Scientific Research Publishing

Beijing Law Review, 2017, 8, 100-140
http://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

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

Mario Caterini

University of Calabria, Rende, Italy
Email: mario.caterini@unical.it

How to cite this paper: Caterini, M. (2017). The Presumption of Innocence in Europe: Developments in Substantive Criminal Law. *Beijing Law Review, 8,* 100-140.
https://doi.org/10.4236/blr.2017.81007

Received: December 26, 2016
Accepted: March 27, 2017
Published: March 30, 2017

Copyright © 2017 by author and Scientific Research Publishing Inc.
This work is licensed under the Creative Commons Attribution International License (CC BY 4.0).
http://creativecommons.org/licenses/by/4.0/

Open Access

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 probative 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 incontrollable parametres leaving space to illegitimate solutions.

Keywords

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

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 simplicist 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

[1]On the subject, I dare referring to Caterini, 2015: p. 55 et seq.

[2]Bolle, 2006: p. 43 et seq.; Dejemeppe, 2007: p. 17 et seq.

[3]Skinner (2015), *passim*; Bottoms & Tonry (2002), *passim*; Radzinowicz (1966), *passim*. With specific reference to the presumption of innocence, Paulesu (2009), p. 8; Garofoli, 1998: p. 1169 et seq.; Pisani, 1965: p. 1 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.

[5]Spirito (1974), p. 35 et seq.; Cassinelli (1954), p. 43 et seq.; Costa (1924), p. 229 et seq.

[6]See Beccaria (1764-1991), § XVI, p. 60; as well as art. 9 of the "Déclaration des droits de l'homme et du citoyen" dated August 26th, 1789. On the subject see Moccia, 2009: p. 469 et seq., spec. p. 480; Pene Vidari (2014), p. 29; Ferot (2007); Porret (1997); Panzarella & Vona (2006), p. 3 et seq., p. 29 et seq.; Braum, 2007: p. 111 et seq. On the conribution of the Spanish penal enlightenment see Prieto Sanchís, 2001: p. 489 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.

[9]Sbriccoli (1973), p. 615; Longhi, 1921: p. 87.

a judgement rule,[10] as expression of the *in dubio pro reo*—at the same time rule about the burden of proof—a fundamental instrument against illiberal abuses.[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.[12]

Although the guarantist approach of the classical school was far from a full legislative application,[13] since it was rather a formal recognition deprived of any factual implementation,[14] the undermining of the principle went on with the open criticism coming from most exponents of the positive school.[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.[16] The "evil" expression *in dubio pro reo* was given up and preventive custody was considered to be a normal consequence of mere indictment.[17] The ideological foundation of these proposals was the denial of *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.[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.[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.[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.[21] The guarantist nature of the innocence presumption, then, was so undermined, that this principle was considered to be paradoxical and irrational,[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-

[10]Carrara (1881), p. 17 et seq.; Carrara (1859-1907), p. 276 et seq.
[11]Lucchini (1905), p. 12 et seq.; Lucchini (1886), p. 245 et seq.
[12]Carrara (1874), p. 47.
[13]Carrara (1874); Dominioni (1985), p. 217.
[14]Stoppato, 1915: p. 192 et seq.; Stoppato, 1893: p. 321.
[15]Costa (1924), p. 271 et seq.; Cassinelli (1954), p. 61 et seq.; Spirito (1974), p. 119 et seq.
[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.
[17]Garofalo (1891), p. 350, p. 407.
[18]As regards the critical attitude of the Spanish doctrine towards the Italian positivist school, see Dorado Montero (1894), *passim*; Dorado Montero (1889), p. 19 et seq.; Amor Neveiro (1899), p. 31 et seq.; Aramburu Zuloaga (1887), *passim*.
[19]Cassinelli (1954), p. 195 et seq.; Spirito (1974), p. 183 et seq.; Seminara, 2011: p. 575 et seq.
[20]Longhi, 1921: p. 90.
[21]Manzini (1931), p. 200; Manzini (1912), p. 53 et seq.; Mortara, 1915: p. 156.
[22]Manzini (1931), p. 180. In a different way Vázquez Sotelo (1984), p. 270.

nocent or guilty.[23]

It is then evident that the value of the presumption of innocence changes according to the ideology ruling within a certain historical context.[24] 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.[25]

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 defedant is indicted, without any necessity for the prosecution to prove their existence.[26]

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.[27] 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.[28]

2.1. Great Britain

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

[23]Mortara, 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.

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

[25]Manzini (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.

[26]Carrara (1874), p. 47.

[27]Roberts & Zuckerman (2004), p. 327; Illuminati (1979), p. 28 et seq.

[28]For 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.[29] In Great Britain, the famous decision of the *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.[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,[31] so much so that such decision has also influenced the American jurusprudence, being the model for the other famous sentence of the Supreme Court of the United States, *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.[32]

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

[29]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.

[30]Roe (1999), p. 12.

[31]Roberts & Zuckerman (2004), p. 328.

[32]Allen, 1980: p. 321 et seq.; Dripps, 1987: p. 665 et seq.

[33]Zuckerman (1989), p. 109 et seq.; Dennis (1999), p. 154 et seq.; Keane (2006), p. 474.

[34]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.

[35]Palazzo & Papa (2013), p. 221 et seq.

[36]Sullivan, 2005: p. 195 et seq.

[37]Stumer (2010), *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

[38]See *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.

[39]About this decision of the House of Lords and on the influence of the principle of the presumption of innocence on the English law contained in the ECHR, see Stumer (2010), p. 22 et seq.; Munday (2011), p. 77 et seq.; Glover & Murphy (2013), p. 82 et seq.

[40]Simester (ed.) (2005), *passim*, particularly the contribution again by Simester, 2005: p. 21 et seq., as well as by Duff, 2005: p. 125 et seq.; by Roberts, 2005: p. 151 et seq.; by Sullivan (2005); see also Ashworth (2003), p. 164. On the subject, for a comparison with the German system, Hörster (2009), *passim*. In the Italian literature, Donini (1993), p. 159 et seq.; Cadoppi & Pricolo, 1999: p. 20 et seq.; Vallini (2003), p. 117 et seq.

[41]See *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.[42] The possibility of designing tyes 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.[43] In Germany,[44] 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*.[45] 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.[46] 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.[47] 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).[48] 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.[49]

One of the issues in Germany that seems to cause some problems linked to the presumption of innocence,[50] is that concerning the criminal offenses of abstract or presumed danger, described as "typically" dangerous, without the proof of

[42]Card (2014), p. 131 et seq.; Stumer (2010) p. 54 et seq.

[43]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.

[44]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.

[45]Krauβ, 1971: p. 153 et seq.; Frister (1988), p. 85; Roxin (1992), p. 59 et seq.; Juy-Burmann, 2001: pp. 180-181.

[46]Juy-Burmann, 2001: pp. 212-213.

[47]Krey (2007), p. 157 et seq.; Clages (2004), p. 46; Juy-Burmann, 2001: p. 193; Rieβ (2001), p. 304 et seq.

[48]Rieβ (2001), p. 86 et seq. Within a comparative context Joubert (2005), p. 58 et seq.

[49]Juy-Burmann, 2001: p. 210. For a comparison with the American system Trüg (2003), p. 60 et seq.

[50]Graul (1991).

dangerous event being required[51]: for example § 325 par. 2 and §§ 326, 327, 328, 329 StGB, on the subject of the protection of the environment.[52] Since the harm principle is in some ways unknown to the German doctrine,[53] the question has been risen with reference to the principle of guilt[54], also because the author of the conduct may act without guilt and intention of causing the danger itself.[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.[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.[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.[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.[59] Then the doctrine and jurisprudence consider the principle being fully effective in the internal law.[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.[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.[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.[63] In Belgium, then,

[51]About danger offenses in the literature in German language see Wohlers (2000); Zieschang (1998); Kindhäuser (1989); Horn (1973).

[52]For a comment on these offenses Steindorf (1997), p. 201 et seq., p. 246 et seq., p. 351 et seq., p. 377 et seq., p. 412 et seq.

[53]Maiwald, 2008: p. 40 et seq.; Palazzo, 2006: p. 74 et seq.; Donini, 2002: p. 111 et seq. About the conciliation between the use of penal law as ultimate resource and the freedom of the legislator in the choices of protection of legal assets, see Bundesverfassungsgericht, 2 BvR 392/07 vom 26 febbraio 2008, in <www.bundesverfassungsgericht.de>; on the subject see Lagodny (1996), p. 21 et seq., p. 52 et seq.

[54]Palazzo & Papa (2013), p. 83 et seq.

[55]Roxin (1992), p. 262 et seq.; Kaufmann, 1963: p. 432.

[56]Schröder, 1969: p. 14 et seq.; Cramer (1962), p. 74.

[57]Schünemann, 1975: p. 787 et seq. As regards other attempts to solve the conflict with the presumption of guilt, see Horn (1973), p. 94 et seq. The German doctrine has also created a category of danger half way between concrete and abstract (abstrakt-konkrete Gefährdungsdelikte o potentielle Gefährdungsdelikte); on the subject we refer to Schröder, 1969; p 8 et seq.; Rudolphi, 1984: p. 248 et seq.; Azzali, 2006: pp. 1340-1341.

[58]Bohnert, 1984: p. 182 et seq.

[59]In general Dejemeppe, 2007: p. 17 et seq. In particular about the forms of presumption of penal liability, see Colette-Basecqz, 2008: p. 413 et seq.

[60]du Jardin & Masset, 1993: p. 959; Pesquié, 2001: p. 46; Kuty, 2003: p. 524 et seq.

[61]Pesquié (2001), p. 57.

[62]du Jardin, 2003: p. 616.

[63]du Jardin, 2003: p. 616; Declercq (1999), p. 1293 et seq.

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.[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[65] provides a presumption of innocence to be proved by by the owner of the vehicle.[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.[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.[68]

2.4. France

In France[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.[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 referrable to the treatment reserved to the defendant.[71] The principle—in a global sense, and with reference also to the corollary *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.[72]

The presumption of innocence in France has been strongly associated with its function of evidential rule,from which also the rule *affirmanti 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 (*partie poursuivante*).[73] It is the prosecuting party, which provides for the proof of the criminal offence made, in order to "*établir tous les éléments constitutifs de l'infraction et l'absence de tous les éléments susceptibles de la fa ire disparaître*".[74]

Such *charge de la preuve* undergoes some mitigation of the principle, because

[64]du Jardin, 2003: p. 618, highlights the consistency of these Belgian rules with the jurisprudence of the ECtHR (case Salabiaku vs. France, October 7th 1988, see *below* and fn. 123).

[65]Loi 16 mars 1968, n. 1968031601, Loi relative à la police de la circulation routière.

[66]Colette-Basecqz, 2008: p. 420 et seq.; Kuty (2006), p. 263 et seq.; Verstraeten (2005): n. 1759.

[67]Cfr. *Cour de cassation de Belgique*, 19 octobre 1999, Bulletin et Pasicrisie (Bull. et Pas.), 1999, I, n. 547; *Id.*, 17 mars 1999, *ivi*, 1999, I, n. 160; *Id.*, 22 octobre 1997, *ibidem*, 1997, I, n. 421. From a critical point of view Holsters, 1991: p. 299 et seq., spec. n. 26.

[68]Colette-Basecqz, 2008: p. 422 et seq., p. 427 et seq.

[69]For a review of the presumption of innocence in France, Stuckenberg (1997), p. 171 et seq. As regards comparative profiles Koering-Joulin, Buchet & Coste (1998), *passim*, in particular Buchet (1998), p. 27 et seq.; Brigham (1998), p. 71 et seq. For a comparison with Germany, Henrion, 2005: p. 1031 et seq.

[70]Bernard, 2003-2004: p. 33 et seq.

[71]*Ibidem*.

[72]Pradel, 2003: *passim*.

[73]Pradel (2004), p. 315 et seq.

[74]See *Cour de cassation française*, *Chambre criminelle*, March 24th 1949, Bulletin des arrêts de la Cour de cassation. Chambre criminelle (Bull. crim.), n. 114.

of the role of the French penal judge and of the traditional principle of the *intime conviction*.[75] As regards the first aspect, the reference is to the judge's examining 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 *intime conviction*, will be spurred to a defence of himself not merely passive (that is waiting for the prosecution to fulfil its task), but more active, that is aiming at introducing new evidence 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 accessories, 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 presumption 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 practicing prostitution.[81] Then we have today this wide range type of offense, referred to by art. 321-6 of the Penal Code, introduced in 2006, which today punishes who cannot justify the resources corresponding to his lifesyle 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

[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, 2001: p. 119.

[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 offenses[87] 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 requirable 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

[84]See *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 ECtHR for infringement of the principle of the presumption of innocence, being the subject of the above mentioned decision *Salabiaku vs. France*, dated October 7th 1988, which will be later better discussed (fn. 123).

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

[86]Urbino-Soullier, 1987: p. 750; De Guardia, 1990: p. 487 et seq.

[87]Rassat (2011), p. 585 et seq. See *Cour de cassation française*, *Chambre criminelle*, November 19th 1985, *Revue de science criminelle et de droit pénal comparé*, 1986, p. 612.

[88]See *Cour de cassation française*, *Chambre criminelle*, January 11th 1996, nr. 95-81776, *Bulletin des arrêts de la Cour de cassation. Chambre criminelle*, 1996, nr. 21; Royer, 2008: p. 506.

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

[90]Montañés Pardo (1999) p. 82.

[91]Flores Prada, 2010: p. 349 et seq.; Armenta Deu, 2004: p. 3052 et seq.

[92]Jaén Vallejo (2002), p. 110.

[93]Carballo Armas (2004) *passim*.; Jaén Vallejo (2002), p. 109 et seq.

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 scrupolous 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

[94] *Tribunal Constitucional de España*, Sala Segunda, Sentencia n. 33/2000 dated February 14th 2000, in <www.tribunalconstitucional.es>.

[95] Miranda Estrampes (1997), *passim*.

[96] *Tribunal Constitucional de España*, Sentencia nr. 84/1981 dated July 22nd 1981, in <www.tribunalconstitucional.es>.

[97] The idea of Roxin (1998), § 53-13 has been taken up.

[98] Rodríguez Ramos, 1983: p. 1249 et seq.; Jaén Vallejo (2002), p. 115.

[99] *Tribunal Constitucional de España*, Sala Segunda, Sentencia n. 319/2006 dated November 15th 2006, in <www.tribunalconstitucional.es>; *Tribunal Constitucional de España*, Sala Segunda, Sentencia n. 256/2007 del 17 dicembre 2007, in <www.tribunalconstitucional.es>; *Tribunal Supremo*, Sala de lo Penal, Sentencia 15 settembre 2006, n. 867, in <www.poderjudicial.es>; *Tribunal Supremo*, Sala de lo Penal, Sentencia March 12th 2010, nr. 214, in <www.poderjudicial.es>.

mitigated.[100]

We must then remember that the Spanish jurisprudence makes a distinction between presumed and abstract danger.[101] 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*".[102] 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.[103]

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,[104] 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.[105] Besides this, it was affirmed in the above said art. 6, par. 2, of the European Convention of human rights dating back to 1950,[106] 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.[107] Likewise—as regards war crimes against mankind, genocide and crimes against peace—in the Statute of Rome of the International penal

[100]Pipaón Pulido, L. Pedreño Navarro & E. Bal Francés (2009), p. 35 et seq.

[101]See *Tribunal Supremo*, Sala de lo Penal, Sentencia March 29th 1993, nr. 5122, quoted in the comment of art. 368 Código penal on the subject of illegal drug use crimes, by Sequeros Sazatornil, 2010: p. 1400. Méndez Rodríguez (1993), *passim*; Mendoza Buergo (2001), *passim*.

[102]The distinction made by the Spanish jurisprudence between abstract and concrete danger, in some ways reminds to that made in the Italian doctrine, by Parodi Giusino (1990), p. 217 et seq. See also the distinction between offenses of danger only seemingly abstract and offenses of danger really abstract or presumed, made by Marinucci & E. Dolcini (2001), p. 563 et seq.

[103]See Morales Prats, 2002: p. 86 et seq. On the principle of "exclusiva protección de bienes jurídicos" with reference to the Spanish Constitution, see Roca Agapito, 2005: p. 145 et seq. On the harm principle in the Soanish doctribe, see, among others, Octavio de Toledo y Ubieto, 1990: p. 5 et seq.

[104]Nguyen (2012), *passim*; Luzi, 2006: p. 1063 et seq. For a global perspective of the presumption of innocence in the preparation works of the international rules, see Henrion, 2005: p. 39 et seq.

[105]Henrion, 2005: p. 40 et seq.

[106]See Chiavario, 2001: p. 216 et seq.

[107]Human Rights Committee, General Comment nr. 13, para. 7, Report of the Human Rights Committee, adopted on Apri, 12th 1984, 40 U.N. GAOR supp., nr. 40. On the subject, Henrion, 2005: p. 43 et seq.

Court approved in 1998,[108] art. 66 affirms this principle paying special attention to the burden of proof, specifying that the burden of prooving the guilt of the defendant falls upon the prosecution, while the assessment of the guilt itself, beyond any reasonable doubt,[109] falls upon the Court; art. 67, moreover, forbids the inversion of the burden of proof or of the burden of rebuttal.[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.[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.[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.[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.[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.[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.[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.[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.

[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.

[109]Klamberg (2013), p. 126 et seq.; Schabas (2011), p. 216 et seq.

[110]Schabas (2010), p. 793 et seq.; Sluiter, 2009: p. 467 et seq.; Cassese (2006), p. 88 et seq.; Zappalà (2005), p. 99 et seq.

[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>.

[112]Sayers, 2014: p. 1303 et seq.; López Escudero, 2008: p. 759 et seq.; Grasso, 2007: p. 655 et seq.; Rengeling & Szczekalla (2004), p. 983 et seq.

[113]Maugeri, 2007: p. 227 et seq.; Buzzelli, 2008: p. 717 et seq.; Paliero & Viganò (2013); Manes (2012); Sotis (2012); Donini (2011).

[114]Paulesu, 2008: p. 127.

[115]Cfr. Illuminati (1979), p. 26 et seq.

[116]The final "Green Paper", Bruxelles, April 26th 2006, COM (2006) 174 can be found in <eur-lex.europa.eu>; Bassiouni (2008), p. 264; Ruggieri, 2008: pp. 514-515.

[117]Canestrari & Foffani, 2005, in particular the contributions of Picotti, Bernardi, Silva Sánchez, Tiedemann, Lüederssen, Vervaele, p. 325 et seq.; Bernardi, 2007: p. 193 et seq.

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 sopranational level, both for the *common law*, and for the *civil law* systems following a prosecution procedure as well as an investigation procedure.[118]

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.[119] 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.[120] 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.[121]

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.[122] 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.[123] 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 accout the degree of seriousness of the offense and the rights of the defence to be respected.[124] 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.[125] The Court has then given legitimacy limits to these types of objective

[118]Paulesu, 2008: p. 126.

[119]Lautenbach (2013), p. 126; Barrot, 2010: p. 701 et seq.

[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/>.

[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.

[122]Munday (2015), p. 102 et seq.; Emmerson (2012), p. 697-698.

[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/>.

[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; Esser (2002), p. 742 et seq.; Cuykens, Holzapfel & Kennes (2015), cap. II, par. II.3.

[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/>.

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.[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.[127] It seems possible to affirm that the Court does not exclude the necessity of the existence of a *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.[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 presunption 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 incompatibile with the purpose of art. 6, par. 2, ECHR.[129]

The contingent case submitted to the ECtHR, then, has been solved by a judgement referring to the "denounced" rule (art. 392 *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

[126]For some similarities with the hermeneutical approach of the Italian Constitutional Court, see Panebianco, 2015: p. 56 et seq.

[127]Sicurella, 2002: p. 20 et seq.; *contra* Nicosia (2006), p. 83 et seq.; Salcuni (2011), p. 443 et seq.

[128]Zagrebelsky, 2011: p. 69 et seq.

[129]About critical comments on the sentence "Salabiaku", Jeandidier (1991), La présomption d'innocence ou le poids des mots, *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.[130] 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.[131]

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.[132] 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.[133]

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".[134] In excep-

[130]Abbadessa (2011), p. 383 et seq.

[131]Cfr. Maugeri (2001), p. 776 et seq.

[132]*European Court of Human Rights* (ECtHR), *Sud Fondi srl e altri v. Italia*, sentence dated January 20th 2009, para. 116, in <http://hudoc.echr.coe.int/>; Panebianco, 2015: p. 59-60; Manacorda, 2011: p. 167-168; Mazzacuva, 2009: p. 1540 et seq.

[133]Manifesto on European Criminal Policy, para. 3, promoted by a group of scholars from eleven Countries of the European Union gathered in the European Criminal Policy Initiative, first published in Zeitschrift für Internationale Strafrechtsdogmatik, 2009, p. 697 et seq., updated in European Criminal Law Review (EuCLR), 2011, p. 86 et seq.; also published in Quaderni costistuzionali (QCost), 2010, p. 899 et seq., with introduction by Canestrari & Foffani, aswell as in the *Rivista italiana di diritto e procedura penale*, 2010, p. 1262 et seq., with comment by Satzger, 2010: p. 1278 et seq. On this document refer to the work of one of the promoters, Foffani, 2010: p. 657 et seq.

[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 SA 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 jurispridence 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

[135] *House of Lords*, July 5th 2001, *Regina vs. Lambert*, <https://www.publications.parliament.uk/>, or *Criminal Law Review*, 2001, p. 806 et seq.

[136] *Court of First Instance*, *Third Chamber*, 8 July 2008, case T-48/05, *Franchet and Byk c. Commission*, para. 211, which can be found in <www.curia.europa.eu>. On this sentence in general, see Mitsilegas (2013) The Aims and Limits of EU Anti-Corruption Law, in: J. Horder & P. Alldridge (eds.), Modern Bribery Law. Comparative Perspectives, Cambridge, 2013, p. 188; Stefanou, White & Xanthaki (2011), p. 95-96.

[137] *European Court of Justice* (ECJ), 8 July 1999, case C-1999/92, *Hüls AG v. Commissione delle Comunità europee*, [1999], Reports of Cases before the Court of Justice and the Court of First Instance, Section I, Court of Justice, p. 4336 et seq., segnatamente para 150 a p. 4384. See Ezrachi (2012), p. 71; Arabadjiev, 2012: p. 384 et seq.; Dammann (2007), p. 38.

[138] Palmieri, 2013: p. 1440.

[139] *European Court of Justice* (ECJ), December 23rd 2009, case C-45/08, *Spector Photo Group NV e Chris Van Raemdonck v. Commissie voor het Bank, Financie en Assurantiewezen—CBFA*), para. 44, which can be found in <www.curia.europa.eu>. On the subject see Craig & De Búrca (2015), p. 412; Panebianco, 2015: p. 69; Bachmann (2015), p. 28; Seredyńska (2012), p. 26; Maugeri, 2007: p. 163 et seq.

not respected in any circumstance, deeply affects mutual trust and judicial co-operation.[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 impliying 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 alrady 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-

[140]Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, Bruxelles, 27 november 2013, COM(2013) 821 final, 2013/0407 (COD), which can be found in <www.europarl.europa.eu>. On the subject see Flore (2014), para. 795; Pache, 2014: pp. 1178-1179; Damián Moreno (2014), pp. 124-125.

[141]*European 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/>.

[142]In 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 discretional 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 a 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 unoffesive fact is not typical, or it is

[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/>.

[145]Donini, 2002: p. 109 et seq.; Donini, 2013, p. 4 et seq., spec. p. 31 et seq.; Manes (2005), p. 129 et seq.; Salcuni (2011), p. 430 et seq.; Stea, 2013: 1 et seq.

[146]As regards differences and analogies, notwithstanding the heterogeneous ideological positions, between the Anglo-Saxon harm priciple 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, 2011: p. 275 et seq.

such only seemingly, according to considerations that are only formalistic.[147] 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.[148] The debate on the abstract character of danger has been developed specially in Germany,[149] Italy[150] and Spain,[151] 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,[152] 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 pesumptions of danger, always admitting opposite evidence.[153] 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.[154]

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*,[155] 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.[156] The difficult application of the inversion of the burden of

[147]Fiore, 1994: p. 283 et seq.; Caterini (2004) p. 375 et seq.; Morales Prats, 2002: p. 86 et seq.

[148]Cfr. Pedrazzi, 1979: p. 32 et seq.

[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.

[150]In the Italian doctrine with different perspectives D'Alessandro (2012); Catenacci, 2006: p. 1415 et seq.; Manna, 2002: p. 35 et seq.; Parodi Giusino (1990); Fiandaca, 1984: p. 441 et seq.; Gallo (1970); Gallo, 1969: and of p. 1 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.

[153]Fiore & Fiore (2004), p. 176 et seq.; Fiore, 1996: p. 65. Within a future prospect of reform, Mantovani, 1982: p. 70. With reference to the principle of guilt, Schröder, 1969: p. 14 et seq.

[154]Cfr. Catenacci, 2010: p. 54 et seq.; Catenacci, 2012: p. 373 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.

[156]See Stella (2001), p. 222 et seq.; Hassemer, 1992: p. 378 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 impicitly 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

[157]About the critical points concerning the subjective element and its proof in the Anglo-Saxon systems, Twining (1994), p. 12 et seq.; Lacey, 1993: p. 621 et seq.; Williams (1965), p. 9 et seq. More in general about the crisis of proofs in the Anglo-Saxn systems and for a comparison with the continental systems, see Damaška (1997), *passim*.

[158]As regards the perplexities and censure of the presumptions concerning the psychological element of the criminal offense, particularly fraud, in the German literature Perron, 1998: pp. 153 et seq.; Volk, 1993: pp. 618, 624; Hassemer, 1992: pp. 382-383; Hruschka, 1985: pp. 197-198; Schünemann, 1984: pp. 51 et seq.; Henkel, 1961: p. 578 et seq. In the Spanish doctrine, among others Ragués Vallès (1999), *passim*.

[159]On the inadmissibility of this kind of fraud, in the Italian literature see Bricola (1960), *passim*. More recently Pierdonati (2012), *passim*; Masucci (2004), p. 28 et seq.; Catenacci, 2006: p. 1421 et seq.; Marafioti, 2002: pp. 653 et seq.; Pagliaro, 2000: p. 2495 et seq.

[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 parametre 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

[162]Trapani (2006), p. 149 et seq.
[163]Maiwald (2009), p. 81 et seq.
[164]Trapani (2006), p. 136 et seq.; *Cass. pen.*, sez. I, September 14th 1982, n. 10697. *Cassazione penale*, 1984, p. 900. A different opinion is expressed by Gallo (2014), p. 512 et seq.
[165]Prosdocimi, 1985: pp. 288 e 300; Giannelli (1994), p. 21; Vannini (1950), p. 86; Alimena (1947), p. 85 et seq., p. 194 et seq. In the Italian jurisprudence *Cass. pen.*, sez. I, March 25th 2015 n. 12548; *Cass. pen.*, Sez. V, July 3rd 2012 (filed on October 5th 2012), Martena, n. 39389, *Cassazione penale*, 2013, p. 4469; *Cass. pen.*, sez. V, December 11th 2008 (filed on January 22nd 2009), De Nunzio, n. 4237; *Cass. pen.*, November 15th 1989, Paradisi, *Rivista penale*, 1990, p. 774.
[166]Caterini (2008), p. 230 et seq., p. 336; Basile, 2015: p. 199 et seq

penal liability in case the different event were unforeseeable or inevitable,[167] 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.[168]

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.[169] 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 discretional 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.[170]

The proof that the prosecution should provide, then, should cover the whole penal disvalue of the fact, represented, in the legal systems of liberaldemocratic 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

[167]Carmona, 2003: p. 240 et seq.; Pagliaro (2003), p. 293 et seq., pp. 329-330.

[168]Trapani (2006), p. 65 et seq. In the most traditional Italian jurisprudence the defendant must provide the proof of the unforeseeable circumstances as an element preventing the type of offense, see *Cass. pen.*, August 6th 1991, Moscatelli, in C.e.d. Cass., n. 191193; *Cass. pen.*, Sez. III, March 31st 1982, Zanetti, in C.e.d. Cass., n. 153688. For critical observations see Dolcini & Marinucci (2006), p. 461.

[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 parametres for the formal definition of the fact, but rather for helping the judge to become convinced in the concrete case,[171] without any inversion of the burden of proof.[172]

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 liberaldemocratic 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, viceversa, 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

[171]As regards the proof of fraud, see Hruschka, 1985: p. 197 et seq.; Ragués Vallès (1999), p. 285. More in general, Saraceno (1940), p. 75.

[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 unoffesive 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 heterogenous values that cannot be easily measured—can extend his discretional 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]

[173]Shaman (2001), p. 49 et seq., p. 199 et seq.; Kokott (1998), p. 75 et seq.; Scaccia (2000), p. 315 et seq.
[174]Bin (1992), p. 60.
[175]D'Atena, 1997: p. 3065 et seq.
[176]Newman, 2014: p. 145 et seq., spec. p. 154 et seq.; Bongiovanni, Sartor & Valentini (2009), *passim*, with specific reference to reasonableness in the ECHR, see the contribution by Sadurski, 2009: p. 129 et seq.; Celano, 2002: p. 101 et seq.
[177]Guastini, 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.[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.[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*").[180]

It is quite clear that these are very elusive balancing parametres that offer uncontrollable solutions not being liable to be reproduced in the future, where the reasoning foollwed 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 pragramatic 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*.[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 jurisprdence—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

[178]Moreso, 2002: p. 201 et seq.; Prieto Sanchìs, 2002: p. 169 et seq.
[179]Celano, 2002; p. 101 et seq.; Bin, 1992: p. 62.
[180]ECtHR, *Salabiaku v. Francia*, fn. 123, para. 28; *European Court of Human Rights* (ECtHR), *Janosevic vs. Sweden*, July 23rd 2002, para 101, that can be found in <hudoc.echr.coe.int>.
[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 discretional 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.[182] 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.[183] 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.

References

Abbadessa, G. (2011). Il principio di presunzione di innocenza nella Cedu: Profili sostanziali. In V. Manes, & V. Zagrebelsky (Eds.), *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano* (pp. 383 et seq.). Milano.

Alimena, F. (1947). *La colpa nella teoria generale del reato*. Palermo.

Allen, J. (1980). Structuring Jury Decision-Making in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices. *Harvard Law Review, 94,* 321-368. https://doi.org/10.2307/1340583

Amor Neveiro, C. (1899). *Examen crítico de las nuevas escuelas de derecho penal*. Madrid.

Arabadjiev, A. (2012). Unlimited Jurisdiction: What Does It Mean Today? In P. Cardonnel, A. Rosas, & N. Wahl (Eds.), *Constitutionalising the EU Judicial System. Essays in Honour of Pernilla Lindh* (pp. 384 et seq.). Oxford.

Aramburu Zuloaga, F. (1887). *La nueva ciencia penal (exposición y crítica)*. Madrid, Sevilla.

Armenta Deu, T. (2004). La riforma del processo penale in Spagna. *Cassazione penale*, 3052 et seq.

Ashworth, A. (2003). *Principles of Criminal Law*. Oxford.

Azzali, G. (2006). Osservazioni sui reati di pericolo. In E. Dolcini, & C. E. Paliero (Eds.), *Studi in onore di Giorgio Marinucci* (Vol. I, pp. 1340 et seq.). Milano.

Bachmann, G. (2015). *Das Europäische Insiderhandelsverbot*. Berlin, München.

[182]Moccia, 2015: p. 3.

[183]In 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.

https://doi.org/10.1515/9783110282634

Barrot, J. (2010). Die Unschuldsvermutung in der Rechtsprechung des EGMR. *Zeitschrift für das Juristische Studium*, 701 et seq.

Basile, F. (2015). I delitti contro la vita e l'incolumità individuale. In G. Marinucci, & E. Dolcini (Eds.), *Trattato di diritto penale. Parte speciale* (Vol. III, pp. 199 et seq.). Padova.

Bassiouni, M. C. (2008). *International Criminal Law. Multilateral and Bilateral Enforcement Mechanisms*. Leiden.

Beccaria, C. (1764-1991). *Dei delitti e delle pene*. §XVI, edizione a cura di A. Burgio, Milano.

Bellavista, G. (1976). Considerazioni sulla presunzione d'innocenza. In Vv.Aa., *Studi sul processo penale* (Vol. IV, pp. 84 et seq.), Milano.

Bernal del Castillo, J. (2011). *Derecho penal comparado. La definición del delito en los sistemas anglosajón y continental*. Barcelona.

Bernard, G. (2003-2004). Les critères de la présomption d'innocence au XVIII[e] siècle: De l'objectivité des preuves à la subjectivité du juge. In *La présomption d'innocence*, Vol. 4, *Revue de l'Institut de Criminologie de Paris*, 33 et seq.

Bernardi, A. (2007). Politiche di armonizzazione e sistema sanzionatorio penale. In T. Rafaraci (Eds.), *L'area di libertà sicurezza e giustizia: Alla ricerca di un equilibrio tra priorità repressive ed esigenze di garanzia* (pp. 193 et seq.). Milano.

Bin, R. (1992). Bilanciamento e interessi e teoria della Costituzione. In V. Angiolini (Ed.), *Libertà e giurisprudenza costituzionale* (pp. 62 et seq.). Torino.

Bin, R. (1992). *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale*. Milano.

Bohnert, J. (1984). Die Abstraktheit der abstrakten Gefährdungsdelikte. *Juristische Schulung*, 182 et seq.

Bolle, P. H. (2006). Origines et destin d'une institution menacée: La présomption d'innocence. In Vv.Aa., *Le droit pénal à l'aube du troisième millénaire. Mélanges en l'honneur du Professeur Jean Prade* (pp. 43 et seq.). Paris.

Bongiovanni, G., Sartor, G., & Valentini, C. (Eds.) (2009). *Reasonableness and Law*. London. https://doi.org/10.1007/978-1-4020-8500-0

Bottoms, A., & Tonry, M. (2002). *Ideology, Crime and Criminal Justice. A Symposium in Honour of Sir Leon Radzinowicz*. Cullompton.

Braum, S. (2007). Historische Modelle transnationalen Strafrechts. In S. Kesper-Biermann, & P. Overath (Eds.), *Die Internationalisierung von Strafrechtswissenschaft und Kriminalpolitik (1870-1930). Deutschland im Vergleich* (pp. 111 et seq.). Berlin.

Brehm, W. (1973). *Zur Dogmatik des abstrakten Gefährdungsdelikts*. Tübingen.

Bricola, F. (1960). *Dolus in re ipsa. Osservazioni in tema di oggetto e di accertamento del dolo*. Milano.

Brigham, G. (1998). Quelques observations sur la présomption d'innocence aux Etats-Unis. In R. Koering-Joulin, A. Buchet, & J. L. Coste, *La présomption d'innocence en droit compare* (pp. 71 et seq.). Paris.

Buchet, A. (1998). La présomption d'innocence au regard de la Convention européenne des droits de l'homme et des libertés fondamentales. In R. Koering-Joulin, A. Buchet, & J. L. Coste, *La présomption d'innocence en droit compare* (pp. 27 et seq.). Paris.

Buzzelli, S. (2008). Processo penale europeo. *Enciclopedia del diritto*, 717 et seq.

Cadoppi, A. (2008). Liberalismo, paternalismo e diritto penale. In G. Fiandaca, & G.

Francolini, *Sulla legittimazione del diritto penale. Culture europeo-continentale e anglo-americana a confronto* (pp. 83 et seq.). Torino.

Cadoppi, A., & Pricolo, C. M. (1999). Strict Liability nel diritto anglo-americano. In *Digesto delle discipline penalistiche* (Vol. XIV, pp. 20 et seq.). Torino.

Canestrari, S., & Foffani, L. (Eds.) (2005). *Il diritto penale nella prospettiva europea. Quali politiche criminali per quale Europa? Atti del Convegno organizzato dall'Associazione Franco Bricola*, Bologna, 28 febbraio—2 marzo 2002. Milano. In particular the contributions of *L. Picotti*, *A. Bernardi*, *J.M. Silva Sánchez*, *K. Tiedemann*, *K. Lüederssen*, *J.A.E. Vervaele* (pp. 325 et seq.).

Carballo Armas, P. (2004). *La presuncion de inocencia en la jurisprudencia del Tribunal Constitucional.* Madrid.

Card, R. (2014). *Card, Cross and Jones: Criminal Law*. Oxford: Oxford University Press. https://doi.org/10.1093/he/9780198702306.001.0001

Carmignani, G. (1848). *Elementi del diritto criminale*. Malta.

Carmona, A. (2003). La responsabilità colpevole è necessariamente solo dolosa o colposa? A proposito della scomparsa delle ipotesi di responsabilità oggettiva. In Vv.Aa., *La riforma della parte generale del codice penale* (pp. 240 et seq.). Napoli.

Carrara, F. (1859-1907). *Programma del corso di diritto criminale. Parte generale*. Firenze.

Carrara, F. (1874). *Lineamenti di pratica legislativa penale*. Torino.

Carrara, F. (1881). *Il diritto penale e la procedura penale. Opuscoli di diritto criminale*. Prato.

Cassese, A. (2006). *Lineamenti di diritto internazionale penale*, *Vol. II*, *Diritto processuale*. Bologna.

Cassinelli, B. (1954). *Prospetto storico del diritto penale*. Milano.

Catenacci, M. (2006). I reati di pericolo presunto fra diritto e processo penale. In E. Dolcini, & C. E. Paliero (Eds.), *Studi in onore di Giorgio Marinucci* (Vol. II, pp. 1415 et seq.). Milano.

Catenacci, M. (2010). I reati ambientali e il principio di offensività. *Rivista quadrimestrale di diritto dell'ambiente*, 54 et seq.

Catenacci, M. (2012). I reati in materia ambientale. In A. Fiorella (Ed.), *Questioni fondamentali della parte speciale del diritto* penale (pp. 373 et seq.). Torino.

Caterini, M. (2004). *Reato impossibile e offensività*. Napoli.

Caterini, M. (2008). *Il reato eccessivo*. Napoli.

Caterini, M. (2013). L'ambiente "penalizzato". Evoluzione e prospettive dell'antagonismo tra esigenze preventive e principio di offensività. In K. Aquilina, & P. Iaquinta (Eds.), *Il sistema ambiente, tra etica, diritto ed economia* (pp. 146 et seq.). Padova.

Caterini, M. (2015). Criminal Risk, Media Representation and Role of the Criminal Law Culture. *Beijing Law Review, 6,* 55-68. https://doi.org/10.4236/blr.2015.61008

Celano, B. (2002). Giustizia procedurale pura e teoria del diritto. In M. Basciu (Ed.), *Giustizia e procedure. Dinamiche di legittimazione tra Stato e società internazionale* (pp. 101 et seq.). Milano.

Cere, J. P. (2003). Le virage répressif de la loi n. 2003-495 du 12 juin 2003 sur la violence routière. *Recueil Dalloz*, 2705 et seq.

Chiavario, M. (2001). Comment on Art. 6. In S. Bartole, B. Conforti, & G. Raimondi (Eds.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali* (pp. 216 et seq.). Padova.

Clages, H. (2004). *Der rote Faden. Grundsätze der Kriminalpraxis*. Heidelberg.

Colette-Basecqz, N. (2008). Réflexions critiques sur les présomptions de responsabilité en droit penal. In *Liber Amicorum Jean-Luc Fagnart* (pp. 413 et seq.). Bruxelles.

Corcoy Bidasolo, M. (1999). *Delitos de peligro y protección de bienes jurídicopenales supraindividuales*. Valencia.

Cordero, F. (1985). *Riti e sapienza del diritto*. Bari.

Costa, F. (1924). *Delitto e pena nella storia della filosofia*. Milano.

Craig, P., & De Búrca, G. (2015). *EU Law: Text, Cases, and Materials*. Oxford: Oxford University Press. https://doi.org/10.1093/he/9780198714927.001.0001

Cramer, P. (1962). *Der Vollrauschtatbestand als abstraktes Gefährdungsdelikt*. Tübingen.

Cuesta Pastor, P. (2002). *Delitos obstáculo. Tensión entre política criminal y teoría del bien jurídico*. Granada.

Cuykens, S., Holzapfel, D., & Kennes, L. (2015). *La preuve en matière pénale*. Bruxelles.

D'Alessandro, F. (2012). *Pericolo astratto e limiti-soglia. Le promesse non mantenute del diritto penale*. Milano.

D'Ascola, V. N. (2008). *Impoverimento della fattispecie e responsabilità penale senza prova*. Reggio Calabria.

D'Atena, A. (1997). In tema di principi e di valori costituzionali. *Giurisprudenza costituzionale*, 3065 et seq.

Damaška, M. (1997). *Evidence Law Adrift*. New Haven, London.

Damián Moreno, J. (2014). *La decisión de acusar. Un estudio a la luz del sistema acusatorio inglés*. Madrid.

Dammann, J. C. (2007). *Materielles Recht und Beweisrecht im System der Grundfreiheiten*. Tübingen.

Daury-Fauveau, M. (2010). Infractions assimilées au recel. Non-justification de ressources et facilitation de la justification de ressources fictives. *Juris Classeur Pénal*, fasc. 20.

De Guardia, P. (1990). L'élément intentionnel dans les infractions douanières. *Revue de science criminelle et de droit pénal comparé*, 487 et seq.

Declercq, R. (1999). *Beginselen van Strafrechtspleging*. Anvers.

Degenhart, C. (2014). *Staatsrecht I. Staatsorganisationsrecht mit Bezügen zum Europarecht*. Heidelberg.

Dejemeppe, B. (2007). La présomption d'innocence entre réalité et fiction. In B. Dejemeppe, P. Henry, & E. Krings (Eds.), *Liber Amicorum Paul Martens. L'humanisme dans la résolution des conflits: Utopie ou réalité?* (pp. 17 et seq.). Bruxelles.

Delga, J. (2008). *Manuel de l'innocent. De l'atteinte à la présomption d'innocence*. Paris.

Delmas-Marty, M., & Mingxuan, G. (Eds.) (1997). *Vers des principes directeurs internationaux de droit pénal, Vol. 5, Criminalité économique et atteintes à la dignité de la persone, Bilan comparatif et propositions.* Paris.

Dennis, I. H. (1999). *The Law of Evidence*. London.

Dervieux, V. (2001). Il processo penale in Francia. In Vv.Aa., *Procedure penali d'Europa* (pp. 136 et seq.). Padova.

Dolcini, E., & Marinucci, G. (2006). *Codice penale commentato, Vol. I, Milanofiori*. Assago.

Dominioni, O. (1985). La presunzione d'innocenza. In O. Dominioni, *Le parti nel processo penale. Profili sistematici e problemi* (pp. 217 et seq.). Milano.

Donini, M. (1993). *Il delitto contravvenzionale. Culpa iuris e oggetto del dolo nei reati a condotta neutra*. Milano.

Donini, M. (2002). Prospettive europee del principio di offensività. In A. Cadoppi (Ed.), *Offensività e colpevolezza* (pp. 111 et seq.). Padova.

Donini, M. (2011). *Europeismo giudiziario e scienza penale*. Milano.

Donini, M. (2013). Il principio di offensività. Dalla penalistica italiana ai programmi europei. *Diritto penale contemporaneo, No. 4,* 4 et seq.

Dorado Montero, P. (1889). *La antropología criminal en Italia*. Madrid.

Dorado Montero, P. (1894). *El positivismo en la ciencia jurídica y social italiana*. Madrid.

Dripps, D. A. (1987). The Constitutional Status of the Reasonable Doubt Rule. *California Law Review, 75,* 1665-1718. https://doi.org/10.2307/3480489

du Jardin, J. (2003). Le droit de défense dans la jurisprudence de la Cour de cassation (1990-2003), Discours prononcé par le Procureur général près la Cour de cassation, à l'audience solennelle de rentrée le 1er septembre 2003. *Journal des tribunaux, No. 3107,* 609 et seq.

du Jardin, J., & Masset, A. (1993). Les mouvements de réforme de la procédure pénale et la protection des droits de l'homme en Belgique. *Revue Internationale de Droit Pénal*, 959 et seq.

Duff, R. A. (2005). Strict Liability, Legal Presumptions, and the Presumption of Innocence. In A. P. Simister (Ed.), *Appraising Strict Liability* (pp. 125 et seq.). Oxford, New York. https://doi.org/10.1093/acprof:oso/9780199278510.003.0006

Emmerson, B. (2012). *Human Rights and Criminal Justice*. London.

Esser, R. (2002). *Auf dem Weg zu einem europäischen Strafverfahrensrecht*. Berlin. https://doi.org/10.1515/9783110889956

Ezrachi, A. (2012). *EU Competition Law. An Analytical Guide to the Leading Cases*. Oxford.

Ferot, P. (2007). *La présomption d'innocence: Essai d'interprétation historique*, *doctoral thesis*. Université Lille 2. http://tel.archives-ouvertes.fr/tel-00429540/document

Ferri, E. (1900). *Sociologia criminale*. Torino.

Fiandaca, G. (1984). La tipizzazione del pericolo. *Dei delitti e delle pene*, 441 et seq.

Fiandaca, G., & Francolini, G. (2008). *Sulla legittimazione del diritto penale. Culture europeo-continentale e anglo-americana a confronto*. Torino.

Fiore, C. (1994). Il principio di offensività. *Indice penale*, 283 et seq.

Fiore, C. (1996). Il principio di offensività. In Vv.Aa., *Prospettive di riforma del codice penale e valori costituzionali* (pp. 65 et seq.), Milano.

Fiore, C., & Fiore, S. (2004). *Diritto penale*, *Parte generale*. Vol. I, Torino.

Flore, D. (2014). *Droit pénal européen. Les enjeux d'une justice penale européenne*. Bruxeles.

Flores Prada, I. (2010). L'investigazione difensiva nel processo penale spagnolo. In A. Scalfati, O. Moscarini, L. Filippi, & P. Gualtieri (Eds.), *La circolazione investigativa nello spazio giuridico europeo: Strumenti, soggetti, risultati* (pp. 349 et seq.). Padova.

Florian, E. (1914). Il processo penale e il nuovo codice. In R. Garofalo, A. Berenini, E. Florian, & A. Zerboglio (Eds.), *Commentario del nuovo codice di procedura penale* (pp. 118 et seq.). Milano.

Foffani, L. (2010). Il "Manifesto sulla politica criminale europea". *Criminalia*, 657 et seq.

Francolini, G. (2008). L'harm principle del diritto angloamericano nella concezione di

Joel Feinberg. *Rivista italiana di diritto e procedura penale*, 282 et seq.

Frister, H. (1988). *Schuldprinzip, Verbot der Verdachtsstrafe und Unschuldsvermutung als materielle Grundprinzipien des Strafrechts*. Berlin. https://doi.org/10.3790/978-3-428-06440-3

Gallas, W. (1972). Abstrakte und konkrete Gefährdung. In H. Lüttger, H. Blei, & P. Hanau (Eds.), *Festschrift für Ernst Heinitz zum 70. Geburtstag am 1. Januar 1972* (pp. 171 et seq.). Berlin.

Gallo, E. (1970). *Riflessione sui reati di pericolo*. Milano.

Gallo, M. (1964), Dolo (dir. pen.). In *Enciclopedia del diritto italiano* (Vol. XIII, pp. 637 et seq.). Milano.

Gallo, M. (1969). I reati di pericolo. *Foro penale*, 1 et seq.

Gallo, M. (2014). *Diritto penale italiano. Appunti di parte generale*. Vol. I, Torino.

Gambini Musso, R. (1991). Habeas Corpus. In Vv. Aa., *Digesto delle discipline penalistiche* (Vol. VI, pp. 58 et seq.). Torino.

Garofalo, R. (1891). *Criminologia.* Torino.

Garofalo, R. (1892). La detenzione preventiva. *Scuola positiva*, 199 et seq.

Garofoli,V. (1998). Presunzione di innocenza e considerazione di non colpevolezza. La fungibilità delle due formulazioni. *Rivista italiana di diritto e procedura penale*, 1169 et seq.

Ghiara, A. (1974). Presunzione d'innocenza, presunzione di non colpevolezza e formula dubitativa, anche alla luce degli interventi della Corte Costituzionale. *Rivista italiana di diritto e procedura penale*, 73 et seq.

Giannelli, F. (1994). *La figura del delitto preterintenzionale*. Salerno.

Glover, R., & Murphy, P. (2013). *Murphy on Evidence*. Oxford.

Grasso, G. (2007). La protezione dei diritti fondamentali nella Costituzione per l'Europa e il diritto penale: spunti di riflessione critica. In G. Grasso, & R. Sicurella (Eds.), *Lezioni di diritto penale europeo* (pp. 655 et seq.). Milano.

Graul, E. (1991). *Abstrakte Gefährdungsdelikte und Präsumtionen im Strafrecht*. Berlin. https://doi.org/10.3790/978-3-428-07103-6

Guastini, R. (1999). Principi di diritto e discrezionalità giudiziale. In M. Bessone (Ed.), *Interpretazione e diritto giudiziale, Vol. I, Regole, modelli, metodi* (pp. 98 et seq.). Torino.

Hassemer, W. (1992). Kennzeichen und Krisen des modernen Strafrechts. *Zeitschrift für Rechtspolitik, No. 25,* 378 et seq.

Hefendehl, R. (2002). Die Materialisierung von Rechtsgut und Deliktsstruktur. *Goltdammer's Archiv für Strafrecht*, 20 et seq.

Henkel, H. (1961). Die "Praesumtio doli" im Strafrecht. In P. Bockelmann, & W. Gallas (Eds.), *Festschrift für Eberhard Schmidt zum 70. Geburtstag* (pp. 578 ss.). Göttingen.

Henrion, H. (2005). *La présomption d'innocence dans les travaux préparatoires au XX*ème *siècle. Archives de politique criminelle, No. 1,* 39 et seq.

Henrion, H. (2005). La présomption d'innocence, un "droit à..."? Comparaison franco-allemande. *Revue internationale de droit comparé, 4,* 1031 et seq.

Holsters, D. (1991). Over "in de vlucht" gedane "vaststellingen" inzake verkeer. In *Liber Amicorum Marc Chatêl* (pp. 299 et seq.). Anvers.

Horn, E. (1973). *Konkrete Gefährdungsdelikte*. Köln.

Hörster, M. (2009). *Die strict liability des englischen Strafrechts. Zugleich eine Ge-*

genüberstellung mit dem deutschen Straf- und Ordnungswidrigkeitenrecht. Berlin.

Hruschka, J. (1985). Über Schwierigkeiten mit dem Beweis des Vorsatzes. In K. H. Gössel, H. Kauffmann, & T. Kleinknecht (Eds.), *Strafverfahren im Rechtsstaat. Festschrift für Theodor Kleinknecht zum 75. Geburtstag* (pp. 197 et seq.). München.

Illuminati, G. (1979). *La presunzione d'innocenza dell'imputato*. Bologna.

Itzcovich, G. (2006). Bananen. Bilanciamento, diritti fondamentali e integrazione europea nella "guerra delle banane". In G. Maniaci (Ed.), *Eguaglianza, ragionevolezza e logica giuridica* (pp. 11 et seq.). Milano.

Jackson, J. D., & Summers, S. J. (2012). *The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil Law Traditions*. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9781139093606

Jaén Vallejo, M. (2002). *Tendencias actuales de la Jurisprudencia Constitucional Penal*. Madrid.

Jayawickrama, N. (2002). *The Judicial Application of Human Rights Law. National, Regional and International Jurisprudence*. Cambridge: Cambridge University Press. https://doi.org/10.1017/cbo9780511494017

Jeandidier, W. (1991). La présomption d'innocence ou le poids des mots. *Revue de science criminelle et de droit pénal compare*, 51 et seq.

Joubert, C. (2005). *Judicial Control of Foreign Evidence in Comparative Perspective*. Amsterdam.

Juy-Burmann, R. (2001). Il processo penale in Germania. In M. Chiavario (Ed.), *Procedure penali d'Europa* (pp. 180 et seq.). Padova.

Kaufmann, A. (1963). Unrecht und Schuld beim Delikt der Volltrunkenheit. *Juristen Zeitung*, 432 et seq.

Keane, A. (2006). *The Modern Law of Evidence*. Oxford.

Kindhäuser, U. (1989). *Gefährdung als Straftat. Rechtstheoretische Untersuchungen zur Dogmatik der abstrakten und konkreten Gefährdungsdelikte*. Frankfurt am Main. https://doi.org/10.3196/9783465018629

Klamberg, M. (2013). *Evidence in International Criminal Trials. Confronting Legal Gaps and the Reconstruction of Disputed Events*. Leiden. https://doi.org/10.1163/9789004236523

Koering-Joulin, R., Buchet, A., Coste, J. L. et al. (1998). *La présomption d'innocence en droit compare*. Paris.

Kokott, J. (1998). *The Burden of Proof in Comparative and International Human Rights Law. Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*. The Hague, Boston.

Krauβ, D. (1971). Der Grundsatz der Unschuldsvermutung im Strafverfahren. In H. Müller-Dietz (Ed.), *Strafrechtsdogmatik und Kriminalpolitik* (pp. 153 et seq.). Köln.

Krey, V. (2007). *Deutsches Strafverfahrensrecht. Band 2. Hauptverhandlung, Beweisrecht, Gerichtliche Entscheidungen, Tatbegriff, Rechtskraft, Rechtsmittel und Rechtsbehelfe*. Stuttgart.

Kuty, F. (2003). Le droit à un procès équitable au sens de la jurisprudence strasbourgeoise en 2002—Le respect des droits de la défense. *Revue de Jurisprudence de Liège, Mons et Bruxelles*, 524 et seq.

Kuty, F. (2006). *Justice pénale et procès equitable.* Bruxelles.

Lacey, N. (1993). A Clear Concept of Intention. Elusive or Illusory? *Modern Law Review, 56,* 621-642. https://doi.org/10.1111/j.1468-2230.1993.tb01894.x

Lagodny, O. (1996). *Strafrecht vor den Schranken der Grundrechte*. Tübingen.

Lautenbach, G. (2013). *The Concept of the Rule of Law and the European Court of Human Rights*. Oxford: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199671199.001.0001

Lazerges, C. (2004). La présomption d'innocence en Europe. *Archives de politique criminelle*, 125 et seq.

Leone, G. (1937). *Il codice di procedura penale illustrato articolo per articolo*. Milano.

Leone, G. (1961). *Trattato di diritto processuale penale*. Vol. I, Napoli.

Longhi, S. (1921). Dell'istruzione. In L. Mortara, A. Stoppato, G. Vacca, A. Setti, R. Notaristefani, & S. Longhi (Eds.), *Commento al codice di procedura penale* (Pp. 87 ss.). Torino.

López Escudero, M. (2008). Comentario art. 48. In A. Mangas Martín (Ed.), *Carta de los Derechos Fundamentales de la Unión Europea. Comentario artículo por artículo* (pp. 759 et seq.). Bilbao.

Lozzi, G. (1968). *Favor rei e processo penale*. Milano.

Lucchini, L. (1886). *I Semplicisti (antropologi, psicologi e sociologi) del diritto penale.* Torino.

Lucchini, L. (1905). *Elementi di procedura penale*. Firenze.

Luzi, T. (2006). I diritti della persona innanzi alla Corte. In G. Lattanzi, & V. Monetti (Eds.), *La Corte penale internazionale* (pp. 1063 et seq.). Milano.

Maiwald, M. (2008). Introduzione al diritto penale italiano dal punto di vista di un penalista tedesco. In D. Fondaroli (Ed.), *Principi costituzionali in materia penale e fonti sovranazionali* (pp. 40 et seq.). Padova.

Maiwald, M. (2009). *Einführung in das italienische Strafrecht und Strafprozeßrecht*, Frankfurt am Main.

Malinverni, A. (1972). *Principi del processo penale*. Torino.

Manacorda, S. (2011). Carta dei diritti fondamentali dell'Unione Europea e Cedu: una nuova topografia della garanzie penalistiche in Europa? In V. Manes, & V. Zagrebelsky (Eds.), *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano* (pp. 167 et seq.). Milano.

Manes, V. (2005). *Il principio di offensività nel diritto penale. Canone di politica criminale, criterio ermeneutico, parametro di ragionevolezza*. Torino.

Manes, V. (2012). *Il giudice nel labirinto. Profili delle intersezioni tra diritto penale e fonti sovranazionali*. Roma.

Manna, A. (2002). I reati di pericolo astratto e presunto e i modelli di diritto penale. In U. Curi, & G. Palombarini (Eds.), *Diritto penale minimo* (pp. 35 et seq.). Roma.

Mantovani, F. (1982). Il problema dell'offensività del reato nelle prospettive di riforma del codice penale. In G. Vassalli (Ed.), *Problemi generali di diritto penale. Contributo alla riforma* (pp. 70 et seq.). Milano.

Manzini, V. (1912). *Manuale di procedura penale italiana*. Torino.

Manzini, V. (1931). *Trattato di diritto processuale italiano secondo il nuovo codice*. Vol. I, Torino.

Manzini, V. (1952). *Trattato di diritto processuale penale italiano*. Vol. VI, 4ª ed., Torino.

Marafioti, L. (2002). Appunti in tema di dolo e regime della prova. *Giurisprudenza italiana*, 653 et seq.

Marinucci, G., & Dolcini, E. (2001). *Corso di diritto penale*. Milano.

Masucci, M. (2004). *"Fatto" e "valore" nella definizione del dolo*. Torino.

Mathias, E. (2007). *Procédure pénale*. Levallois-Perret.

Maugeri, A. M. (2001). *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*. Milano.

Maugeri, A. M. (2007). Il sistema sanzionatorio comunitario dopo la Carta europea dei diritti fondamentali. In G. Grasso, & R. Sicurella (Eds.), *Lezioni di diritto penale europeo* (pp. 163 et seq.). Milano.

Mayaud, Y. (1999). Entre le dit et le non-dit, ou les leçons de droit pénal du Conseil constitutionnel. *Recueil Dalloz*, 589 et seq.

Mazza, O. (2014). Una deludente proposta in tema di presunzione d'innocenza, *Archivio penale, No. 3,* 5 et seq.

Mazzacuva, F. (2009). Un "hard case" davanti alla Corte europea: Argomenti e principi nella sentenza su Punta Perotti. *Diritto penale e processo*, 1540 et seq.

Méndez Rodríguez, C. (1993). *Los delitos de peligro y sus técnicas de tipificación*. Madrid.

Mendoza Buergo, B. (2001). *Límites dogmáticos y político-criminales de los delitos de peligro abstracto*. Albolote, Granada.

Mesa, R. (2010). De la portée des présomptions de responsabilité en matière d'infractions au Code de la route. *Gazette du Palais*, 18 Novembre 2010, 11 et seq.

Mezzetti, E. (2006). L'elemento soggettivo dei crimini internazionali. In G. Lattanzi, & V. Monetti (Eds.), *La Corte penale internazionale* (pp. 340 et seq.). Milano.

Micheletti, D. (2011). Il paternalismo penale giudiziario e le insidie della bad samaritan jurisprudence. *Criminalia. Annuario di scienze penalistiche*, 275 et seq.

Miranda Estrampes, M. (1997). *La mínima actividad probatoria en el proceso penal*. Barcelona.

Mitsilegas, V. (2013). The Aims and Limits of EU Anti-Corruption Law. In J. Horder, & P. Alldridge (Eds.), *Modern Bribery Law. Comparative Perspectives* (pp. 188 et seq.). Cambridge.

Moccia, S. (2009). Cesare Beccaria e la difesa dei diritti dell'individuo. In W. Hassemer, E. Kempf, & S. Moccia (Eds.), *In dubio pro libertate. Festschrift für Klaus Volk zum 65. Geburtstag* (pp. 469 et seq.). München.

Moccia, S. (2015). El aspecto actual del sistema penal. ¿Una experiencia solo italiana? *Revista general de derecho penal, No. 23,* RI § 415865.

Montañés Pardo, M. A. (1999). *La presuncion de inocencia. Análisis doctrinal y jurisprudencial*. Pamplona.

Morales Prats, F. (2002). L'offensività nel diritto penale spagnolo. In A. Cadoppi (Ed.), *Offensività e colpevolezza* (pp. 86 et seq.). Padova.

Moreso, J. J. (2002). Conflitti tra principi costituzionali. *Ragion pratica, No. 18,* 201 et seq.

Mortara, L. (1915). Discorso al Senato (5 marzo 1912). In L. Mortara, A. Stoppato, G. Vacca, A. Setti, R. Notaristefani, & S. Longhi (Eds.), *Commento al codice di procedura penale* (Vol. III, pp. 156 et seq.). Torino.

Munday, R. (2011). *Evidenc*e. Oxford.

Munday, R. (2015). *Evidence*. Oxford.

Newman, C. J. (2014). Statutory Defences of Reasonableness: Inexcusable Uncertainty or Reasonable Pragmatism. In A. Reed, & M. Bohlander, *General Defences in Criminal Law. Domestic and Comparative Perspectives* (pp. 145 et seq.) Farnham.

Nguyen, A. (2012). *Die Unschuldsvermutung im Verfahren vor den internationalen Strafgerichten*. Hamburg.

Nicolini, N. (1843). *Della procedura penale del Regno delle Due Sicilie*. Livorno.

Nicosia, E. (2006). *Convenzione europea dei diritti dell'uomo e diritto penale*. Torino.

Octavio de Toledo y Ubieto, E. (1990). Función y límites del principio de exclusiva protección de bienes jurídicos. *Anuario de derecho penal y ciencias penales, No. 43,* 5 et seq.

Ouvrard, L. (2000). *La prostitution. Analyse juridique et choix de politique criminelle*. Paris.

Pache, E. (2014). Die Union als Raum der Freiheit, der Sicherheit und des Rechts. In M. Niedobitek (Ed.), *Europarecht—Politiken der Union* (pp. 1178 et seq.). Berlin, Boston. https://doi.org/10.1515/9783110271393.1065

Pagano, F. M. (1787). *Considerazioni di Francesco Mario Pagano sul processo criminale*. Napoli.

Pagliaro, A. (2000). Dolo ed errore: Problemi in giurisprudenza. *Cassazione penale*, 2495 et seq.

Pagliaro, A. (2003). *Principi di diritto penale, Parte generale*. IV ed., Milano.

Palazzo, F. (2006). Meriti e limiti dell'offensività come principio di ricodificazione. In Vv.Aa., *Prospettive di riforma del Codice penale e valori costituzionali* (pp. 74 et seq.). Milano.

Palazzo, F., & Papa, M. (2013). *Lezioni di diritto penale comparato*. Torino.

Paliero, C. E., & Viganò, F. (2013). *Europa e diritto penale*. Milano.

Palmieri, F. (2013). Il giudizio. In P. Gianniti (Ed.), *I diritti fondamentali nell'Unione Europea. La Carta di Nizza dopo il Trattato di Lisbona* (pp. 1440 et seq.). Bologna.

Panebianco, G. (2015). The *Nulla Poena Sine Culpa* Principle in European Courts Case Law. In S. Ruggeri (Ed.), *Human Rights in European Criminal Law. New Developments in European Legislation and Case Law after the Lisbon Treaty* (pp. 47-78). Switzerland: Springer International Publishing. https://doi.org/10.1007/978-3-319-12042-3_4

Panzarella, R., & Vona, D. (2006). *Criminal Justice Masterworks: A History of Ideas about Crime, Law, Police, and Corrections*. Durham (USA).

Parodi Giusino, M. (1990). *I reati di pericolo tra dogmatica e politica criminale*. Milano.

Paulesu, P. P. (2008). La presunzione di innocenza, tra realtà processuale e dinamiche extraprocessuali. In A. Balsamo, & R. Kostoris (Eds.), *Giurisprudenza europea e processo penale italiano* (pp. 127 et seq.). Torino.

Paulesu, P. P. (2009). *La presunzione di non colpevolezza dell'imputato*. Torino.

Pedrazzi, C. (1979). Problemi di tecnica legislative. In Vv.Aa., *Comportamenti economici e legislazione penale* (pp. 32 et seq.). Milano.

Pene Vidari, G. S. (2014). *Storia del diritto. Età contemporanea*. Torino.

Perron, W. (1998). Vorüberlegungen zu einer rechtsvergleichenden Untersuchung der Abgrenzung von Vorsatz und Fahrlässigkeit. In A. Eser (Ed.), *Festschrift für Haruo Nishihara zum 70. Geburtstag* (pp. 153 ss.). Baden-Baden.

Pesquié, B. (2001). Il processo penale in Belgio. In Vv.Aa., *Procedure penali d'Europa* (pp. 46 et seq.). Padova.

Pessina, E. (1912). *Storia delle leggi sul procedimento penale*. Napoli.

Pierdonati, M. (2012). *Dolo e accertamento nelle fattispecie penali c.d. "pregnanti"*. Napoli.

Pipaón Pulido, J. G., Pedreño Navarro, L., & Bal Francés, E. (2009). *Los delitos contra la seguridad vial*. Valladolid.

Pisani, M. (1965). Sulla presunzione di non colpevolezza. *Foro penale*, 1 et seq.

Pisani, N. (2001). L'elemento psicologico del crimine internazionale nella parte generale dello Statuto della Corte internazionale penale. *Rivista italiana di diritto e procedura penale*, 1372 et seq.

Plowden, P., & Kerrigan, K. (2002). *Advocacy and Human Rights. Using the Convention in Courts and Tribunals*. London.

Porret, M. (1997). *Beccaria et la culture juridique des Lumières*. Genève.

Pradel, J. (2004). *Procédure pénale*. Paris.

Pradel, J. (Ed.) (2003). *Les dispositions procédurales de la loi du 15 juin 2000 sur la présomption d'innocence, deux années d'application*. Journée d'études organisée le 15 juin 2002 par l'Institut de sciences criminelles de Poitiers. *Travaux de l'Institut de sciences criminelles de Poitiers*, Paris.

Prieto Sanchís, L. (2001). La filosofía penal de la ilustración española. In L. A. Arroyo Zapatero, & I. Berdugo Gómez de la Torre (Eds.), *Homenaje al Dr. Marino Barbero Santos. In memoriam* (Vol. 1, pp. 489 et seq.). Cuenca.

Prieto Sanchìs, L. (2002). Neocostituzionalismo e ponderazione giudiziale. *Ragion pratica, No. 18,* 169 et seq.

Prosdocimi, S. (1985). Delitti aggravati dall'evento e reato complesso. *Indice penale*, 288 et seq.

Radzinowicz, L. (1966). *Ideology and Crime. A Study of Crime in Its Social and Historical Context.* London.

Ragués Vallès, R. (1999). *El dolo y su prueba en el proceso penal*. Barcelona.

Rassat, M.-L. (2011). *Droit pénal spécial, Les infractions à l'honneur et à la consideration*. Paris.

Rengeling, H.-W., & Szczekalla, P. (2004). *Grundrechte in der Europäischen Union. Charta der Grundrechte und Allgemeine Rechtsgrundsätze*. Köln, München.

Rieβ, P. (Ed.) (2001), *Die Strafprozeßordnung und das Gerichtsverfassungsgesetz: Ggroßkommentar*, §§ 213-295. Berlin, New York.

Roberts, P. (2005). Strict Liability and the Presumption of Innocence. An Expose of Functionalist Assumptions. In A. P. Simister (Ed.), *Appraising Strict Liability* (pp. 151 et seq.). Oxford, New York.

Roberts, P., & Zuckerman, A. (2004). *Criminal Evidence*. Oxford.

Roca Agapito, L. (2005). La repercusión de la aprobación de la Constitución Española de 1978 en el ámbito del Derecho Penal. In Vv.Aa., *Homenaje a la Constitución española. XXV anniversario* (pp. 145 et seq.). Oviedo.

Rocco, A. (1929). Relazione ministeriale sul progetto preliminare del codice di procedura penale. In *Lavori preparatori del codice penale e del codice di procedura penale* (p. 22). Roma.

Rodríguez Ramos, L. (1983). Presunción de inocencia no minimizada. *La Ley. Revista Jurídica Española de Doctrina, Jurisprudencia y Legislación*, 1249 et seq.

Roe, D. (1999). *Criminal Law*. London.

Romeo Casabona, C. M. (2005). *Conducta peligrosa e imprudencia en la sociedad de riesgo*. Granada.

Ronco, M. (2006). Il principio di legalità. In M. Ronco (Ed.), *Commentario sistematico al codice penale, Vol. I, La legge penale*. Bologna.

Roussel, G. (2010). *Suspicion et procédure pénale equitable*. Paris.

Roxin, C. (1992). *Strafrecht, Allgemeiner Teil, Band I. Grundlagen. Der Aufbau der Verbrechenslehre.* München.

Roxin, C. (1998). *Strafverfahrensrecht*. München.

Royer, G. (2008). Le gérant qui ne justifie pas de l'affectation des biens de la société est présumé les avoir utilisés dans son intérêt personnel, nota a Cour de cassation, Chambre criminelle, 24 settembre 2008. *Actualité juridique pénale*, 506 et seq.

Rudolphi, H. J. (1984). Primat des Strafrechts im Umweltschutz? *Neue Zeitschrift für Strafrecht*, 248 et seq.

Ruggieri, F. (2008). Diritti della difesa e tutela della vittima nello spazio giuridico europeo. In G. Grasso, & R. Sicurella (Eds.), *Per un rilancio del progetto europeo* (pp. 514 et seq.). Milano.

Sabatini, G. (1931). *Principi di diritto processuale penale italiano*. Città di Castello.

Sadurski, W. (2009). Reasonableness and Value Pluralism in Law and Politics. In G. Bongiovanni, G. Sartor, & C. Valentini C. (Eds.), *Reasonableness and Law* (pp. 129-146). Netherlands: Springer. https://doi.org/10.1007/978-1-4020-8500-0_6

Salcuni, G. (2011). *L'europeizzazione del diritto penale: Problemi e prospettive*. Milano.

Saraceno, P. (1940). *La decisione sul fatto incerto nel processo penale*. Padova.

Satzger, H. (2010). Le carenze della politica criminale europea. *Rivista italiana di diritto e procedura penale*, 1278 et seq.

Sayers, D. (2014). Article 48. Presumption of Innocence and Right of Defence (Criminal Law). In S. Peers, T. Hervey, J. Kenner, & A. Ward (Eds.), *The EU Charter of Fundamental Rights. A Commentary* (pp. 1303 et seq.). Oxford.

Sbriccoli, M. (1973). Dissenso politico e diritto penale in Italia tra otto e novecento. *Quaderni Fiorentini*, 615 et seq.

Scaccia G. (2000). *Gli "strumenti" della ragionevolezza nel giudizio costituzionale*. Milano.

Schabas, W. A. (2010). *The International Criminal Court. A Commentary on the Rome Statute*. Oxford, New York.

Schabas, W. A. (2011). *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press. https://doi.org/10.1017/cbo9780511975035

Schmidt, J. (1999). *Untersuchung zur Dogmatik und zum Abstraktionsgrad abstrakter Gefährdungsdelikte*. Marburg.

Schröder, H. (1967). Abstrakt-konkrete Gefährdungsdelikte? *Juristen Zeitung*, 522 et seq.

Schröder, H. (1969). Die Gefährdungsdelikte im Strafrecht. *Zeitschrift für die gesamte Strafrechtswissenschaft, 81,* 5-28. https://doi.org/10.1515/zstw.1969.81.1.5

Schünemann, B. (1975). Moderne Tendenzen in der Dogmatik der Fahrlässigkeits und Gefährdungsdelikte. *Juristische Arbeitsblätter*, 787 et seq.

Schünemann, B. (1984). Einführung in das strafrechtliche Systemdenken. In B. Schünemann (Ed.), *Grundfragen des modernen Strafrechtssystems* (pp. 51 et seq.). Berlin. https://doi.org/10.1515/9783110900453.1

Seminara, S. (2011). Sul metodo tecnico-giuridico e sull'evoluzione della penalistica italiana nella prima metà del XX secolo. In Vv.Aa., *Studi in onore di Mario Romano* (Vol. I, p. 575). Napoli.

Sequeros Sazatornil, F. (2010). In M. Gómez Tomillo (Ed.), *Comentarios al Código penal* (pp. 1400 et seq.). Valladolid.

Seredyńska, I. (2012). *Insider Dealing and Criminal Law. Dangerous Liaisons*. Berlin,

Heidelberg: Springer. https://doi.org/10.1007/978-3-642-22857-5

Sermonti, A. (1943). *Principi generali dell'ordinamento giuridico fascista*. Milano.

Shaman, J. M. (2001). *Constitutional Interpretation. Illusion and Reality*. Westport.

Sicurella, R. (2002). Nulla poena sine culpa: Un véritable principe commun européen? *Revue de science criminelle et droit pénal comparé*, 20 et seq.

Simester, A. P. (2005). Is Strict Liability Always Wrong? In A. P. Simester (Ed.), *Appraising Strict Liability* (pp. 21 et seq.) Oxford, New York: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199278510.003.0002

Simester, A. P. (Ed.) (2005). *Appraising Strict Liability*. Oxford, New York: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199278510.001.0001

Siracusano, D. (1961). Condanna (dir. proc. pen.). In *Enciclopedia del diritto* (Vol. VIII, pp. 733 et seq.). Milano.

Skinner, S. (2015). *Fascism and Criminal Law. History, Theory, Continuity.* Oxford.

Sluiter, G. (2009). Proof (Burder of). In A. Cassese (Ed.), *The Oxford Companion to International Criminal Justice* (pp. 467 et seq.). Oxford.

Sotis, C. (2012). *Le "regole dell'incoerenza". Pluralismo normativo e crisi postmoderna del diritto penale*. Roma.

Spirito, U. (1974). *Storia del diritto penale italiano*. Firenze.

Stea, G. (2013). L'offensività europea come criterio di proporzione dell'opzione penale. *Archivio penale, No. 3,* 1 et seq.

Stéfani, G., & Levasseur, G. (1962). *Procédure pénale* (2ª ed.). Paris.

Stefanou, C., White, S., & Xanthaki, H. (2011). *OLAF at the Crossroads*. Oxford.

Steindorf, J. (1997). *Umwelt-Strafrecht*. Berlin. https://doi.org/10.1515/9783110908060

Stella, F. (2001). *Giustizia e modernità. La protezione dell'innocente e la tutela delle vittime*, Milano.

Stella, F. (2004). Oltre il ragionevole dubbio: Il libero convincimento del giudice e le indicazioni vincolanti della costituzione italiana. In Vv.Aa., *Il libero convincimento del giudice penale. Vecchie e nuove esperienze* (pp. 79 et seq.). Milano.

Stilinovic, D. (2003). *Voyage au pays de la présomption d'innocence. Dans le secret des enquêtes judiciaries*. Paris.

Stoppato, A. (1893). Sul fondamento scientifico della procedura penale. *Rivista penale*, 321 et seq.

Stoppato, A. (1915). Relazione della Commissione della Camera dei deputati sul progetto del codice di procedura penale. In L. Mortara, A. Stoppato, G. Vacca, A. Setti, R. Notaristefani, & S. Longhi (Eds.), *Commento al codice di procedura penale* (Vol. III, pp. 192 et seq.). Torino.

Stuckenberg, C.F. (1997). *Untersuchungen zur Unschuldsvermutung*. Berlin, New York.

Stumer, A. (2010). *The Presumption of Innocence. Evidential and Human Rights Perspectives.* Oxford.

Sullivan, G. R. (2005). Strict Liability for Criminal Offences in England and Wales Following Incorporation into English Law of the European Convention on Human Rights. In A. P. Simester (Ed.), *Appraising Strict Liability* (pp. 195 et seq.). Oxford, New York: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199278510.003.0008

Tadros, V., & Tierney, S. (2004). The Presumption of Innocence and the Human Rights Act. *Modern Law Review, 67,* 402-434. https://doi.org/10.1111/j.1468-2230.2004.00493.x

Trapani, M. (2006). *La divergenza tra il "voluto" e il "realizzato"*. Torino.

Trüg, G. (2003). *Lösungskonvergenzen trotz Systemdivergenzen im deutschen und US-amerikanischen Strafverfahren*. Tübingen.

Twining, W. (1994). *Rethinking Evidence. Exploratory Essays*. Evanston.

Urbino-Soullier, F. (1987). L'évolution de la jurisprudence de la Chambre criminelle de la Cour de cassation sur l'application des dispositions répressives du code des douanes. *Gazette du Palais, 1,* 750 et seq.

Vallini, A. (2003). *Antiche e nuove tensioni tra colpevolezza e diritto penale artificiale*. Torino.

Vannini, O. (1950). *Aborto—Omicidio preterintenzionale, Vol. V, Quid iuris? Manuale di esercitazioni pratiche in diritto penale*. Milano.

Vargas Pinto, T. (2007). *Delitos de peligro abstracto y resultado. Determinación de la incertidumbre penalmente relevante*. Cizur Menor.

Vázquez Sotelo, J. L. (1984). *Presunción de inocencia del imputado e íntima convicción del Tribunal*. Barcelona.

Vegas Torres, J. (1993). *Presunción de inocencia y prueba en el proceso penal*. Madrid.

Verstraeten, R. (2005). *Handboek strafvordering.* Anvers.

Vogel, J. (2007). Vorbemerkungen zu den §§ 15 ff. In T. Weigend, G. Dannecker, G. Werle et al. (Eds.), *Strafgesetzbuch, Leipziger Kommentar, Band 1, Einleitung* (pp. 987 et seq.). Berlin.

Volk, K. (1993). Dolus ex re. In F. Haft (Ed.), *Strafgerechtigkeit. Festschrift für Arthur Kaufmann zum 70. Geburtstag* (pp. 618 ss.). Heidelberg.

Von Hirsch, A. (2002). Der Rechtsgutsbegriff und das "Harm Principle". *Goltdammer's Archiv für Strafrecht*, 2 et seq.

Williams, G. L. (1965). *The Mental Element in Crime*. Jerusalem.

Wohlers, W. (2000). *Deliktstypen des Präventionsstrafrechts—Zur Dogmatik "moderner" Gefährdungsdelikte*. Berlin.

Wohlers, W. (2002). Rechtsgutstheorie und Deliktsstruktur. *Goltdammer's Archiv für Strafrecht*, 16 et seq.

Wohlers, W. (2008). Le fattispecie penali come strumento per il mantenimento di orientamenti sociali di carattere assiologico? Problemi di legittimazione da una prospettiva europea continentale e da una angloamericana. In G. Fiandaca, & G. Francolini, *Sulla legittimazione del diritto penale. Culture europeo-continentale e anglo-americana a confronto* (pp. 125 et seq.). Torino.

Zagrebelsky, V. (2011). La convenzione europea dei diritti dell'uomo e il principio di legalità nella materia penale. In V. Manes, & V. Zagrebelsky (Eds.), *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano* (pp. 69 et seq.). Milano.

Zappalà, S. (2005). *La giustizia penale internazionale*. Bologna.

Zieschang, F. (1998). *Die Gefährdungsdelikte*. Berlin.

Zuckerman, A. (1989). *The Principles of Criminal Evidence*. Oxford.

Scientific Research Publishing

Submit or recommend next manuscript to SCIRP and we will provide best service for you:

Accepting pre-submission inquiries through Email, Facebook, LinkedIn, Twitter, etc.
A wide selection of journals (inclusive of 9 subjects, more than 200 journals)
Providing 24-hour high-quality service
User-friendly online submission system
Fair and swift peer-review system
Efficient typesetting and proofreading procedure
Display of the result of downloads and visits, as well as the number of cited articles
Maximum dissemination of your research work

Submit your manuscript at: http://papersubmission.scirp.org/
Or contact blr@scirp.org