

# The Ideal of the Presumption of Innocence

Victor Tadros

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**Abstract** This article clarifies and further defends the view that the right to be presumed innocent until proven guilty, protected by Article 6(2) of the European Convention of Human Rights has implications for the substantive law. It is shown that a ‘purely procedural’ conception of the presumption of innocence has absurd implications for the nature of the right. Objections to the moderate substantive view defended are considered, including the acceptability of male prohibits offences, the difficulty of ascertaining intentions of legislatures and the proper role of prosecutorial discretion.

**Keywords** Presumption of innocence · Overcriminalization · Human rights · Sexual offences · Assisted suicide · Prosecutorial discretion · Legislative intentions · Mala prohibits

The presumption of innocence has a longstanding pedigree in the law of England and Wales.<sup>1</sup> It has also more recently been protected as a human right enshrined by article 6(2) of the European Convention of Human Rights. Traditionally understood, at least since *Woolmington v DPP*,<sup>2</sup> the legal or human right to be presumed innocent until proven guilty is thought to have two implications. First, the burden of proving that the defendant is guilty of a criminal offence, and that he lacks a defence, typically falls on the prosecution. Secondly, the standard of proof that the prosecution must satisfy is very high—normally beyond a reasonable doubt.<sup>3</sup> Let’s call these the central standard principles of the

<sup>1</sup> For a useful brief history, see A. Stumer *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Oxford: Hart, 2010) Ch. 1.

<sup>2</sup> [1935] AC 462.

<sup>3</sup> The ‘beyond a reasonable doubt’ standard is itself contested in meaning, of course. For discussion, see L. Laudan *Truth, Error and Criminal Law* (Cambridge: CUP, 2006) Ch. 2. For reasons outlined later,

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V. Tadros (✉)  
School of Law, University of Warwick, Coventry, UK  
e-mail: v.tadros@warwick.ac.uk