The Presumption of Innocence in Europe: Developments in Substantive Criminal Law

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Abstract

The essay is focused on the idea that the content considered to be intrinsic to the principle of presumption of guilt is the product of specific ideological choices, ranging between a higher sensitivity to social defence and individual guarantees. This is confirmed by the historical social debate in Italy, by the classical school up to the Republican Constitution, by the ideas of the positivist school and those of the technical-juridical school. Then the work opens to a comparative perspective, by analyzing certain aspects of the presumption of guilt in some European state systems, both from a constitutional point of view and from the point of view of the disciplines specifically pertaining to the different juridical cultures; they leave us doubts about the legitimacy of normative and interpretation models, which seem to consider some elements of the cases in point as being implicit in the tangible fact or to be assessed by presumptions, with a possible inversion of the burden of proof. After an excursus about the homogenizing role of the presumption of guilt within a supranational perspective, the research focuses on the case law of the European Court of Human Rights and of the European Court of Justice, highlighting some of its ambiguities and contradictions as regards the admission of “reasonable” waivers of the presumption of guilt as rule of evidence. The same critical observations are made as regards the proposal of EU directive about the consolidation of the idea of the presumption of guilt, which, instead, paradoxically seems to weaken its content of defence of civil rights. The research deals with some hypotheses undermining the principle by the help of the substantive penal law, such as the ideas of presumed danger or intention and guilt, underlining, on the contrary, the necessity of an integrated vision of the penal system, imposing a model of trial being consistent with that of the substantive law defending civil rights. Conclusions are devoted to the risk, due to misunderstood punishment efficiency, of a substantially new interpretation, from a probable point of view, of substantive penal guarantees showing how the case law and European norms in course of development can influence this. Finally they also deal with the critical points and ambiguities in the evaluation of the
reasonableness of waivers of the principle and in the balance between social defence and individual guarantees made according to equivocal and uncontrollable parameters leaving space to illegitimate solutions.

**Keywords**

Presumption of Innocence, Criminal Justice System, Europe, Criminal Conduct

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**1. Introduction. The Presumption of Guilt between Individual Guarantees and Social Defence: The Historical Debate in Italy**

Over the last years we have more and more been influenced by the idea, emphasized by the emerging legislation and by mass media,\(^1\) that the presumption of guilt is increasingly perceived as an anachronistic principle, hindering the pervasive penal protection of some interests considered to be primary.\(^2\) The presumption of guilt and the different contents attributed to it, are the consequence of specific ideological choices on which a certain political organization of society is based. These choices range, from a more or less axiological point of view, between fostering the repression of crimes and protecting the innocent.\(^3\)

The main points of this issue have remained unchanged within the opposition between social defence and individual guarantees, between authority and freedom.\(^4\) It is well known that the classical school\(^5\)—following the Enlightenment principles\(^6\)—, perhaps using a too simplist approach, criticized the inquisitorial system of trials,\(^7\) as being medieval and absolutist, because it was based on the presumption of guilt.\(^8\) However, in the school based on liberal principles, once the guarantees of the defendant were formally affirmed, points of view which considered the historical motivations of guilt presumption,\(^9\) being well grounded, still existed. There was also who tenaciously defended this principle, without any mitigation, perceiving it as the fundamental postulate of all the other trial guarantees. Two meanings of the principle were pointed out: one concerning the defendant’s treatment, the other one concerning the working out of...

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\(^1\)On the subject, I dare referring to Caterini, 2015: p. 55 et seq.
\(^4\)For a historical introduction to the issues concerning the presumption of innocence, see Stumer (2010), p. 1 et seq.; Stuckenberg (1997), p. 11 et seq.
\(^7\)Pagano (1787). See also Cordero (1985), p. 625 et seq.
\(^8\)Carmignani (1848), p. 249; Nicolini (1843), p. 319; Carrara (1881), p. 31; Pessina (1912), p. 84; Vegas Torres (1993), p. 15.
a judgement rule,\textsuperscript{10} as expression of the \textit{in dubio pro reo}—at the same time rule about the burden of proof—a fundamental instrument against illiberal abuses.\textsuperscript{11} The sensitivity of this doctrine towards the guarantist value of guilt presumption, was such as to directly affect also the typical themes of substantive law, which were linked to the undermining of the principle in the case of types of offenses built on the presumption of elements against the defendant, only causing, in this way, the inversion of the burden of proof.\textsuperscript{12}

Although the guarantist approach of the classical school was far from a full legislative application,\textsuperscript{13} since it was rather a formal recognition deprived of any factual implementation,\textsuperscript{14} the undermining of the principle went on with the open criticism coming from most exponents of the positive school.\textsuperscript{15} Starting from the asserted presumption of the alarming increase of criminality, they considered guilt presumption as a guarantee to be eliminated or however to be strongly limited.\textsuperscript{16} The “evil” expression \textit{in dubio pro reo} was given up and preventive custody was considered to be a normal consequence of mere indictment.\textsuperscript{17} The ideological foundation of these proposals was the denial of \textit{favor rei}, in order to oppose the liberal individualist guarantism, thus fostering the defence of society, which is prominent, compared with that of the single individuals.\textsuperscript{18}

A further attack to the principle of the presumption of innocence was made by the technical-juridical school, in the form of a merely logical-formal reasoning, which on the contrary implied a real ideological option.\textsuperscript{19} No principle, even the one of innocence presumption, could have any importance if it was not implemented within the positive law, as well as such principle was thought not to be able to hinder the application of the objective rules that denied it.\textsuperscript{20} The real ideological nature of this approach clearly emerged in the affirmation of penal rules as being not meant for the protection of innocents, but for the prevention of criminal offences.\textsuperscript{21} The guarantist nature of the innocence presumption, then, was so undermined, that this principle was considered to be paradoxical and irrational,\textsuperscript{22} often denied by the positive law, which on the other side legitimated the different principle of the presumption of non guilt, the meaning of which is that the defendant could not be presumed either in-

\textsuperscript{10}Carrara (1881), p. 17 et seq.; Carrara (1859-1907), p. 276 et seq.
\textsuperscript{11}Lucchini (1905), p. 12 et seq.; Lucchini (1886), p. 245 et seq.
\textsuperscript{12}Carrara (1874), p. 47.
\textsuperscript{13}Carrara (1874); Dominioni (1985), p. 217.
\textsuperscript{16}Garofalo, 1892: p. 199 et seq.; Ferri (1900), p. 728 et seq. In the positivist school, for a position more favourable towards the presumption of innocence, see Florian, 1914: p. 118 et seq.
\textsuperscript{17}Garofalo (1891), p. 350, p. 407.
\textsuperscript{18}As regards the critical attitude of the Spanish doctrine towards the Italian positivist school, see Dorado Montero (1894), \textit{passim}; Dorado Montero (1889), p. 19 et seq.; Amor Neveiro (1899), p. 31 et seq.; Aramburu Zuloaga (1887), \textit{passim}.
\textsuperscript{20}Longhi, 1921: p. 90.
nocent or guilty. It is then evident that the value of the presumption of innocence changes according to the ideology ruling within a certain historical context. In the second postwar period this led the Constituent to take a clearer stand, in Italy, in favour of the presumption of innocence, which has been instead watered down in the weaker compromissory formula—that of non guilt up to the final conviction, referred to by art. 27, par. 2, Const. This has given place to different interpretations, some of them fundamentally consistent with the previous positions of the technical-juridical school, according to which the defendant finds himself in a “neutral” position, not of presumption of guilt, of mere non guilt.

The above brief excursus shows that the guarantist value of the principle has a double effect: both as a rule for dealing with the defendant, which excludes or reduces the possibility of his personal freedom; and as judgement rule, which imposes the burden of proof by the prosecution and the acquittal in case of doubt. In the latter sense, the presumption of guilt may have important consequences also on the substantive penal law, as Carrara had already guessed as regards those incriminating rules built up in order to presume elements of the type of offense for which the defendant is indicted, without any necessity for the prosecution to prove their existence.

2. The Rule of Evidence for the Presumption of Innocence in Some European Legal Systems

The two “cores” of the presumption of innocence seem to have a different historical-cultural origin: as rule for dealing with the defendant, within the legalitarian principle of the continental illuminists; as judgement or evidence rule, within the pragmatism of the Anglo-Saxon judiciary gnoseology. Even if the ranges of action are well distinguished, from a rational point of view the link between the two stages seems quite clear, since that such presumption implies, from one side, that punishment must follow the conviction sentence and, on the other side, that the liability must be proved by prosecution in the ways provided by law.

2.1. Great Britain

In common law systems the principle is historically linked to the evidential field

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23Mortara, 1915: p. 153; Leone (1937), p. 357; Sabatini (1931), p. 33. Within this context in Italy the repudiation of the principle by the fascist legislator in the 1930 was expected. He considered the presumption of innocence “absurd” and a product of the “old” illuministic ideals; see Rocco, 1929: p. 22; Sermonti (1943), p. 322 et seq.

24Paulesu (2009), p. 30 et seq.

25Manzini (1952), p. 202 et seq.; Leone (1961), p. 207; Siracusano, 1961: p. 733; Lozzi (1968), p. 10; Ghiara, 1974: p. 73 et seq. The ambiguity of the constitutional formula, after all, has also legitimated many attempts of restoration of the principle—which can be shared in the light of a spirit of deep change that has inspired the Italian Constituent—, aiming at a more guarantist application of it, by the removal of the distinction between the presumption of guilt and the presumption of innocence; see Malinverni (1972), p. 472; Bellavista, 1976: p. 84; Illuminati (1979), p. 28; Dominioni (1985), p. 239; Paulesu (2009), p. 51 et seq.

26Carrara (1874), p. 47.


28For a rapid comparative review at an European level Lazerges, 2004: p. 125 et seq.
and the famous formula of the presumption of innocence, up to a contrary proof beyond any reasonable doubt.\textsuperscript{29} In Great Britain, the famous decision of the \textit{House of Lords, Woolmington vs. Director of Public Prosecutions} dating back to 1935, has established the rule according to which the prosecutor is bound to demonstrate the guilt of the defendant, failing which he cannot be convicted.\textsuperscript{30} Although the above said decision deals with this issue only in an incidental way, the principle is undisputed and by now belongs to that juridical culture,\textsuperscript{31} so much so that such decision has also influenced the American jurisprudence, being the model for the other famous sentence of the Supreme Court of the United States, \textit{In re Winship} dating back to 1970, according to which, in order to consider the defendant guilty, each “essential element” of the offense must be proved, beyond any reasonable doubt.\textsuperscript{32}

In Anglo-Saxon legal systems, then, the presumption of innocence is above all linked to the burden of proof (\textit{legal burden}) falling upon the prosecution, in the sense that the jury must be convinced, without any reasonable doubt left.\textsuperscript{33} The \textit{legal burden}, therefore, identifies the party upon which the burden of persuading the jury falls, while the \textit{evidential burden} usually falls upon the party bound to raise a question for the acquittal of the defendant or to demonstrate his innocence \textit{prima facie}, a burden that in some cases can be ascribed to the defendant, while the \textit{legal burden} always falls only upon the \textit{prosecutor}.\textsuperscript{34}

Since it is known that in the English legal system there is no written Constitution, the presumption of innocence has not got this “coverage” rank of principle of primary importance. Notwithstanding this, the approval in 1998 of the \textit{Human Rights Act}, being in force since 2000, has caused a “selective” inclusion within the English legal system, of the European Convention for the protection of human rights.\textsuperscript{35} One of the possible implications is the influence on the English penal law of art. 6, par. 2, ECHR, as regards the presumption of innocence, above all in some fields where more evident conflicts emerge.\textsuperscript{36}

A possible conflict with the principle under discussion regards the burden of proof that in Great Britain can concern some elements of certain offenses.\textsuperscript{37} According to the ECHR principle included into the English system and the power of adaptation to the same ECHR, recognized by art. 3 of the \textit{Human Rights Act},

\textsuperscript{29}\textsuperscript{For a review of the presumption of innocence in England and more in general in the systems of common law, Stuckenberg (1997), p. 253 et seq. In such systems the application of the principle also in relation with the treatment of the defendant, cannot be excluded. Such treatment is perhaps less important in consideration of the importance that in those systems the Habeas Corpus has got to prevent abuses against personal freedom; on the subject Roberts & Zuckerman (2004), p. 329, reference nr. 6; Gambini Musso, 1991: p. 58 et seq.}
\textsuperscript{30}\textsuperscript{Roe (1999), p. 12.}
\textsuperscript{31}\textsuperscript{Roberts & Zuckerman (2004), p. 328.}
\textsuperscript{32}\textsuperscript{Allen, 1980: p. 321 et seq.; Dripps, 1987: p. 665 et seq.}
\textsuperscript{34}\textsuperscript{On the distribution of the evidential burden as “technique of risk allocation” we refer to Zuckerman (1989), p. 105 et seq. On the distinction between “legal burden” and “evidential burden”, Munday (2015), p. 65 et seq.}
\textsuperscript{35}\textsuperscript{Palazzo & Papa (2013), p. 221 et seq.}
\textsuperscript{36}\textsuperscript{Sullivan, 2005: p. 195 et seq.}
\textsuperscript{37}\textsuperscript{Stumer (2010), \textit{passim}; Tadros & Tierney, 2004: p. 402 et seq.}
the House of Lords in some cases has upturned, in a sense favourable to the defendant, the provision of a burden of proof falling upon him by law.38

In this specific case, the claimant had been convicted for the possession of drugs for the purpose of pushing, since that the police had found him holding a big bag containing two kilos of cocaine, in infringement of the section 5.3 of the Misuse of Drugs Act dating back to 1971. The section 28 of the same law, on the other hand, provided the burden for the defendant, to prove that he did not think, he did not suspect, nor had any reason to doubt that they were drugs forbidden by law. In the first degree of judgement the defendant had defended himself by affirming that he did not know nor had any reason to think that in the big bag there were drugs. But the Judge had given directions to the jury about the fact that the prosecution had to prove the only possession of the big bag and, in this case, of the cocaine, thus leaving to the defendant the burden to prove that he did not know what the big bag really contained. The House of Lords has considered that this burden of proof violates the presumption of innocence guaranteed by art. 6.2 of the ECHR, and has adopted an adaptive interpretation of section 28 of the Misuse of Drugs Act, in the sense that such rule imposes a mere “evidential” and not a real burden of proof falling upon the defendant. For him it is enough to sustain not to have been aware of the drug quality of the substances that he possessed, thus giving place to the burden by the prosecution to prove otherwise.39

The approach of the English courts has been, on the contrary, more cautious and conservative as regards the different hypotheses of strict liability, that is of objective liability, which, failing a system of administrative offenses, the Anglo-Saxon law continues to punish, without being necessary that the prosecution proves the intention or the knowledge or the recklessness or the negligence of them.40 The English judges have denied that in these cases there is a violation of the European Convention.41 Also reminding to the famous and ambiguous sentence dating back to 1988 by the European Court of Human Rights in the case Salabiaku vs. France, the Anglo-Saxon jurisprudence has concluded that the types of offenses punished as mere material violations not accompanied by any intention or negligence, are not in contrast, as such, with art. 6, par. 2, ECHR, which, then, would not forbid any element of the type of offense, if the latter is

38See House of Lords, Judgments (On Appeal from the Court of Appeal, Criminal Division), case Regina vs. Lambert, July 5th 2001, UKHL 37, in <https://www.publications.parliament.uk/>, or Criminal Law Review (CrLR), 2001, p. 806 et seq.
41See House of Lords, Judgments (On Appeal from the Court of Appeal, Criminal Division), case R. vs. G., March 5th, 2008, UKHL 37, in <https://www.publications.parliament.uk/>; House of Lords, Judgments - Attorney General’s Reference nr. 4 of 2002, (On Appeal from the Court of Appeal, Criminal Division), case Sheldrake vs. Director of Public Prosecutions, October 14th 2004, UKHL 43,
kept within reasonable and not arbitrary limits. The possibility of designing types of offense with some elements, in some way presumed, which must not be proved by the prosecution, is admitted, since the presumption of innocence would not also imply a special substantial content of the penal law, that is the necessary description of some objective and subjective elements of the incriminated fact.

2.2. Germany

In some systems of civil law the presumption of innocence does not always receive an explicit internal normative recognition, nevertheless this has not avoided, anyway, the principle to be unconditionally included also within these legal systems. In Germany, for example, the presumption of innocence (die Unschuldsvermutung) is implicitly deduced from the principles of the Constitutional State that are “republikanischen, demokratischen und sozialen” according to art. 28 of the Grundgesetz. The German procedure, as regards the proof, is ruled by the principle of the investigation, which allows the judge to become convinced, within certain limits of rationality, without being bound by the declarations received. The judge, on the other hand, in order to convict the defendant, is thought, according to the principle of the free evaluation of the proof (der Grundsatz der freien Beweiswürdigung, § 261 Strafprozeßordnung - StPO), to be convinced without any doubt, since the latter is in favour of the defendant. The German penal trial is not of “parties” and if, from one side, the prosecution is charged with extending its investigations to the elements being favourable to the defendant (§ 160, II, StPO) as it also happens in other legal systems, where the trial is considered “of parties”; on the other side the judge himself has to extend his research to any element of proof being relevant for his decision (§ 244, II, StPO). The burden of proof (die Beweislast), then, does not only fall upon the prosecution, since the principle of the search of the “tangible truth” by the judge is implicitly acknowledged.

One of the issues in Germany that seems to cause some problems linked to the presumption of innocence, is that concerning the criminal offenses of abstract or presumed danger, described as “typically” dangerous, without the proof of

\[\text{In such countries, like Germany and Belgium, the principle of the presumption of innocence and the related corollaries, like that of the in dubio pro reo, are directly derived from the international sources, like art. 6, par. 2, of the ECHR. See Degenhart (2014), p. 176 et seq. For an analysis of the principle of the presumption of innocence in the jurisprudence of the ECtHR, with special reference to the German system, see Barrot, 2010: p. 701 et seq.}\]
\[\text{For a wide analysis of the presumption of innocence in Germany, Stuckenberg (1997), passim, spec. p. 46 et seq. For a comparison with France, Henrion, 2005: p. 1031 et seq.}\]
\[\text{Juy-Burmann, 2001: pp. 212-213.}\]
\[\text{Graul (1991).}\]
dangerous event being required\textsuperscript{55}: for example § 325 par. 2 and §§ 326, 327, 328, 329 StGB, on the subject of the protection of the environment.\textsuperscript{52} Since the harm principle is in some ways unknown to the German doctrine,\textsuperscript{53} the question has been risen with reference to the principle of guilt\textsuperscript{54}, also because the author of the conduct may act without guilt and intention of causing the danger itself.\textsuperscript{55} One of the possible solutions tried to make these types of offense be conforming with the principle of guilt, has been that of admitting the proof of lack of danger in the conduct concretely considered.\textsuperscript{56} By this way of reasoning, it has been replied, these types of offense cases would be transformed by an interpretation artifice, into offenses of concrete danger.\textsuperscript{57} German jurisprudence in some cases, however, by using interpretation, tends to refuse abstract danger, thus changing the rules as regards types of offense of concrete danger.\textsuperscript{58}

2.3. Belgium

The principle of the presumption of innocence not even in Belgium is acknowledged by an internal rule, either ordinary or constitutional, but is derived from art. 6, par. 3, ECHR.\textsuperscript{59} Then the doctrine and jurisprudence consider the principle being fully effective in the internal law.\textsuperscript{60} As regards the burden of proof, also in Belgium the principle of the free intime conviction of the judge is valid and doubt is favourable to the defendant.\textsuperscript{61} According to the Belgian Court of Cassation, on the other hand, the presumption of innocence implies that the defendant is not bound to even prove the truth of the justification alleged by him, if the latter is not deprived of any credibility.\textsuperscript{62}

In the legislation of this country, types of offense exist that, even if they invert the burden of proof falling upon the defendant, they are not considered to be in contrast with the principle of the presumption of innocence.\textsuperscript{63} In Belgium, then,
also by reminding to the ECtHR jurisprudence, some presumptions on the fact, can be used as proof, not excepted the possibility for the defendant, to prove the contrary, without this causing the violation of the rights of defence.\textsuperscript{64} For example, as regards some criminal offenses committed while driving, when the driver has not been identified at the time of the infringement, art. 67 bis of the law on road circulation\textsuperscript{65} provides a presumption of innocence to be proved by by the owner of the vehicle.\textsuperscript{66} The rule dismisses the burden of proof being traditionally borne by the registered owner of the vehicle, even if it can be refuted by providing a contrary proof or at least by causing a reasonable doubt.\textsuperscript{67} Other hypotheses are found as regards customs and excise duties, as well as regards the liability of the people participating into the commitment of the crime, for the objective aggravating circumstances.\textsuperscript{68}

\section{2.4. France}

In France\textsuperscript{69} the presumption of innocence has been given a fundamental value by the introduction to the Constitution dating back to 1958, which solemnly proclaims faithfulness to the human rights set out into the Declaration issued in 1789.\textsuperscript{70} Art. 9 of the latter, which is a manifesto of the Enlightenment principles, expressly mentions the principle, even if in a sense that is more referable to the treatment reserved to the defendant.\textsuperscript{71} The principle—in a global sense, and with reference also to the corollary \textit{in dubio pro reo}—has been established again in the ordinary legislation, by including it, in 2000, into the preliminary art. 304, of the Code of Penal Procedure.\textsuperscript{72}

The presumption of innocence in France has been strongly associated with its function of evidential rule, from which also the rule \textit{affirmantui incumbit probatio} and the identification of the party on which the risk of the failed proof or of doubt falls back, that is the public prosecutor or the plaintiff (\textit{partie poursuivante}).\textsuperscript{73} It is the prosecuting party, which provides for the proof of the criminal offence made, in order to “\textit{établir tous les éléments constitutifs de l’infraction et l’absence de tous les éléments susceptibles de la faire disparaître}”.\textsuperscript{74}

Such \textit{charge de la preuve} undergoes some mitigation of the principle, because

\begin{itemize}
\item[\textsuperscript{64}] \textit{du Jardin}, 2003: p. 618, highlights the consistency of these Belgian rules with the jurisprudence of the ECtHR (case Salabiaku vs. France, October 7\textsuperscript{th} 1988, see \textit{below} and fn. 123).
\item[\textsuperscript{65}] \textit{Loi 16 mars 1968, n. 1968031601, Loi relative à la police de la circulation routière.}
\item[\textsuperscript{68}] \textit{Colette-Basecqz, 2008: p. 422 et seq., p. 427 et seq.}
\item[\textsuperscript{70}] \textit{Bernard, 2003-2004: p. 33 et seq.}
\item[\textsuperscript{71}] \textit{Ibidem.}
\item[\textsuperscript{72}] \textit{Pradel, 2003: \textit{passim.}}
\item[\textsuperscript{73}] \textit{Pradel (2004), p. 315 et seq.}
\item[\textsuperscript{74}] \textit{See \textit{Cour de cassation française, Chambre criminelle}, March 24\textsuperscript{th} 1949, Bulletin des arrêts de la Cour de cassation. Chambre criminelle (Bull. crim.), n. 114.}
\end{itemize}
of the role of the French penal judge and of the traditional principle of the *in-
time conviction*.\(^{75}\) As regards the first aspect, the reference is to the judge’s ex-
amining power of the tangible truth;\(^{76}\) as regards the second aspect, the reference
is, instead, to the circumstance for which the law does not require the judge to
explicit, what supports his conviction, nor it fixes any rule from which to derive
the adequacy of a proof, but it only requires the judge to ask himself about which
impression the proofs collected have left in the depth of his conscience.\(^{77}\) These
two aspects, can practically shift the balance of the burden of proof, not only for
the unofficial examining power of the judge, but also because the defendant, in
consideration of the unforeseeable character of the *in-time conviction*, will be
spurred to a defence of himself not merely passive (that is waiting for the prose-
cution to fulfil its task), but more active, that is aiming at introducing new evi-
dence for the defence.\(^{78}\)

In France the prosecution has to provide both the proof of the *matérialité de l’infraction*, and that of the *culpabilité du suspect*.\(^{79}\) In the first sense, the proof
concerns the tort (*acte répréhensible*, both action and omission) and its accesso-
ries, such as circumstances, and obviously the identity of the author of the tort.
Also in this system, inculpatory rules exist waiving the principle of the presump-
tion of innocence and of the burden of proof falling upon the prosecution.\(^{80}\) For
example, as regards *proxénétisme*—aiding and abetting of prostitution punished
by art. 225-5 of the Penal Code—art. 225-6 of the Penal Code provides the same
punishment also for whom cannot explain the resources he uses to keep his lifestyle, if he lives or has got an usual relationship with one or more people prac-
ticing prostitution.\(^{81}\) Then we have today this wide range type of offense, re-
ferred to by art. 321-6 of the Penal Code, introduced in 2006, which today pun-
ishes who cannot justify the resources corresponding to his lifestyle or he is not
able to prove the origin of his possessions, if he has got an usual relationship
with one or more people committing crimes punishable with at least five years of
imprisonment.\(^{82}\) Other examples exist as regards the exploitation of begging,
type of offence included in 2003 (art. 225-12-5 of the Penal Code, par. 2), as well
as fines for the breach of rules about road circulation, imposed on the registered
owner of the vehicle, unless the latter provides information for the identification
of the real author of the offense (artt. L. 121-2 and L. 121-3 *Code de la route*).\(^{83}\)

These penalties on road circulation have been also submitted to the judgement

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\(^{75}\)Stéfani & Levasseur (1962), p. 276 et seq.

\(^{76}\)Art. 81, par. 1, of the Frech Code of Penal Procedure; in relation to the powers of the judge during
the proceedings, see artt. 283, 397-2, 463 and 538. On the subject see Dervieux, 2001: p. 136.

\(^{77}\)Art. 427, par. 1, of the French Code of Penal Procedure; see also art. 353. Refer again to Dervieux,

\(^{78}\)Stéfani & Levasseur (1962), 276 et seq.

\(^{79}\)Mathias (2007), p. 30 et seq.

\(^{80}\)For different analyses of some “waivers” of the principle of the presumption of innocence in the
French legal system, see the following different works by Roussel (2010); Delga (2008); Stilinovic
(2003).

\(^{81}\)Ouvrard (2000); in perspective comparatist Delmas-Marty & Mingxuan (1997), p. 73 et seq.

\(^{82}\)Daury-Fauveau (2010).

\(^{83}\)Cere, 2003: p. 2705 et seq.; Mesa, 2010: p. 11 et seq.
of the *Conseil constitutionnel*, which, even if from one side has reaffirmed, as a principle, the prohibition of presumptive forms of penal liability, on the other side it has admitted the exceptional possibility of providing forms of torts punishable with fines, based on presumptions, in those situations in which facts make the responsibility of a certain individual very probable. It has specified that presumption cannot be absolute and that anyway the law must guarantee defence rights.84

Also waivers exist, of jurisprudential derivation, of the principle of innocence presumption, within the context of the proof of the *éléments psychologiques*:85 for example as regards customs offenses,86 or *mala fides* (*mauvaise foi*) in press offenses87 or *abus de biens sociaux* (art. L241-3, 4°, L242-6, 3°, *Code de commerce*).88

### 2.5. Spain

The presumption of innocence is a constitutional principle in Spain too, it is established by art. 24, par. 2 of the fundamental Charter dating back to 1978.89 From the point of view of the burden of proof, presumption is obviously considered *iuris tantum* and can be overcome only by the taking of evidence of an incrimination kind, according to the necessary procedural guarantees.90 Both the indictment character (*formal or mixto*) of the Spanish penal trial also after the reform carried out in 2002,91 and the necessity that the investigations are extended to all facts, circumstances and guilt (art. 299 *Ley de Enjuiciamiento Criminal*), and above all the principle of presumption of innocence clearly show that the burden of proof falls upon the prosecution.92

According to the *Tribunal Constitucional de España*, the presumption of innocence, as evidential rule, implies that the burden of proof falls solely upon the prosecution, without a *probatio diabolica* of the negative facts being requireable by the defence.93 The proof falling upon the prosecution, again according to the Spanish Constitutional Court, is that aiming at proving the fact subject of incrimination and the circumstances characterizing it, the causal relationship, as well

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84See *Conseil constitutionnel*, decision nr. 99-411 DC, June 16th 1999, in <www.conseil-constitutionnel.fr>. The Court has admitted “reasonable” waivers of the presumption of innocence, considering it liable to be “balanced” with the protection of the public order. On the subject see Mayaud, 1999: p. 589 et seq. Another type of offence in the French legal system, art. 392, par. 1, *Code des douanes*, has been submitted to the examination of the ECHR for infringement of the principle of the presumption of innocence, being the subject of the above mentioned decision *Sabiabu vs. France*, dated October 7th 1988, which will be later better discussed (fn. 123).

85For some examples of “faute présumée” under the previous French Penal Code in force, see Stéfani & Levasseur (1962), §§ 298-300.


89For a review of the presumption of innocence in Spain, Stuckenberg (1997), p. 230 et seq.

90Montañés Pardo (1999) p. 82.


as the subjective elements and the chargeability.94

The presumption of innocence in Spain, is influenced, on one side, by the principle of the free evaluation of the proof by the judges (art. 117.3 Constitución española and art. 741 Ley de Enjuiciamiento Criminal); on the other side by the principle of the “mínima actividad probatoria”95 suitable for overcoming the presumption of innocence and carried out with a scrupulous observation of the constitutional and fair procedural guarantees.96 By the free evaluation of the proof the judge is released from legal rules for obtaining his conviction and the idea of adequacy of the proof has not got a quantity value, because the judge gets to conviction about the existence or non existence of the punishable act, regardless of the type and amount of the proofs collected. This, however, does not mean that the free evaluation of proof is limitless. Spanish judges are bound by the laws of logic, of experience and of scientific knowledge,97 so that the evaluation of the proof evidence can be controlled by the right interpretation of art. 741 Ley de Enjuiciamiento Criminal, following the constitutional principles, such as the presumption of innocence (art. 24.2), the obligation of sentence motivation (art. 120.3), as well as more in general, the guarantees against “la arbitrariedad de los poderes públicos” (art. 9.3).98

The principle of the presumption of innocence has been also used to give a character of concreteness to some infringements that otherwise could be only formally subject to incrimination. It is the type of offense concerning driving under the effect of alcoholic substances referred to by art. 379 Código penal, being previously in force, for the description of which, according to the Tribunal Constitucional, in the light of the presunción de inocencia, the only element of the ingestion of alcohol was not enough, but it was also necessary to prove that in this concrete case such ingestion had caused effects on the driver and, then, an offense to the protected legal asset, that is a real danger for the safety of road circulation.99 In the version of the rule being previously in force, the type of offense was seen from the point of view of the driving condition “bajo la influencia de drogas tóxicas, estupefacientes, sustancias psicotrópicas o de bebidas alcohólicas”. Today’s version, being in force since 2007, adds, instead, that “en todo caso será condenado con dichas penas el que condujere con una tasa de alcohol en aire espirado superior a 0,60 miligramos por litro o con una tasa de alcohol en sangre superior a 1,2 gramos por litro”. We can say, therefore, that in today’s type of offense the rigour of the proof of a dangerous situation caused, has been

95Miranda Estrampes (1997), passim.
96Tribunal Constitucional de España, Sentencia nr. 84/1981 dated July 22nd 1981, in <www.tribunalconstitucional.es>.
97The idea of Roxin (1998), § 53-13 has been taken up.
We must then remember that the Spanish jurisprudence makes a distinction between presumed and abstract danger. The first hypothesis occurs when a conduct objectively corresponding to the type of offense is considered criminal as such, without the possibility of a different assessment or of a contrary evidence. This category is considered to be in conflict with the principle of the presumption of innocence. The abstract danger, instead, takes place when the legislator designs a type of offense before it is committed, where the entity being the holder of the legal asset put in danger is not pre-determined. In order to integrate this type of offense, it is however necessary that such danger, as risk of a future offense to that legal asset, is really existing in the concrete conduct, in order that “ésta incluya en sí el contenido de antijuridicidad penal y la adecuación al tipo necesario para su ilicitud penal”. Such approach falls within a doctrinal context in which “the typical characteristic of a type of offense without offense is a characteristic empty of its typical value, and being, therefore, without penal relevance. In this context the Tribunal Constitucional has clearly linked the harm principle to that of the principle of legality, in order to mean that the typical character must be always the expression of a harm or of danger for legal assets.

3. The Role of the Presumption of Innocence in the Supranational Cohesion of Legal Systems

The principle of the presumption of innocence has got such a value such as to be acknowledged in all the International conventions concerning fundamental rights, first of all in art. 11, par. 1 of the Universal Declaration of human rights adopted in 1948 by the Assembly of the United Nations. Besides this, it was affirmed in the above said art. 6, par. 2, of the European Convention of human rights dating back to 1950, as well as in art. 14, par. 2 of the International Convention on civil and political rights, approved by the Assembly of the United Nations in 1966. Likewise—as regards war crimes against mankind, genocide and crimes against peace—in the Statute of Rome of the International penal
Court approved in 1998,\textsuperscript{108} art. 66 affirms this principle paying special attention to the burden of proof, specifying that the burden of proving the guilt of the defendant falls upon the prosecution, while the assessment of the guilt itself, beyond any reasonable doubt,\textsuperscript{109} falls upon the Court; art. 67, moreover, forbids the inversion of the burden of proof or of the burden of rebuttal.\textsuperscript{110} An explicit reference to the presumption of innocence and the evidential standard of the beyond any reasonable doubt principle, also exists in the conclusions of the tenth Congress of the United Nations, held in 2000, about the prevention of crimes and the treatment of transgressors.\textsuperscript{111} The principle, moreover, is referred to by art. 48 of the Charter of the fundamental rights of the European Union and by art. 108 of the European Constitution.\textsuperscript{112} Finally, it is to remember that the Treaty of the European Union, also as modified by the Treaty of Lisbon signed in 2007, establishes that the fundamental rights guaranteed by the ECHR, belong to the law of the Union, since they are general principles, among which there is also the presumption of innocence.\textsuperscript{113}

In these provisions the presumption of innocence is described in “positive terms”, without ambiguities, with formulas being sometimes consistent with and clearly referred to the principle intended as judgement rule.\textsuperscript{114} This confirms the hypothesis according to which any ambiguity deriving from the dichotomy guilt/innocence, made for example by some of the above said interpretations of art. 27, par. 2 of the Italian Constitution, disappears.\textsuperscript{115}

The “Green Paper on the presumption of innocence” presented by the Commission of the European Communities in 2006, shows the will to know if such principle is intended in the same way in the whole European Union.\textsuperscript{116} The Commission, within the context of the harmonization of the penal law, has tried to identify the differences of interpretation and application of the presumption of non guilt in the member States, in order to suggest minimum shared rules avoiding differences between the levels of guarantees offered by the different States.\textsuperscript{117} For this purpose the “Green Paper” has also dealt with the circumstances for which, in case they occur in different countries, the inversion of the burden of proof or its modification, is admitted.

\begin{itemize}
\item \textsuperscript{108}For an analysis of the principle of the presumption of innocence in the rules concerning special penal international Courts, see Klamberg (2013), p. 122 et seq.
\item \textsuperscript{111}Wien, 10-17 April 2000, published by the Department of Public Information of the United Nations, DPI/2088/A, in <www.unric.org/it>.
\item \textsuperscript{114}Paulesu, 2008: p. 127.
\item \textsuperscript{115}Cfr. Illuminati (1979), p. 26 et seq.
\item \textsuperscript{116}The final “Green Paper”, Bruxelles, April 26\textsuperscript{th} 2006, COM (2006) 174 can be found in <eur-lex.europa.eu>; Bassiouni (2008), p. 264; Ruggieri, 2008: pp. 514-515.
\item \textsuperscript{117}Canestrari & Foffani, 2005, in particular the contributions of Picotti, Bernardi, Silva Sánchez, Tiedemann, Lüderssen, Vervaele, p. 325 et seq.; Bernardi, 2007: p. 193 et seq.
\end{itemize}
Then we can say that the principle of the presumption of innocence—because of its solid ideological core shared by the old continent influenced by the Illuminist thought—, aims at playing a leading role in the harmonization of the European systems, as the natural guarantee of whom undergoes penal proceedings. This allows to create a cohesion at a supranational level, both for the common law, and for the civil law systems following a prosecution procedure as well as an investigation procedure.\footnote{118}{Paulesu, 2008: p. 126.}

### 4. The “Reasonable” Waivers of the Presumption of Innocence by the European Jurisprudence

Within this context it is important to notice how the principle of the presumption of innocence is intended by the European Court of human rights and then to discover its application aspect as evidential rule.\footnote{119}{Lautenbach (2013), p. 126; Barrot, 2010: p. 701 et seq.} This Judge has affirmed that the burden of proof falls upon the prosecution, in the sense of the production of proofs suitable for conviction, while doubt is favourable to the defendant.\footnote{120}{European Court of Human Rights (ECtHR), Barberà, Messegué e Jabardo v. Spagna, sentence December 6th 1988, para. 77, in <http://hudoc.echr.coe.int/>.} Besides these statements of principle, from such jurisprudence more conflicting questions emerge, in which in some way the burden of proof does not fall solely upon the prosecution.\footnote{121}{On the subject of the reversal of the burden of proof in relation to the ECHR jurisprudence, see Munday (2015), p. 85 et seq.; Jackson & Summers (2012), p. 223 et seq.; Emmerson (2012), p. 670 et seq.; Stumer (2010), p. 99 et seq.; Bernal del Castillo (2011), pp. 99-100.}

A first area of interest concerns the kinds of objective liability, in which the prosecution has to solely prove the typical tangible conduct, but not the mens rea as well.\footnote{122}{Munday (2015), p. 102 et seq.; Emmerson (2012), p. 697-698.} According to the above mentioned sentence Salabiaku vs. France, the member States may, in theory and under certain conditions, establish the punishment of an objective or tangible fact as such, regardless of the proof of the intention or of negligence.\footnote{123}{European Court of Human Rights (ECtHR), Salabiaku vs. France, sentence dated October 7th 1988, para. 28; Id., Pham Hoang vs. France sentence dated September 25th 1992, para. 33; both of them can be found in <http://hudoc.echr.coe.int/>.} Once the proof of the tangible fact has been received, for these types of offense a kind of legal presumption of existence of the subjective element would exist. The European Court on its side, has specified that such presumption must be considered as applicable into reasonable limits, always taking into account the degree of seriousness of the offense and the rights of the defence to be respected.\footnote{124}{Jackson & Summers (2012), p. 217 et seq., spec. 225 et seq.; Stumer (2010), p. 98 et seq.; Jayawickrama (2002), p. 536; Plowden & Kerrigan (2002), p. 298; Vogel, 2007: p. 987; Isser (2002), p. 742 et seq.; Cuykens, Holzapfel & Kennes (2015), cap. II, par. II.3.} In this way a mere balance in terms of proportion is made, in order to find out if the sacrifice of the guilt principles and of the presumption of innocence is reasonable compared with the purposes of criminal policy.\footnote{125}{European Court of Human Rights (ECtHR), Janosevic v. Svezia, sentence dated July 23rd 2002, para. 101, which can be found in <http://hudoc.echr.coe.int/>.} The Court has then given legitimacy limits to these types of objective
liability, without identifying them clearly, thus affirming at the same time, the non opportunity of limiting the range of art. 6, par. 2, ECHR, to a mere formal and unconditioned reference to any assumption of typical character of the offense freely established by the laws of the member States. According to this jurisprudence, then, the principle of innocence is not foreign to the presumptions in fact or in law that can be found in penal laws—with all the consequent implications of substantive law—, but it imposes to the member States to keep them within reasonable limits.\textsuperscript{126}

Although the sentence “Salabiaku” is not easy to read and in some ways it seems ambiguous, it leaves space to implications of substantive law being typical of the presumption of innocence, with reference to the principle of guilt and to the limits fixed by the legislator on designing the incriminatory types of offense.\textsuperscript{127} It seems possible to affirm that the Court does not exclude the necessity of the existence of a \textit{mens rea} among the elements of the offense, but it shifts its attention above all as regards the probative aspect, considering it legitimate, within reasonable limits, that the legislator allows the implicit assessment of evidence by presumptions derived from the tangibility of the conduct.

The ambiguity of the decision and the shift of reasoning, as regards the assessment of evidence, are in some way typical of the role of guarantee of the ECtHR, which is more focused on the defence of the legal system and the principles of the member State, on the effectiveness of the protection of the rights acknowledged by the ECHR in concrete situations. This gives place to a jurisprudence based on cases which cannot be understood if it is separated from the practical case under examination.\textsuperscript{128}

In the sentence “Salabiaku”, in theory, affirmations that leave a margin of uncertainty are made, since it is stated, on one side, that the States can, under certain conditions, establish to punish a tangible fact, as such, deriving from a malicious or involuntary intent; on the other side, it is clearly stated that the presumption of innocence also involves substantive penal law, because otherwise “the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words “according to law” were construed exclusively with reference to domestic law”, a result considered to be incompatible with the purpose of art. 6, par. 2, ECHR.\textsuperscript{129}

The contingent case submitted to the ECtHR, then, has been solved by a judgement referring to the “denounced” rule (art. 392 \textit{code des douanes}), not in an abstract way, but practically, that is referred to its practical application, getting to the conclusion that there was no infringement of art. 6, par. 2, ECHR, because the French judges, even if the incriminatory rule made it possible, had not limited their action to an automatic presumption, as it was the case, but had

\textsuperscript{126}For some similarities with the hermeneutical approach of the Italian Constitutional Court, see Panebianco, 2015: p. 56 et seq.
\textsuperscript{128}Zagrebelsky, 2011: p. 69 et seq.
\textsuperscript{129}About critical comments on the sentence “Salabiaku”, Jeandidier (1991), \textit{La présomption d’innocence ou le poids des mots}, \textit{Revue de science criminelle et de droit pénal comparé}, p. 51 et seq.
also assessed a psychological element (élément intentionnel) in the concrete case. Although it is not clear whether such need of assessing the psychological element is limited to the procedural aspect (as restoration of the burden of proof falling upon the prosecution), or it can be extended to the “substantive” aspect (as a necessity of the subjective element of the penal liability), we can sustain that, even if we wanted to limit such need to the sense of the trial, a clear effect of it at the level of substantive law exists. This is only because, if a psychological element—even if it is not explicitly described in the type of offense—must be however assessed in conformity with the presumption of innocence, such an element implicitly helps describing the substantive case conforming, then, with the principle referred to by art. 6, par. 2, ECHR. This shows the fundamental role played by the presumption of innocence in the relationships between the substantive penal law and the procedural law, in order to avoid the exploitation of the former for a blind claim of effectiveness of the latter.

The question comes out again in another way, if we admit that in the assessment of the objective element we can solely rely on presumptions that can be derived from the tangible conduct. This possibility, according to the type of presumptions admitted, can hide ways of fictitious assessment and of elusion of the presumption of innocence. Even more so, after the sentence of the ECtHR “Sud Fondi vs. Italy” dating back to 2009, in which—even if not according to the presumption of innocence, but to the principle of legality referred to by art. 7 ECHR—the Court has acknowledged the value of guilt as a fundamental principle, establishing the necessity of a link of an intellectual kind between the tangible element of the offense and its author. If this lien moral must exist, it must be also the subject of procedural assessment, with the problems implied by this, if such assessment is carried out by presumptions or by the inversion of the burden of proof.

Besides the types of the so called objective liability, another problematic area of interest, which is in some way related to this, is that of the inversion of the burden of proof, which, under certain conditions, would be legitimated by the same argumentations of the above mentioned sentence “Salabiaku”. In excep-

134 See “Green Paper on the presumption of innocence” (fn. 116), p. 7. See also the conclusions of the General lawyer Yves Bot, presented on October 26th 2010 to the European Court of Justice (ECJ), joint cases C-201/09 P e C-216/09 P, (ArcelorMittal Luxembourg S.A v. Commissione europea), para 207, which can be found in <http://curia.europa.eu/>. Another problematic field in which, again according to the “Green Paper”, the burden of proof does not wholly fall upon the prosecution, is that of confiscation. On the latter issue, see Paulesu (fn. 114), p. 137 et seq.
tional cases, above all in the case of less serious offenses, the prosecution is required to prove that the defendant has had a certain conduct, while the defendant must prove a certain situation suitable for eliminating his liability. Such hypotheses are more controversial when the defendant is required to prove the absence of an element of the case (a subjective or objective element), which otherwise is assumed to exist, a burden that in theory would fall upon the prosecution.135

Similar positions have been assumed by the jurisprudence of the European Court of Justice too, which, besides underlining that the presumption of innocence has a wider range that has not to be limited only to a procedural guarantee,136 has also affirmed that the principle, as judgement rule, can be also applied to the infringement of the rules on the competition of enterprises, which can give place to the imposition of amends and penalties.137 The influences of the jurisprudence of the ECtHR are clear, since that, as regards the burden of proof, it is stated that presumptions can be admitted, provided that they are kept within reasonable limits.138 According to the European Court of Justice, for example, the presumption which does not overcome such limits is that in which the intention of the author of abuse of privileged information, is implicitly deduced by the tangible elements characterizing such infringement: this presumption is refutable and the rights of the defence are guaranteed.139

Just the inversion of the burden of proof, according to presumptions, has been recently dealt with by the European Commission in the directive proposal which is discussed in the following paragraph, with results that are, we anticipate it, disappointing.

5. The Weakening of the Principle in the EU Directive Proposal on the Presumption of Innocence

The proposal of a directive of the European Parliament and Council, submitted by the European Commission in 2013, aims at guaranteeing in all the member States, a consolidation of some aspects of the presumption of innocence, through a minimum level of protection of the same principle, on the assumption that the idea according to which the rights of the indicted individuals and defendants are

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not respected in any circumstance, deeply affects mutual trust and judicial cooperation.¹⁴⁰

The proposal, then, from one side considers only some aspects of the presumption of innocence which are mostly linked to the instruments of mutual recognition and judicial cooperation on penal matters; on the other side, according to the principle of proportionality, it keeps itself within the limits of what is considered the minimum element required to reach the above said goal at a European level, assuming as reference parametre of these minimum guarantees, what is established by the European Court for human rights.

From the point of view of what interests us here, the directive proposal, in art. 5, specifically deals with the burden and degree of proof, stating, in par. 1, that the member States have to ensure that the burden of proving the guilt of the defendant falls upon the prosecution, any possible powers of assessment of the facts officially exerted by the judge, excepted. Par. 3, instead, provides that the member States must guarantee acquittal in case of a reasonable doubt about guilt. But par. 2 establishes an exception to the principle, since that it legitimates those presumptions implying the inversion of the burden of proof, even if it specifies that such presumptions must be enough strong to justify such exception, and however they are always refutable by means of the proofs submitted by the defence being at least suitable for arousing a reasonable doubt as regards the guilt of the indicted or the defendant.

The directive proposal, reminding to the jurisprudence of the ECtHR, in particular the sentence “Salabiaku”,¹⁴¹ therefore admits the inversion of the burden of proof, considered to be compatible with the presumption of innocence provided that, it is specified in the report, certain guarantees are respected: in particular presumptions in fact or in law must be kept within reasonable limits and must be suited to the importance of the interests at stake.

The European Commission, then, takes the jurisprudence of ECtHR, as a model for the proposal, but it interprets it in a sense more open to waive the principle of presumption, not considering its ambiguities and the fact that—as it has been already anticipated—other statements of the court, if suitably used and systematically connected with each other, can have a different weight. Moreover the Commission has not considered that the decisions of the Court that have dealt with the issue, have always done it within that above said “concrete” perspective, with very specific details of the internal rules and of their practical applications carried out in the different Countries.¹⁴² Therefore it can seem ap-


¹⁴¹European Court of Human Rights (ECtHR), Barberà, Messegué e Jabardo vs. Spain, December 6th 1988; as well as Telfner vs. Austria, March 20th 2001, which can be found in http://hudoc.echr.coe.int/.

¹⁴²In this sense see the observations contained in the Working document on Strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur Renate Weber, 17 March 2014, pp. 4-5, in www.europarl.europa.eu.
proximate and risky to transform a very specific and case based jurisprudence into a rule that generalizes and legitimates legislative presumptions having the power of inverting the burden of proof, a rule that therefore does not suitably reflect the particular aspects of the jurisprudence of the ECtHR.

Moreover art. 5, par. 2 appears to be quite questionable and equivocal in the part in which it tries to impose a limit to admissible presumptions, limiting them solely to those of “sufficient importance”. This is an extremely undefined wording, which does not really limit States, and this vagueness may give place to disruptive internal rules being seriously detrimental to the principle of the presumption of innocence, and may have a paradoxical effect since that in a directive about presumption of innocence the opposite presumption of guilt is admitted.\(^{143}\)

The prospect emerging from the proposal under discussion appears, then, to be dominated by an idea of the penal system unbalanced in favour of the efficiency of the system to the detriment of individual guarantees. Such efficiency centered approach—being regardless of the intangibility of the single guarantees, and aiming, instead, at preserving a system in balance between public interest and individual rights—, allows dangerous discretion assessments, as regards the concrete effectiveness of guarantees. Notwithstanding the clause included in art. 12, which is meant for avoiding a weakening of the internal guarantees being in force in the member States—, the real risk is the development of the internal systems being more and more derogatory as regards the presumption of innocence. If the proposed rule is enforced, it is illusory to think that the legislator and perhaps even more the jurisprudence avoid its influence and are not tempted to imitate the erosion of the guarantees connected with the presumption of innocence.\(^{144}\)

6. The Presumption of Danger as Model of the Presumption of Guilt?

The above mentioned European directive proposal, in the part where presumption is always considered to be refutable, appears to be conforming with the typical approach to offenses of abstract danger related to the harm principle.\(^{145}\) If we want to avoid the undermining of the guarantist function of this principle, the offense against legal assets, should be always an element of the typical character of the offense.\(^{146}\) The consequence is that the unoffensive fact is not typical, or it is

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\(^{143}\) Mazza, 2014: p. 5.

\(^{144}\) For an analysis of the EU directive proposal on the presumption of innocence, in which certain amendments aiming at ensuring the conformity with the international rules on human rights, are suggested, see the document approved by the organizations “International Commission of Jurists” (ICJ), “Justice” and “Netherlands Committee of Jurists for Human Rights” dated March 2015, which can be found in <https://njcm.nl/>.


\(^{146}\) As regards differences and analogies, notwithstanding the heterogeneous ideological positions, between the Anglo-Saxon harm principle and the harm principle of the continent, see von Hirsch, 2002; p. 2 et seq.; Wohlers, 2002; p. 16 et seq.; Hefendehl, 2002; p. 20; Fiandaca & Francolini (2008), passim, and specifically the contributions of Cadoppi, 2008: p. 83 et seq., and of Wohlers, 2008: p. 125 et seq.; Francolini, 2008: p. 282 et seq.; Micheletti, 2013: p. 275 et seq.
such only seemingly, according to considerations that are only formalistic. The offense, even as a danger, should be then a necessary [at least implicit] element of the type of offense. This opens the debate about its evidence assessment and, in particular, about the question whether such an element can be the subject of presumption and if the latter can be overcome.

The propension towards the offenses of abstract or presumed danger is often determined by the difficulty of assessment of the causal connection between the conduct and the dangerous event, then the legislator releases the prosecution from this burden, through the presumptions of danger. The debate on the abstract character of danger has been developed specially in Germany, and Spain, the discussion is about whether to consider these presumptions relative or absolute, that is opposable or not during the trial. The theses affirming that they can be overcome derives from the above remembered distinction between abstract and presumed danger, and from the idea that the aporias emerging in the distinction between abstract danger and the harm principle, are not overcome if we do not renounce to absolute presumptions of danger, always admitting opposite evidence. This approach reduces the difficulties of proving danger, which falls upon the prosecution, leaving to the defendant the possibility of providing an exonerating circumstance aiming at proving that the relative presumption, in the concrete case has not been borne out by the facts, since that the conduct has not caused any danger. Some scholars specify that, in order to avoid the risk of the “return” of the probatio diabolica falling upon the prosecution, the absence of danger should not be only discussed, but really proved, since that the only doubt of abstract danger expressed by the legislator is not enough.

This thesis causes some perplexity about the observance of the presumption of innocence, which, together with the connected principle of the in dubio pro reo represents the transposition at the procedural level, of the function of guarantee of the penal law, because is necessary, within an integrated perspective of the penal system, that a suitable procedural model corresponds to the model of substantive law. The difficult application of the inversion of the burden of

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149 On the issues concerning the offenses of abstract danger, see the German literature in various works expressing different opinions Schmidt (1999); Graul (1991); Brehm (1973); Gallas, 1972: p. 171 et seq.; Schröder, 1967: p. 522 et seq.
151 On the offenses of abstract danger in the Spanish literature see a Vargas Pinto (2007); Romeo Casabona (2005); Cuesta Pastor (2002); Mendoza Buergo (2001); Corcoy Bidasolo (1999); Méndez Rodríguez (1993).
152 Supra fn. 102, nonché Fiore & Fiore (2004), p. 176 et seq.
155 As regards the connections between the presumption of innocence and the beyond any reasonable doubt criterium, see Stella (2001), p. 141 et seq.; Ronco, 2006: p. 89 et seq.
proof in crimes of presumed danger (reinterpreted in the sense of a necessary harm principle), derives from this, from a relative presumption which can be overcome. The solution offered gives space to perplexity when the defendant does not want or not manage to fully prove the lack of danger, a proof which could be really “diabolic”. If danger is an element, even implicit, of the type of offense, and if to the guarantist model of substantive law a procedural model and a model of fact assessment, being guarantist as well must correspond, the burden of proving the existence of this element should fall upon the prosecution; so, in case of doubt, the decision should be in favour of the defendant.

By a different reasoning (in terms of absolute but also relative presumption), we find an offense in re ipsa, in which the danger presumption prevails over the presumption of innocence and, then, of guilt, thus really weakening the range of constitutional and supranational principles imposing a penal, substantive and procedural system, focused on the guarantee of the defendant.

7. The Presumption of Fraud and Guilt, Other Examples of the Weakening of the Presumption of Innocence

Similar issues emerge from those hypotheses, which can be approximately defined as presumption of fraud or guilt, in which the legislator or the interpreter, designs a punishment regardless of the assessment of the elements meeting such criteria of subjective indictment.157 If the dolus in re ipsa is admitted, the will of a tangible fact, without the effective assessment of an intention of doing harm, would be enough.158 In these cases the structure of human conduct seems to be inextricably linked to a certain meaning, so that when the external behaviour is intentional, the action would implicitly contain that specific psychological datum.159 To accept such implicit forms of fraud, then, besides being in conflict with the principle of guilt, seems to be also in conflict with that of the presumption of innocence, since that the prosecution would be released from the burden of proving one of the fundamental elements of the type of offense.160

Similar considerations can be made as regards the so called presumed guilt, in which punishability is regardless of the assessment of the predictability or inevitability of the event, elements which on the contrary should always characterize the guilt itself.161 Penal liability, in these cases, is linked to the assessment of the

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160 As regards the issues concerning the assessment of fraud by the internal penal Court, Mezzetti, 2006: p. 340 et seq.; Pisani, 2001: p. 1372 et seq.

161 Gallo, 1964: p. 637 et seq.
mere tangible conduct, thus giving place to a kind of hidden objective liability. By accepting a guilt normative notion, it seems to be inappropriate to talk about presumption, as if the guilt were something existing in nature, acting as a parameter of reality or of fictitiousness of the related assessment. Since it is on the contrary, a normative criterion, the legislator himself cannot presume it, because he builds it, and, if anything, in some cases he does it in a way different from the general notion, a way which can also consist, this time, really, of the presumption of those elements that form the guilt itself, that is its predictability and inevitability. Presumption, then, is referred more exactly, to the elements of predictability and inevitability, not to guilt as such. But the fact remains that, by presuming predictability and inevitability—which are necessary elements of guilt, without which it does not occur—, also guilt is indirectly presumed.162

An example of presumed guilt may be the aberratio delicti,163 if we accept the thesis according to which, once the intention of committing a certain offense has been proved, punishability as for guilt of an event different from the intended one, would be regardless of the positive assessment of the predictability and inevitability of such event really occurred. By this reasoning a kind of guilt presumption would emerge, where the author is punished as if he had acted culpably, even if the assessment of guilt lacks.164

Another hypothesis of presumed guilt may be that of unintentional liability (according to artt. 43 and 584 of the Italian penal code), if we accept the interpretation according to which the event of death must be referred to a specific (or presumed) guilt, consisting of the violation of the same penal law on blows and injuries, that is of the violation of artt. 581 and 582 of the Penal Code.165 The supporters of this thesis get to the conclusion according to which the assessment of the mere causal connection between conduct and more serious events would be enough, since the guilt atomatically derives from the infringement of the basic penal rule. The necessity of guilt, is then, begging the question, because, ultimately, if unintention would be reduced only to a presumed guilt, we would end up again into a hidden form of objective liability.166

In such examples—and probably in all the other hypotheses of divergence between act intended and act carried out, in which the different event is charged as guilt—by accepting the above said thesis, we can say that the element of predictability is presumed, with all the implications as regards the violation of the presumption of innocence. This even if we accept the thesis according to which unforeseeable circumstances or force majeure would anyhow allow to exclude

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163 Maiwald (2009), p. 81 et seq.
penal liability in case the different events were unforeseeable or inevitable, since the burden of proving the unforeseeable circumstances or the force majeure, would fall upon the defendant. Then there would be a dangerous reversal of the burden of proof denied by the principle of the presumption of innocence.

8. Conclusions: The Presumption of Innocence as a Basic Principle Also of the Substantive Criminal Law

The above exposed hypotheses make us reflect upon the legitimacy of normative and interpretative models, aiming at considering some elements of the type of offense, being implicit in the tangible fact or to be assessed by presumptions, with a possible reversal of the burden of proof. The legitimation of such paradigms seems to be in conflict—regardless of the contrast with other principles—with the presumption of innocence. A non-fictitious application of such principle, in fact, imposes a burden of proof falling upon the prosecution which must cover all the “essential” elements of the offense, as it is also remembered by the famous and above mentioned sentence of the Supreme Court of the United States In re Winship.

The point is what we mean for “essential elements”, that is, are they freely determined by the legislator, or does essentiality impose limits to his discretionary power? The second alternative appears to be necessary, since it clearly highlights the effects of the presumption of innocence on the substantive penal law, according to an integrated perspective of the penal system which imposes a procedural model conforming with the guarantist model of substantive law. If the offense is that historical fact corresponding to a legal type of offence and is assessed according to the rules of the fair trial, it is evident that these rules would inevitably help to practically determine what the typical fact really is.

The proof that the prosecution should provide, then, should cover the whole penal disvalue of the fact, represented, in the legal systems of liberal democratic and lay inspiration, by the tangibility and harm principle of the conduct and by the guilt of the author. Rules or interpretations that allow a conviction without the assessment of the elements proving the above described penal disvalue, or that admit their fictitious assessment by some forms of presumption, seem to be in conflict also with the principle of the presumption of innocence.

When there are difficulties in the collection of proofs, the legislator tends to “relieve” the type of offence of elements that are essential and the penalty results to be the product of a proof which does not cover all that, according to the principles of a liberademocratic system, serve for showing a real penal disvalue, with effects which that allow to design, again from a probative point of view, the

169 D’Ascola (2008), passim.
170 Stella, 2004: p. 79.
substantive penal law. The above examined European directive proposal sides with this high efficiency model and could confirm those questionable legislative and interpretative choices that admit such forms of presumption or of reversal of the burden of proof. Such possibility involves predictable disruptive effects undermining the typical guarantees of the rule of law, first of all those represented by the harm principle and the principle of guilt.

With this, obviously we do not want to neglect the reasons for prevention on which these efficiency models are based, but the argument always goes back to the ideological issue set out in the *incipit*, that is the conflict between social defence and individual guarantees, in order to understand if the latter can be sacrificed and to what extent. Such opposed needs, on the other hand, could be balanced regardless of the sacrifice of the individual guarantees, by finding a point of balance which can preserve the harm principle and the principle of guilt, on one side, and on the other side, that of the presumption of innocence. In the cases in which the proof falling upon the prosecution can ultimately result very hard to demonstrate, thus compromising prevention needs, it would be necessary to identify the way to “lighten” such burden, without frustrating the presumption of innocence and the beyond any reasonable doubt criterion. Such a balance could be found in the normative use of presumptions, of course, neither absolute or relative presumptions, but rather simple presumptions. The latter ones, intended as probabilistic rules, fall outside the issue of the burden of proof, because, like any other natural proof, are not useful for providing *ex ante* legal parameters for the formal definition of the fact, but rather for helping the judge to become convinced in the concrete case, without any inversion of the burden of proof.\(^\text{171}\)

Apart from this, we must observe that the principle of the presumption of innocence cannot be conceived as a weak principle, it cannot be confined to the narrow space of the rules being merely formal-procedural, but it is far-reaching, thus becoming a necessary element of the integrated model of penal system of any social rule of law inspired by the typical liberal democratic guarantees. As regards again the field of the harm principle and the principle of guilt, these guarantees would not have any concrete meaning if they are not accompanied by the presumption of innocence in its right sense, and, vice versa, the latter would not have any sense as well, if it is separated by the harm principle and the principle of guilt.

The “guilt”, being the subject of assessment with the burden of proof falling upon the prosecution, then, cannot be intended in a reductive way as any form of assessment according to whatever pre-set legal pattern. If so, the guarantist function of the principle would be exhausted, since that its role would be limited to the mere formal and unconditioned reference to any assumption of typical character chosen by the legislator.

The “guilt” (that is *colpevolezza*, *culpabilité*, *Schuld*, *culpabilidad*) to use the

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\(^\text{172}\)Caterini (2013), p. 146 et seq.
expressions used by the ECHR), that is not presumed but to be proved, seems instead, to refer to that idea of global penal disvalue of the conduct—both in an objective and in a subjective sense—as it is described by the guarantist axioms of any social rule of law of social-democratic inspiration. The presumption of innocence, otherwise, could be easily circumvented by the preparation of normative models that for example incriminate unoffensive or unreproachable facts.

Such considerations, in some way, can be also deduced by the above mentioned jurisprudence of the ECtHR that seems to consider that the presumption of innocence can offset some efficiency needs, within reasonable limits. Waivers of the principle would be ultimately admitted, provided that they are reasonable.

It has been already said above, that the supranational judges tend more to a concrete protection and not to declarations of principle, by checking if in the contingent case a breach of the principle has taken place and if this is reasonable in terms of proportion. It seems to be, by borrowing the term used in the American juridical culture, an *ad hoc balancing*, that is a balancing case by case and not a *definitional balancing*, that is by “category” or “definitional”, which gives place to a general rule likely to be also applied to future conflicting cases. The first kind of balancing, instead, gives place to a settlement of the conflict according to the interests and the circumstances occurred in the concrete case, regardless of the rule wording valid also for other cases.173

The perplexities caused by the balancing technique are well known, because it is not an interpretation operation, that is aiming at “giving a meaning to the legislator’s speech”, but its goal is to “reach a satisfying solution because of the presence of a conflict between interests: a solution that […] has nothing to do with the world of meanings […] but rather belongs to the world of decisions and their rhetorical justifications”.174 This can imply a too big “creative” power given to the judge who, in the balancing activity—since the subject of it are heterogeneous values that cannot be easily measured—can extend his discretionary power too much, with the consequent potential undermining of the content of the fundamental rights recognized by international Constitutions and Conventions, like that of the presumption of innocence.175 The balancing method as it is also remembered by the CtHR, is guided by reasonability, then by not abstract, general and pre-set rules, but by an intuitive skill which sometimes can assume the character of moral or political judgement.176 It is, ultimately a choice of an assessment kind, of a value judgement in which an order of preferences is established that is not mentioned in the positive rules. Balancing, then, does not mean “weighing”, but rather establishing a “mobile axiological hierarchy”, by sacrificing a principle in favour of another or of a conflicting interest.177

175D’Atena, 1997: p. 3065 et seq.
177Guastini, 1999: p. 98 et seq.
In order to limit the too discretional profiles of the balancing judgements, therefore, some “coordination rules” between principles or conflicting rights should be at least deduced, which offer solutions that can be reproduced in the future, specially in the most important cases, with the effect of making the balancing result less uncertain.\textsuperscript{178} They should be rules that as such are liable of subsumption, the application of which should be logically controllable, thus making the balancing process less dependent on the wisdom of the judge and more dependent on the procedure to follow. Judges should refer to controllable argumentation patterns, which do not end up to generally referring to values, they should on the contrary explicit the reasoning followed by themselves in order to let a principle prevail over the other.\textsuperscript{179}

By applying such criteria to the balancing process which involves the principle of the presumption of innocence (and indirectly those of harm and of guilt), first of all it emerges that no “rule of coordination” exists, for example, in the sentences of the ECtHR. The Judge in Strasbourg, as above remembered, only generically underlines that presumptions in fact or in law, provided by the penal law, must fall within reasonable limits, which take into account the importance of “what is at stake” (“enjeu”) and the necessity of respecting the defence rights. The member States, in other words, are required to make a “balance” (“équilibre”) between these two different stages, in order that the means used are proportional to the legitimate pursued aim (“but légitime”).\textsuperscript{180}

It is quite clear that these are very elusive balancing parameters that offer un-controllable solutions not being liable to be reproduced in the future, where the reasoning followed to make the presumption of innocence fail, is not explicit. Moreover, the balancing is carried out between the rights of the defence, then, the presumption of innocence, and vague and not positive “stakes”, which refer to social, political, economic interests, as well as to moral and ethical values, and pragamatic argumentations that, in some way, being balanced with a positive principle, are also used as juridical principles, with a “deformalization” of the law, if not with a real judicial decision-making in the wake of the common law.\textsuperscript{181}

Such considerations confirm the unfavourable opinion about the above mentioned proposal of the European Union directive which, within certain not well defined limits, would intend to render the waivers of the presumption of innocence positive, following the jurisprudence of Strasbourg. More precisely the intention would be that of giving a “universal” character to a rule, according to a case-based jurisprudence—already as such not liable to be generalized—which, after all, is based on a really questionable balancing process, liable to escape from the strict controls which should ensure respect of the fundamental individual guarantees.

In conclusion, the perplexities caused by those more or less surreptitious

\textsuperscript{180} ECtHR, Salabiaku v. Francia, fn. 123, para. 28; European Court of Human Rights (ECtHR), Janosevic vs. Sweden, July 23\textsuperscript{rd} 2002, para 101, that can be found in <hudoc.echr.coe.int>.
\textsuperscript{181} Itzcovich, 2006: p. 11 et seq., p. 21 et seq.
forms of sacrifice of the presumption of innocence, are many. They lend themselves to efficiency exploitations of the penal system, in its integrated, substantive and procedural perspective, giving the legislator and the judge a too big discretionary power. Within a political-criminal perspective of a social modern rule of law, there is the necessity not of normative models depriving the types of offense of their essential elements, or that allow probative shortcuts in favour of the prosecution; viceversa there is the real necessity of something else, that is of the consolidation of that penal system oriented to the defence of the fundamental rights, towards a new consideration of the relationships between law and politics. Also within the process of European integration, this should be so, with the conviction that only a criminal policy fully inspired by liberal-democratic principles can guarantee the best kind of security. To reason in a different way, we risk the recrudescence of those repressive ideologies that have historically privileged a misunderstood social defence against the presumption of innocence, where the European integration should find its first foundation and orientation in the shared illuministic tradition. Such a penal “functionalism” oriented at making the repression answer more efficient, while inhibiting individual guarantees, axiologically tends towards an unliberal regression of a pre-modern kind. The expectations of modernity themselves, however, are still waiting, most of them, for being fulfilled, and the European harmonization is an opportunity that cannot be willingly wasted.

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182Moccia, 2015: p. 3.
183In this sense, see the preamble to the Manifesto on the European Criminal Policy (fn. 133), as well as the comment by Foffani, 2010: p. 665.


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