The Presumption of Innocence and the Pakistani Laws: A Critical Analysis in the Light of the Norms of International Human Rights Law

Research Proposal for LL.M. Human Rights Law

TO THE RESEARCH COMMITTEE

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2014
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THESIS STATEMENT

The Presumption of Innocence, which is recognized by the civilized nation as one of the most fundamental principle of criminal justice system, is still in its rudimentary stage in Pakistan where it is expressly denied in many important criminal laws such as the Control of Narcotics Substance Act 1997, the National Accountability Ordinance 1999 and the most recently enacted Protection of Pakistan Act 2014.

STATEMENT OF THE PROBLEM

The international recognized principles is still lacking its due validity in most of the developing countries and these principles sometime criticized on the ground of complex situation of the state. This work deals with the presumption of innocence in its fundamental role as a right of persons to be treated as innocent before conviction and consequently as a rule of proof\(^1\), and determines how it should be applied and interpreted by the Pakistani courts. The dualistic system of the country also making the situation more complicated because this state recognizing and ratified many internationally adopted instruments recognizing the principle of presumption of innocence.

Islamic law

The Islamic law was based on the presumption of innocence and the responsibility of providing evidence is on the plaintiff (the one who initiates the law suit) not on the defendant\(^2\). On the authority of Ibn Abbas (may Allah be pleased with him), that the Messenger of Allah (peace and blessings of Allah be upon him) said: Were people to be given everything that they claimed, men would [unjustly] claim the wealth and lives of

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1. www.theodorengoyavocat.org/.../Théodore%20Ngoy%20The%20presu Last visited 12-09-2014
2. Imran Ahsan Khan Nyazee, Islamic Legal Maxim (Islamabad: Federal Law House, 2013), 128
[other] people. But, the onus of proof is upon the claimant, and the taking of an oath is upon him who denies.

**International Human Rights Laws**

The presumption of innocence is a long standing principle at the heart of the criminal Justice system of the most states of the world since long. In theory, the Presumption of innocence requires that the criminal justice system is biased in favor of presuming that suspects of crime or defendants in criminal trials did not commit the offence. The maxim also found a place in the European Convention for the Protection of Human Rights, International Covenant on Civil and Political Rights, enacted domestically in the U.K. the *Human Rights Act 1998*, the Rome Statute of the International Criminal Court as well as In Convention against Torture. The maxim, 'Innocent until proven guilty', has had a good run in the twentieth century. The United Nations incorporated the principle in its Declaration of Human Rights. The threshold of evidential proof that an accused person committed the alleged criminal offence is set high as evidence must be beyond a reasonable doubt. Lord Sankey famously described the burden on the prosecution to prove the guilt of the accused beyond a reasonable doubt as a „golden thread” that ran through the common law of England. The question of internationally recognized norms jus cogens is also at stake.

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3. Yahya ibn Sharaf an-Nawawi, Imam Nawawi’s forty hadeeth, Ta-Ha Publishers Ltd. 3rd Edition (2009), Hadith 33
4. ibid
6. ibid
7. www.echr.coe.int/documents/convention_eng.pdf Last visited 01-09-2014
8. www.ohchr.org › OHCHR › English › Professional Interest Last visited 11-09-2014
14. ibid
**Pakistani Laws**

**Constitution of Pakistan**

The Constitution of Pakistan is silent about recognizing the principle of Presumption of innocence in its too comprehensive 280 Articles including 21 fundamental rights articles\(^\text{15}\) and the only known document which recognizing this principle is Qanun-e-Shahadat 1984 but again the question arise that how this law will override the other expressly overriding laws. These rights can be enjoyed only through recognizing the same as fundamental rights in the presence of independent and vibrant judiciary which is still in evolutionary stage in Pakistan. Under such circumstances, one would have expected it to be reasonably clear what the presumption of innocence is, when and where it applies in criminal proceedings, who is bound by it, and what relation it has to other key doctrines and precepts of the law, such as reasonable doubt, the burden of proof, the benefit of the doubt, and due process generally.

**Protection of Pakistan Act 2014:**

The provisions of Protection of Pakistan Act 2014\(^\text{16}\) have been promulgated for an independent nation governed by a Constitution containing fundamental rights. The provisions of the Act are inconsistent with the universally accepted principle of law. Section 14 of the Act is entirely against the internationally established principle that one is innocent unless otherwise proven by to be guilty whereas the said law means that everyone is guilty unless proved to be innocent. This Ordinance gives vast powers to the Law enforcing agencies to infringe the right presumption of innocence till prove guilty of the citizens of Pakistan.

\(^{15}\) www.pakistani.org/pakistan/constitution/ Last visited 02-09-2014  
Control of Narcotics Substance Act

The egregious violation of this universally recognized principle can also be found in many other penal laws of Pakistan such as Control of Narcotics Substance Act 1997\textsuperscript{17}. The Control of Narcotics Substance Act 1997 provide for the capital Punishment which makes the situation more deplorable.

National Accountability Bureau Ordinance 1999

Article 14 of the National Accountability Bureau Ordinance 1999 expressly denying the presumption of innocence right of the accused and considering the accused guilty till prove himself innocent. The supreme court of Pakistan undoubtedly support the presumption of guilt theory in Khan Asfandyar Wali and others versus Federation of Pakistan through Cabinet Division, Islamabad and others Respondents\textsuperscript{18} in which the court Declared that the prosecution succeeds in making out a reasonable case to the satisfaction of the Accountability Court, the prosecution would be deemed to have discharged the prima facie burden of proof and then the burden of proof shall shift to the accused to rebut the presumption of guilt\textsuperscript{19}. The burden of proof on accused is not an alien concept in jurisprudence and further strengthens the Utilitarian approach by reiterating that there are number of existing laws, which place the burden of proof on the accused and/or require an accused to rebut a statutory presumption, Therefore a course is not violative of the equality clause(s) of the Constitution\textsuperscript{20}.

It is thus mildly disconcerting to discover that there is little consensus about precisely what the presumption of innocence means, that there is ardent debate about to whom and when

\textsuperscript{17} \url{www.fmu.gov.pk/.../Control%20of%20Narcotics%20Substances%20Act....} Last visited 09-09-2014
\textsuperscript{18} Khan Asfandyar Wali and others versus Federation of Pakistan through Cabinet Division, Islamabad and others Respondents PLD 2001 Supreme Court 607
\textsuperscript{19} \textit{ibid}
\textsuperscript{20} \textit{ibid}
it applies, and that courts and legal scholars disagree about whether it stands on its own legs doctrinally or is simply an obvious, if nontrivial, consequence of the standard of proof\textsuperscript{21}. There is no lack of those who see its provenance as very broad\textsuperscript{22}. One scholar, William Laufer, claims that the privilege against self-incrimination, the right to silence, the discovery rule, even the rights to counsel and to confront one’s accusers all rest on, and are “reflection[s] of, the presumption of innocence\textsuperscript{23}.” Even if that is perhaps a bit of a stretch, the presumption is widely described as grounding the claim that the burden of proof falls exclusively on the prosecution in a criminal trial, and sometimes as providing a rationale, or Without question, the presumption of innocence plays an important role in our criminal justice system. . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun\textsuperscript{24}. “The presumption of innocence,” the majority wrote, “is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accuse guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial\textsuperscript{25}.” The presumption of innocence is operative and protects against conviction, not against arrest (which is taking into custody).\textsuperscript{26} The right to a presumption of innocence can be breached even indirectly or by implication when the consequential juridical decision is based on the residual suspicions or suppositions following criminal proceedings, which were terminated by other causes other than

\textsuperscript{21} www.derecho.uach.cl/.../Laudan_presumption_of_innocence.pdf Last visited 07-09-2014
\textsuperscript{22} ibid
\textsuperscript{24} Bell v. Wolfish, 441 U.S. 520 at 533 (U.S., 1979)
\textsuperscript{25} Laudan (2006, p. 40); Stumer (2010, p. xxxviii).
\textsuperscript{26} State v. Green, 275 So. 2d 184, 186 (Supreme Court of Louisiana., 1973).
absolution\textsuperscript{27}. The Court considers that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities\textsuperscript{28}.

More importantly for present purposes, while it allows that statutory exceptions might be made to the presumption, this was in the context of general common law acceptance of the doctrine of Parliamentary supremacy, by virtue of which no legal rights were sacred, and any were liable to be taken away by Parliament\textsuperscript{29}.

Sometimes, reverse onus issues have arisen in the context of ‘civil forfeiture’ proceedings, under which the person who owns property is suspected of acquiring the property through unlawful means\textsuperscript{30}. Sometimes, such provisions require the owner of the property to prove, on the civil standard, the lawful means by which they acquired the property, and if they cannot do so, the property is forfeited to the Crown\textsuperscript{31}. This can occur although the person is not charged with any particular crime and such proceedings are, in substance, criminal in nature, and so the protections that typically apply in criminal proceedings should apply to those proceedings, regardless of the ‘clothing’ in which those proceedings appear\textsuperscript{32}.

\textsuperscript{27} www.lawjournal.ghsl.org/.../A%20Presumption%20of%20Innocence%20. Last visited 01-09-2014
\textsuperscript{31} ibid
\textsuperscript{32} ibid
Significance of Research

Shortly after taking office, President Obama asked his advisers why, if those detained at the Guantánamo Bay detention facility in Cuba were so dangerous, ‘can’t we prosecute them?’ This is a question that has been asked on numerous occasions, not just by President Obama and not just about Guantánamo Bay detainees, but by Western liberal democracies about a whole range of suspected terrorists considered non-prosecutable. This ongoing inability (or unwillingness), on behalf of liberal democracies, to engage with such issues more forcefully in public, or to explain why some suspected terrorists will not be tried in a criminal court, has led to a lack of public understanding on the issue. Governments have collectively failed to address why they believe that policies such as detention are necessary, and have failed to explain that the complexities of dealing with modern-day terrorism mean that not all roads lead to a court of law. Drones, detention, preventative arrests, and deportations are the realities of the ongoing struggle against today’s form of terrorism. The idea that stopping terrorism will always result in prosecutions misunderstands the difference between a preventative approach that stops mass-casualty attacks occurring, and a law-enforcement approach that seeks to punish the perpetrators of such an attack. The Presumption of Innocence does not contend that one type of approach to counterterrorism is superior to any other nor seek to establish the guilt or innocence of the named suspects; instead, it argues that the criminal-justice system is not always the most realistic way to eliminate terrorist threats, and is not fundamental in order to prove the legitimacy of the threat. It also shows that President Obama’s question, ‘If these people are so dangerous, why can’t we prosecute them?’ has a perfectly good answer; but today’s governments are just not willing to say it.

There is a vast literature on the importance and theoretical underpinnings of the presumption. This includes judicial assertions that the public interest in ensuring that innocent people are not convicted greatly outweighs the public interest in ensuring that a particular criminal is brought to justice, in order to ensure public confidence in the judicial system. It includes claims that an onus on the defendant to disprove an accusation is ‘repugnant to ordinary notions of fairness’. Ashworth, a leading criminal law academic, defends the presumption on several bases. These include that (a) given the possible sanction of removing someone’s liberty, it is right that a high threshold is needed for that to happen; (b) there is always a risk of error in fact-finding in trials, and it is better that the Crown bear this risk; (c) police have far-reaching...
powers to conduct investigations and that these powers must be exercised in a way that properly respects human rights and freedoms; (d) typically the state’s resources far exceed that of any individual; and (e) the presumption of innocence is logically coherent with the principle of proof of a criminal charge beyond reasonable doubt. In Pakistan most of the people believe that the presumption of innocence is a principle of law and the same is observing in all laws of the country but the situation is totally different because the state is violating this universally accepted principle in a flagrant manner through institutionalize process. The state feels no qualm in this abject refusal of the internationally agreed and recognized principle. The question arise that whether the presumption of innocence is legally binding principle or a rule without legal sanction which is enforceable with the will of the rulers. This controversy must be resolved because this is the only way through which we can determine the true status of this presumption of law.

Through this thesis we will find out the legitimate power or superiority of the parliament and the ambit of their legislation including constitutional amendment as well as its powers compatibility with the basic structure theory. In fact, whether or not the Supreme Court of Pakistan has the power to strike down constitutional amendments is not a new question. Instead, there were uninterrupted case laws precedents in which the superior courts of Pakistan have repeatedly held that they have no jurisdiction.

The Courts were concerned it has never claimed to be above the Constitution nor to have the right to strike down any provision of the Constitution. It has accepted the position that it is a creature of the Constitution; that it derives its powers and jurisdictions from the Constitution; and that it will confine itself within the limits set by the Constitution. But in

42. ibid
the case of Mehmood Khan Achakzai v. Federation of Pakistan\textsuperscript{43}, the then Chief Justice, Mr. Justice Sajjad Ali Shah identified these basic features As “federalism, Parliamentary Form of government blended with Islamic provisions” but two other judges (Mr. Justice Saleem Akhtar and Mr. Justice Raja Afrasiab) pointed out that merely because constitution had certain basic features did not in turn mean that the Supreme Court of Pakistan was to enforce these basic features\textsuperscript{44}. However, the whole basic structure was then re-examined by a seven member full bench in the case of Wukala Mahaz Barai Tahaffuz Dastoor v. Federation of Pakistan\textsuperscript{45}. In his leading judgment, the Chief Justice, Mr. Chief Justice Ajmal Mian, again concluded that “it is evident that in Pakistan the basic structure theory consistently had not been accepted\textsuperscript{46}.” But he then seemed to leave the door open for further argument by posing the following rhetorical question: “If the Parliament by a Constitutional Amendment makes Pakistan as a secular State, though Pakistan is founded as in Islamic Ideological State, can it be argued that this Court will have no power to examine the vires of such an amendment\textsuperscript{47}.”

Finally, in the case of Zafar Ali Shah v. Federation of Pakistan case\textsuperscript{48}, the Supreme Court held that while General Parvez Musharraf could amend the Constitution in his discretion, he could not alter the basic features of the Constitution (this time declared as independence of Judiciary, federalism and parliamentary form of government blended with Islamic provision\textsuperscript{49}).

\textsuperscript{43} . Mehmood Khan Achakzai v. Federation of Pakistan, PLD 1997 SC 426
\textsuperscript{44} .ibid
\textsuperscript{45} . Wukala Mahaz Barai Tahaffuz Dastoor v. Federation of Pakistan, PLD 1998 SC 1263
\textsuperscript{46} . Wukala Mahaz Barai Tahaffuz Dastoor v. Federation of Pakistan, PLD 1998 SC 1263
\textsuperscript{47} .ibid
\textsuperscript{48} . Zafar Ali Shah v. Federation of Pakistan, PLD 2000 SC 869
\textsuperscript{49} .ibid
In the case of Pakistan Lawyers Forum v. Federation of Pakistan\textsuperscript{50}, a five-member bench of the Supreme Court reexamined the basic structure controversy from scratch and finally resolved it. In that case, the court first noted that “it has repeatedly been held in numerous cases that this Court does not have the jurisdiction to strike down provisions of the Constitution on substantive grounds\textsuperscript{51}.” The Court conceded the point that the 1973 Constitution has certain “basic features” but pointed out that this did not mean that it was the job of the judiciary to enforce those basic features\textsuperscript{52}.

**LITRATURE REVIEW**

It would not be an exaggeration to say that presumption of innocence is a most crucial and important right among other rights because it is a key means to defend other rights. It is wildly recognized human right around the developed countries of the globe yet it remained unable to attain the pivotal position it deserve. The presumption of innocence is among the small handful of doctrines in criminal law that are ubiquitous across a very broad spectrum of legal systems\textsuperscript{53}. It is thus mildly disconcerting to discover that there is little consensus about precisely what the presumption of innocence means, that there is ardent debate about to whom and when it applies, and that courts and legal scholars disagree about whether it stands on its own legs doctrinally or is simply an obvious, if nontrivial,

\textsuperscript{50} Pakistan Lawyers Forum v. Federation of Pakistan, reported as PLD 2005 SC 719  
\textsuperscript{51} ibid  
\textsuperscript{52} ibid  
\textsuperscript{53} www.derecho.uach.cl/.../Laudan_presumption_of_innocence.pdf Last visited 04-09-2014
consequence of the standard of proof$^{54}$. One scholar, William Laufer, claims that the privilege against self-incrimination, the right to silence, the discovery rule, even the rights to counsel and to confront one’s accusers all rest on, and are “reflection[s] of, the presumption of innocence$^{55}$. Despite the historical import of the presumption of innocence, changes in federal and state statutes have increased the opportunity for judges to predict guilt before trial. Furthermore, the Supreme Court has said that the presumption of innocence solely requires the prosecutor to show proof beyond a reasonable doubt$^{56}$. The result is that the presumption of innocence now applies only at trial$^{57}$.

The American doctrine of the accused person's "right of silence" and the almost absolute protection the doctrine offers to prevent adverse consequences from exercising this right are also derived in large part from the presumption of innocence$^{58}$. The right to a fair trial does not, however, only protect and benefit the individual accused; it is in the interest of the whole of society that the true perpetrator is punished and the innocent protected$^{59}$. It is therefore argued that the presumption of innocence means the right of persons to be treated as innocent until proven guilty by the Prosecutor, who solely bears the burden of proof$^{60}$. The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law$^{61}$. The threshold of evidential proof that an accused person committed the alleged criminal offence is set high as evidence must be beyond a

$^{54}$ ibid
$^{55}$ ibid
$^{57}$ ssrn.com/abstract=1757624 Last visited 09-09-2014
$^{58}$ scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article Last visited 06-09-2014
$^{59}$ www.theodorengoyavocat.org/.../Théodore%20Ngoy%20The%20presu Last visited 11-09-2014
$^{60}$ ibid
$^{61}$ ssrn.com/abstract=1152886 Last visited 10-09-2014
reasonable doubt. The overriding aim is an attempt to protect innocent people from being convicted even at the expense of guilty offenders escaping conviction for their crimes. This proposal will also attempt to examine that how the Pakistani constitution of 1973 due process of law article is a contributory basis for the presumption of innocence. It is therefore argued that the presumption of innocence means the right of persons to be treated as innocent until proven guilty by the Prosecutor, who solely bears the burden of proof. In order to consider this in depth, the work first discusses the meaning and effects of the presumption of innocence, and subsequently considers its interpretation and application by the Court, in four key respects:

1. Standards of proof;
2. Statements of public officials and media reports;
3. Pre-conviction detention;
4. Rights of Victims.

The work constitutes a doctrinal legal study, which is the most appropriate means of research for the presumption of innocence. It is therefore argued that the presumption of innocence means the right of persons to be treated as innocent until proven guilty by the Prosecutor, who solely bears the burden of proof. Originally, the right to be presumed innocent was not an evidentiary rule but was seen as a safeguard of a persons’ innocence up until the end of a trial. This view, however, is not shared by all legal systems and was not present in their Statutes.
FRAMING OF ISSUES

➢ Is the Presumption of innocence a rule of Jus Cogens?

➢ Does the constitution of Pakistan and the Qanun-e-Shahadat safeguard the presumption of innocence?

➢ What is the scope and ambit of presumption of innocence in the international Human Rights Laws and ICC?

➢ Can states derogate from the Presumption of innocence in time of public emergency?

➢ What does presumption of innocence mean in the context of the judicial process and how does it differ from reasonable doubt?

➢ The status of presumption of innocence in constitutional criminal procedure?
What is the extent to which the presumption of innocence will apply?

What is the balance between Presumption of innocence and state security?

**RESEARCH METHODOLOGY**

This research would focus on analyzing the provision and promoting the presumption of innocence in international instruments as well the struggle made by the government of Pakistan for the realization of this basic principle of criminal law. The role of parliament in protection and violation of presumption of innocence will be discussed with specific reference to Protection of Pakistan Ordinance as well Control of Narcotics Substance Act. The method of research will be descriptive, analytical and critical. It will include official primary and secondary sources such as law magazines, research journal, and decision of Supreme Court and High courts of Pakistan.

**TENTATIVES OUTLINES**

The dissertation structure would provide a comprehensive introduction overview and origin of the presumption of innocence. Chapter one would deal with the presumption of innocence express recognition as a fundamental human right in the world. Chapter two would present the status of the Presumption of Innocence in the prevalent laws of Pakistan. Chapter three would discuss a critical analyses of evidentiary value of Presumption of Innocence and it relation with the burden of proof principle and Chapter four will deals with the conclusion.

**Introduction**

The presumption of law is applicable to the trial of an offence or it may be apply before and after the criminal trial is still a dilemma in the contemporary world. In the twenty first
century the presumption of innocence is restricted to the criminal trial and nothing more
application apart from this. The maxim lack its application in the departmental
proceedings and the summary trial is make the situation more deteriorate.

- **Philosophical Base:**

  The presumption of innocence is a general principle of law due to many reason but
  the most important among them is that it prevent or eliminate many abhoring
  emerging rules of criminal law such as Torture, admissibility of involuntary
  confession, violation of Due process of law and extra judicial killing etc. The
  contemporary development in the legalizing ticking bomb theory which legalizes the
  crime of torture is not a serious threat to only Torture permission but fundamentally
  a threat to presumption of innocence because it is the presumption of innocence
  which is primarily violating. Politically Exposed Persons, [PEPs], has been exploited
  and abused, such that it is now a shield for criminality and license for impunity. It
  argues and recommends that as part of the efforts to curb the cancerous plague,
called corruption, the burden of proof should be placed on those accused of
  corruption. Justice is not a one way traffic. Justice is not even only a two-way traffic.
  It is really a three way traffic - justice for the appellant accused of a heinous crimes
  of murder, justice for the victim, the murdered man, the deceased, ‘whose blood is
  crying to heaven for vengeance’ and finally justice for the society at large - the
  society whose norms and values had been desecrated and broken by the Criminal
  Act complained of - In further promotion and protection of the interest of an accused, section 36 (8) provides that;

  “No person shall be held to be guilty of a criminal offence on account of any act or omission that did not at the time it took
  place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at
  the time the offence was committed”. + This salutary rule, inherited from the English common law has also been described as
the “foundation of a fair trial”, “one golden thread that is always to be seen throughout the web of English criminal law” and a cherished right” and fundamental principle. By this presumption, the burden of proof is invariably on the prosecution; and fundamentally, until the accused person is convicted, his legal rights and privileges remain intact. Indeed, he does not suffer any form of legal disability. From the above description, it becomes quite evident that this presumption, which is one of the ingrediential rights to fair hearing, has global appeal. Thus, it is guaranteed in major international human rights instruments and practiced in many judicial systems operating the accusatorial as distinct from inquisitorial criminal system of justice. Indeed, it has been said that the presumption is so important in modern democracies, constitutional monarchies, and republics that many have explicitly included it in their legal codes and constitutions. Presumption of innocence has been defined as “a principle which requires the government to prove the guilt of a criminal defendant and relieves the defendant of any burden to prove his or her innocence.” According to Black’s Law Dictionary, presumption of innocence is the fundamental criminal law principle that a person may not be convicted of a crime unless the government proves guilt beyond a reasonable doubt, without any burden placed on the accused to prove innocence.”

An elaborate definition of this presumption was given in the old but highly celebrate case of Coffin v U.S as follows: Presumption of innocence is a conclusion drawn by the law in favour of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favour of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption, on the one hand, supplemented by any other evidence he may adduce, and the evidence against him, on the other, constitute the elements, from which the legal element is drawn. In explaining this presumption, Wills observed that: In the investigation and estimate of criminatory evidence, there is an antecedent, prima facie presumption in favour of the innocence of the party accused, grounded in reason and justice not less than in humanity, and recognised in the judicial practice of all civilized nations, which presumption must prevail until it be destroyed by such an overpowering amount of legal evidence of guilt as is calculated to produce the opposite belief. By this presumption therefore, no matter the gravity of the offence or notoriety of the accused, he is not to be presumed guilty. According to the U. S. Supreme Court in Taylor R. Kentucky, the presumption of innocence of a criminal offender is best described as an
assumption of innocence that is indulged in the absence of contrary evidence. However, it is not considered evidence of the defendant’s innocence, and it does not require that a mandatory inference favourable to the defendant be drawn from any facts in evidence. While constructing this constitutional presumption, the Court of Appeal held inter alia that the presumption does not imply an exemption of an alleged wrongdoer from prosecution. It only implies that in a criminal trial, the burden of disposing the fact that an accused is innocent is on the accuser. + Two important components of this presumption are that: i) an accused has the right to remain silent and not offer a word in rebuttal or refutation of criminal liability in respect of the allegation against him; and ii) the burden of proof is on the prosecution to establish, the culpability of the accused. This is expressed in the Latin maxim, *Ei incumbit probation qui dicit, non qui negat*. Put differently, the presumption serves to emphasize that the prosecution has the obligation to prove each element of the offence beyond reasonable doubt. The presumption serves to emphasize that the prosecution has the obligation to prove each element of the offence beyond reasonable doubt. Consequently, if the burden of proof is wrongly placed on the accused, it would lead to the reversal of his conviction on appeal.

The History of the Presumption of Innocence

By Jeralyn, Section Law Related

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It is better that 5, 10, 20, or 100 guilty men go free than for one innocent man to be put to death. This principle is embodied in the presumption of innocence. In 1895, the U.S. Supreme Court, in a decision in the case *Coffin v. United States*, 156 U.S. 432; 15 S. Ct. 394, traced the presumption of innocence, past England, Ancient Greece and Ancient Rome, and, at least according to Greenleaf, to Deuteronomy. [also, Alexander Volokh wrote a law review article on the issue, available free here.]

The *Coffin* case stands for the proposition that at the request of a defendant, a court must not only instruct on the prosecution’s burden of proof— that a defendant cannot be convicted unless the government has proven his guilt beyond a reasonable doubt—but also must instruct on the presumption of innocence—by informing the jury that a defendant is presumed innocent. The Court stated,

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70 . Application of Presumption of Innocence in Nigeria: Bedrock of Justice or Refuge for Felons


www.iiste.org ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.28, 2014
The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

In tracing the presumption of innocence, the Court goes on to state:

It is stated as unquestioned in the text-books, and has been referred to as a matter of course in the decisions of this court and in the courts of the several States. See Taylor on Evidence, vol. 1, c. 5, 126, 127; Wills on Circumstantial Evidence, c. 5, 91; Best on Presumptions, part 2, c. 1, 63, 64; c. 3, 31-58; Greenleaf on Evidence, part 5, § 29, &c.; 11 Criminal Law Magazine, 3; Wharton on Evidence, § 1244; Phillips on Evidence, Cowen & Hill's Notes, vol. 2, p. 289; Lilienthal v. United States, 97 U.S. 237; Hopt v. Utah, 120 U.S. 430; Commonwealth v. Webster, 5 Cush. 295, 320; State v. Bartlett, 43 N.H. 224; Alexander v. People, 96 Illinois, 96; People v. Fairchild, 48 Michigan, 31; People v. Millard, 53 Michigan, 63; Commonwealth v. Whittaker, 131 Mass. 224; Blake v. State, 3 Tex. App. 581; Wharton v. State, 73 Alabama, 366; State v. Tibbetts, 35 Maine, 81; Moorer v. State, 44 Alabama, 15.

Greenleaf traces this presumption to Deuteronomy, and quotes Mascardus De Probationibus to show that it was substantially embodied in the laws of Sparta and Athens. Greenl. Ev. part 5, section 29, note. Whether Greenleaf is correct or not in this view, there can be no question that the Roman law was pervaded with the results of this maxim of criminal administration, as the following extracts show:

"Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day." Code, L. IV, T. XX, 1, 1. 25.

The noble (bivus) Trajan wrote to Julius Frontonus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent." Dig. L. XLVIII, Tit. 19, 1. 5.

"In all cases of doubt, the most merciful construction of facts should be preferred." Dig. L. L, Tit. XVII, 1. 56.

"In criminal cases the milder construction shall always be preserved." Dig. L. L, Tit. XVII, 1. 155, s. 2.

"In cases of doubt it is no less just than it is safe to adopt the milder construction." Dig. L. L, Tit. XVII, 1. 192, s. 1.

Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the enforcement of this principle in the Roman law. Numerius, the governor of Narbonensis, was on trial before the Emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, "a passionate man," seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, "Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?" to which Julian replied, "If it suffices to accuse, what will become of the innocent?" Rerum Gestarum, L. XVIII, c. 1. The rule thus found in the Roman law was, along with many other fundamental and humane maxims of that system, preserved for mankind by the canon law. Decretum Gratiani de Presumptionibus, L. II, T. XXIII, c. 14, A.D. 1198; [***492] Corpus Juris Canonici Hispani et Indici, R.P. Murillo Velarde, Tom. 1, L. II, n. 140. Exactly when this presumption was in precise words stated to be a part of the common law is involved in doubt. The writer of an
able article in the North American Review, January, 1851, tracing the genesis of the principle, says that no express mention of the presumption of innocence can be found in the books of the common law earlier than the date of McNally's Evidence (1802). Whether this statement is correct is a matter of no moment, for there can be no doubt that, if the principle had not found formal expression in the common law writers at an earlier date, yet the practice which flowed from it has existed in the common law from the earliest time.

Fortescue says: "Who, then, in England can be put to death unjustly for any crime? since he is allowed so many pleas and privileges in favor of life; none but his neighbors, men of honest and good repute, against whom he can have no probable cause of exception, can find the person accused guilty. Indeed, one would much rather that twenty guilty persons should escape the punishment of death than that one innocent person should be condemned and suffer capitally." De Laudibus Legum Angliae, Amos' translation, Cambridge, 1825.

[*456] Lord Hale (1678) says: "In some cases presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die." 2 Hale P.C. 290. He further observes: "And thus the reasons stand on both sides, and though these seem to be stronger than the former, yet in a case of this moment it is safest to hold that in practice, which hath least doubt and danger, quod dubitas, ne faceris." 1 Hale P.C. 24.

Blackstone (1753-1765) maintains that "the law holds that it is better that ten guilty persons escape than that one innocent suffer." 2 Bl. Com. c. 27, margin page 358, ad finem. How fully the presumption of innocence had been evolved as a principle and applied at common law is shown in McKinley's case (1817), 33 St. Tr. 275, 506, where Lord Gillies says: "It is impossible to look at it [a treasonable oath which it was alleged that [**404] McKinley had taken] without suspecting, and thinking it probable, it imports an obligation to commit a capital crime. That has been and is my impression. But the presumption in favor of innocence is not to be reargued by mere suspicion. I am sorry to see, in this information, that the public prosecutor treats this too lightly; he seems to think that the law entertains no such presumption of innocence. I cannot listen to this. I conceive that this presumption is to be found in every code of law which has reason, and religion, and humanity, for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and jurymen; and I was happy to hear from Lord Hermand he is inclined to give full effect to it. To overturn this, there must be legal evidence of guilt, carrying home a decree of conviction short only absolute certainty."

The Coffin case was later overruled on other grounds, having nothing to do with these principles.

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Wikipedia

**Presumption of innocence**

From Wikipedia, the free encyclopedia
## Criminal procedure

Criminal trials and convictions

### Rights of the accused

- **Fair trial**
- **Speedy trial**
- **Jury trial**
- **Counsel**
- **Presumption of innocence**
  - **Exclusionary rule**
  - **Self-incrimination**
  - **Double jeopardy**

### Verdict

- **Conviction**
- **Acquittal**
- **Not proven**
- **Directed verdict**

### Sentencing

- **Mandatory**
- **Suspended**
- **Custodial**
  - **Totality**
  - **Dangerous offender**
- **Capital punishment**
- **Execution warrant**
- **Cruel and unusual punishment**
- **Life imprisonment**
- **Indefinite imprisonment**

### Post-sentencing

- **Parole**
- **Probation**
- **Tariff**
- **Life licence**
- **Miscarriage of justice**
- **Exoneration**
The presumption of innocence, sometimes referred to by the Latin expression *Ei incumbit probatio qui dicit, non qui negat* (the burden of proof is on he who declares, not on he who denies), is the principle that one is considered *innocent until proven guilty*. In many nations, presumption of innocence is a legal right of the accused in a criminal trial. The burden of proof is thus on the prosecution, which has to collect and present enough compelling evidence to convince the trier of fact, who is restrained and ordered by law to consider only actual evidence and testimony that is legally admissible, and in most cases lawfully obtained, that the accused is guilty beyond reasonable doubt. If reasonable doubt remains, the accused is to be acquitted.

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6 See also
The sixth century *Digest* of Justinian (22.3.2) provides, as a general rule of evidence: *Ei incumbit probatio qui dicit, non qui negat*—"Proof lies on him who asserts, not on him who denies". It is there attributed to the second and third century jurist Paul.

Islamic law[edit]

Similar to that of Roman Law, Islamic law also holds the principle that the onus of proof is on the claimant, based on a *hadith* documented by Imam Nawawi. ‘Suspicion’ is also something that is highly condemned, also from some hadith documented by Imam Nawawi as well as Imam Bukhari and Imam Muslim.

After the time of Muhammad, the fourth Caliph Ali ibn Abi Thalib has also been cited to say 'Avert the prescribed punishment by rejecting doubtful evidence.'

There have been theories that the modern principle of Presumption of Innocence was not actually brought about by Roman Law, rather it was by the influence of Islam.

Middle Ages in Europe[edit]

After the fall of the Roman Empire, Europe fell back on a Germanic system that presumed guilt. The accused could prove his innocence by having, for example, twelve people swear that he could not have done what he was accused of. This tended to favor the nobility over the lower classes.

Common law[edit]

In sources from common law jurisdictions, the expression appears in an extended version, in its original form and then in a shortened form (and in each case the translation provided varies). As extended, it is: *Ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum negantis probatio nulla sit*—"The proof lies upon him who affirms, not upon him who denies; since, by the nature of things, he who denies a fact cannot produce any proof." As found in its original form, it is (as above): *Ei incumbit probatio qui dicit, non qui negat*—"The proof lies upon the one who affirms, not the one who denies." Then, shortened from the original, it is: *Ei incumbit probatio qui*—"the onus of proving a fact rests upon the man who".

Civil law[edit]

The maxim or its equivalent has been adopted by many civil law systems, including Brazil, France, Italy, Philippines, Poland, Romania and Spain.
"Presumption of innocence" serves to emphasize that the prosecution has the obligation to prove each element of the offense beyond a reasonable doubt (or some other level of proof depending on the criminal justice system) and that the accused bears no burden of proof. This is often expressed in the phrase *innocent until proven guilty*, coined by the English lawyer Sir William Garrow (1760–1840). Garrow insisted that accusers be robustly tested in court. An objective observer in the position of the juror must reasonably conclude that the defendant almost certainly committed the crime.

The presumption of innocence is in fact a legal instrument created by the French cardinal and jurist Jean Lemoine to favor the accused based on the legal inference that most people are not criminals. It is literally considered favorable evidence for the accused that automatically attaches at trial. It requires that the trier of fact, be it a juror or judge, begin with the presumption that the state is unable to support its assertion. To ensure this legal protection is maintained a set of three related rules govern the procedure of criminal trials. The presumption means:

1. With respect to the critical facts of the case - whether the crime charged was committed and whether the defendant was the person who committed the crime - the state has the entire burden of proof.
2. With respect to the critical facts of the case, the defendant does not have any burden of proof whatsoever. The defendant does not have to testify, call witnesses or present any other evidence, and if the defendant elects not to testify or present evidence, this decision cannot be used against them.
3. The jury or judge is not to draw any negative inferences from the fact the defendant has been charged with a crime and is present in court and represented by an attorney. They must decide the case solely on evidence presented during the trial.

This duty on the prosecution was famously referred to as the “golden thread” in the criminal law by Lord Sankey LC in Woolmington v DPP [1935] AC 462:

> 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 insanity and subject also to any statutory exception...

The fundamental right

This right is so important in modern democracies, constitutional monarchies and republics that many have explicitly included it in their legal codes and constitutions:

- The *Universal Declaration of Human Rights*, article 11, states: "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."

- The *Convention for the Protection of Human Rights and Fundamental Freedoms* of the Council of Europe says (art. 6.2): "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". This convention has been adopted by treaty and is binding on all Council of Europe members. Currently (and in any foreseeable
expansion of the EU) every country member of the European Union is also member to the Council of Europe, so this stands for EU members as a matter of course. Nevertheless, this assertion is iterated verbatim in Article 48 of the Charter of Fundamental Rights of the European Union.

- In the 1988 Brazilian constitution, article 5, section LVII states that "no one shall be considered guilty before the issuing of a final and unappealable penal sentence".

- In Canada, section 11(d) of the Canadian Charter of Rights and Freedoms states: "Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".

- In the Colombian constitution, Title II, Chapter 1, Article 29 states that "Every person is presumed innocent until proven guilty according to the law".

- In France, article 9 of the Declaration of the Rights of Man and of the Citizen 1789, which has force as constitutional law, begins: "Any man being presumed innocent until he has been declared guilty ...". The Code of Criminal Procedure states in its preliminary article that "any person suspected or prosecuted is presumed innocent for as long as their guilt has not been established" and the jurors' oath repeats this assertion (article 304).

- In Iran, Article 37 of the Constitution of the Islamic Republic of Iran states: "Innocence is to be presumed, and no one is to be held guilty of a charge unless his or her guilt has been established by a competent court".

- In Italy, the second paragraph of Article 27 of the Constitution states: "A defendant shall be considered not guilty until a final sentence has been passed."

- The Constitution of Russia, in article 49, states that "Everyone charged with a crime shall be considered not guilty until his or her guilt has been proven in conformity with the federal law and has been established by the valid sentence of a court of law". It also states that "The defendant shall not be obliged to prove his or her innocence" and "Any reasonable doubt shall be interpreted in favor of the defendant".

- In the South African Constitution, section 35(3)(h) of the Bill of Rights states: "Every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings."

- Although the Constitution of the United States does not cite it explicitly, presumption of innocence is widely held to follow from the 5th, 6th, and 14th amendments. See also Coffin v. United States and In re Winship.

The presumption of innocence in modern practice

This section contains weasel words: vague phrasing that often accompanies biased or unverifiable information. Such statements should be clarified or removed. (May 2014)
Article 48 of the Charter of Fundamental Rights of the European Union affirms the right to the presumption of innocence.

Some legal systems have employed de jure presumptions of guilt, such as at an order to show cause criminal proceeding. Otherwise, accusations of presumption of guilt generally do not imply an actual legal presumption of guilt, but rather denounce failures to ensure that suspects are treated well and are offered good defence conditions. Typical infringements could include:

- Suspects held at Guantanamo Bay have been detained for long periods while inquiries proceed. Such long imprisonment constitutes, in practice, a hardship and a punishment for the suspect, even though they have not been sentenced. (See speedy trial)

- Courts may prefer the testimonies of persons of certain class, status, ethnicity, sex, or economic or political standing over those of others, regardless of actual circumstances.

- Until relatively recently, it was common for the justice system to have suspects tortured to extract confessions from them, since circumstantial evidence was rarely analyzed or admitted in those times. Although this practice is generally and has generally been disallowed in the more recent past, except during 20th-century fascist and Soviet governments, there have been attempts to introduce evidence obtained from suspects tortured elsewhere.

- In one case, (see: Duke lacrosse case) a university punished members of athletic teams accused of a felony after they were indicted, even if they have not been convicted, including by expulsion from the team and/or loss of athletic scholarship.

- In the United Kingdom changes have been made affecting this principle. Defendants’ previous convictions may in certain circumstances be revealed to juries. Although the suspect is not compelled to answer questions after formal arrest, failure to give information may now be prejudicial at trial. Statute law also exists which provides for criminal penalties for failing to decrypt data on request from the Police. If the suspect is unwilling (or even unable) to do so, it is an offence. Citizens can therefore be convicted and imprisoned without any evidence that the encrypted material was unlawful. Further, the onus is on the defendant to decrypt the data, and having lost the key or the password is not considered reasonable excuse. Furthermore, in sexual offence cases such as rape, where the sexual act has already been proved beyond reasonable doubt, there are a limited number of
circumstances where the defendant has an obligation to adduce evidence that the complainant consented to the sexual act, or that the defendant reasonably believed that the complainant was consenting. These circumstances include, for example, where the complainant was unconscious, unlawfully detained, or subjected to violence.\[10\]

- Scottish law provides for a third verdict: "not proven"

- In some jurisdictions state funded defences may not match the quality of state funded prosecutions. Further, where a defendant funds their own defence, the cost is borne solely by the individual, whereas the burden of funding a prosecution is collectively borne by the State. Individual defence resources in finances, information, equipment, expertise, research, and personnel may not match the resources of a government, especially if the defendant is imprisoned.

Guaranteeing the presumption of innocence extends beyond the judicial system. For instance, in many countries journalistic codes of ethics state that journalists should refrain from referring to suspects as though their guilt is certain. For example, they use "suspect" or "defendant" when referring to the suspect, and use "alleged" when referring to the criminal activity that the suspect is accused of.

More subtly, publishing of the prosecution's case without proper defence argumentation may in practice constitute presumption of guilt. Publishing a roster of arrested suspects may constitute undeserved punishment as well, since in practice it damages the reputation of innocent suspects. Private groups fighting certain abuses may also apply similar tactics, such as publishing the real name, address, and phone number of suspects, or even contacting the suspects' employer, friends and neighbors.

Modern practices aimed at curing social ills may run against presumption of innocence. Some civil rights organizations, such as the Canadian Civil Liberties Association consider pre-employment drug testing, while legal, as violating this principle, as potential employees are presumed to be users of illegal drugs, and must prove themselves innocent through the test.\[31\] Similarly, critics argue that prevailing policies of zero tolerance toward sexual harassment or racial discrimination show a strong presumption of guilt. These dispositions were meant to ease the burden of proof on the victim, since in practice harassment or discrimination practices are hard to prove.

Civil rights activists note that the well-meaning practices so adopted may have a deleterious effect on justice being served. An example is the use of a screen in sexual assault cases, which is set up to prevent the complainant from being distressed at the sight of the accused.\[citation needed\] Where a victim was in fact victimized by the accused, this may be argued to serve the principles of therapeutic justice.\[23\]
The maxim, Innocent until proven guilty, has had a good run in the twentieth century. The United Nations incorporated the principle in its Declaration of Human Rights in 1948 under article eleven, section one. The maxim also found a place in the European Convention for the Protection of Human Rights in 1953 [as article 6, section 2] and was incorporated into the United Nations International Covenant on Civil and Political Rights [as article 14, section 2]. This was a satisfying development for Americans because there are few maxims that have a greater resonance in Anglo-American, common law jurisprudence. The Anglo-American reverence for the maxim does pose an interesting conundrum: it cannot be found in Magna Carta, the English Bill of Rights of 1689, the Declaration of Independence, or in the Constitution of the United States; and not, I might add, in the works of the great English jurists, Bracton, Coke, and Blackstone. Nevertheless, some scholars have claimed that the maxim has been firmly embedded in English jurisprudence since earliest times.
Claims about the maxim’s Anglo-Saxon roots are sometimes quite stirring and display a peculiarly British capacity to create intellectual Camelots — on their side of the Channel. An English scholar named Clementi gave a talk on the maxim at Göttingen, Germany in 1974. He informed his continental audience about the maxim’s unique Anglo-Saxon origins. The English devotion to the principle of ‘Innocent until proven guilty’ served, he said, to “emphasize a separation between England and its European mainland in matters of law." With a missionary’s zeal, Clementi propounded the virtues of innocence while being guilty of explicating texts in which the maxim was completely absent.

Clementi did not know that the maxim "Innocent until proven guilty" cannot be found in any English court case or any jurisprudential treatise before ca. 1800 --- at least I have not yet found it in one. He also did not seem to know that the French, in spite of their legal system’s being based on rebarbative Roman jurisprudence, did include an article in the French Declaration of the Rights of Man and Citizen of 1789 stating that "every man is presumed innocent until declared guilty." These facts raise two questions that will be the subject of this essay: how did this piece of English pragmatism become a part of the Romanist French tradition and how and when did the maxim surface in the Anglo-American tradition?

Before we embark, a few remarks about what we are looking for. We are not looking for the general notion of presumption or assumption of innocence. That notion is remarkably widespread in every legal system that I’ve looked at --- except the most primitive. It may even be there too, but there were no jurists to express the idea. We are also not looking for the modern notion of presumption of innocence in American law. That notion has been the subject of much debate that, as far as I can tell, now centers around the question: what does presumption of innocence mean in the context of the judicial process and how does it differ from reasonable doubt? We are looking for the maxim, “A person
is presumed innocent until proven guilty,” and we are looking of the rights of due process that the maxim aphoristically expressed in earlier jurisprudence. By the end of my essay, I hope to have proven that the maxim and the norm it expressed were core principles of earlier jurisprudence, whose original meaning has been eviscerated, or at least radically changed, in modern American jurisprudence. As this paper will also attempt to demonstrate, the maxim began life as a norm that articulated a cluster of rights protecting litigants. In American law, it has become a notion, an assumption, with very little content.

We can know exactly when the maxim formally entered American law: through a Supreme Court decision of 1894, Coffin vs. U.S. A lower court had refused to instruct the jury that "The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty". The appeal to the Supreme Court was based in part on the lower court's refusal.

Although the lower court rejected the maxim, the judge did instruct the jury that "Before you can find any one of the defendants guilty you must be satisfied of his guilt as charged in some of the counts of the indictment beyond a reasonable doubt." The lower court then instructed the jury at great length on the doctrine of reasonable doubt and its relationship to evidence. The Supreme Court saw its task as determining whether the lower court had violated the defendants' rights by not instructing the jury on presumption of innocence and whether reasonable doubt was essentially the same as presumption of innocence.

Justice Edward Douglas White wrote the majority opinion. For a legal historian, his analysis is a dazzling display of legal history --- even if most of it is wrong. To prove the antiquity of "Innocent until Proven Guilty" White cited a story from the late antique Roman historian, Ammianus Marcellinus, and texts from Justinian's Digest and Code, Pope Gregory IX's Decretales, a decretal of Pope Innocent III, and Giuseppe Mascardi’s De probationibus, all of these works, except for
Ammianus, from the continental law. None of the texts, unfortunately, contained the maxim. Not one of them was from English law.

When White turned to the Anglo-American tradition, he found the principle clearly articulated in a number of nineteenth-century treatises on evidence and criminal law. The jurists White cited were William Wills, († 1860) On circumstantial Evidence, Simon Greenleaf, On the Law of Evidence (1783-1853), and William Best, (1809-1869) On Presumptions. Of these jurists Best is the only one who explicitly states that it is a "maxim of law, that every person must be presumed innocent until proven guilty."

Justice White did try and trace the maxim in the English common law tradition but could only find one piece of evidence. He cited an anonymous author of an article in the North American Review of 1851 who stated that the maxim is first found in a treatise on evidence by an Irish jurist named Leonard MacNally. White concluded that even "if the principle had not yet found formal expression in the common law writers at an earlier date, yet the practice which flowed from it has existed in the common law from earliest time."

In Coffin v. U.S. Justice White ordained Leonard MacNally (1752-1820) as the midwife of "Innocent Until Proven Guilty’s" entrance into the American common law tradition. Who is he? He was born in Dublin in 1752. An ambitious sort, he was called to the Irish bar in 1776 and to the English bar in 1783. At the same time he began to write lyrics for musicals, some of which were performed in Covent Garden and other London theaters. In 1779 "The Apotheosis of Punch: A Satirical Masque" was performed, followed by thirteen other plays between 1779 and 1789. In anticipation of the pullulation of romantic medieval themes in the nineteenth century, he entitled one play "Robin Hood, or Sherwood Forest, a comic opera" and another "Richard Coeur de Lion: An Historical Romance." Although light fare, sort of a bargain basement Gilbert and Sullivan, MacNally does merit a mention in The Grove
The anonymous author of the Dictionary of National Biography’s article on MacNally alleged that he was "no great lawyer" but an "astute and eloquent advocate." His dismissal of MacNally's legal skills does the Irish barrister a grave disservice. The DNB’s author did not realize that MacNally's The Rules of Evidence on Pleas of the Crown illustrated from Printed and Manuscript Trials and Cases, published in Dublin and London 1802 was immediately transported across the Atlantic and printed in Philadelphia 1804 and reprinted in 1811. One cannot read American treatises on evidence and presumption in the first half of the nineteenth century without stumbling over MacNally.

MacNally was particularly important for the development of rules governing evidence and procedure in criminal cases because he had represented a number of United Irishmen accused of treason. He quotes a large number of his own cases in his book. It is no fluke that treason led MacNally to consider the rules of evidence more carefully than previous writers. The cases that society has found most heinous have always been those in which the rules of fair and just procedure have come under attack.

The rules of procedure for cases of treason were still substantially different from the normal rules of criminal procedure in eighteenth-century Ireland. During MacNally's lifetime the same rules of due process enjoyed by English defendants were not extended to Irishmen defendants in treason trials. Although two statutes of King Edward VI and another of William III required two witnesses for any conviction of treason, this procedural nicety was not extended to Irishmen. MacNally emphasized the presumption of innocence for those accused of treason and justified applying the same rules of due process to them as to other defendants of criminal offences. His defense of Irish rights was fierce, and he argued vehemently for the rights of defendants, often using examples from cases in which he had participated. Although MacNally
never, pace The North American Review and White, quoted our maxim, he came very close to stating the principle when he discussed the two witness rule for cases of treason by citing Cesare Beccaria.

In Beccaria's judgment, one witness is not sufficient; for whilst the accused denies what the other affirms, truth remains suspended, and the right that every one has to be believed innocent turns the balance in his favour.

A century later Justice White may have used this passage from MacNally to plant the doctrine of presumption of innocence firmly in American jurisprudence. Let me note an important caveat here: White does not give a specific citation, and from the wording of his opinion, he may not have even looked at MacNally’s book.

MacNally’s story does however have a darker side. After his death in 1820 the English press revealed that MacNally had played the role of a double agent since at least 1794. While he was representing Irish revolutionaries as their defense attorney in court, he was betraying them to the government by passing on key information. He relayed all the details about the revolutionary activities that he received from his clients to the government prosecutors. From 1800 until his death he received 300l. a year for his trouble. Of this side of MacNally, Justice White knew nothing.

One may ask, from where did MacNally get his principles? MacNally acknowledged Beccaria, and, indeed, Cesare did extoll presumption of innocence several times in his famous treatise, Dei delitti e delle pene (On crimes and punishments). He argued for always having two witnesses before one could be condemned for a criminal offence:

More than one witness is needed, because, so long as one party affirms and the other denies, nothing is certain and the right triumphs that every man has to be believed innocent.
A few pages later, Beccaria repeated the same argument when, in the most passionate page of his tract, he assailed torture.

either the crime is certain or it is not; if it is certain, then no other punishment is called for than what is established by law and other torments are superfluous because the criminal's confession is superfluous; if it is not certain, then according to the law, you ought not torment an innocent because such is a man whose crimes have not been proven.

MacNally relied on Cesare Beccaria to justify presumption of innocence. But the story is much longer and more complicated than the obvious link that I have shown between Beccaria, MacNally, and Justice White. The right to the presumption of innocence had a long history that stretches back to the thirteenth century. It is to the jurisprudence of the Ius commune that I shall now turn in search of the birth of our maxim.

The Ius commune was the common law of Europe from the twelfth to the seventeenth centuries. It was formed by the fortuitous and contingent conjuncture of Roman law, canon law, and, later, feudal law in the schools and courts of medieval Europe. Its birth took place in an age when momentous changes in the practice of law were taking place. Law was evolving from unwritten customary usages to written customary and legislated law. Judicial procedure was in a state of great flux. Prior to the twelfth century the judicial ordeal was a pervasive mode of proof. During the course of the twelfth century, particularly in Southern Europe, the ordeal was replaced by the ordo iudiciarius, a mode of proof that was based on Roman law, but whose rules were established by the jurists of the Ius commune.

The change from modes of proof based on the ordeal to a mode of proof borrowed from the procedural norms of Roman law was profoundly unsettling for twelfth-century society. Procedure is the central part of any legal system. A society’s sense of justice is intimately
linked to its modes of proof. As the ordo iudiciarius was imposed on Europe’s courts by ecclesiastical and secular authorities, there is clear evidence that all strata of society had questions about its legitimacy.

Although founded on Roman law, the ordo was new. It takes a leap of our imaginations to understand the turmoil this change must have created. We might project this turmoil into our own lives if we could imagine how we would react if our traditional procedural system were suddenly replaced by an alien set of procedural norms. Jurists of the twelfth century needed to justify these radical changes of procedure. Quite surprisingly, they found their justification in the Old Testament and ingeniously traced the origins of the ordo iudiciarius to God's judgment of Adam and Eve in paradise. By doing so, they created a powerful myth justifying the ordo that retained its explanatory force until the seventeenth century.

The myth can give us insight into the workings of the twelfth-century juridical mind. It’s originator was a jurist named Paucapalea. He was the first to link the ordo iudiciarius to Adam and Eve. Around 1150 he noted in his commentary on Gratian’s Decretum that the ordo originated in paradise when Adam pleaded innocent to the Lord's accusation of wrongdoing. In Genesis 3.9-12, the Lord burst into Paradise and demanded: Adam ubi es? One may note that for a Deity His question was not particularly omniscient. Adam responded to the Lord’s accusation of illegal apple picking by complaining "My wife, whom You gave to me, gave <the apple> to me, and I ate it." God had, in other words entrapped Adam when he gave him a wife. Paucapalea's point is subtle but was not be lost on later jurists. Although God is omniscient, he too must summon defendants and hear their pleas. Paucapalea added another piece of evidence that the ordo arose from the Bible. When Moses decreed that the truth could be found in the testimony of two or three witnesses, he pronounced a basic rule of evidence and confirmed the antiquity of a system of procedure accepted by God himself (Deuteronomy 19.15). Most importantly for our story,
the subtext of Paucapalea’s commentary clearly implies that if God must summon litigants to defend themselves, mere humans must also summon them and presume that every defendant is innocent until proven guilty in court.

So, from the middle of the twelfth century, the jurists legitimated the ordo by placing its origins in the Bible. Without question this myth then justified the ordo’s general adoption by ecclesiastical courts --- and by some secular courts --- in the second half of the twelfth century. Although the general principle of presumption of innocence was well established in the jurisprudence of the Ius commune by the beginning of the thirteenth century, that right was far from absolute. Notorious crimes provided the most clear infringement of the right. The jurists did not see immediately that if God must summon Adam to judgment, then logic inexorably dictated that every defendant must be summoned to trial. They did universally agree that when a crime was heinous and notorious a judge could render a decision against a defendant without a trial. In the middle of the thirteenth century, one of the most distinguished jurists of the age, Henricus of Segusio, summed up juristic thought when he declared that notorious crimes, especially those committed against the Church, needed no formal juridical examination.

Before presumption of innocence could become an absolute right, one more crucial change had to occur. This change was brought about in large part by Paucapalea’s argument that the ordo iudiciarius originated in the Bible. Before the middle of the thirteenth century jurists accepted the right of the prince or the judge to ignore the rules of the judicial process because they considered legal procedure to be a part of the civil law, that is positive law, and, therefore, completely under the prince's or judge’s authority. Paucapalea and the canonists introduced a different story and a different paradigm. The inexorable logic of their argument resulted in the inevitable conclusion that, if the ordo iudiciarius can first be found in the Old Testament, and if God had to respect the rights of
defendants, then the rules of procedure must transcend positive law.

The implications of Paucapalea’s new paradigm evolved slowly in the jurisprudence of the thirteenth century. The Bible was, after all, the cornerstone of human understanding of divine law, and, from Gratian on, the jurists equated divine law and natural law. Consequently, under the influence of Paucapalea, between 1250 and 1300 the jurists began to argue that the judicial process and the norms of procedure were not derived from civil law, but from natural law or the law of nations, the ius gentium. Consequently, the fundamental rules of procedure could not be omitted by princes or judges. The right of a defendant to have his case heard in court was absolute, not contingent.

The jurists who first discussed this problem often referred to a gloss of Pope Innocent IV when they redefined the origins of "actiones." Indeed, although he does not quite meet the issue, Innocent was the first jurist to broach the question whether the prince has an absolute right to take an action away from a subject.

Later two civilians, Odofredus and Guido of Suzzara connected the right to own property with the right to obtain a remedy for a wrong. If property had been established by natural law, remedies for the recovery of property must also be protected by natural law. They stopped short, however, of arguing that actions derived from natural law.

Once the jurists decided that the norms of procedure were part of natural law, they quickly saw that essential rights of defendants could not be transgressed. The most sophisticated and complete summing up of juristic thinking about the rights of defendants in the late thirteenth and early fourteenth centuries is found in the work of a French canonist, Johannes Monachus who died in 1313. While glossing a decretal of Pope Boniface VIII (Rem non novam) he commented extensively on the rights of a defendant. He began by asking the question: could the pope, on the
basis of this decretal, proceed against a person if he had not cited him? Johannes concluded that the pope was only above positive law, not natural law. Since a summons had been established by natural law, the pope could not omit it. He argued that no judge, even the pope, could come to a just decision unless the defendant was present in court. When a crime is notorious, the judge may proceed in a summary fashion in some parts of the process, but the summons and judgment must be observed. He argued that a summons to court (citatio) and a judgment (sententia) were integral parts of the judicial process because Genesis 3.9-12 proved that both were necessary. God had been bound to summon Adam; human judges must do the same. Then he formulated an expression of a defendant’s right to a trial and to due process with the following words: a person is presumed innocent until proven guilty (item quilbet presumitur innocens nisi probetur nocens).

This fact is a double blow to Anglophilic sensibilities: not only is the maxim not found in Anglo-Saxon source, it was not even expressed English!

This then is the ultimate irony of the story: rather than a sturdy Anglo-Saxon, a cardinal of the Roman church, a Frenchman, a canonist, Johannes Monachus was the first European jurist to recognize the inexorable logic of God's judgment of Adam: God could not condemn Adam without a trial because even God must presume that Adam was innocent until proven guilty. Other canonists played with the idea of defendants’ rights. They coined a proverb that God must even give the devil his day in court. Johannes' commentary on Rem non novam eventually became the Ordinary Gloss of a late medieval collection of canon law known as the Extravagantes communes. This collection and its gloss circulated in hundreds of manuscripts and scores of printed editions until the seventeenth century. So — the answer to our question, who first uttered the principle, Innocent until proven guilty — a perfect question for the legal edition of Trivial Pursuit — is the French canonist Johannes Monachus. Since his gloss was read by the jurists of the Ius commune to the time of Cesare Beccaria, it was a primary vehicle
for transmitting the principle to later generations of jurists.

Roman law, canon law, the Ius commune: from these sources spring that great Anglo-Saxon principle: A person is presumed innocent until proven guilty. The question remains, however, how deeply did this doctrine inform the jurisprudence and court practice of late medieval and early modern Europe? In this essay I shall give only a brief outline of the problem and a rough sketch of the story's main features up to the time with which we began, the time of Beccaria and MacNally.

A glance at the standard accounts of procedure and law after the thirteenth century would seem to render the opinion risible that any conception of "innocent until proven guilty" existed before the eighteenth century in European jurisprudence. Inquisitorial courts searching out heresy seem the antithesis of due process and contrary to any conception of defendants’ rights. Torture, secret accusations, and arbitrary procedural injustices seem the norm rather than the exception. Some modern scholars have argued that the courts felt an obligation to punish crimes, it was a matter of public utility, and that procedural short cuts to the "truth" like torture were means through which these courts fulfilled their obligations.

So the question is, how did a defendant’s right to a presumption of innocence survive in late medieval and early modern jurisprudence? It has been true in the past and remains true today that procedural rules are broken and rights violated most often when judges have faced crimes that strike society's most sensitive nerves. The cases in which I have found that the presumption of innocence is discussed again and again are those that dealt with marginal groups, especially heretics, witches, and Jews.

Let me give a few examples. In 1398 or 1399, Salamon and his son Moyses, Jews living in Rimini, had been accused by several Christian women of having had sexual relations with them. The case was heard by
a Franciscan inquisitor, Johannes de Pogiali. The case fell under the jurisdiction of the Inquisition because Salamon and Moyses had used heretical arguments to seduce the women. When they encountered virtuous resistance from the women Salamon and Moyses told them that Christian women who fornicated with Jewish men did not sin. The women testified before the Inquisition that they capitulated to Salamon and Moyses only after having been convinced by their clever arguments. We do not know the facts behind this case, only its outcome as reported in the papal court. Although the bare facts might make us think of this case as material for a Boccaccian farce, Salamon and Moyses did not think the accusation was amusing. The inquisitor's summary of the case is of great interest. He called witnesses before him, examined them, and took their oaths to tell the truth. In the end he did not find that the accusations against Salamon and Moyses were juridically and legitimately proven. It is not often that we find a judge justifying his decision in the Middle Ages. In this case, Johannes de Pogiali did. He examined the facts and concluded that "it was better to leave a crime unpunished than to condemn an innocent person." Many of you will recognize in these words “Blackstone’s ratio”: “the law holds that it is better that ten guilty persons escape than one person suffer,” that entered English law from the Ius commune through Fortescue.

Johannes had to choose between two conceptions of order: that crimes should be punished in the public interest or that defendants should be presumed innocent if proofs were insufficient, even in a delicate case where an outsider had violated more than just the public order. Johannes also had to choose between a standard of justice for Christians and a standard for Jews. When judges and jurists asked themselves that question in the fifteenth and sixteenth century, the theoretical answer was invariably the same: Jews had the same rights of due process as Christians. And if proofs failed, they were presumed innocent. To be sure, the theory did not always find its way into the courtroom, but the rules were repeated again and again in papal
mandates sent to local judges and to inquisitorial courts. In 1469 Pope Paul II confirmed the petition of the Emperor Frederick III that absolved Christian judges, notaries, and scribes who participated in cases involving Jews from any wrong doing. Some Christian priests had refused to absolve them from their sins unless they did penance for their roles in court aiding Jews. "Justice," Pope Paul observed, "ought to be common to all, Christian or Jew." Later popes issued decretals that specified in great detail the procedural protections that Jews must be given. A letter of Pope Sixtus IV in 1482 mandated that Jews should receive the names of their accusers, should be able to present legitimate exceptions, proofs, and defenses to the court, and, if these rights were violated, could appeal to Rome. From the number of times the Roman curia repeated these admonitions over the next fifty years, theory and practice may not have always happily coincided. Several sixteenth-century letters emphasized a Jew's right to a defense, to have an advocate, and to receive money from supporters for a defense in heresy and apostasy trials. As Pope Paul III declared in 1535, "no one should be deprived of a defense, which is established by the law of nature." The right to a defense, a lawyer, and the means to conduct a defense was an obvious extension of the rights enshrined by the maxim "Innocent until Proven Guilty." By way of contrast, the common law did not recognize the right of a criminal defendant to counsel in treason trials until 1696.

The sixteenth century became a great age for criminal law and procedure in the Ius commune. Earlier jurists had written tracts on torture, evidence, heresy and witchcraft trials, but none had written a detailed tract on criminal procedure. From the thirteenth to fifteenth centuries, treatises on criminal procedure were, with only a few exceptions, short and schematic. During the sixteenth century, the jurists synthesized the jurisprudence of the Ius commune, and they wrote great tracts on the rights of criminal defendants. The names of these proceduralists are not well known: Giuseppe Mascardi, Giovanni
Luigi Riccio, Giulio Claro, and Giacomo Menochio are not household names, even to legal historians. One of the great figures in this development was Prospero Farinacci who lived from 1544-1618. He was educated in Perugia and quickly gained experience on both sides of the bench. In 1567 he became the general commissioner in the service of the Orsini of Bracciano; the next year he took up residence in Rome as a member of the papal camera. However, in 1570 he was imprisoned for an unknown crime. Legal problems hounded him for the rest of his life. He lost an eye in a fight, was stripped of his positions, and was even accused of sodomy. In spite of his difficulties, Pope Clement VIII reinstated him to the papal court in 1596. He began his most important work, Praxis et theorica criminalis, in 1581 and put the finishing touches on it by 1601.

Farinacci's treatise bristles with the presumption of innocence. The issue arose in several different contexts. He insisted that the exception of innocence was privileged in law and could never be abolished by statute; if a statute would abolish a defendant's right to a defense, it should be interpreted as only being unjust or calumnious defenses. Even the pope could not take away the right of a defendant to prove his innocence, since that right was grounded in the law of nature. Like other jurists who wrote on criminal procedure, Farinacci distinguished between presumptions of law and of men: a presumption of man was, for example, that in doubt, a man was presumed to be good.

Another great voice of reason in criminal procedure was Frederick von Spee (1591-1635). Spee was a jurist, Jesuit, poet --- literary critics are still spilling ink on his most important poem, Trutznachtigall. Most importantly, he was a critic of intolerance and ignorance. As Beccaria would a century later, he condemned torture, the persecution of witches, and other crimes that enraged princes and the rabble. Unfortunately for him, Europe was not yet ready for his voice of reason. He was stripped of his academic positions and condemned by his
order after the publication of Cautio criminalis, his famous treatise on procedure in witchcraft trials. He died young at Trier while helping to treat soldiers infected by the plague of 1635.

"Must we assume that witches are guilty?" he asked in Cautio criminalis. "That's a stupid question," he answered. His condemnation of torture was absolute. He took his arguments from Farinacci. His rhetoric inspired Beccaria a century later:

Can a defendant who does not confess under torture be condemned? "I assume," wrote Spee, "that no one can be condemned unless his guilt is certain; an innocent person ought not be killed. Everyone is presumed innocent, who is not known to be guilty."

There is some irony in this part of the story too. Beccaria and Pietro Verri, Beccaria’s muse who wrote a significant tract on torture published long after Dei delitti, probably borrowed Spee's thought and adapted his words when they wrote about torture. Yet Beccaria and Verri condemned Spee, Farinacci and other jurists at the same time that they appropriated their ideas, accusing them of being soft on torture.

As Alessandro Manzoni eloquently pointed out, Verri overemphasized his contribution to the intellectual arguments that underpinned his condemnation of torture and de-emphasized the contribution of earlier jurists. As part of Manzoni's account of a Milanese cause célèbre in which the judges sent several innocent men to the rack with almost no evidence of their guilt, he demonstrated that Verri had seriously distorted the legal tradition.

From this evidence and from all we know of the practice of torture in their own time, one can undoubtedly conclude that the interpreters of criminal procedure left the theory and practice of torture much, but much, less barbarous than they found it. Of course it would be absurd to attribute this diminution of evil to one
cause alone, but I think that among the many causes that it would be reasonable to count the repeated reproofs and warnings, renewed publicly, century after century, by jurists to whom it is certainly granted a definite authority over the practice of the courts.

Manzoni had extraordinary insight into the evolution of norms in European jurisprudence. He perceived extraordinarily well the complicated dialectic through which jurists argued with, borrowed from, and added to the thought of their predecessors and, in their works, spoke across the centuries to their successors. I might add, in this essay dedicated to the modern scholar who has done most to reintroduce the norms of the Ius commune into contemporary scholarship, that the jurists and Manzoni have had a worthy successor.

We have come full circle: from Justice White to MacNally to Beccaria to Johannes Monachus and back to Beccaria. The evolution of the norm that every person is presumed innocent until proven guilty is a case study of the long process through which principles of law emerge, slowly, hesitantly, sometimes painfully, in jurisprudence. The maxim, innocent until proven guilty was born in the late thirteenth century, preserved in the universal jurisprudence of the Ius commune, employed in the defense of marginalized defendants, Jews, heretics, and witches, in the early modern period, and finally deployed as a powerful argument against torture in the sixteenth, seventeenth and eighteenth centuries. By this last route it entered the jurisprudence of the common law through a thoroughly disreputable Irishman’s having read a book on criminal punishments by an Italian. But because it was a transplant from the Ius commune, it entered the world of American law in a very different form. It no longer was a maxim that signified the bundle of rights that was due to every defendant. Because American law did not inherit the jurisprudence of the Ius commune directly, its broader meanings were lost during the transplant. Consequently, the focus in American has been entirely on its meaning for the presenting of evidence and for procedural rules in the courtroom. In the jurisprudence of the Ius commune, the
maxim summarized the procedural rights that every human being should have no matter what the person’s status, religion, or citizenship. The maxim protected defendants from being coerced to give testimony and to incriminate themselves. It granted them the absolute right to be summoned, to have their case heard in an open court, to have legal counsel, to have their sentence pronounced publically, and to present evidence in their defense. A jurist of the Ius commune would be puzzled that today we can embrace “a person is innocent until proven guilty” and still deny human beings a hearing under certain circumstances. For them the maxim meant “no one, absolutely no one, can be denied a trial under any circumstances.” And that everyone, absolutely everyone, had the right to conduct a vigorous, thorough defense.

In a world that is choked by the narrow horizons of legal systems imprisoned by national sovereignties, this story is the best argument I know for returning to a conception of law that broad, comparative, and open to the jurisprudence of other legal systems.

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Innocent Until Proven Guilty: The Origins of a Legal Maxim

Ken Pennington

In spite of what you have been reading and hearing in the media during the last year, the presumption of innocence, or even its existence, has not been on the lam. In fact, one might argue it's done quite well in the second half of the twentieth century. The United Nations placed the principle that a defendant is innocent until proven guilty in its Declaration of Human Rights in 1948 under article eleven, section one. The maxim also found a place in the European Convention for the
Protection of Human Rights in 1953 [as article 6, section 2] and was incorporated into the United Nations International Covenant on Civil and Political Rights [as article 14, section 2].

The United Nations' declaration established "Innocent until proven guilty" as a right in the modern world. Yet there are few maxims that have a greater resonance in Anglo-American jurisprudence. But, in spite of our reverence for it, the maxim cannot be found in Magna Carta, the English Bill of Rights of 1689, the Declaration of Independence, or the Constitution of the United States; or, I might add, in the works of the great English jurists, Bracton, Coke, or Blackstone. Nevertheless, some scholars have claimed that the maxim has been firmly embedded in English jurisprudence since earliest times.

Claims about the maxim's Anglo-Saxon roots are sometimes quite stirring and display a particularly British capacity to create intellectual Camelots -- on their side of the Channel. An English scholar named Clementi gave a talk on the maxim at Göttingen, Germany in 1974. He informed his learned, continental audience about the maxim's unique Anglo-Saxon origins. When a fourteenth-century English Parliament declared its complete independence from Roman law, the principle on which Parliament stood, was, he said, "that an accused person must be deemed innocent until such time as his or her guilt has been proved conclusively in court." Clementi declared that he would not have bothered his continental colleagues with "intimate details of English pragmatism" before England had entered the Common Market. Now, however, he assured them that "there is good reason why you should become better acquainted with us." English devotion to the principle of 'Innocent until proven guilty' served to "emphasize a separation between England and its European mainland in matters of law." With missionary zeal, Clementi propounded the virtues of innocence while being guilty of explicating a text in which the concept was completely absent.

Clementi did not know that the maxim "Innocent until proven guilty" cannot be found in any English court case or any tract on jurisprudence before ca. 1800 --- at least I have not yet found it in one. He also did not seem to know that the French, in spite of their legal system's being based on rebarbative Roman jurisprudence, did include an article in the French Declaration of the Rights of Man and Citizen of 1789 stating that "every man is presumed innocent until declared guilty." These facts raise two questions that will be the subject of this talk: how did this piece of English pragmatism become a part of the Romanist French tradition and how and when did the maxim surface in the Anglo-American tradition?

We can know exactly when the maxim formally entered American law: through a Supreme Court decision of 1894, Coffin vs. U.S. The court had heard a case from Indiana in which Francis A. Coffin and Percival A. Coffin had been convicted of having aided and abetted the President of the Indianapolis National Bank in the commission of misapplication of funds and making false entries in the bank's
books. In other words, they defrauded the bank. The forty-fourth charge in the case was rejected by the lower court in its instruction to the jury. The appeal was based in part on the lower court's refusal.\(^{(2)}\)

The forty-fourth charge stated: "The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty." Although the court rejected this charge, it did instruct the jury that "Before you can find any one of the defendants guilty you must be satisfied of his guilt as charged in some of the counts of the indictment beyond a reasonable doubt." The lower court then instructed the jury at great length on the doctrine of reasonable doubt and its relationship to evidence. The Supreme Court saw its task as determining whether the lower court had violated the defendants' rights by not instructing the jury on presumption of innocence and whether reasonable doubt was essentially the same as presumption of innocence.

Justice Edward Douglas White wrote the majority opinion. For a legal historian, his analysis is a dazzling display of legal history --- even if most of it is not correct. To prove the antiquity of "Innocent until Proven Guilty" White cited a story from the late antique Roman historian, Ammianus Marcellinus, Justinian's Digest and Code, Pope Gregory IX's Decretales, a decretal of Pope Innocent III,\(^{(3)}\) and Giuseppe Mascardi's *De probationibus*, all, except for Ammianus, from the continental law.\(^{(4)}\) None of the texts, unfortunately, contained the maxim. Not one of them, you may note, was from English law. Puzzling.

When White turned to the Anglo-American tradition, he found the principle clearly articulated in a number of nineteenth-century treatises on evidence and criminal law. The jurists White cited were William Wills', († 1860) *On circumstantial Evidence*, Simon Greenleaf's, *On the Law of Evidence* (1783-1853), and William Best's, (1809-1869) *On Presumptions*. Of these jurists Best is the only one who explicitly states that it is a "maxim of law, that every person must be presumed innocent until proven guilty."

Justice White did try and trace the maxim in the English common law tradition but could only find one piece of evidence. He cited an anonymous author of an article in the *North American Review* of 1851 who stated that the maxim is first found in a treatise on evidence by an Irish jurist named Leonard MacNally. White concluded that even "if the principle had not yet found formal expression in the common law writers at an earlier date, yet the practice which flowed from it has existed in the common law from earliest time."\(^{(5)}\) Another piece of evidence that Clementi's faith was not unique.

Through Coffin v. U.S. Justice White ordained Leonard MacNally (1752-1820) as the midwife of "Innocent Until Proven Guilty's" entrance into the American common law tradition.\(^{(6)}\) Who was he? He was born in Dublin in 1752. After his father died in 1756, he spent a part of his childhood in Bordeaux. At 19 he opened
a grocery shop in Dublin. An ambitious sort, he was called to the Irish bar in 1776 and to the English in 1783. At the same time he began to write lyrics for musicals, some of which were performed in Covent Garden and other London theaters. In 1779 "The Apotheosis of Punch: A Satirical Masque" was performed, followed by thirteen other plays between 1779 and 1789. In anticipation of the pullulation of romantic medieval themes in the nineteenth century, he entitled one play "Robin Hood, or Sherwood Forest, a comic opera" and another "Richard Coeur de Lion: An Historical Romance." Although light fare, sort of a Kmart Gilbert and Sullivan, MacNally does merit a mention in The Grove Dictionary of Music.

The anonymous author of the Dictionary of National Biography's article on MacNally alleged that he was "no great lawyer" but an "astute and eloquent advocate." His dismissal of MacNally's legal skills does the Irish barrister a grave disservice. The DNB author did not realize that MacNally's The Rules of Evidence on Pleas of the Crown illustrated from Printed and Manuscript Trials and Cases, published in Dublin and London 1802 was immediately transported across the Atlantic and printed in Philadelphia 1804 and reprinted in 1811. One cannot read American treatises on evidence and presumption in the first half of the nineteenth century without stumbling over MacNally.

MacNally was particularly important for the development of rules governing evidence and procedure in criminal cases because he had represented a number of United Irishmen accused of treason. He quotes a large number of his own cases in his book. It is no fluke that treason led MacNally to consider the rules of evidence more carefully than previous writers. The cases that society has found most heinous have always been those in which the rules of fair and just procedure have come under attack.

The rules of procedure for cases of treason were still substantially different from the normal rules of criminal procedure. Even during MacNally's lifetime the same rules of due process were not extended to Irish defendants in trials of treason. Although two statutes of King Edward VI and another of William III required two witnesses for any conviction of treason, this procedural nicety was not extended to Ireland. MacNally emphasized the presumption of innocence for those accused of treason and justified applying the same rules of due process to them as to other defendants of criminal offences. His defense of Irish rights was rhetorically compelling:

If these English statutes were enacted because in cases of treason the oath of allegiance counterpoises the information of a single witness, is not an Irishman intitled(sic) to the benefit of that reason? --- or, if the principal reason for enacting those statutes was, as sir William Blackstone states, "To secure the subject from being sacrificed to fictitious conspiracies which have been the engines of profligate and crafty politicians in all ages," why should not Irishmen be granted the same security, from such conspiracies and the machinations of such politicians? The
imperial parliament have to discuss and determine those questions at a future day. (7)

He never used the maxim "Innocent until Proven Guilty," but he argued vehemently for the rights of defendants, often using examples from cases in which he had participated. MacNally came very close to stating the principle when he discussed the two witness rule for cases of treason by citing Cesare Beccaria.

In Beccaria's judgment, one witness is not sufficient; for whilst the accused denies what the other affirms, truth remains suspended, and the right that every one has to be believed innocent turns the balance in his favour. (8)

A century later Justice White may have used this passage from MacNally (he does not give a specific citation) to plant the doctrine of presumption of innocence in American jurisprudence.

MacNally's story does however have a darker side. After his death in 1820 the English press revealed that MacNally had played the role of a double agent since at least 1794. At the same time he represented Irish revolutionaries in court, he was betraying them to the government by passing on key information about their accomplices and their organization. He relayed all the details about the revolutionary activities that he learned from his clients to the government prosecutors. From 1800 until his death he received 300l. a year for his trouble. Of this side of MacNally, Justice White knew nothing. (9)

One may ask, from where did MacNally get his principles? MacNally acknowledged Beccaria, and, indeed, Cesare did extoll presumption of Innocence several times in his famous treatise, *Dei delitti e delle pene* (On crimes and punishments). He argued for always having two witnesses before one could be condemned for a criminal offence:

More than one witness is needed, because, so long as one party affirms and the other denies, nothing is certain and the right triumphs that every man has to be believed innocent. (10)

A few pages later, Beccaria repeated the same argument when, in the most passionate page of his tract, he assailed torture. (11)

either the crime is certain or it is not; if it is certain, then no other punishment is called for than what is established by law and other torments are superfluous because the criminal's confession is superfluous; if it is not certain, then according to the law, you ought not torment an innocent because such is a man whose crimes have not been proven. (12)
MacNally relied on Cesare Beccaria to justify presumption of innocence.\textsuperscript{13} The short version of the story is that presumption of Innocence entered American law thanks to a traitorous Irishman who learned it from a reclusive Italian. But the story is much longer and more complicated than the obvious link that I have shown between Beccaria and MacNally. Presumption of innocence had a long history that stretches back to the twelfth century. To learn about this history we must turn to the jurisprudence of the \textit{ius commune}.

The \textit{ius commune} was the common law of Europe from the twelfth to the seventeenth centuries. It was formed by the fortuitous and contingent conjuncture of Roman law, canon law, and, later, feudal law in the schools and courts of medieval Europe. Its birth took place in an age when momentous changes in the practice of law were taking place. Law was evolving from unwritten customary usages to written customary and legislated law. Judicial procedure was in a state of great flux. Prior to the twelfth century the judicial ordeal was a pervasive mode of proof. During the course of the twelfth century, particularly in Southern Europe, the ordeal was replaced by the \textit{ordo iudiciarius}, a mode of proof that was based on Roman law. The consequences were unsettling.\textsuperscript{14} Procedure is the central part of any legal system. A society's sense of justice is intimately linked to its modes of proof. As the \textit{ordo iudiciarius} was imposed on Europe's courts by ecclesiastical and secular authorities, there is clear evidence that all strata of society had questions about its legitimacy.

Medieval conceptions of rights were intimately connected with judicial procedure. Even in the world of the ordeal, a man or woman had the right to prove his or her innocence. Although the ordeal lacked a jurisprudence and a set of written norms, literary sources give us insight into their presumptions. In the \textit{Romance of Tristan} that is part of the Arthurian cycles, King Mark condemned Tristan and Isolt to death without a trial when they were caught in \textit{flagrante delicto}. The poet tells us that the people of the Kingdom were dismayed because they had not been tried by the proper judicial procedure, in this case an ordeal. The people cried out: "King, you would do them too great a wrong if they were not first brought to trial. Afterwards put them to death." Tristan and Isolt had been caught with their clothes off and their defenses down. Neither they nor King Mark had ever formulated the thought: Ah, yes, I'm innocent until proven guilty, but the story of Tristan and Isolt pinpoints a crucial problem that has hindered the development of a presumption of innocence in every legal system. Do the perpetrators of flagrant, notorious, public, and observed crimes have a right to a trial? Are they whom everyone presumes guilty because every knows they are guilty still deserving of a presumption of innocence?

The jurists of the \textit{ius commune} did create norms that a defendant must be canonically summoned and publicly convicted. A few texts in Roman law supported a defendant's right to be heard in court. In his famous decretal \textit{Venerabilem}, Pope Innocent III stated that if defendants had not been cited,
witnesses could not present testimony against them.\(^{(15)}\) In another decretal, cited by Justice White in *Coffin vs. U.S.*, the same Pope Innocent formulated a general presumption that a person should always be presumed to be of good reputation.\(^{(16)}\)

Although the general principle of presumption of innocence was well established in the jurisprudence of the *Ius commune* by the beginning of the thirteenth century, the right was not absolute. Notorious crimes provided the most clear infringement of the right. The jurists agreed that when a crime was heinous and notorious a judge could render a decision against a defendant without a trial. In the middle of the thirteenth century, one of the most distinguished jurists of the age, Henricus of Segusio, declared that notorious crimes, especially those committed against the Church, needed no formal juridical examination.

At the same time as jurists were creating a jurisprudence that recognized a presumption of innocence for defendants, Europe's courts were making a transition from the ordeal to the *ordo iudiciarius* in the twelfth century. Although founded on Roman law, the *ordo* was new. It takes a leap of our imaginations to understand the turmoil this change must have created. We might project this turmoil into our own lives if we could imagine how we would react if the court system suddenly replaced juries with panels of judges. Jurists of the twelfth century needed to justify the radical changes in the modes of proof that were taking place. The jurists found their justification in the Old Testament and ingeniously traced the origins of the *ordo iudiciarius* to God's judgment of Adam and Eve in paradise. By doing so, they created a powerful myth justifying the *ordo* that retained its explanatory force until the seventeenth century.

Around 1150 a jurist named Paucapalea was the first to link the *ordo iudiciarius* to Adam and Eve. He noted that the *ordo* originated in paradise when Adam pleaded innocent to the Lord's accusation. In Genesis 3.9-12, the Lord burst into Paradise and shouted: Adam ubi es? One may note that for a deity his question was not particularly omniscient. Adam responded to the Lord's accusation of illegal apple picking by complaining to God that "My wife, whom You gave to me, gave <the apple> to me, and I ate it." God had, in other words entrapped Adam by giving him a wife (not the only time that idea has popped into the heads of our dumber gender). Paucapalea's point is subtle but would not be lost on later jurists. Although God is omniscient, he too must summon defendants and hear their pleas. Paucapalea added another piece of evidence that the *ordo* arose from the Bible. When Moses decreed that the truth could be found in the testimony of two or three witnesses, he pronounced a basic rule of evidence and confirmed the antiquity of a system of procedure accepted by God himself (Deuteronomy 19.15). A few years later (ca. 1165) Stephen of Tournai further dissected the "trial" of Adam and Eve finding even more evidence that this event marked the beginning of the *ordo iudiciarius*. He pointed out that Adam raised a formal objection (exceptio), to the Lord God's complaint (actio) and shifted the blame on his wife or the serpent.
"Exceptio" and "actio" were technical terms that were fundamental parts of the ordo iudiciarius. Stephen was the first jurist to define the ordo iudiciarius:

The defendant shall be summoned before his own judge and be legitimately called by three edicts or one peremptory edict. He must be permitted to have legitimate delays. The accusation must be formally presented in writing. Legitimate witnesses must be produced. A decision may be rendered only after someone has been convicted or confessed. The decision must be in writing.

This litany of admonitions indicates that by the second half of the twelfth century, the jurists were conscious of a defendant's right to a trial and his right to have his trial conducted according to the rules of the ordo iudiciarius --- limiting to right of the judge to act arbitrarily. Most importantly for our story, the subtext clearly implies that if God must summon litigants to defend themselves, mere humans must also, presuming that every defendant is innocent until proven guilty in court.

However, presumption of innocence was not yet a right. Notorious crimes still trumped innocence in the jurisprudence of the Ius commune. One more crucial change had to occur. The biblical origins of the ordo iudiciarius enabled that change to occur. Before the middle of the thirteenth century jurists accepted the right of the prince to subvert the judicial process because they considered legal procedure to be a part of the civil law, that is positive law, and, therefore, completely under the prince's authority. They traced the idea that procedural rights were derived from positive law back to ancient Roman jurisprudence. Paucapalea and Stephen of Tournai, however, introduced a different story and a different paradigm. If the ordo iudiciarius can be first found in the Old Testament, and if God had to respect the rights of defendants, then the rules of procedure must transcend positive law.

The jurists were not slow to see the implications of Paucapalea's and Stephen's new paradigm. During the second half of the thirteenth century they began to argue that the judicial process was not derived from civil law, but from natural law or the law of nations, the ius gentium. A paradigm shift occurred. The story is interesting but complicated. So I'll skip most of it.

The main point is that once the jurists decided that the norms of procedure were part of natural law, they quickly saw that essential rights of defendants could not be transgressed. The most sophisticated and complete summing up of juristic thinking about the rights of defendants in the late thirteenth and early fourteenth centuries is found in the work of a French canonist, Johannes Monachus who died in 1313. While glossing a decretal of Pope Boniface VIII (Rem non novam) he commented extensively on the rights of a defendant. He began by asking the question: could the pope, on the basis of this decretal, proceed against a person if he had not cited him? Johannes concluded that the pope was only above positive law, not natural law. Since a summons had been established by natural law, the
pope could not omit it. He argued that no judge, even the pope, could come to a just decision unless the defendant was present in court. When a crime is notorious, the judge may proceed in a summary fashion in some parts of the process, but the summons and judgment must be observed. He argued that a summons to court (citatio) and a judgment (sententia) were integral parts of the judicial process because Genesis 3.12 proved that both were necessary. God had been bound to summon Adam; human judges must do the same. Then he formulated an expression of a defendant's right to a trial and to due process with the following words: a person is presumed innocent until proven guilty (item quilbet presumitur innocens nisi probetur nocens). (17) This sentence is the ultimate irony of the story: rather than a sturdy Anglo-Saxon, a cardinal of the Roman church, a Frenchman, a canonist, Johannes Monachus was the first European jurist to recognize the inexorable logic of God's judgment of Adam: God could not condemn Adam without a trial because even God must presume that Adam was innocent until proven guilty. Johannes' commentary on Rem non novam eventually became the Ordinary Gloss of the Extravagantes communes and was circulated in hundreds of manuscripts and scores of printed editions until the seventeenth century. (18) Johannes Monachus gave birth to the maxim, "Innocent until Proven Guilty." Since it was read by the jurists of the Ius commune to the time of Cesare Beccaria, his Ordinary Gloss was a primary vehicle for broadcasting the principle to later generations of jurists.

Roman law, canon law, the Ius commune: from these sources spring that great Anglo-Saxon principle: A person is innocent until proven guilty. The question remains, however, how deeply did this doctrine inform the jurisprudence and court practice of the late medieval and early modern Europe? Today I can give only a brief outline of the problem and rough sketch of the story's main features up to the time with which we began, the time of Beccaria and MacNally.

A glance at the standard accounts of procedure and law after the thirteenth century would seem to render the opinion risible that any conception of "innocent until proven guilty" existed before the eighteenth century in European jurisprudence. Inquisitorial courts searching out heresy seem the antithesis of due process and contrary to any conception of defendants' rights. Torture, secret accusations, and arbitrary procedural injustices seem the norm rather than the exception. Some scholars have argued that the courts had an obligation to punish crimes, it was a matter of public utility, and that procedural short cuts to the "truth" like torture were means through which the courts fulfilled their obligations. A legal maxim that paralleled "innocent until proven guilty" and that stated that "It is in the public interest that crimes not remain unpunished" might seem to reflect the essence of late medieval and early modern juristic thought (Rei publicae interest, ne crimina remaneant impunita).

It has been true in the past and remains true today that procedural rules are broken and rights violated most often when judges have faced crimes that strike society's
most sensitive nerves. The cases in which I have found that the presumption of innocence discussed again and again are those that dealt with marginal groups, especially heretics, witches, and Jews. In these sources we find evidence that presumption of innocence was not reinvented in the eighteenth century.

Let me give a couple of examples. In 1398 or 1399, Salamon and his son Moyses, Jews living in Rimini, had been accused by several Christian women of having had sexual relations with them. The case was heard by a Franciscan inquisitor, Johannes de Pogiali. The case fell under the jurisdiction of the inquisition because Salamon and Moyses had used heretical arguments to seduce the women. When the Jews encountered virtuous resistance from the Christian women, they told them that Christian women who fornicated with Jewish men did not sin. The women testified before the Inquisition that they capitulated to Salamon and Moyses only after having been convinced by their clever arguments. (19)

We do not know the facts behind this case, only its outcome as reported in the papal court. Although the bare facts might make us think of this case as material for a Boccaccian farce, Salamon and Moyses did not think the accusation was amusing. The inquisitor's summary of the case is of great interest. He called witnesses before him, examined them, and took their oaths to tell the truth. In the end he did not find that the accusations against Salamon and Moyses were juridically and legitimately proven. It is not often that we find a judge justifying his decision in the Middle Ages. In this case, Johannes de Pogiali did. He examined the facts and concluded that "it was better to leave a crime unpunished than to condemn an innocent person." (20) Johannes had to choose between two conceptions of order: that crimes should be punished in the public interest or that defendants should be presumed innocent if proofs were insufficient, even in a delicate case where an outsider had violated more than just the public order. (21) Johannes also had to choose between a standard of justice for Christians and a standard for Jews. When judges and jurists asked themselves that question in the fifteenth and sixteenth century, the theoretical answer was invariably the same: Jews had the same rights of due process as Christians. And if proofs failed, they were presumed innocent. To be sure, the theory did not always find its way into the courtroom. (22) Johannes also had to choose between a standard of justice for Christians and a standard for Jews. When judges and jurists asked themselves that question in the fifteenth and sixteenth century, the theoretical answer was invariably the same: Jews had the same rights of due process as Christians. And if proofs failed, they were presumed innocent. To be sure, the theory did not always find its way into the courtroom, but the rules were repeated again and again in papal mandates sent to local judges and inquisitorial courts. In 1469 Pope Paul II confirmed the petition of the Emperor Frederick III that absolved Christian judges, notaries, and scribes who participated in cases involving Christians and Jews from any wrong doing. Some Christian priests refused to absolve them from their sins unless they did penance for their roles in court aiding Jews. "Justice," Paul observed, "ought to be common to all, Christian or Jew." (23) Later popes issued decretals that specified in great detail the procedural protections that Jews must be given. A letter of Pope Sixtus IV in 1482 mandated that Jews should receive the names of their accusers, should be able to present legitimate exceptions, proofs, and defenses to the court, and, if these rights were violated, could appeal to Rome. (24) From the number of times the Roman curia repeated these admonitions over the next fifty years, theory and practice may
not have always happily coincided. Several sixteenth-century letters emphasized a Jew's right to a defense, to have an advocate, and to receive money from supporters for a defense in heresy and apostasy trials. As Pope Paul III declared in 1535, "no one should be deprived of a defense, which is established by the law of nature." The right to a defense, a lawyer, and the means to conduct a defense was a necessary extension of the rights enshrined by the maxim "Innocent until Proven Guilty." By way of contrast, the common law did not recognize the right of a criminal defendant to counsel in treason trials until 1696.

The sixteenth century became a great age for criminal law and procedure in the *Ius commune*. Earlier jurists had written tracts on torture, evidence, heresy and witchcraft trials, but none had written a detailed tract on criminal procedure. From the thirteenth to fifteenth centuries, treatises on criminal procedure were, with only a few exceptions, short and schematic. During the sixteenth century, the jurists synthesized the jurisprudence of the *Ius commune*, and they wrote great tracts on the rights of criminal defendants. The names of these proceduralists are not well known: Giuseppe Mascardi, Giovanni Luigi Riccio, Giulio Claro, and Giacomo Menochio are not household names, even to legal historians. One of the great figures in this development was Prospero Farinacci (1544-1618). He was educated in Perugia and quickly discovered both sides of the bench. In 1567 he became the general commissioner in the service of the Orsini of Bracciano; the next year he took up residence in Rome as a member of the papal camera. However, in 1570 he was imprisoned for an unknown crime. Legal problems hounded him for the rest of his life. He lost an eye in a fight, was stripped of his positions, and accused of sodomy. In spite of his difficulties, Pope Clement VII reinstated him to the papal court in 1596. He began his most important work, *Praxis et theorica criminalis*, in 1581 and put the finishing touches on it by 1601.

Farinacci's treatise bristles with the presumption of innocence. The issue arose in several different contexts. He insisted that the exception of innocence was privileged in law and could never be abolished by statute; if a statute would abolish a defendant's right to a defense, it should be interpreted as only being unjust or calumnious defenses. Even the pope could not take away the right of a defendant to prove his innocence, since that right was grounded in the law of nature. Like other jurists who wrote on criminal procedure, Farinacci distinguished between presumptions of law and of men: a presumption of man was, for example, that in doubt, a man was presumed to be good.

Presumption of innocence was alive and well in the *Ius commune* during the sixteenth and seventeenth centuries. And the maxim, "Innocent until Proven Guilty" was flourishing as well. A great voice of reason in criminal procedure was Frederick von Spee (1591-1635). Spee was a jurist, Jesuit, poet --- literary critics are still spilling ink on his most important poem, Trutznachtigall --- he was a critic of intolerance and ignorance. As Beccaria would a century later, he condemned torture, the persecution of witches, and other crimes that enraged princes and the
rabble. Unfortunately for him, Europe was not yet ready for his voice of reason. He was stripped of his academic positions after the publication of *Cautio criminalis*, his famous treatise on procedure in witchcraft trials, condemned by his order, and died young, helping to treat soldiers infected by the plague of 1635 in Trier.\(^{32}\)

"Must we assume that witches are guilty?" he asked in *Cautio criminalis*. "That's a stupid question," he bellowed.\(^{33}\) His condemnation of torture was absolute. He took his arguments from Farinacci.\(^{34}\) His rhetoric inspired Beccaria a century later.\(^{35}\)

I ask a judge who tortures a defendant, to what end? Is the torture a punishment for a crime? Or a road to the truth? It is against all law that torture is punishment, and precisely unheard of, for, of which crime is it punishment?

A few pages earlier he had already made the point explicit that implicitly underlies this passage. Can a defendant who does not confess under torture be condemned? "I assume," wrote Spee, "that no one can be condemned unless his guilt is certain; an innocent person ought not be killed. Everyone is presumed innocent, who is not known to be guilty."\(^{36}\)

There is some irony in this part of the story too. Beccaria and Pietro Verri, Beccaria's muse who wrote a significant tract on torture published long after *Dei delitti*\(^{37}\) probably borrowed Spee's thought and adapted his words when they wrote about torture.\(^{38}\) Yet Beccaria and Verri condemned Spee, Farinacci and other jurists at the same time that they appropriated their ideas, accusing them of being soft on torture.\(^{39}\) Alessandro Manzoni, the mother of all modern Italian novelists, whose father was Verri's brother and whose mother was Beccaria's daughter, laid bare Verri's dishonesty. Verri, he wrote, overemphasized his own contribution to the intellectual arguments condemning torture and de-emphasized the contribution of earlier jurists. Verri had seriously distorted the legal tradition.

Manzoni's defense of Spee and the earlier proceduralists was as elegant as any passage in his great novel, *I promessi sposi*:\(^{40}\)

From this evidence and from all we know of the practice of torture in their own time, one can undoubtedly conclude that the interpreters of criminal procedure left the theory and practice of torture much, but much, less barbarous than they found it. Of course it would be absurd to attribute this diminution of evil to one cause alone, but I think that among the many causes that it would be reasonable to count one as particularly significant: the repeated reproofs and warnings of jurists, who renewed then publicly, century after century and who exercised a de facto authority over the practices of the courts.

Manzoni had extraordinary insight into the evolution of norms in European jurisprudence. He perceived the complicated dialectic through which jurists
argued, borrowed, and added to the thought of their predecessors and spoke to their peers and successors. This dialectic recognized no national laws, was not impoverished by territorial and linguistic boundaries, and did not try to conform to a particular set of customs and practices.

We have come full circle: from Justice White to MacNally to Beccaria to Johannes Monachus and back to Beccaria. The evolution of the norm that every person is presumed innocent until proven guilty is a case study of the long process through which principles of law emerge, slowly, hesitantly, sometimes painfully, in a legal system. The maxim, Innocent until proven guilty was born in the late thirteenth century, preserved in the universal jurisprudence of the Ius commune, employed in the defense of marginalized defendants, Jews, heretics, and witches, in the early modern period, and finally deployed as a powerful argument against torture in the sixteenth, seventeenth and eighteenth centuries. By this last route it entered the jurisprudence of the common law through a thoroughly disreputable Irishman’s having read a book on criminal punishments by an Italian. In a world that is choked by the narrow horizons of legal systems imprisoned by national sovereignties, this story is the best argument I know for returning to a conception of law that looks outside the national, territorial boundaries that Cerberus, the great hound of Hell and defender of the Austinian doctrine of legal positivism, so assiduously guards today.


3. Dudum (X 2.23.16), which was in fact used by the creator of the maxim in the thirteenth century to justify it; see below n. 18.


15. The idea was already found in Gratian's Decretum, C. 3 q.9 c.3: "Absente reo accusator non audiatur."

16. X 2.23.15 (Dudum).

17. Citing Innocent III's decretal *Dudum* (X 2.23.16) to justify his assertion.

19. The Apostolic See and the Jew: Documents: 492-1404 (Studies and Texts, 94; Toronto: 1991) 527-529, ASV, Reg. Vat. 316, fol. 226r-226v and Bologna, Bibl. univers. Cod. Lat. 317, Vol. 5.1, fol. 277r-280v. Published by C. Piana, Cartularium Studii Bononensis S. Francisci (Analecta Francescana 11; Assisi: 1970) 384ff. For another consilium treating a Jew's allegation that fornication was not a sin, see Bologna, Collegia di Spagna, MS 123, fol. 382r-416r: "Quidam Iudeus firmiter credit et publice aserit quod cohire solutum cum soluta non est peccatum mortale." This consilium was probably written between 1381 and 1387 by Guglielmo de Vallseca who was the chancellor to King Peter IV of Catalonia. See I codici del Collegio di Spagna di Bologna, ed. Domenico Maffei, Ennio Cortese, Antonio García y García et al. (Orbis Academicus: Saggi e documenti di storia delle università, 5; Milano: 1992) 400. On Muslim and Jewish miscegenation with Christian women, see David Nirenberg, Communities of Violence: Persecution of Minorities in the Middle Ages (Princeton: 1996) 127-165.

20. Ibid., p. 528: "non invenit contra ipsum Salomonem fore iuridice et legitime probatum, videlicet quod ipse talia verba protulerit aut alia supradicta commiserit vel fecerit, considerans fore melius facinus impunitum relinquere quam innocentem condempnare . . . declaravit dictum Salomonem de verborum prolatione et aliorum premissorum perpetratione fuisse et esse innocentem."

21. Richard M. Fraher has argued in a series of articles that medieval procedure between 1200 and 1500 was saturated with the idea that the Ius commune dictated that it was in the public interest that crimes not remain unpunished. This conception of judicial order led to the introduction of torture and deposited the burden of proof on defendants. I think that presumption of innocence played a greater role in theory and practice than Fraher would concede. See his articles "The Theoretical Justification for the New Criminal Law of the High Middle Ages: `Rei publicae interest ne crimina remaneant impunita'," University of Illinois Law Review (1984) 577-595 and 'Conviction according to Conscience: The Medieval Jurists' Debate concerning Judicial Discretion and the Law of Proof," Law and History Review 7 (1989) 23-88. Also see "Ut nullus describatur reus prius quam


23. Ibid. 1284-1287.


27. Tancred of Bologna wrote one the first tracts dealing solely with criminal procedure ca. 1210-1215, see Richard M. Fraher, "Tancred's 'Summula de criminibus': A New Text and a Key to the Ordo Iudiciarius," Bulletin of Medieval Canon Law 9 (1979) 23-35, edited on pp. 29-35. The most complete discussion of criminal procedure during this period was the third part of Guilhemus Durantis' Speculum iuris (2 vols. Basel: 1574; reprinted Aalen: 1975). Other influential tracts on criminal procedure can be found in volume 11 of Tractatus universi iuris (Venice: 1584).


30. Ibid., p. 143-144, num. 15: "Et si tu subtilis dices ergo Princeps isto casu <cases where the pope has judged someone contumacious> tollit exceptionem, et defensionem innocentiae? Qua tamen eum sit de iure naturae, nec a principe, nec a statuto tolli potest . . . Respondeo duobus modis. Primo, quod ex caussa (sic) publicae utilitatis multa potest princeps contra generales iuris regulas, praeertim ne delicta remaneant impunita, ita in his terminis respondet Carer. d. num. 89 et 99 poret Matth. et Andr. in constit. Paenam eorum, in i. notab. . . . Respondeo secundo, quod isto caso summus pontifex non prohibuit exceptionem innocentiae, sed illius admissionem sibi reservavit, cum dicit "Nisi habita desuper asignatura nostra speciali gratia" (Cited bull of Pius V, dated to the fifth year of his pontificate on p. 143). Advertat ergo iudex isto caso, ne sit velox ad exsequendum sententiam quia si reus offert innocentiam suam docere per contrarias probationes debet supersedere et principem consulere vel exspectare, quod pro parte rei adeundum principem recurratur, isto praesertim caso, in quod prout infra dicetur, facilis esse debet idem princeps in admissendo reum ad defensiones, et si iudex aliter faceret, male faceret."


Spee's Trutznachtigall (German Studies in America, 13; Bern-Frankfurt am Main: 1973) 11-13.


34. Ibid. p.264, Dubium XXXIX, Ratio i. "Si convicta esset, torta non esset, est autem torta, non igitur convicta: Constat ex supra dictis et vide Farinacium q.38 n. 4."


36. Ibid., p. 262-263: "Dubium XXXIX. An, quae nihil in torturis confessa est, damnari possit? Suppono damnari neminem posse nisi certo de eo constet culpam sustinere; neque enim innocens occidi debet. Innocens autem omnis praesumitur, qui nocens esse nescitur."


40. Alessandro Manzoni, Storia della colonna infame: Testo del 1840, ed. Alberto Chiari and Fausto Ghisalberti (Verona: 1963) 702: "Da queste testimonianze, e da quello che sappiamo essere stata la tortura negli ultimi suoi tempi, si può francamente dedurre che i criminalisti interpreti la lasciarono molto, ma molto, men barbaro di quello che l'avevan trovata. E certo sarebbe assurdo l'attribuire a una sola causa una tal diminuzione di male; ma, tra le molte, me par che sarebbe
anche cosa poco ragionevole il non contare il biasimo e le ammonizioni ripetute e rinnovare pubblicamente, di secolo in secolo, da quelli ai quali pure s’attribuisce un’autorità di fatto sulla practica de’ tribunali.” Manzoni’s father was probably Giovanni Verri, the brother of Pietro, and his mother was Giulia Beccaria, the daughter of Cesare, see Alessandro Manzoni, *Storia della colonna infame: Testo definitivo e prima redazione*, ed. Renzo Negri (Milano: Marzorati, 1974) 5.

- **Presumption of Innocence Recognition and Importance**

  The presumption of innocence is a centuries old general principle of law, which is recognized by the civilized nation of the contemporary world.

- **The Status of Presumption of Innocence in Pakistan**

  The presumption of innocence

- **The Role of Parliament in Amendment of International Norms (Jus Cogens)**

  The presumption of innocence

  Parliamentary sovereignty is seen as a unique feature. I shall call this the ‘classic’ view. Nevertheless, a closer look at the theoretical presuppositions of parliamentary sovereignty shows that this conclusion is unsustainable. If parliamentary sovereignty is to be a legal doctrine (and not a sociological or historical observation), it must rely on a list of powers that belong to parliament as an institution. These legal powers are organised in powers and disabilities and are thus both empowering and limiting. In other words, all legally organised parliaments have limited powers. The Westminster Parliament has constitutionally limited powers, very much like its
German and American counterparts. The parliamentary sovereignty is not a rule of natural law/general principle of law it has any historical background, furthermore its nor logical because they cannot do all thing due to natural, public, judicial and contemporary international law limitation. The omnipotence of parliament is also targeted by the sword of Damocles such recently enacted evolving the basic structure theory. Parliamentary sovereignty is therefore an undoubted legal fact. It is complete both on its positive and on its negative side. Parliament can legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation. There is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament. No one of the limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence, or receives any countenance, either from the statute-book or from the practice of the Courts. As is well known, Austin argued that a legal order existed when a sovereign obeyed the commands of no one and whose commands were obeyed by everyone. Has the advent of human rights considerations achieved any notable successes in the reform or improvement of criminal procedure? In those jurisdictions still contemplating human rights legislation, which improvements are expected or promised by human rights advocates? What is the content of pertinent human rights norms, especially the — ‘right to a fair trial’? How, if at all, does the terminology, conceptual structure or scope of human rights differ from established common law procedural traditions? Have standard definitions and approaches been imported wholesale from outside the jurisdiction, or have adaptations been made to accommodate local conditions? How have different legal systems balanced generality and

71. Parliamentary Sovereignty and the Constitution Pavlos Eleftheriadis
74. Introduction—The Human Rights Revolution in Criminal Evidence and Procedure
PAUL ROBERTS AND JILL HUNTER
specificity (with corresponding allocations of institutional responsibility for normative development)? 75

- The Role of Judiciary in Protecting the Presumption of Innocence
  - The presumption of innocence

- The Literature Review
  - The presumption of innocence

CHAPTER ONE: Presumption of innocence as a fundamental Human Right

1.1: Introduction

The International human rights law is binding on all States and their agents, including law enforcement officials.76 Human rights derive from the inherent dignity of the human person.77 Law enforcement officials shall at all times fulfil the duty imposed on them by law, by serving the community and by protecting all persons against illegal acts.78

Human Rights is a legitimate subject for international law, and international scrutiny79.

1.2: Islamic Law

The presumption of innocence. Prior to the crusades the medieval legal system in Europe was governed by ‘God’s judgement’. These judgements were made by ‘trial by combat’ or ‘trial by ordeal’. For example a ‘trial by ordeal’ would see the accused burnt with hot irons or boiling oil. If the accused survived, he/she would be declared ‘not guilty’. King Louis IX would regularly keep the company of philosophers. Whilst on the crusade he kept the company of a Friar. The Friar, who had

75 . . Introduction—The Human Rights Revolution in Criminal Evidence and Procedure. PAUL ROBERTS AND JILL HUNTER
76 . International Covenant on Civil and Political Rights [hereinafter “ICCPR”], article 2(3).
77 . xxi. UDHR, article 1; ICCPR, preamble.
78 . xxii. Code of Conduct, article 1.
read many religious scriptures, stated kingdoms were lost without the rule of law. He said to the King to return to his people with fair justice and good law.79 Law enforcement officials are obliged to know, and to apply, international standards for human rightsiv

Ethical and Legal Conduct

Human rights derive from the inherent dignity of the human personv

Law enforcement officials shall at all times respect and obey the lawvi

Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their professionvii

Law enforcement officials shall not commit any act of corruption. They shall rigorously oppose and combat all such actsviii

Law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all personsix

Law enforcement officials shall report violations of those laws, codes and sets of principles which protect and promote human rightsx

All police action shall respect the principles of legality, necessity, non-discrimination, proportionality and humanityxi

Everyone has the right to a fair trialxxix

Everyone is to be presumed innocent until proven guilty in a fair trialxxx

Pre-trial detention shall be the exception, rather than the rulelviii

79 What the West took from Islam: presumption of innocence, Submitted by Abdullah Hasan on October 28, 2012 – 8:17 pm or http://abdullahhasan.net/?p=7296#_ednref4

80. iv. ICCPR, article 2(3); United Nations Code of Conduct for Law Enforcement Officials [hereinafter "Code of Conduct"], article 2.

v. Universal Declaration of Human Rights [hereinafter "UDHR"], preamble and article 1.

vi. Code of Conduct, article 1 and article 8.


ix. Code of Conduct, article 2.

x. Code of Conduct, article 8; Basic Principles on the Use of Force and Firearms [hereinafter "Principles on Force & Firearms"], principles 6, 11(f), 22, 24, and 25.


81. xxix. UDHR, article 10; ICCPR, article 14.

xxx. UDHR, article 11(1); ICCPR, article 14(2).
All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person

Everyone charged with a penal offence shall be presumed innocent until proven guilty in a fair trial

Islamic influence on the presumption of innocence:

The historian Marcel Boisard states in his journal “On the probable influence of Islam on western public and international law”, published in the International Journal of Middle East studies:

It was above all the very high ethical standard of Islamic law that impressed the medieval West and provoked the development of a more refined legal thinking. This aspect is undoubtedly the most durable merit of Muslim influence, as illustrated by the administration of justice. Until the Crusades, legal procedure in the West consisted of “God’s judgments” by boiling water or by duel, or by “ordeal” during which people were burnt with red-hot irons or boiling oil and, if they survived, declared “not guilty.” In contrast, we have only to quote the instructions given by Omar in the seventh century to the Muslim judges to show what a chasm separated the two conceptions: “Only decide on the basis of proof, be kind to the weak so that they can express themselves freely and without fear, deal on an equal footing with litigants by trying to reconcile them.”

From Islam’s beginnings the suspect was presumed innocent until it could be proved otherwise. It is certainly not a coincidence that Louis IX was the monarch who created the French legal administration by appointing “royal inquirers,” by instituting testimonial proof, and by permitting the recourse of “making a plea to the King.” The legislation he introduced marked a turning point in the history of law in Europe. Popular imagery was not mistaken on this point, since it is that above all which was remembered. Louis IX had frequented the philosophic theologians of his time; he had received St. Thomas Aquinas at his table. The influence of Islam was, however, even more direct. We can make this presumption since it was on his return from Palestine that the King undertook his major legal reforms. Joinville (Jean de Joinville, chronicler of St Louis) gives us fairly clear proof in his writings.

82. Iviii. ICCPR, article 9(3); Principles of Detention or Imprisonment, principle 37.
lix. ICCPR, article 10; Principles of Detention or Imprisonment, principle 1.
lx. UDHR, article 11; ICCPR, article 14(2); SMR, rule 84(2); Principles of Detention or Imprisonment, principle 36.
Presumption of Innocence

The principle of the presumption of innocence is applicable both to criminal legislation and the implementation of it. In fact, in an early hadith (recorded sayings of the Prophet by his companions), the Prophet stated: “Had men been believed only according to their allegations, some persons would have claimed the blood and properties belonging to others, but the accuser is bound to present positive proof.”[40]

Regarding the application of the principle of the presumption of innocence to the categories of crimes in Islamic Law the following ahadith (pl. of hadith) are relevant:

The Prophet said: “avoid using circumstantial evidence in hudud”, which are the most serious of all crimes because they are explicitly mentioned in the Qur’an. Referring to this hadith, Aisha (the wife of the Prophet) reported that the Prophet also said:

“Avoid condemning the Muslim to hudud whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he err in favor of innocence [pardon] than in favor of guilt [punishment].”[42]

It is firmly established principle in qisas crimes that circumstantial evidence favorable to the accused is to be relied upon, while if unfavorable to him it is to be disregarded. Regarding the lesser ta`zir offenses, the presumption of innocence applies as well. In his Farewell Sermon, the Prophet said: “Your lives, your property, and your honor are a sacred trust upon you until you meet your Lord on the Day of Resurrection.” Professor Bassiouni notes that this passage has been interpreted to mean that the duty to protect life, property and honor cannot be breached without positive proof of crime. It is thus a fundamental rule in Islamic criminal law that: “The burden of proof is on the proponent, and the oath is incumbent on the one who denies.”[46]

1. 84. http://defensewiki.ibj.org/index.php/Rights_of_the_Accused_under_Shari'ah_Law#2._Presumption_of_Innocence see also ↑ Bassiouni, supra note 8, at 44 (Citing Al Baihagi, The 40 Hadith of Imam al Nawawi, No. 33.)
3. ↑ Bassiouni, supra note 8, at 43 (Citing Al Turmuzy, No. 1424; Al Baighagi, No. 8/338; Al Hakim, No. 4384).
4. ↑ Bassiouni, supra note 8, at 43.
5. ↑ Id.
6. ↑ Bassiouni, supra note 8, at 43-44.
Criminal Procedure

The victim of a criminal act or his kinsman ("the avenger of the blood") was personally responsible for presenting a claim against the accused criminal before the court. The case then went on much like a private lawsuit. No government prosecutor participated although certain officials brought some cases to court.

The classic Sharia provided for due process of law. This included notice of the claim made by the injured person, the right to remain silent, and a presumption of innocence in a fair and public trial before an impartial judge. There were no juries. Both parties in the case had the right to have a lawyer present, but the individual bringing the claim and the defendant usually presented their own cases.

At trial, the judge questioned the defendant about the claim made against him. If the defendant denied the claim, the judge then asked the accuser, who had the burden of proof, to present his evidence. Evidence almost always took the form of the direct testimony of two male witnesses of good character (four in adultery cases). Circumstantial evidence and documents were usually inadmissible. Female witnesses were not allowed except in cases where they held special knowledge, such as childbirth. In such cases, two female witnesses were needed for every male witness. After the accuser finished with his witnesses, the defendant could present his own.

If the accuser could not produce witnesses, he could demand that the defendant take an oath before Allah that he was innocent. "Your evidence or his oath," the Prophet Muhammad taught. If the defendant swore he was innocent, the judge dismissed the case. If he refused to take the oath, the accuser won. The defendant could also confess to a crime, but this could only be done orally in open court.

In all criminal cases, the evidence had to be "conclusive" before a judge could reach a guilty verdict. An appellate system allowed persons to appeal verdicts to higher government officials and to the ruler himself.85

The Federal Shariat Court, which has the power to annul any law it considers to be in conflict with Islamic injunctions, has been challenged by several legislators as a supra-legislature, imposed on a parliamentary democracy by a military dictatorship. However, no efforts have been made to amend its power or to abolish it.86

86. PAKISTAN Time to take human rights seriously, Amnesty International June 1997
Article 9 of the Constitution of Pakistan, which says that “No person shall be deprived of life or liberty save in accordance with law.

Torture and ill-treatment of people in the custody of police and other law enforcement personnel is widespread, almost routine, in Pakistan. Many victims consider beating as part of normal procedure and do not even report it when questioned about torture.

1.3: International Instruments

The presumption of innocence

1.4: The Universal Declaration of Human Rights (UDHR)

The lawful use of force is presumption of innocence. Force is to be used only for lawful law enforcement purposes lxxvi87 The lawful use of force is granted by the international law in other too many sources also but the question arise that whether the force which is prima facie prohibited in the international law is permitted in the national law, will be consider legitimate in the eye of law i.e such as national accountability ordinance which violate the international law principle is legitimate use of power?

1.5: International Covenant on Civil and Political Rights (ICCPR)

The presumption of innocence

1.6: the European Convention on Human Rights

The presumption of innocence

1.7: International Criminal Court (ICC) Statute

The presumption of innocence

1.8: Presumption of Innocence v. International Rules of war

The presumption of innocence is also violating in many international Humanitarian laws. The new phenomenon of unlawful combatant is sprout due to the flagrant violation of the presumption of Innocence.

CHAPTER TWO: Presumption of innocence and Pakistani laws

2.1: Introduction

The presumption of innocence

2.2: Presumption of innocence Status in the constitution of Pakistan 1973

The presumption of innocence

2.3: Presumption of innocence in Protection of Pakistan Act 2014

The presumption of innocence

2.4: Presumption of innocence in Control of Narcotics Substance Act 1997

The presumption of innocence

2.5: Presumption of Innocence in National Accountability Bureau Ordinance 1999
The presumption of innocence is never ever flagrantly violated in such a manner as violated in the law/legislation of the national accountability Bureau ordinance 1999 because it not only this generally recognized principle of law but also recognize the plea bargaining, which is in the ambit of egregious violation of this universally recognized law. This law come into existence on the name of justice but the law itself make the justice stultify.

It is in fact a paper merit for the simple reason that in practice it is largely unworkable. Cromwell discovered that to his cost;135 and there has been no state in which methods have not been used to break down the theoretic barriers. In France the judiciary has largely been re- garded as a delegate of the sovereign govern- mental power. In America the development of the standing-committee in Congress provided a simple system of communication between the cabinet and the legislature. In Massachusetts, even before the war of independence, the power- ful “Junto” of Boston practically made itself an executive committee.136 The truth is that the business of government does not admit any ex- act division into categories. It has been found increasingly necessary to bestow judicial pow- ers upon English government departments.137 The system of provisional orders may depend upon a genial fiction of generous delegation; but if the work of the Local Government Board is not, in this particular, legislation, there is noth- ing that is worthy of that name. “The work of a taxing department today,” the chairman of the Board of Customs told a recent Royal Commis- sion,138 “is an absolutely
different thing from what it was twenty or even ten years ago. In those days Parliament, when it fixed a tax, settled every detail, leaving to the department only the administration of the tax on the lines laid down by Parliament. The tendency of Parliament nowadays... is to lay down only principles, leaving matters of difficulty to the discretion of the department. I think it fair to say that a department like mine nowadays exercises powers which are often judicial and which sometimes get very near being legislative.” Nor must Professor Dicey’s insistence on the value of judicial legislation be forgotten.139

No one, moreover, who has watched at all carefully the development of the English cabinet in recent years can mistake the evident tendency of the executive—a tendency of course strengthened by the fact of war—to escape from Parliamentary control.140 It is not less significant that both Insurance and Development Acts have given quasi-legislative and fully judicial powers to commissions who are expressly excepted from the ordinary rules of law.141 This evolution, whether or no it be well-advised, surely bears testimony to the breakdown of traditional theory. The business of government cannot in fact be hampered by the search after the exact branch into which any particular act should fall. And it may even be urged that recent American history bears testimony to the further conclusion that
the breakdown of the doctrine has nowhere proved unpopular. Certainly an external observer sees no sign of lament over the Presidential control of Congress; and there has been, in recent years, a clear tendency in England to look for the active sovereignty of the state outside of Parliament. We have in fact come to believe that the loss in formal independence may well be compensated by a gain in the efficiency of government.

The theory yet contains an important truth of which perhaps too little notice has been taken in our time. We have become so accustomed to representative government as to realise only with difficulty the real basis of its successful operation. It presupposes an educated and alert electorate which is continually anxious for the results of that system. It ought not to involve, as it has within recent years so largely involved, + The state, he insists, is now non-religious in character, and where there is not complete fusion it is necessary that there should be the recognition of complete independence. So the civil authority may not force upon the church the burial of those who have violated its laws.118 The church has its own code of legislation and its self-sufficiency must be recognised.119 From the principles of religious freedom that the charter has consecrated he draws the inference that the right to form associations is fundamental; for without them the Catholic church cannot prosper. Because man belongs to two societies, the
religious and the civil, his education is the function of both alike; but he
denies that government can in any sense act as the controlling agent in the
process. The real decision must rest with the family, whose rights in this
aspect no government may invade. Clearly he is seeking to make of the al-
legiance of men to his church a thing in nowise distinct from that which the
state may demand.+ Legislation means no more than the triumph of special
interests, adminis- tration is the victory of caprice and incoher- ence.175
There is no longer room for virtue, and the multiplication of private
speculation and invention results in the confusion of public pros- perity with
the progress of civilisation.+ It was the expression of such limitations upon
the exercise of power as the past seemed to sug- gest. Sovereignty of king
and people it alike re- jected. The one presupposed a despotism and the
other a republic. But France by her political nature was a monarchy in which
the king gov- erned by means of his ministers. He chose his ministers and his
will was law. But upon his action a vital check was laid. The Chamber of
Deputies was a deliberative council resort to which gave government the
means of reading wisdom in legislation.23 Since the object of roy- alty was to
translate into action the balance of interests within the Chamber the result
was to limit the possibility of despotic government. Neither king nor
Parliament was therefore sov- ereign for the simple reason that the power of
each was limited, either in practice or in theory. To each was assigned functions which, while they might involve the exercise of will, never admitted the possibility of a will without control. The king was government, and government might involve the exercise of force; but the problem was always the extent of force to be used and the test was the principles of the Charter. Nor did he admit an uncontrolled right in the people. They represented only the brute mass of men and he would not admit that the mere agglomeration of numbers would justify the exercise of sovereign powers. The despotism of many was for him still a despotism, and he rejected it. He would no more admit that principles so fundamental can be contradicted by tradition or number than he would have admitted the justice of extravagance.

The psychological background of this attitude it is not difficult to discover. The abuse of sovereignty under the ancien régime had resulted in the despotism of the Convention. In each case the claim of uncontrolled power had resulted in the destruction of liberty. It did not matter that in one case that lack of limitation could give it self historic background. It was unimportant that in the other men were tasting, for the first time, a right which they had been too long denied. He saw clearly that some system of
checks and balances was essential if order and peace were to be safeguarded.

The prohibition of torture etc also come into existence due to the protection of the fundamental principle of presumption of innocence because it is the real violation of the presumption of innocence which says that every everyone should be presumed innocent till he prove guilty but unfortunately this fundamental principle flagrantly violated in the many important laws of Pakistan.

2.6: Obstacles in Effective Enforcement of Presumption of Innocence.

The presumption of innocence

2.7: Role of NGO

The presumption of innocence

2.8: Conclusion

The presumption of innocence

CHAPTER THREE: Evidentiary Value of Presumption of innocence and its Relation with the Burden of Proof and with the Benefit of the Doubts

3.1: Introduction

The presumption of innocence

3.2: The Qanun-e-Shahadat (Law of Evidence) and presumption of innocence

The presumption of innocence

88 . Authority in the Modern State Harold J. Laski, Batoche Books Kitchener, 2000, Yale University Press,
3.3: Role of Judiciary in Realization of Presumption of Innocence

The presumption of innocence we owe the bi-polar sovereignty of the legislature and the courts upon which the rule of law within a democratic polity continues to depend.89

3.4: Burden of Proof and Presumption of Innocence

The presumption of innocence. On examining the judgements of the Strasbourg Court relative to the interpretation of that Court of Article 6(2) of the European Convention on Human Rights, I summarised that interpretation to comprise six propositions which can consistently be repeated here for ease of reference. Article 6(2) of the Convention states that Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. This principle is based on the need of assuring a fair trial by an impartial court. It is crystal clear that for a tribunal to be impartial it cannot prejudicially hold a view against the accused by deeming him guilty before he is so pronounced after a fair trial.90 this fundamental right of the presumption of innocence can be breached not only by a judge or a court but also by any other public authority. + Case of Allenet de Ribemont v France of 1995 That dissension was based on the argument that if, besides judges and jurors, even other public authorities can be found to have violated the fundamental right of the presumption of innocence, it is not possible to expect that the right can be upheld in a practical and efficient manner. This on the contrary is sufficiently and clearly possible when the violation is committed by a judge or a juror. Subsequent experience has shown that this is a valid objection as will be explained later in this essay.+ A further illustration by a Maltese case is as follows.11 On 1 August 2002, the Maltese Prime Minister called a Press
Conference in which inter alia he said: I regret that I have to inform the public that today two judges are being investigated by the police in connection with serious offences. On 5th July, judgement was delivered by the Court of Criminal Appeal presided by Chief Justice Noel Arrigo, Judge Patrick Vella and Judge Joseph Filletti... Days before the judgement of the Appeal Court, it became known that contacts were being made on behalf of the accused with Judge Patrick Vella and the Chief Justice so that the prison term to which he had been condemned [in the lower court] be reduced by four years from sixteen to twelve years and that these two judges were promised amounts of thousands of Liri each... On the Government side, I want to assure everyone that this case will continue to be investigated to the end and that steps will be taken according to law. The accused raised the question of a breach of the presumption of innocence before the Magistrate Court of Criminal Inquiry, which, in line with the Constitutional provision of Maltese Law referred the plea to the Civil Court. This Court considered that what the Prime Minister had said could not be taken as a statement of guilt and therefore there was no breach of the presumption of innocence. On appeal to the Constitutional Court this court, on 29 October 2003, revoked the Civil Court’s decision and declared that there had been a violation of the applicants’ rights to a fair trial and right to be presumed innocent. The Court leant heavily on the de Ribemont, Daktaras and Butkevicius decisions of the European Court of Human Rights that had repeatedly stated that statements by a public official, in this case the Prime Minister, had to respect the right to the presumption of innocence. In spite of this finding however, the Constitutional Court ordered that the Criminal Enquiry
should continue as there was no reason to halt those proceedings. The Court finally considered that it’s finding to be upheld and enforced in a practical and efficient manner (in accordance with proposition (e) above) its judgement, is to be included in the file of the ongoing proceedings against the accused.

It is no wonder that the accused considered that the insertion of the copy of that favourable judgement on the violation they had suffered, could not reasonably satisfy the requirement that their right was to be upheld by a practical and efficient remedy for that violation. The accused accordingly sought recourse with the European Court of Human Rights complaining that because of this verdict, their right to be presumed innocent under Article 6 (2) had been breached and it also undermined their right to a fair trial by an impartial tribunal under Article 6 (1). However above all, they complained that they had not been accorded an effective remedy by a national authority notwithstanding that the violation had been committed by a person who was acting in an official capacity – Article 7. This insistence reflects a fear or suspicion that any public official or the general public can violate the presumption of innocence by influencing or even pressuring the judge to go out of his way and instead of applying the strictness, impartiality, and fairness of the law, will make him go along with what the public official or the general public have expressed. It is this which is surreptitiously implied by the insistence that public official statements violate the presumption of innocence. It is symptomatic of the reality of the situation that
what the public media says in violation of the presumption of innocence is and has to be rightly ignored.91

3.5: Basic Structure Theory and Legislature

The presumption of innocence

3.6: Conclusion

The presumption of innocence is really a principle which not to be measure through the principle of utility. The question arise that why the presumption of guilty were incorporated in the the above mention Pakistani laws, whether the existing laws are become obsolete, it is definitely inserted for the purpose of ensuring the maximum punishments. If it is so then it is important to know, that what are the true purpose of punishment? The punishments theory might be retributive, reformatory, deterrent or preventive. In such situation the preferred theory will deterrent in order to deter maximum number of citizens regarding the consequences.

If we presumption of guilt is the necessity of the situation then how the judiciary will deal with this problem, if a person charged with such crimes and he fail to prove himself innocent nor does the prosecution succeeded in proving his/her guilt what the judiciary will do? So definitely they will order for the incarceration of the same accuse because at least if nothing more the law presumed his/her guilt. As the positivist theory believe that the judge is presumed to apply to true or plain meaning of the law/statute because It involves the fidelity to their offices of important, well paid and powerful people who sit in the judgment

91. Gh.S.L. Online Law Journal 2013 The Presumption of Innocence, A second look, PROF GIUSEPPE MIFSUD BONNICI
seat. When some of these people are accused of "judicial activism"—even metaphorical "treason" against the constitution.+ But the fundamental doctrine remained that a judge applied the law. A judge did not make law.+ Making the law is the province of sovereigns. 92 Thus Francis Bacon in one of his essays remarked: "Judges ought to remember that their office is jus dicere, and not jus dare: to interpret law, and not to make law or give law. Else will it be like the authority claimed by the Church of Rome .93

CONCLUSIONS AND RECOMMENDATIONS

The presumption of innocence

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