. The Sa Kaeo Provincial Court and Min Buri Provincial Court were going to apply such provisions of law to the cases, and there had not yet been a ruling of the Constitutional Court in relation to such provisions. The case was in accordance with section 211 paragraph one of the Constitution.

The Court found that Section 72/5 of the Fertilizer Act B.E. 2518 (1975) provided a legal presumption, which resulted in the presumption of criminal wrongdoing by a defendant. The plaintiff was not required to prove from the outset any act or intent of a defendant who was a managing director, managing partner, juristic person's authorized officer or any person responsible for the operations of the juristic person, which showed involvement in the commission of the wrongdoing by the juristic person. The wrongdoing of another person was relied upon as a basis for a presumption of the defendant's wrongdoing and criminal liability. Of an offence after the plaintiff's proof of any act relating to the defendant's alleged wrongdoing. The presumption was also inconsistent with the rule of law principle, which stated that the plaintiff had the burden of proving a defendant's wrongdoing in regard to all elements of the offence. Moreover, the provisions in such section also drew a person into the criminal justice process as a suspect or defendant, which could result in a restriction of rights and liberties of such person, such as by arrest or detention without reasonable preliminary evidence that such person had acted or had any intent relating to the alleged offence. Section 72/5 of the Fertilizer Act B.E. 2518 (1975), in regard to the presumption of guilt of a

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38 Ibid., p.49-51.



suspect or defendant without any finding that the suspect or defendant had committed an act or had any intent relating to such a wrongdoing was therefore inconsistent with the rule of law and contrary to or inconsistent with section 39 paragraph 2 of the 2007 Constitution.

5) **Ruling No. 2/2556 (2013)**<sup>39</sup> : Whether or not section 158 of the Labour Protection Act B.E. 2541 (1998) was contrary to or inconsistent with section 39 paragraph 2 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007)?

The issue considered by the Constitutional Court was whether or not section 158 of the Labour Protection Act B.E. 2541 (1998) was contrary to or inconsistent with section 39 paragraph 2 of the Constitution.

The Constitutional Court found as follows. Section 158 of the Labour Protection Act B.E. 2541 (1998) was a provision of law, which laid down a presumption that any conduct or action of a person under a duty or responsibility relating to the commission of wrongdoing by a juristic person should be liable for the outcome of his or her action. This provision was not a presumption of guilt of a managing director or a person under the duty pertaining to the operations of a juristic person from the commencement of proceedings. The prosecution still had the burden of proving an act or omission of a duty by such a person, that there was an order or silence, or action or omission of a mandatory duty, and that an offence was committed under the Labour Protection Act B.E. 2541 (1998). This provision was consistent with the general rules of criminal liability, which stated that a wrongdoer should be liable for the outcome of an act or omission when there was a provision of law stipulating the offence, and where the act or omission satisfied all the elements of the offence. During court trial or other agencies in the judicial process, the managing director or a person responsible for the operations of the juristic person would be regarded as innocent until a final conviction of a court. Therefore, section 158 of the Labour Protection Act B.E. 2541 (1998) was neither contrary to nor inconsistent with section 39 paragraph 2 of the Constitution. This case was dissimilar from section 54 of the Direct Sales and Marketing Act B.E. 2545 (2002) considered in Constitutional Court Ruling No. 12/2555 (2012).

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<sup>39</sup> Ibid., p.6-8.



Finally, the Constitutional Court held unanimously that section 158 of the Labour Protection Act B.E. 2541 (1998) was neither contrary to nor inconsistent with section 39 paragraph 2 of the Constitution.

### **C. The Impact on the Landmark Constitutional Court Ruling**

According to the Constitutional Court Ruling above, we have found the effect on the Constitutional Court Ruling No.12/2555 (2012) shows some important:

(1) The Constitutional Court Ruling No.12/2555 (2012) concerns, the right to Presumption of Innocence. The Constitutional Court held that Section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002), specifically that part which presumed the person was guilty as a representative of the juristic person should be jointly liable to the juristic person's criminal penalties, despite the absence of any involvement with the commission of the offence by the juristic person, was contrary to or inconsistent with Section 39 paragraph 2 of the Constitution and the rule of law with regard to the Presumption of Innocence. Thus, these provisions were null and unenforceable. However, this Ruling No. 12/2555 has had an impact on other cases in which the provisions are similar to the concept of presumption of guilt on the part of the representative of the juristic person in criminal liabilities by stating that these provisions were unconstitutional and unenforceable. For example, of the said Constitutional Court Rulings Nos. 5/2556, 10/2556, 11/2556, 19-20/2556 and so forth which are related to the Copyright Act B.E. 2537 (1994), the Telecommunications Business Operation Act, B.E. 2544 (2001), the Entertainment Place Act B.E. 2509 (1996) and the Fertilizer Act B.E. 2518 (1975), respectively. Such cases were contrary to or inconsistent with Section 39 paragraph 2 of the 2007 Constitution. It might be said that these cases may confirm that any provision - that provided a legal presumption, which resulted in a presumption of the defendant's guilt - was unconstitutional due to the provision being contrary to or inconsistent with the Presumption of Innocence as well as the Rule of Law.

(2) Due to the landmark Constitutional Court ruling No.12/2555 (2012), more than seventy Acts, which contained a similar concept to Section 54 of the Direct Sales and Direct Marketing Act B.E. 2545





(2002), amend in order to comply with the Constitution. As a result, the National Legislative Assembly enacted the Act on the Amendment of Legal Provisions relating to Criminal Liabilities of Representatives of a Juristic Person B.E. 2560 (2017). The new law automatically replaced liability for the Presumption of Innocence in seventy-six laws. Moreover, under the new law, the representative of a juristic person is presumed innocent, unless it is proven that their action or omission caused the juristic person to commit the offence. It should be noted that these provisions became part of the constitution and complied with the Presumption of Innocence. Criminal lawsuits against the representative of the juristic person should be more certain and predictable in the future.

This suggests that due to these Constitutional Court Rulings, not only is the Presumption of Innocence an important principle reaffirmed in the Constitution, but any provisions already enforced or in process of being drafted should be in compliance with the Constitution as well as the Rule of Law. These Constitutional Court rulings are directly binding on the National Assembly, the Council of Ministers, and the Courts as well as all state agencies concerned with the enactment, application and interpretation of law. However, the implication of these decisions is that if the provision of law contains a legal Presumption of Innocence, which results in a presumption of the defendant's guilt, it will violate the rule of law in terms of the Presumption of Innocence. Thus, future provisions in Thailand regarding criminal liability of the representative of a juristic person should presume that the representative of a juristic person is innocent, unless it is proven that their action or omission caused the juristic person to commit the offence.

## VI. CONCLUSION

The Presumption of Innocence has been recognized globally as a fundamental criminal principle and human rights, which is the basis of a democratic society. The provisions of international laws including UDHR, ICCPR and ECHR have acknowledged the Presumption of Innocence, and many modern States have also recognized and protected the right to Presumption of Innocence in their constitutions which are consistent with such international laws.



In Thailand, the Presumption of Innocence was first recognized by the Constitution of the Kingdom of Thailand B.E. 2492 (1949). Furthermore, this principle has been recognized and protected continuously by previous Constitutions, and the recognition of this principle both protect Thai citizens in any Constitution and is also consistent with the fundamental concepts of human rights in international law.

Even though, the Constitutional Court has decided cases relating to the Presumption of Innocence of Thai people in practice through the ruling of Constitutional Court, there is, however, a landmark case as the result of ruling No.12/2555 (2012), which assumes the criminal liabilities of a corporation's representative for a crime committed by a juristic person who was presumed to have committed an offence without any proof of his or her intention is contrary to or inconsistent with the Constitution as well as the rule of law in terms of the Presumption of Innocence.

However, such a ruling has had an impact on other provisions, which contained a similar concept concerning the presumption of criminal liability of a corporation's representative - for instance, the Copyrights Act, B.E. 2537 (1994) (Ruling No. 5/2556), the Fertilizer Act B.E. 2518 (1975) (Ruling No. 19-20/2556) – which have a similar result to ruling No.12/2555 and were unenforceable. Due to these rulings, there is a new provision which is the Provision of Law on the Criminal Liability of the Representative of a Juristic Person, B.E. 2560 (2017). However, the new Act has automatically amended such presumption, which was contrary to and inconsistent with the Constitution. Finally, the rights and liberties of Thai people including the criminal liabilities of the representative of corporations will be recognized and protected as fundamental human rights and the Rule of Law in terms of the Presumption of Innocence by the Constitutional Court rulings, which are consistent with the international principles and laws.



***PRESUMPTION OF INNOCENCE  
IN THE CONSTITUTION OF UKRAINE  
AND IN THE NATIONAL LEGISLATION***

***Taras YAKIMETS***

***CONSTITUTIONAL COURT OF  
UKRAINE***





## PRESUMPTION OF INNOCENCE IN THE CONSTITUTION OF UKRAINE AND IN THE NATIONAL LEGISLATION

*Taras YAKIMETS\**

### I. INTRODUCTION

Ukraine, like a majority of democratic legal states, proclaims its main purpose as an affirmation and insurance of human rights and freedoms. The protection of these rights and freedoms by the State becomes especially essential when it goes about legal responsibility. The necessity for special respect for human rights and freedoms is significantly strengthened in criminal proceedings.

The international community has developed a set of principles on which appropriate national criminal proceedings should be based on. One of them is the principle of presumption of innocence. This principle enshrined in Article 11 of the Universal Declaration of Human Rights (1948), Article 14 of the International Covenant on Civil and Political Rights and in other international acts.

Presumption of innocence is well known and quite thoroughly researched in Ukrainian legal doctrine. It found its normative definition in the Constitution of Ukraine and in the sectoral national legislation. It is worth mentioning that at the dawn of Ukrainian independence the presumption of innocence was not provided in the legislation. With the proclamation of Ukraine's independence, our State decided to join the Council of Europe. In 1995 Ukraine assumed several formal obligations of this organization, which were foreseen in the Opinion No. 190 (1995) of the Parliamentary Assembly of the Council of Europe regarding the Application by Ukraine for membership to the Council of Europe. Among the national commitments were, inter alia, the

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adoption of a new Constitution in conformity with Council of Europe standards, signing and ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

Article 6 of the European Convention on Human Rights enshrines the principle of presumption of innocence. In this Article it is stated that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Consequently, taking into account the international obligations of our State, the existence of a consensus on this issue among Ukrainian lawyers, scholars, and politicians, the presumption of innocence is directly provided in the new Constitution of Ukraine of 1996.

## **II. PRESUMPTION OF INNOCENCE IN THE CONSTITUTION OF UKRAINE**

According to Article 62 of the Fundamental Law of Ukraine, a person shall be presumed innocent of committing a crime and shall not be subjected to criminal punishment until his guilt is proved through a legal procedure and established by a court verdict of guilty (paragraph 1). Paragraph 2 of Article 62 of the Constitution of Ukraine states that no one shall be obliged to prove his innocence of committing a crime. Paragraph 3 of Article 62 of the Constitution establishes: an accusation shall not be based on illegally obtained evidence or on assumptions; all doubts in regard to the proof of guilt of a person shall be interpreted in his favour. These constitutional provisions set the content of the principle of presumption of innocence.

Article 62 is under the Title II “Human and citizen rights, freedoms, and duties” of the Constitution of Ukraine. This Title groups the fundamental constitutional human rights and freedoms. Therefore, the presumption of innocence simultaneously appears to be a constitutional human right and a constitutional principle that enshrines special legal mechanisms for ensuring other corresponding constitutional rights and freedoms of human and citizen (in particular, in a criminal proceeding).

Presumption of innocence is a key principle in protection of human rights and freedoms in the area of the criminal proceedings and shall



not be restricted under any circumstances. This conclusion is confirmed by the fact that the effect of Article 62 of the Constitution of Ukraine, according to the second paragraph of Article 64 of the Fundamental Law of Ukraine, cannot be restricted even under special constitutional and legal conditions (under martial law or a state of emergency).

Thus, in its constitutional legal sense, the presumption of innocence is the constitutional right of a person to be protected from premature conviction by competent officials and to have the right not to prove his or her innocence. At the same time, this principle is the basis to ensure certain other constitutional rights in criminal proceedings, such as the right to have dignity respected, the right to freedom and personal inviolability, the right to judicial protection and other rights. In addition, in a wider aspect, the presumption of innocence is one of the guarantees for the implementation of the key function of the state – the affirmation and insurance of human rights and freedoms as the highest social value.

The constitutional principle of the presumption of innocence lies not only in the right which stipulates that he or she shall be presumed innocent until proved guilty according to law and that no one shall be obliged to prove his innocence for not committing a crime. It also includes a set of other important elements.

First, this principle contains a stipulation that no one shall be subjected to criminal punishment until his guilt is proved through a legal procedure. The presumption of innocence also comprises a public prosecution authorities' duty to prove the guilt of a person before the court and all doubts of the guilt of the person shall be interpreted in his/her favour.

The Constitutional Court of Ukraine, in the Decision (*No 1-r/2019, 26 February 2019*), held that one of the elements of presumption of innocence is *in dubio pro reo* principle, according to which, in assessing evidence, all doubts about the guilt of a person should be interpreted in favor of his/her innocence. The Court stated that the presumption of innocence of a person implies the obligation to prove the guilt of the accused and this obligation rests with the state.





Furthermore, the principle of presumption of innocence is directly related to the constitutional principle of the necessity of ensuring the guilt to be proven as an element of judicial proceedings, which is stated in item 2 of paragraph 2, Article 129 of the Constitution Law of Ukraine.

Consequently, the constitutional principle of the presumption of innocence is a complex constitutional legal institution, containing several elements (subprinciples), which together fulfil the observance of constitutional human rights, especially in the area of the criminal proceedings.

### **III. PRESUMPTION OF INNOCENCE IN THE CRIMINAL CODE OF UKRAINE, CRIMINAL PROCEDURE CODE OF UKRAINE**

As it was mentioned, observance of human and citizen rights and freedoms guaranteed by the Constitution of Ukraine becomes especially essential in criminal proceedings. The main reason is that criminal prosecution is usually accompanied by significant restrictions on human rights and freedoms.

In Ukrainian legal doctrine, the presumption of innocence is usually determined as a legal status or provision in which a suspect, accused or defendant is presumed innocent in committing a crime until his guilt is proved following the procedure established by law.

The national criminal and criminal procedure legislations are based on the juridical approach that, despite the existence of sufficient grounds for being charged, everyone is presumed innocent until the court makes a conviction. Before that, the constitutional rights and freedoms must be guaranteed for every person at the same level as for other citizens despite the legal status of the suspected or accused one. This conclusion is not taken into account in cases clearly defined by law, when, without a temporary application of restrictions of some constitutional human rights and freedoms impossible to realize the main task of criminal proceedings – quick, comprehensive and impartial investigation and trial in criminal proceedings.

General provisions of the Criminal Code of Ukraine almost literally reproduce the provision of paragraph one of Article 62 of the



Fundamental Law of Ukraine. In paragraph two of Article 2 of the Criminal Code of Ukraine it is stated that a person is deemed innocent of a crime and may not be criminally punished until his/her guilt is legally proven and found by a lawful sentence.

Constitutional provisions of the principle of presumption of innocence detailed in the criminal procedural legislation.

The presumption of innocence in the Criminal Procedure Code of Ukraine (hereinafter – the CPC of Ukraine) is defined as one of the twenty-two general principles of criminal proceedings.

In accordance with Article 17 of CPC of Ukraine an individual shall be considered innocent of the commission of a criminal offence and may not be imposed a criminal penalty unless her/his guilt is proved in accordance with the procedure prescribed in the CPC of Ukraine and established in the court's judgment of conviction which has taken legal effect (paragraph one).

Unlike the provisions of Article 62 of the Constitution of Ukraine and Article 2 of the Criminal Code of Ukraine, the criminal procedural legislation contains a special reservation according to which a person is considered innocent in committing a criminal offense unless his/her guilt will be established in court judgment of conviction, *which has taken legal effect*. It means that, even after a guilty verdict passed, but before it will have legal effect, there are no grounds to assert that the defendant is guilty for a criminal offense. It gives an accused the possibility to fulfil the constitutional right of judicial protection, provided in Article 55 of the Fundamental Law of Ukraine, in particular, in appeal proceedings. This legislative approach strengthens the guarantee of an impartial review of the decision of the first-instance court by the court of appeal.

Article 17 of the CPC of Ukraine also reproduces elements of the principle of presumption of innocence, which follow from the obligations to prove defendant's guilt. In paragraph two of this Article it is stated that no one shall be required to prove their innocence of having committed a criminal offence and shall be acquitted unless the prosecution proves their guilt beyond any reasonable doubt. Paragraph three of Article 17 of the CPC of Ukraine establishes that charges might not be based on evidence obtained illegally. In paragraph four of Article



17 of the CPC of Ukraine it is stipulated that any doubt as to the proof of the guilt of an individual shall be interpreted in this person's favour.

These provisions of the criminal procedural law impose the obligation of proof (burden of proof) on the public prosecution. At the same time, they do not deprive the accused person of the right to defend with help from the legal assistance of a defence counsel, and the right to argue that he or she did not commit a crime.

In my opinion, it's important to mention the legal stipulation about the impossibility of substantiating suspicion, the accusation by evidence obtained by illegal means.

The Constitutional Court of Ukraine in Decision (*No. 12-rp/2011, 20 October 2011*), concluded that only factual data obtained in accordance with the requirements of criminal procedure legislation could be admissible and used as evidence in a criminal case; the verification of admissibility of evidence is the most important guarantee of ensuring the rights and freedoms of human and citizen in the criminal process and of making a legitimate and fair decision in the case. In this Decision, on the basis of the analysis of paragraph three of Article 26 of the Constitution of Ukraine, the Court also stated that the charge in a criminal offence cannot be substantiated by factual data obtained by illegal means, specifically: with a violation of constitutional rights and freedoms of human and citizen; with violation of the procedure established by law, means, sources of obtaining factual data; by a person not authorized by the law.

In the context of the principle of presumption of innocence it is a very important legislative requirement that all doubts regarding the guilt of a person shall be interpreted in his favour. This provision of the CPC of Ukraine actually requires the investigative authorities to examine more scrupulously all available evidence, to analyse attentively the circumstances of the criminal case before making certain procedural steps to prosecute a person. The provisions of paragraph four of Article 17 of the CPC of Ukraine, establishing a principle "in dubio pro reo" in Ukrainian criminal procedure, serve as a preventer against arbitrary decisions and actions of public prosecution bodies.



Paragraph five of Article 17 of the CPC of Ukraine stipulates that the treatment of a person whose guilt for committing a criminal offense is not established by the court's conviction judgment, which has entered into force, must correspond to the treatment of an innocent person. This imperative of criminal procedural law reproduces, the most precisely, the way of treatment that public prosecution authorities should follow in relation to a person during criminal proceedings. It should be mentioned that this model of behaviour is essentially the substance of the principle of presumption of innocence because only in this case, in criminal proceedings, the right to have human dignity respected can be guaranteed.

Summing up written above, it can be stated that the normative definition of the presumption of innocence in national legislation conforms with international legal standards in this field. Ukraine has made significant progress on this issue at the legislative level in recent years. However, it must be recognized that the enshrinement of the presumption of innocence in the Constitution of Ukraine and in the laws does not guarantee its real implementation in practice.

#### **IV. PROBLEMS OF APPLICATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE IN UKRAINE**

It has been about seven years since the adoption of the current CPC of Ukraine (entered into force 2012), but the Ukrainian legal system has not removed the accusatory bias of criminal proceedings. The statistics of the courts' decisions in criminal cases confirm indirectly this conclusion<sup>1</sup>.

Far from ensuring the real effect of the principle of presumption of innocence and the realization of the principle of the rule of law is the situation with the restriction of personal freedom during pre-trial detention, despite the increased use by courts of alternative measures of restraint (for example, bail).

Another actual problem related to the incorrect understanding of the essence of the principle of presumption of innocence is the problem of

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<sup>1</sup> Analytical tables on the state of justice for 2018 (Official web portal of the State Judicial Administration of Ukraine) available at [https://court.gov.ua/inshe/sudova\\_statystyka/analit\\_tabl\\_2018](https://court.gov.ua/inshe/sudova_statystyka/analit_tabl_2018).



excessive media coverage of some criminal proceedings by officials of public authorities. Some comments prematurely contain allegations of the guilt of person who is suspected (accused). In addition, sometimes officials demonstrate in media the evidence of guilt of an accused in criminal cases that have not been sent to the court yet, including evidence obtained from the conduct of cover investigative (search) actions.

At the same time, the European Court of Human Rights has a clear position that the presumption of innocence under Article 6 § 2 of the Convention will be violated if a judicial decision or, indeed, a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proven according to law. It suffices, in the absence of a formal finding, that there is some reasoning suggesting that the court or the official in question regards the accused as guilty, while a premature expression of such an opinion by the tribunal itself will inevitably run afoul of the said presumption (*see, e.g., Nešťák v. Slovakia, no. 65559/01, §§ 88 and 89, 27 February 2007*).

In my opinion, the situation with media coverage of some criminal cases with comments of official bodies, which contain allegations of the guilt of person suspected (accused), is a strong negligence of the principle of the presumption of innocence and requires regulatory improvement in terms of the establishment of strict criteria for prosecuting officials who consciously allow such violations.

## V. CONCLUSION

To summarize all written above, it should be mentioned that the presumption of innocence has its normative implementation both in the Constitution of Ukraine and in Ukrainian legislation. The presumption of innocence in Ukraine is considered as a constitutional right and a constitutional principle, which serves as a certain guarantee of ensuring the rights and freedoms of human and citizen. The provisions of Article 62 of the Fundamental Law of Ukraine establish not only the subjective right of a person to be presumed innocent in committing a crime before a court conviction. This principle also establishes the right not to prove his or her innocence, to demand that evidence shall



be collected in a legal manner, and all doubts shall be interpreted in favour of the accused one.

The constitutional provisions of presumption of innocence are detailed in laws of the State.

It should also be noted that, despite the rather progressive changes in Ukrainian legislation that have taken place over the past years, there are still some problems with the lack of compliance on the principle of presumption of innocence.



***PRESUMPTION OF INNOCENCE:  
OVERVIEW OF THE PRINCIPLES  
ENUNCIATED IN THE CASE-LAW OF  
THE EUROPEAN COURT OF HUMAN  
RIGHTS***

***Zeynep UÇAR TAGNEY***

***EUROPEAN COURT OF  
HUMAN RIGHTS***







## **PRESUMPTION OF INNOCENCE: OVERVIEW OF THE PRINCIPLES ENUNCIATED IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS**

*Zeynep UÇAR TAGNEY\**

### **I. INTRODUCTION**

Before I begin I would like to thank the Constitutional Court of Turkey for their kind invitation and for giving me the opportunity to speak to you today via a videoconference.

I will be talking about the presumption of innocence as it has evolved in the jurisprudence of the European Court of Human Rights (“the Court”). It is a comprehensive subject, and I have organised my presentation in four parts. In the first part, I will be talking about burden of proof and evidentiary presumptions. In the second part, I will focus on the offending comments made by public officials and in the third part I will talk about the applicability of presumption of innocence to proceedings other than the criminal proceedings. In the fourth and final part, I will answer some practical questions and considerations.

### **II. BURDEN OF PROOF: EVIDENTIARY PRESUMPTIONS**

#### **A. Presumptions of fact and law**

The presumption of innocence which is set out in the second paragraph of Article 6 [of the *European Convention on Human Rights* (“the Convention”)] is a guarantee of fair trial. It must be emphasized the provision is foremost a guarantee of a fair criminal trial. This is evident from the text which provides that “*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*”

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At first sight, it may be noticed that this provision is somewhat phrased in absolute terms, as if there are no exceptions to the rule that everyone must be presumed to be innocent unless proven guilty. But the Court has stated that the presumption of innocence is not an absolute right. Some limitations to this right might be permissible even necessary in certain contexts.

While the rule is that the prosecution must prove the accused's guilt, by seeking out evidence and establishing intent or negligence on part of the offender, in certain systems of law, there are categories of strict liability offences which operate with presumptions of fact or law. Road offences and customs offences are of this category and the Court has a consistent jurisprudence in this field.

To give an example, let us assume you collect someone's bag at the airport by mistake. Before you leave the airport, the customs officials stop you and search the bag and if they find smuggled goods or drugs in your bag, this might be enough to convict you of an offence. There have been cases like this in which the Court had to consider whether the fact that an occurrence of a simple event, or an objective fact, had sufficed to convict an applicant was compatible with presumption of innocence.

The Court has stated in that connection that the Convention does not prohibit presumptions of fact or law provided that they are *within reasonable limits* and *the rights of defence* are respected. The notion of reasonable limits has something to do with the nature of the offence. Road offences and customs offences are the two major areas where such presumptions are regarded as reasonable and common-sensical. As regards the rights of defence, the Court looks at whether such presumptions are applied *automatically*, that is, whether the defendants have any means of defence irrespective of whether they used them or not in the proceedings. In other words, the Court examines in a given case whether the domestic law creates a presumption of fact or law that is impossible for the accused to refute, or whether, however limited, there is some defence available to him or her. In the latter case, a violation will be unlikely provided that the presumption employed is reasonable with respect to the nature of the offence at stake.



For example, in the case of *Falk v. Netherlands* ((dec.), no. 66273/01, 19 October 2004) where a registered car owner was found liable for a minor offence (not giving way to a pedestrian) even though it was not proven by the prosecution that it was in fact him who had driven the car at the time, the Court declared the case inadmissible. The Court deemed the context to be important; especially the reality that traffic offences were detected by technical means, such as radar installations and cameras, without a direct confrontation between the offender and the police and having regard to the undesirability of leaving traffic offences go unpunished. It then noted that the presumption that “registered car owner was the offending individual” was not an automatic presumption that was impossible for the defendant to rebut. The Court noted in that connection that the domestic law allowed for certain defences, in particular, absolute necessity, or that the police could have stopped the car to establish the identity of the driver, or that the car was commercially leased.

Similarly the Court found no violation of the right to presumption of innocence in the case of *Pham Hoang v. France* (25 September 1992, Series A no. 243) where the applicant was accused of a customs offence (possession of drugs). In respect of the particular offence in French law with which the applicant was accused, the burden of proving that no offence has been committed was on the accused. Also being in possession of a smuggled good or drugs was sufficient for conviction. The applicant had been the driver of a car and the drugs were not seized inside his car but when the other accused who had been in the possession of the drugs had been walking towards the applicant’s car. The courts convicted the applicant for taking part in the commission of the customs offence. Here, the Court observed that the applicant’s right to presumption of innocence had not been violated because the domestic courts had not automatically relied on the simple fact of the applicant being the driver but had weighed all the evidence against the applicant and assessed the facts of the case freely. Moreover, the Court observed that the presumption in French law was not irrefutable. The applicant, even though he had not used them, had available defences to rebut the presumption against him - such as the case of necessity, *force majeure*, or the absolute impossibility of knowing the contents of the package.



In all these cases it can be seen that the Court scrutinises whether the presumption of fact or law was applied by the domestic courts in an automatic manner and/or whether the courts in the individual case maintain a freedom of assessment of evidence.

### **B. Reversal of burden of proof**

In a criminal trial, the burden is on the prosecution to make a case against the defendant. The presumption of innocence will therefore be violated if the burden of proof is shifted from the prosecution to the defence. This was the case in *Telfner v. Austria* (no. 33501/96, 20 March 2001), where the Court found a violation of the defendant's right to be presumed innocent. In that case a pedestrian had been struck and injured by a car but she had not been able to see the driver. She had only seen the license plate of the car. The car belonged to the applicant's mother and the police noted in their investigation that the several members of the family, including the applicant and his sister had been in the habit of using the car. They singled the applicant out as a suspect and in the trial the applicant was required to show that he did not drive the car on that night. In other words, the burden of proof was reversed. The Court found a violation in that case because even though the prosecution had failed to make a *prima facie* case against the applicant (no evidence in the file that he had driven the car that night), the burden was shifted on the applicant to prove his innocence.

The Court also found a violation of the same principle in the case of *Capeau v. Belgium* (no. 42914/98, ECHR 2005-I v. Belgium), in cost proceedings following the discontinuation of the criminal proceedings. There the prosecution decided to discontinue the case for lack of sufficient evidence to go trial and the applicant sued for compensation for the time he spent in pre-trial detention. In those compensation proceedings, the courts asked him to prove his innocence in respect of the offence for which he had been detained which the Court found to be incompatible with presumption of innocence.

### **C. Drawing inferences from a defendant's right to silence**

The prohibition of the reversal of burden of proof does not mean that no conclusions could be drawn from a defendant's silence. In *John*



*Murray v. the United Kingdom* (8 February 1996, *Reports of Judgments and Decisions* 1996), the Grand Chamber of the Court held that the right to silence was not absolute and that common-sense conclusions or inferences could be drawn from an accused's silence in cases an explanation is due from him or her. This is of course only true when the prosecution has made a formidable case against the defendant, so technically there is no reversal of burden of proof. Whether adverse inferences drawn from a silence of an accused infringe Article 6 of the Convention falls to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.

In the *John Murray* case for example, to remain silent was not a criminal offence and applicant was able to remain silent throughout proceedings, so there was no degree of compulsion. Also, the drawing of inferences was subject to important safeguards. In particular, only common-sense inferences could be drawn where the evidence against the accused was such that it "called" for an answer. In that respect, the evidence presented at trial constituted a formidable case against the applicant. Thus the drawing of inferences was not unfair or unreasonable.

Conversely in the case of *Krumpholz v. Austria*, (no. 13201/05, 18 March 2010), the Court found a violation because the domestic courts convicted the applicant solely on the grounds of his silence. Interestingly this was a case involving a road offence, where the applicant's car was caught on camera and he was asked by the authorities to disclose the name of the driver. The applicant did not reply. He was later on convicted for speeding. In finding a violation, the Court underlined that this was not a case of presumptions of fact or law operating in the Austrian legal system as at the time Austrian law did not provide for a legal presumption that the registered car owner must be presumed to be the driver. This was a case where the prosecution only relied on the radar reading and the applicant's silence was deemed sufficient for the courts to deem him guilty. The difference of *Krumpholz* from the circumstances of the *John Murray* case is largely the fact that there had



been no “formidable case” against the applicant in the former which required him to give an explanation.

### III. COMMENTS MADE BY PUBLIC OFFICIALS DURING THE PROCEEDINGS

#### A. Statement by public officials

This is an area where the Court has a rich case-law. The first question that comes to mind is what kind of public officials must respect presumption of innocence and refrain from making comments that create a prejudice in the trial? The trial court, prosecution, police officers, investigation authorities are included in this group; so are the elected members of the state such as ministers, presidents and prime ministers.

It must be noted at the outset that in the examination of the comments made by public officials, the Court focuses on the context in which such statements were made. It deciphers the real – not literal meaning – of the statements and whether they describe a state of suspicion – which is allowed –, or whether they portray an accused as guilty as fact, which clearly violates the right to presumption of innocence. The Court has said in that context that presumption of innocence does not prevent public officials from informing the press about pending criminal investigations, but they must do it discreetly and with circumspect. These are the keywords: “being discreet and circumspect” which must be understood as the duty of the public officials to be careful about the quality of the statements they make. Unqualified declarations of guilt will fly in the face of presumption of innocence. This is precisely how the Court examines these types of situations.

I noted, in the beginning, that the context in such situations was important. I would like to give an example in that respect.

In the case of prosecutors, in a decision to dismiss the applicant’s request that the pre-trial case against him be dismissed, the prosecutor had said “*according to the evidence in the case file, the applicant’s guilt has been proven*”. The Court found that the presumption of innocence applied even to prosecutor’s use of language, but in the case, that even though the expression i.e., “the applicant’s guilt being proved” was



unfortunate; the context in which it had been used did not mean that his guilt was established (see *Daktaras v. Lithuania*, no. 42095/98, §§ 39-45, ECHR 2000-X). The Court noted that the prosecutor was mainly referring to whether evidence in the file was sufficient to go to trial. There was therefore no violation of Article 6 § 2 of the Convention. It must be noted that the prosecutor's comments here was given in the context of a judicial decision in response to the applicant's request to dismiss the case and it was not a publication or press statement.

In contrast, in the case of *Turyev v. Russia*, (no. 20758/04, 11 October 2016), the Court did find a violation of a prosecutor's comments because the comments were made by the prosecutor to the press, where he had identified the applicant not with his initials but with his full name, and had called him a "murderer". In other words, the prosecutor's statements had a far-reaching audience and he had made an unqualified declaration of guilt which was not justified in the context where the statement was made.

Presumption of innocence applies to other prosecution officials. In *Khuzhin and Others v. Russia* (no. 13470/02, 23 October 2008), prosecution officials had discussed the applicants' trial in a TV show, and their comments went beyond describing a state of suspicion, as they imputed guilt on the applicants. In that Russian case, the prosecuting officials commented that the only possible outcome of the proceedings would be a sentence of appropriate length. They had referred to the applicants' criminal record, and how their personal qualities matched their commission of the crimes, so on and so forth. In other words, they gave the public the impression that they, as prosecuting officials, believed the applicants to be guilty and therefore encouraged the public to believe the applicants' guilt before they had been proved guilty according to law.

Presumption innocence applies also to police officials (see, for example, the case of *Alenet de Ribemont v. France*, 10 February 1995, Series A no. 308). It applies to a president of republic, prime minister or other ministers. In the case of *Konstas v. Greece* (no. 53466/07, 24 May 2011), the Court found that comments made by the minister of justice and the minister of finance when the appeal proceedings were ongoing





against the applicant's conviction were of a sufficiently serious nature to prejudice the appeal proceedings. It was a case of misappropriation of public funds, where the applicant had been charged of fraud, and the ministers referred to him as a crook and a thief. The minister of justice also said the first instance court had boldly and resolutely convicted those involved in the case.

The Court found a violation in that case. It further commented that as minister of justice, the official embodied, par excellence, the political authority responsible for the organisation and the proper functioning of the courts. He should have therefore been particularly careful not to say anything that might give the impression that he wished to influence the outcome of proceedings pending before the Court of Appeal.

Finally it must be noted that a trial court itself could breach an accused's right to presumption of innocence. Such was the case in *Cleve v. Germany* (no. 48144/09, 15 January 2015), where the domestic court acquitted the applicant on account of inconsistent victim testimonies, but in its reasoning it used language that demonstrated that it regarded him as guilty. Thus there was an apparent inconsistency with the operative part of the judgment and the reasoning.

### **B. Extensive media coverage of a trial**

Right to impart and receive information under Article 10 of the Convention and the public's interest in being informed of criminal proceedings must be balanced with a person's right to privacy and his or her right to presumption of innocence. A virulent press campaign might affect the fairness of a trial and affect an applicant's presumption of innocence. The Court held therefore that the press must be careful not to overstep certain boundaries with respect to a person's privacy and right to be presumed innocent.

In *Y.B. and Others v. Turkey*, (nos. 48173/99 and 48319/99, 28 October 2004) when the applicants were arrested, the police presented them by stating that they were "members of an illegal organisation" and that they were involved in "criminal activities". Even though the applicants were not identified by their names, their photographs were taken. After they were brought before a judge, a daily newspaper published an article in which they were named and specific offences had been



attributed to them. It was after the publication of the newspaper that the applicants were charged with those offences. All these elements led the Court to find to a breach of Article 6 § 2 of the Convention.

Conversely in *Paulikas v. Lithuania* (no. 57435/09, 24 January 2017), there was no violation of Article 6 § 2 on account of the virulent press coverage of the criminal trial. In that case the press had a continuous adverse campaign against the applicant calling him the killer of the children. The Court held that a fair trial could nevertheless be held after intensive adverse publicity. The Court said that impact of a media campaign on the fairness of the trial depended on the following factors:

- the time which has elapsed between the press campaign and the commencement of the trial;
- whether the impugned publications were attributable to, or informed by, the authorities;
- whether the publications influenced the judges and thus prejudiced the outcome of the proceedings.

In the case of *Paulikas* it was professional judges who had determined the criminal case, not a jury who would have been more likely to be influenced by the press campaign. Judgment of the domestic court was well-reasoned and some of the applicant's arguments were upheld and his sentence was reduced. All these factors contributed to a finding of no violation. It must be noted that the authorities had made no contributions to the press unlike the case in *Y. B. and Others v. Turkey*.

### **C. Post-humous findings of guilt**

A fundamental rule of criminal law is that criminal liability does not survive the person who committed the criminal act. Thus, post-humous findings of guilt are prohibited by the Convention. In a case where a deceased's co-accused were being tried and the domestic courts referred to him as the "organiser of the criminal gang", that he had "funded the gang and paid each member to commit the crimes", the Court found a violation in respect of the deceased's right to presumption of innocence. The statements made by the domestic courts were not limited to describing a "state of suspicion" against the deceased; they were stated as an established fact, without any



qualification or reservation, that he had been the leader of a criminal syndicate and that he had coordinated and funded the criminal activities of that syndicate (see *Vulakh and Others v. Russia*, no. 33468/03, 10 January 2012).

In the case of *Lagardère v. France* (no. 18851/07, 12 April 2012), the applicant's father died during the criminal trial which involved a third-party civil action, the criminal action was therefore time-barred but the civil action continued against his son. In that case, the courts referred to the applicant's dead father as his guilt having been established. In terms of both the language the courts had used and the reasoning they had given, they had declared the applicant's father guilty of the charges against him even though the prosecution had lapsed as a result of his death and no court had ever found him guilty during his lifetime. The domestic courts had therefore violated his right to be presumed innocent.

#### **IV. APPLICABILITY OF PRESUMPTION OF INNOCENCE TO PROCEEDINGS OTHER THAN CRIMINAL PROCEEDINGS**

Presumption of innocence, which is primarily a guarantee of fair criminal trial, has a spill over effect to proceedings other than the main criminal proceedings. If proceedings which are concerned or otherwise have a link with the original criminal proceedings, than in those other proceedings, the Court has accepted that an applicant may enjoy the guarantees of presumption of innocence.

In that context when two proceedings, one criminal and another related proceedings are going parallel to each other, the courts are obliged to refrain from any statements that may have a prejudicial effect on the pending criminal proceedings. For example, in the case of *Karaman v. Germany* (no. 17103/10, 27 February 2014) where the domestic courts who were trying the applicant's co-suspects in separate proceedings referred to the applicant's guilt, the Court found a violation. Even though the impugned court's statements were not binding on the other court who was trying the applicant, the Court found that they may have nonetheless had a prejudicial effect in the actual criminal trial.



In a case where the applicant was dismissed on account of his alleged involvement in a serious offence, the Court found that in the parallel dismissal proceedings, the courts had relied on the evidence in the case-file and commented on the applicant's criminal guilt rather than his disciplinary liability and found a violation of his right to be presumed innocent (see *Kemal Coşkun v. Turkey*, no. 45028/07, 28 March 2017).

In subsequent proceedings, that is when the criminal proceedings end with a result other than a conviction, the Court has also said that the presumption of innocence may continue to apply with respect to subsequent proceedings which have a *link* with the criminal proceedings that have ended. Whether or not there is a link between two such proceedings can be determined by looking at whether the subsequent proceedings require an examination of the outcome of the prior criminal proceedings, for example whether they oblige the court to analyse the criminal judgment, to engage or review the evidence therein or to comment on the events or the applicant's possible guilt. Then it is accepted that there is a link between the original criminal proceedings and the subsequent proceedings (see *Allen v. the United Kingdom* [GC], no. 25424/09, ECHR 2013).

The Court found such a link to be present, for example, in below mentioned subsequent proceedings:

- A former accused's obligation to bear *court costs and prosecution costs*. In *Minelli v. Switzerland*, (25 March 1983, Series A no. 62) the authorities had a right to shift the court costs to the accused if he had misled the prosecution during the trial. In that case, the criminal proceedings were time-barred but in the decision to discontinue the proceedings, the courts ruled that the applicant should bear the costs. When the applicant appealed, the domestic courts noted that the proceedings would have probably ended with conviction had they not been time-barred. The Court found that there was a link between the original proceedings and the subsequent cost proceedings, since the outcome of the criminal proceedings had been discussed and commented on during the cost proceedings. It further found that the reasoning of the domestic courts in those cost proceedings amounted to a violation of the applicant's established right to be presumed innocent.



- A former accused's request for *compensation for detention on remand*. Even though there is no right under the Convention to compensation for pretrial detention in the case of dismissal of charges or acquittal, if in refusing compensation, a court expresses the view that the former accused was in fact guilty or asks the former accused to prove his innocence, a violation will be likely. See the case of *Capeau*, cited above.

- A former accused's obligation to pay *civil compensation to victims*. In the case *Y v. Norway* (no. 56568/00, ECHR 2003-II (extracts)), the Court reiterated that acquittal from criminal liability should not be called into question in the subsequent compensation proceedings. The Court went on to add that this principle did not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof. If, however, the national decision on compensation contains a statement imputing the criminal liability of the respondent party, this could raise an issue falling within the ambit of Article 6 § 2 of the Convention. In that case, the Norwegian courts had used language that contravened the applicant's innocence. Referring to the original criminal proceedings, the domestic courts had stated that it was clearly probable that the applicant had committed the offences against the victim. This reasoning and the language used by the domestic courts fell afoul of the principle to respect for a person's established innocence. The Court further found that the civil courts had overstepped the bounds of the civil forum, and had casted doubt on the correctness of the applicant's acquittal.

- A former accused's *disciplinary liability* in civil or administrative proceedings following acquittal or discontinuance of the criminal proceedings (see *Moulet v. France (dec.)*, no. 27521/04, 13 September 2007; *Çelik (Bozkurt) v. Turkey*, no. 34388/05, § 34, 12 April 2011; Kemal Coşkun, cited above; and *Güç v. Turkey*, no. 15374/11, 23 January 2018). Principles are the same as mentioned above. Namely, it is not against the Convention that domestic authorities vested with disciplinary power impose sanctions on a civil servant for acts with which he has been charged in criminal proceedings where such misconduct has been duly established. What is important is that the domestic authorities maintain the distinction between disciplinary and criminal liability. In practical terms, disciplinary authorities should not comment on the



criminal liability of a person and they should be careful not to draw inappropriate conclusions from the criminal proceedings.

## V. PRACTICAL CONSIDERATIONS ON PRESUMPTION OF INNOCENCE

- Can Article 6 § 2 apply even if the applicant has never been formally charged with a criminal offence?

Presumption of innocence only applies, whether in the context of main or subsequent proceedings, if there is a criminal charge, which is interpreted autonomously under the Convention. If the applicant has never been charged with a criminal offence, or there have never been any criminal proceedings against him or her, statements attributing criminal or other reprehensible conduct to the applicant are more relevant in terms of Article 8 of the Convention.

- Is there any difference or nuance between what kind of statements will not infringe presumption of innocence when the criminal proceedings are pending and when they have ended with a result other than conviction?

Yes. A state of suspicion – namely that a person is a suspect but not guilty is allowed during the stage when proceedings are pending. However once a person is not convicted, voicing of suspicions is no longer compatible with presumption of innocence.

- Does presumption of innocence cease to apply in appeal proceedings?

No. It covers the proceedings in entirety. Even if a person is convicted at first-instance, his or her right to presumption of innocence does not cease in appeal proceedings. Otherwise there would be no point in appeal.

- Does the fact that the person is later convicted negate or vacate his initial right to be presumed innocent?

No. A posteriori considerations or conclusions by courts does not invalidate a person's right to be presumed innocent during a criminal trial.

- Can a breach of presumption of innocence be cured on appeal?



Yes, as long as the domestic courts can acknowledge a violation and offer redress for the applicant (see, for example, *Vanjak v. Croatia*, no. 29889/04, § 69, 14 January 2010).

- What domestic remedies should be in place for applicants to voice an alleged violation of their right to be presumed innocent?

To require an applicant to lodge a civil compensation claim for the alleged violation of presumption of innocence in a criminal trial may not be a sufficient or relevant remedy (see *Dakratas, Konstas* and *Paulikas*, all cited above). The Court has suggested in *Konstas* that a remedy which enables an applicant to invite the concerned criminal court to find a violation of the presumption innocence from the procedural standpoint would be relevant.



## **CLOSING SPEECH OF THE SEVENTH SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE**

**Ankara, 11 September 2019**

**Esteemed guests,**

On behalf of Turkey, the Turkish Constitutional Court as well as on my own behalf, I once again welcome you in this final session and greet you all with respect.

As everything that has a beginning has an end, we are today on the final day of this pleasant programme. This year's summer school may be deemed to have achieved its purpose if you, as we do, feel happy for establishing a fruitful and pleasant synergy but sorrowful, at the same time, to leave. That is because I consider that one of the aim pursued by the training provided through this event is to give a comprehensive insight into professional knowledge and approach whereas the other is to establish and promote connection and fellowship among persons from different countries.

As a matter of fact, prior to and in the course of every summer school event, my colleagues at the Turkish Constitutional Court, being honoured for being assigned at the First Congress of the AACC as the permanent undertaker of the Summer Schools, are highly motivated to deserve the confidence. Taking this occasion, I express my thanks, not only on behalf of the Turkish Constitutional Court but also of Turkey, to Mr. Zühtü Arslan, President of the Constitutional Court, for his full support for the proper functioning of the summer school event as well as to all officials and staff of the Constitutional Court for their efforts.

**Ladies and gentlemen,**

Summer schools are an international platform based on mutual utilization where professional experiences on a specific pre-determined theme are exchanged, participants mention their own national practices and thereby gaining a deep insight into these practices; so to say, where they train each other. The Turkish Constitutional Court, compiling the





participants' presentations and discussions during the conference in a book every year, also aims at bringing this accumulation into the future.

"Presumption of innocence", theme of this year's summer school, is an issue needed to be discussed in order to attract attention in terms of criminal law, criminal justice law and human rights practices as well as to raise awareness given the excess number of related matters.

Lexical meaning of presumption is "an indication that may lead to a certain point or conclusion in case of a complex situation". In the legal framework, it refers to legal inferences of a fact from other facts proved or admitted or judicially noticed by presuming that "it will be frequently so". In this regard, presumption of innocence, which means "to be presumed innocent until proven guilty", had made itself to be acknowledged by conscience, building upon unpleasant experiences of numerous and tragic biased stigmatizations until enshrined in the Universal Human Rights Declaration of 1948 (Article 11 § 2) and the European Convention on Human Rights of 1950 (Article 6 § 2). We still encounter, all across the world, with many cases where individuals are exposed to such unjust treatment.

On the other hand, although the accused is presumed to be innocent until proven guilty in criminal procedure, it must not imply that no step can be taken against him during the trial at the end of which he may be either convicted or acquitted in that he has been proven neither guilty nor, as being a suspect, innocent yet. It must be therefore underlined that recourse to certain procedural measures in respect of the accused will not be in breach of presumption of innocence provided that there are certain constraints. At this point, what is important is to determine such constraints: as in the case where excessive length of pre-trial detention is incompatible with the principle of presumption of innocence.

As is known, Article 6 of the European Convention on Human Rights, where the right to a fair trial is enshrined, embodies the right to a public and fair hearing of one's case by an independent and impartial tribunal within a reasonable time; the principle of presumption of innocence; the right to self-defence; the right to obtain the attendance and examination of witnesses on his behalf under the same conditions



as witnesses against him; and the right to have the free assistance of an interpreter. The principle of presumption of innocence, along with the other principles, must be undoubtedly considered to fall under the scope of the right to a fair trial.

Regard being had to the fact that in case of breach of the presumption of innocence, binding for all public authorities and private third parties, the judicial authorities, administrations and media may take primary role, it is evident that presumption of innocence is closely interrelated with the freedoms of expression and the press as well as the right to protection of one's reputation and honour.

### **Distinguished participants,**

Presumption of innocence undoubtedly arises with "a criminal charge". Criminal charge accordingly designates the principle "burden of proof rests on the claimant" as an element inherent in the principle of presumption of innocence. The former principle consequentially refers to the "right to remain silent" which contextually refers to the "principle of *in dubio pro reo*" requiring that the accused is to be given the benefit of the doubt.

These principles are inherent elements in the presumption of innocence. The principle "burden of proof rests on the claimant" must also embody the prohibition of use of, and reaching any conclusion based on, illegally obtained evidence during the trial. This is also inferred from Article 6 § 2 of the European Convention on Human Rights. In Turkish law, Articles 148 § 3 and 217 § 2 of the Code of Criminal Procedures are the clauses explicitly setting forth the circumstances which cannot be relied on as evidence. Besides, the State cannot be allowed to criminalize any acts based on suspicion in order not to operate the presumption of innocence.

By virtue of Article 15 § 2 of the Turkish Constitution, presumption of innocence is considered as one of the core rights which can never be derogated from even in times of war, martial law and state of emergency.

However, I would like to stress at this very point that presumption of innocence must be regarded as a value and criterion of humanity based not only on legality but also on morality.



### **Esteemed guests,**

Morality is a conscientious stance. This stance may be originated from philosophy and religious beliefs. For instance, the Islamic civilization, which we, the Turks, are a part of, introduced the term “*istishab*” (an Islamic term used in the jurisprudence to denote the principle of the presumption of continuity) by the 9<sup>th</sup> century. Serahsi and Al-Ghazali, jurists on the procedural law who lived during the 11<sup>th</sup> century, elaborated on this term and thereby made it an established concept.

Presumption of innocence has been explained, in its various aspects, within the framework of the term “*istishab*”, which lexically means preservation of the existing situation. This rule which has been in force in this territory for a millennium is also embodied in the *Mecelle* (Ottoman Code of Civil Law), one of the latest legal instruments of the previous age. I would like to mention the following five principles originated from the “*istishab*” rule and set forth in the *Mecelle* under the presumption of innocence:

- 1) Concrete facts cannot be overshadowed by suspicion (Article 4).
- 2) It is essential to preserve the original state of any fact unless otherwise proven (Article 8).
- 3) Everything shall be deemed licit unless otherwise indicated, and forbidding shall be an exception.
- 4) Everyone shall be presumed innocent until proven otherwise (Article 8).
- 5) Intrinsic circumstances shall be deemed to exist, and extrinsic circumstances shall be deemed not to exist unless proven otherwise (Article 9).

As I have just mentioned, presumption of innocence, which has become an established practice of trial procedure in this territory during the 11<sup>th</sup> century and worded in the legal texts of the last century, was denoted in the *Magna Carta* -a constitutional start underlying the today’s human rights law in the West- only in 13<sup>th</sup> century not in an explicit but implicit wording which would be construed as presumption of innocence. The explicit reference to this term was made



in the French Declaration of the Rights of Man and the Citizen of 1789. It is very pleasing that presumption of innocence has been universally acknowledged as an inherent part of the contemporary law.

**Esteemed guests,**

Proper observation of presumption of innocence by jurists undoubtedly plays an important role for a just, peaceful and liveable world. I wish wholeheartedly that these activities that serve for establishing a better world would achieve the desired aim. Taking this opportunity, I would like to extend my thanks to all participants making a presentation on this theme and contributing to the event.

I would like to once again say welcome to all and each of the esteemed foreign guests. I hope you would be very pleased to attend the summer school programme and I would like to emphasize that it would be our pleasure to host you again in Turkey.

I wish success and happiness to you all and once again greet you with my sincere respects.

Celal Mümtaz AKINCI

Member Judge of the Constitutional Court  
of the Republic of Turkey





**7<sup>th</sup> SUMMER SCHOOL OF THE AACC**  
**8 - 14 SEPTEMBER 2019**  
**LIST OF PARTICIPANTS**

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<b>Name-Surname</b>	<b>Title</b>
Mr. Murat Şen	Secretary General
Mr. Mustafa Eyyüb Demirbaş	Vice Secretary General
Dr. Mücahit Aydın	Vice Secretary General
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Ms. Zeynep Uçar Tagney	Senior Jurist at the European Court of Human Rights
Mr. Hamit Yelken	Chief Rapporteur Judge at the Constitutional Court of Turkey



Mr. Mehmet Sadık Yamlı	Rapporteur Judge at the Constitutional Court of Turkey
Dr. Akif Yıldırım	Rapporteur Judge at the Constitutional Court of Turkey
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Ms. Daniela Emilova Dimitrova	Constitutional Court of Bulgaria
Mr. Emile Essombe Mr. Felix Pangmashi Mbutruh	Constitutional Council of Cameroon
Ms. Helena Majić	Constitutional Court of Croatia
Mr. Syukri Asy'ari Mr. Achmad Dodi Haryadi	Constitutional Court of the Republic of Indonesia
Ms. Gvantsa Lashkhia	Constitutional Court of Georgia
Mr. Ramon Paul Hernando	Supreme Court of the Republic of the Philippines
Mr. Abdalrahman A. A. Abunaser	Constitutional Court of Palestine
Mr. Talgat Mushanov	Constitutional Council of the Republic of Kazakhstan
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Ms. Eun Joo Chun Mr. Hyungui Kim	Constitutional Court of the Republic of Korea
Mr. Dukagjin Abdyli Mr. Bardh Bokshi	Constitutional Court of the Republic of Kosovo
Ms. Datin Fadzlin Suraya binti Dato' Mohd Suah	Federal Court of Malaysia
Ms. Munkhbolor Lkhagva	Constitutional Court of Mongolia
Ms. Jelena Marković	Constitutional Court of Montenegro



Mr. Kyaw Zeya	Constitutional Tribunal of the Republic of the Union of Myanmar
Mr. Amer Saleem Rana	Supreme Court of Pakistan
Ms. Nattapapim Phattranurukkul	Constitutional Court of Thailand
Ms. Fatma Şenol Bedevi	Supreme Court of the Turkish Republic of Northern Cyprus
Mr. Taras Yakimets	Constitutional Court of Ukraine
Mr. Shokhrukh Majidov	Constitutional Court of Uzbekistan





**PHOTOGRAPHS FROM  
THE SUMMER SCHOOL**





*Prof. Dr. Zühtü ARSLAN, President of the Turkish Constitutional Court*



*Opening Ceremony, Grand Tribunal Hall of the Turkish Constitutional Court*



*Prof. Dr. Zühtü Arslan, President of the Turkish Constitutional Court, and  
Abdalrahman A. A. Abunaser, Constitutional Court of Palestine*



*Guided tour of the Constitutional Court of Turkey*



*Guided tour of the Constitutional Court of Turkey*



*Murat Şen, Secretary General of the Turkish Constitutional Court*



*Dr. Mücahit Aydın, Vice Secretary General of the Turkish Constitutional Court*



*Assoc. Prof. Dr. Yaşar Salihpaşaoğlu, Faculty of Law, Hacı Bayram Veli University*



*Mehmet Sadık Yamli, Rapporteur Judge of the Turkish Constitutional Court*





*Zehra Gayretli, Rapporteur Judge of the Turkish Constitutional Court*



*Sabina Babayeva, Constitutional Court of Azerbaijan*



*Daniela Emilova Dimitrova, Constitutional Court of Bulgaria*



*Achmad Dodi Haryadi and Syukri Asy'ari, Constitutional Court of Indonesia*



*Ramon Paul Hernando, Supreme Court of Philippines*



*Abdalrahman A. A. Abunaser, Constitutional Court of Palestine*



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*Felix Pangmashi Mbutruh, Constitutional Court of Cameroon*



*Jelena Marković, Constitutional Court of Montenegro*



*Talgat Mushanov, Constitutional Council of Kazakhstan*



*Aisuluu Aitymbetova, Constitutional Chamber of the Supreme Court of Kyrgyzstan*



*Hamit Yelken, Chief Rapporteur Judge of the Turkish Constitutional Court*



*Fatma Şenol Bedevi, Supreme Court of the Turkish Republic of Northern Cyprus*





*Eun Joo Chun and Hyungui Kim, Constitutional Court of the Republic of Korea*



*Dukagjin Abdyli and Bardh Bokshi, Constitutional Court of Kosovo*



*Datin Fadzlina Suraya binti Dato' Mohd Suah, Federal Court of Malaysia*



*Munkhbolor Lkhagva, Constitutional Court of Mongolia*



*Kyaw Zeya, Constitutional Tribunal of Myanmar*



*Shokhrukh Majidov, Constitutional Court of Uzbekistan*



*Amer Saleem Rana, Supreme Court of Pakistan*



*Dr. Akif Yıldırım, Rapporteur Judge of the Constitutional Court of Turkey*



*Nattapim Phattranurukul, Constitutional Court of Thailand*



*Taras Yakimets, Constitutional Court of Ukraine*



*Videoconference, Ms. Zeynep Uçar Tagney, European Court of Human Rights*



*Celal Mümtaz Akıncı, Member Judge of the Turkish Constitutional Court*



*Family Photo from the Social Program, Mausoleum of Atatürk*



*Family Photo from the Social Program, Eskişehir*



*Closing Session of the 7<sup>th</sup> Summer School, Conference Hall*



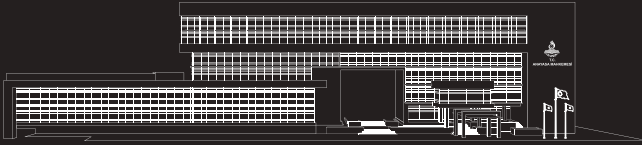




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