RAIS RESEARCH ASSOCIATION for INTERDISCIPLINARY STUDIES
March 12-13, 2026

DOI:10.5281/zenodo.19535886

Presumption of Innocence and the Right to Defense. Procedural Guarantee Between Silence and Reaction

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Abstract: Universally recognized by all legal systems based on the rule of law, the presumption of innocence is not merely a corollary of criminal proceedings but their very essence, stemming from the adversarial system. Although the topic has been extensively addressed in legal scholarship, no definition of the legal nature of this principle has yet been provided. This scholarly endeavor aims only to provide a sequential and comparative analysis of the principle, in close connection with the right to defense, as applied in the European Union and the United States. This analysis will be continued, as it is not possible to address all its aspects in a single paper, given the extensive nature of the doctrine and the richness of judicial practice.

Keywords: Presumption of Innocence, Right to a Defense, Fair Trial

Introduction

The architecture of the criminal procedural system involves a series of fundamental rules, having the status of principles, whose observance and guarantee are intended to ensure order within the vast field of theoretical thought regarding criminal procedure, with the ultimate goal of fairness in the procedure as a whole. These principles function as a comprehensive theoretical system reflected in legal norms that provide them with substantive content, such that the legislature must reconcile all principles safeguarding different legal values, which leads to mutual limitations; the full balance, so necessary, is difficult to achieve and maintain.

Furthermore, the legal sanctions applicable to violations of these principles are provided for by criminal procedural law, as well as by the European Court of Human Rights or the Court of Justice of the European Union (for member states of the Council of Europe or the European Union) and by international human rights instruments such as the American Declaration of the Rights and Duties of Man (Resolution XXX, adopted in Bogotá, Colombia, on May 2, 1948) and the American Convention on Human Rights (adopted in San José, Costa Rica, on November 22, 1969. Each legislature has chosen solutions consistent with its own legal systems, sometimes more nuanced, but the rationale and essence remain the same, regardless of the sanctions and procedural remedies chosen to address the negative effects of such violations.

The manner of regulation, but especially their application and the procedural sanctions for violations (Paraschiv, 2015, 97), reflect the differences between the two major legal systems - the adversarial and the civil law systems - but their rationale and overwhelming importance in either of these systems is nearly the same. While the civil law or inquisitorial system is centered on the principle of discovering the truth, the legality of criminal charges and punishment, and tends to prioritize the principle of leniency (Whitman, 2016, 94:933-934), the adversarial system centers on the presumption of innocence, based on the idea that one of the greatest dangers to the justice system may be abusive investigations (Whitman, 2016, 94:933-934), and the lack of impartiality among judicial actors (police, prosecutors, judges, jurors), so that the burden of proof falls on the accuser, and thus overturning the presumption of innocence becomes a difficult task.

A definition of the presumption of innocence is difficult to outline, due to the implications that this principle has on the conduct of the entire criminal process. The

presumption of innocence is the principle according to which, until the final judgment of conviction, the person is considered a priori innocent (Hegheș, 2023, p. 259).

1. Brief considerations regarding the differences between the two systems

Without delving into an analysis of the history of the presumption of innocence in the inquisitorial system, we limit ourselves to noting that over the past 20 years, most of these systems have undergone profound reforms driven by societal evolution. These reforms have also involved the adoption of institutions specific to the adversarial system, such as the principle of discretion, the institution of plea bargaining (the conclusion of plea agreements between the prosecutor and the defendant), and the granting of greater importance and effectiveness to the rights of the suspect or accused in criminal proceedings, with special reference to the presumption of innocence and the right to defense, as central pillars of a fair criminal proceeding. The main rationale behind these reforms was to strike a fair balance between the fundamental principles of criminal procedure (in particular legality and the discovery of the truth - as the essence of the civil law system) and the rights of the accused: this balance implies that it is not permissible to encourage judicial authorities to violate the law in order to obtain and adduce evidence, nor to render the discovery of the truth impossible in situations where the rights of others protected by criminal law have been infringed. We venture to assert that the goal is to eliminate the extremes that would lead either to abuses and totalitarianism or to an uncontrolled rise in crime.

The defendant's relationship with state authority in the context of admitting guilt is manifested in a series of benefits granted to the defendant, beginning with the institution of the plea agreement, the procedure for admitting guilt - which results in a reduction of the applicable sentencing limits - and also in the judicial individualization of criminal treatment; As a result of applying one of these institutions, in cases involving offenses that are not of a serious nature, the judge has the option to choose to apply another sanction under criminal law that does not constitute a punishment.

These effects have been notably isolated and analyzed by the cited author, who termed them the presumption of leniency (Whitman, 2016, 94:936-937). It is true that in the civil law system there is no separation between the phase of determining the accused's guilt and that of pronouncing the judgment and determining the penalty, as is the case in the adversarial system; these are carried out within the criminal procedure: essentially, the defendant is brought to trial, the specific procedural stages are followed, evidence is presented, and after the trial phase, the judge deliberates and pronounces the sentence based on the evaluation of all the evidence presented. From this perspective, we must note that, in fact, one of the greatest differences between the two legal systems is the role of jurors - their participation and function in criminal proceedings.

On the other hand, the difference between the adversarial and inquisitorial systems is a profound one, stemming from their opposing approaches to the essence of judicial activity, namely the discovery of judicial truth (Mateuț, 2007, pp. 135-144), that is, determining what actually happened. Advocates of the adversarial system do not dispute the importance of establishing the facts, but rather emphasize and accord greater importance to individual rights and freedoms. Thus, some authors have pointed out that "one of the main functions of judicial procedures and rules of evidence in cases pending before the courts where the facts are disputed is to establish the truth. Some scientists in the natural sciences, some scientists in the social sciences, some philosophers, and many others commonly assume that the discovery of the truth is the only important function of judicial proceedings and rules of evidence. It is true that, without findings of fact that generally correspond to the truth, the political objectives or basic norms of the law could not be fulfilled (Summers, 1999, p. 497). The cited author rightly asserted that: "without judicial findings of fact that generally accord with truth, it would not be possible to test and improve upon the law in light of genuine experience with it

in its concrete applications. If a rule of law is judicially applied to the true facts it envisions, the rule can also be tested for the adequacy of its formulation and for the soundness of any means-end hypothesis it embodies. If, in light of the true facts, the rule is found wanting, then a legislature or perhaps even a higher court may modify the rule in some way. Also, without judicial findings of fact that generally accord with truth, citizens would, over time, lose confidence in adjudicative processes as fair and reliable tribunals of justice and as effective means of dispute resolution, both in civil and criminal cases. Interestingly, this would be undesirable also because it might lead to more litigation rather than less, as fewer parties would fear that truth adverse to their positions would come out in court proceedings, and so would be less inclined to settle out of court. Thus, in general, and without further qualification, a legal finding of fact in a court proceeding should accord with the actual truth" (Summers, 1999, p. 498).

Most authors define formal judicial truth as "any fact established by the court (judge, jury, or both), regardless of whether it corresponds to the material truth" (Summers, 1999, p. 498; Kelsen, 1994, pp. 207-218). On the other hand, it is well known that judicial truth - that which is reconstructed and emerges from the evidence presented - is not always the "real", objective truth of the parties involved, in the sense that there may be differences between these two forms of truth, which are valued differently in the two legal systems. This represents the foundation of the adversarial system, which holds that the procedure must be fully fair and perfectly equitable in order to reach a just solution. The author highlighted an emblematic statement by Morgan: "The trial is a proceeding not for the discovery of truth as such, but for the establishment of a basis of fact for the resolution of a dispute between litigants. Still, it must never be forgotten that its prime objective is to have that basis as close an approximation to the truth as practicable" (Morgan, 1956, p. 128).

In the adversarial system, the principle of availability applies, meaning that the prosecutor may withdraw charges at any time, thereby halting the proceedings. The inquisitorial system is characterized by the principles of officiality, legality, and the mandatory nature of criminal proceedings, according to which the judicial body is obligated to initiate and continue criminal proceedings ex officio; this cannot be left to the discretion of the victim, another person, or even the prosecutor. In reality, even today, even in adversarial systems, we find public prosecutors, just as in inquisitorial systems, criminal proceedings are sometimes initiated solely upon the complaint of the victim or the report of an interested party, with that person's complaint being a condition for the admissibility and punishability of the case.

In the adversarial system, there is a separation of the three essential procedural functions: the defense function, the prosecution function, and the adjudicative function, which are exercised by different bodies. In the purely inquisitorial system, all three of these procedural functions were exercised by a single person, namely the judge, who performed all acts necessary to ascertain the truth of the case, regardless of whether it was favorable or unfavorable to the accused. In the adversarial system, the judge is merely an arbiter of the proceedings, playing a passive role. The judge does not seek out or gather evidence, as it is the prosecution that must convince the court through the evidence presented.

In the inquisitorial system, the judge had an active and unlimited role, which required him to seek out and gather all evidence in order to ascertain the objective truth. He cannot leave the procurement of evidence to the discretion of the parties, as the discovery of the truth must not depend on the diligence and availability of any one person; however, recent years have seen a substantial reduction in this active role, with the judge now serving more as an independent and impartial arbiter.

In a purely inquisitorial system, judges were professionals, as they represented the central authority, not the community where the crime occurred. Furthermore, the active role

they must play in gathering evidence to ascertain the objective truth requires their specialization.

In the adversarial system, judges are representatives of the community before which the accused is called to answer, which is why they are not professionals, being elected or selected by lot from among the population. Criminal justice in this case is devoid of technicality, requiring not legal experts but citizens of sound judgment, since a person can only be judged by people equal to them in rights and obligations (Mateuț, 2007, p. 137). Thus, the best guarantee of a just outcome is that the accused is judged by peers who can best understand the context in which the crime was committed and its motives, and who can ultimately determine whether the accused is guilty or innocent in the eyes of the community.

Currently, it can be argued that none of these systems retains its "pure historical form" anymore, and in any case, from the perspective of individual guarantees, there were no notable differences (Manzini, 1931, p. 22), as there is a constant tendency to reshape the legal system, with systems "borrowing" aspects from one another that they deem beneficial.

2. The Presumption of Innocence in the Continental Legal System. Legislation and Judicial Practice

It should be emphasized that the adversarial system has as its essential principle the respect for the right to a fair trial, with the consequence of excluding evidence even at the cost of "trials without truth" (Pizzi, Trials without truth, 25, 1999, cited in Whitman, p. 944).

The tradition of the common law system requires treating defendants as subjects of law who enjoy rights and freedoms; at the same time, the continental system treats defendants as mere objects, although this aspect has significantly changed in recent times. As Professor Whitman correctly pointed out, both systems "create presumptions for the same reason: the imposition of criminal punishment is a morally charged matter that tests our conscience. We have a deep fear of making mistakes and, therefore, we create procedural presumptions that will compel us to justify our decisions with care and due deliberation. But the two approaches conceive of the risks of error associated with criminal punishment differently. The first type of presumption is designed to counter the risk of sinning by punishing those who are in fact innocent, while the second is designed to counter the risk of sinning by mistreating those who are in fact guilty" (Whitman, 2016, p. 947) and which the author considered a "contrast between two broader cultural orientations in law."

The idea had a major impact, based on the legal and scientific argument that this orientation "is felt throughout the entire accusatory criminal justice system, not merely in the courtroom's adherence to the technical presumption of innocence" (Pizzi, 1999, pp. 46-68, cited in Whitman, 2016, p. 947).

On the other hand, recent years have demonstrated that the inquisitorial system attaches particular importance to the presumption of innocence, which has been elevated to the status of a fundamental principle of criminal procedure. Thus, according to Article 6(2) of the European Convention on Human Rights, "everyone charged with a criminal offense shall be presumed innocent until proven guilty according to law". The text applies only to persons against whom a formal criminal charge has been brought, which has sparked controversy regarding the extension of the presumption of innocence beyond criminal proceedings or prior to the filing of charges by a criminal investigation body, the conclusion being clear that it extends to other areas as well, for example, to administrative law.

Within the meaning of the European Convention, the presumption of innocence is not merely a legal rule applicable to the admissibility of evidence, but has much broader dimensions and implications, which place it among the principles of criminal procedure, expressing a certain conception of criminal policy - that is, a specific approach by which the legislature has chosen to regulate criminal punishment. As a fundamental principle of criminal procedure, the presumption of innocence determines the structure of criminal

proceedings and some of its basic institutions; if a final criminal court judgment is required to rebut the presumption of innocence, this means that without the activity of the courts, criminal law cannot be applied; every judicial authority before which a criminal case is pending, regardless of its nature, must proceed on the basis of the presumption of innocence and may not proceed unless there is clear evidence of guilt.

Consequently, the entire criminal process is organized in accordance with the presumption of innocence. Even if the law provides that preventive, custodial, or rights-restrictive measures are exceptional in nature or that, as a rule, ordinary appeals have suspensive effect on enforcement, these are beneficial consequences of the principle of the presumption of innocence in criminal proceedings (Paraschiv et al., 2023, p. 16).

Recent years have seen a resurgence in the significance of new legal-philosophical and humanitarian concepts that are universally recognized in the civilized world based on a genuine rule of law, and the presumption of innocence has transcended the narrow confines of a judicial rule pertaining to the burden of proof, rising to the level of a right, without which human rights cannot be accepted as full in the legal conception.

2.1. The European Court of Human Rights: relevant decisions.

In fact, the ECHR has issued numerous judgments in which it has enshrined and affirmed this right, elevated to the status of a fundamental principle, which indicates the adoption and adaptation of certain provisions from the adversarial system that have been deemed essential to a legal system based on the rule of law.

The European Court of Human Rights has ruled that the presumption of innocence can be analyzed from two perspectives: first, as a procedural guarantee in the context of a criminal trial proper, in which case it imposes requirements, in particular regarding the burden of proof, legal presumptions of fact and law, the right not to incriminate oneself, the publicity of the case prior to trial and the issuance, by the court or another public authority, of premature statements of guilt regarding a defendant; second, as a safeguard to protect persons acquitted of a criminal charge or those against whom criminal proceedings have been terminated, from being treated by state agents or other authorities as if they were in fact guilty of the alleged offense. To a certain extent, the protection afforded by Article 6(2) may overlap with that afforded by Article 8 (*Allen v. the United Kingdom*, 2013, paras. 93-94; *Nealon and Hallam v. the United Kingdom*, 2024, para. 109).

The principles established by the case law of the European Court of Human Rights (ECHR, n.d.) provide as follows: (1) in the performance of their duties, members of the bench must not proceed on the preconceived notion that the defendant committed the alleged offense; (2) the burden of proof rests with the prosecution; and (3) any doubt must be resolved in favor of the accused (*Barberà, Messegué, and Jabardo v. Spain*, 1988, para. 77).

The aforementioned text is fully applicable in proceedings that are not directed against a person in the capacity of a defendant, but which nevertheless relate to and are connected with criminal proceedings simultaneously pending against that person, when such judicial decisions involve a premature assessment of his guilt (*Eşonkulov v. Russia,* 2015, paras. 74-75), as well as in parallel proceedings, where administrative and criminal proceedings are initiated concurrently (*Kemal Coşkun v. Turkey*, 2017, para. 44) or when statements made in parallel criminal proceedings against co-defendants have no effect on the accused applicant, provided there is a direct link between the proceedings against the applicant and these parallel proceedings (*Karaman v. Germany,* 2014, para. 43).

In the case of subsequent proceedings, for the presumption of innocence to apply, the person must demonstrate the existence of a link between the concluded criminal proceedings and the subsequent action (*Allen v. the United Kingdom* (MC), 2013, para. 104, cited above).

The ECHR has also applied the principle of the presumption of innocence with regard to court decisions rendered following the conclusion of criminal proceedings concerning the following matters:

- a claim for compensation for damage caused by a miscarriage of justice, brought by a previously convicted person following the annulment of their conviction;
- the imposition of a civil obligation to compensate a victim, where the victim is a public authority; the confiscation of proceeds of crime and/or assets related to criminal offenses; a decision regarding the conditional release of a convicted person; the imposition of an administrative fine; the reopening of criminal proceedings following the Court's finding of a violation of the Convention; a conviction for a new offense while an appeal against the initial offense was still pending.

In applying the presumption of innocence, premature statements of guilt made by the prosecution or a court regarding a person "charged with a criminal offense" prior to the legal determination of their guilt are prohibited, this prohibition also applies to statements by other state officials regarding ongoing criminal investigations that are likely to encourage the community or the public to believe that the suspect is guilty and that undermine the competent judicial authority's assessment of the facts. The principle applies even in the absence of an official finding, it being sufficient to indicate reasoning suggesting that the court or prosecutor in question considers the accused to be guilty (*Karaman v. Germany*, 2014, para. 41).

When the statements are made by private entities (such as newspapers or other media organizations) and do not constitute a verbatim reproduction (or direct quotation) of any official information provided by the authorities, no issue arises under Article 6(2), but an issue may arise under Article 8 of the Convention regarding the right to respect for private life (*Mitianin and Leonov v. Russia*, 2019, paras. 102 and 105; *McCann and Healy v. Portugal*, 2022, paras. 65-66), in which the ECHR held that the statements of a retired police officer were not attributable to the State within the meaning of Article 6(2).

It should also be noted that the European Court of Human Rights distinguishes between statements that merely express suspicions regarding a suspect's guilt and those that clearly indicate the suspect's guilt; the latter violate Article 6(2), while the former have been deemed ineligible as grounds for a claim in various cases examined by the Court (*Garycki v. Poland,* 2007, para. 67).

2.2. Court of Justice of the European Union: relevant decisions

One of the relevant judgments in this area held that: "The presumption of innocence would be violated if public statements by public authorities or judicial decisions, other than those concerning the determination of guilt, refer to a person suspected or accused as being guilty, as long as that person's guilt has not been proven in accordance with the law. Such statements and judicial decisions should not reflect the view that the person in question is guilty. This should not prejudice criminal proceedings aimed at proving the guilt of the suspected or accused person, such as an indictment, nor judicial decisions following which a suspended judgment takes effect, provided that the right to a defense is respected. Furthermore, this should not affect preliminary procedural decisions taken by judicial authorities or other competent authorities that are based on suspicions or incriminating evidence, such as decisions on pretrial detention, provided that such decisions do not treat the suspected or accused person as guilty. Before taking a preliminary procedural decision, the competent authority may need to verify whether there is sufficient incriminating evidence against the suspected or accused person to justify that decision, and the decision may contain references to such evidence" (Case C-439/16 PPU, 2016).

In this particularly important case, the Court of Justice of the European Union ruled that although pretrial detention is not subject to specific European Union legislation, judicial

decisions regarding pretrial detention fall within the scope of the protection of the presumption of innocence, as guaranteed by Directive 2016/343, which are mentioned by way of illustration in recital (16) of the directive as being among the measures provided for in Article 4 of the aforementioned directive as "preliminary procedural decisions."

Subsequent cases have enshrined the presumption of innocence and emphasized its status as an essential, fundamental principle of criminal proceedings, and we will not dwell on them further.

Conclusions

An analysis of the principles of both legal systems raises the question of how to answer questions on which the answers differ: should the state, as the initiator of criminal proceedings, yield from its interest in holding those who have committed crimes criminally liable, in order to give priority to the latter's interest in having their fundamental rights and freedoms fully respected? Can proponents of one of these theses argue that any infringement of human dignity, however minor, may take precedence over the discovery of the truth, or that any violation of procedural rules must lead to the dismissal of the truth thus discovered?

Clearly, societies differ essentially not in terms of the manner and possibilities of development, but through their philosophical, intellectual, and legislative systems. In our view, each of these systems took into account not only the traditions that each legislator considered, but above all the historical, economic, and social specificity, being appropriate in relation to the specific aspects and traditions, the gaps it had to address at a specific historical moment, and the essential values that required increased protection, we consider that it is not possible, at this time, to assess one or the other of these. The future will decide which of these legal systems has proven its effectiveness.

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