

# PRESUMPTION OF INNOCENCE, A DISCUSSION EVERLASTING

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## ABSTRACT

This basic principle of civilization is the result of a guaranteed option to protect the immunity of the innocent, even if the price is the impunity of any culprit. "It is enough for the social body to punish offenders in their entirety," wrote Lauze Peret, "but his great interest was that all innocent people, without exception, be protected."<sup>1</sup> It is this option on which Montesquieu established the link between freedom and security of citizens: "Political freedom consists in security, or at least in the belief that everyone has for their own security," and "this security is not placed at greater risk than under public or private accusation"<sup>2</sup>, consequently, when the innocence of the citizens is not guaranteed, nor is their freedom to be. Consequently, if it is true that the rights of citizens are threatened not only by crimes but also by arbitrary punishments, then the presumption of innocence is not only a guarantee of freedom and truth, but also a security guarantee or even social security, that specific security ensured by the rule of law and expressed by the trust of citizens in justice and the specific protection offered to them against punitive arbitrariness. For this reason, the unmistakable sign of the political legitimacy of the loss of jurisdiction, and its rise to irrational and authoritarian power, is the fear that justice causes to citizens. It is out of the logic of the rule of law every time an innocent defendant has reason to fear a judge: "fear, and even unbelief or insecurity of the innocent, signal the failure of the function of criminal jurisdiction and the breaking of political values that legitimize"<sup>3</sup>. Although it is true that in Roman law, the principle of the presumption of innocence until proven guilty was weakened or overturned by the Inquisition practices developed in the Late Middle Ages<sup>4</sup>. Suffice it to recall that in the medial criminal trials the inadequacy of the evidence, even if there was a suspicion or a shadow of suspicion of blaming, was equal to a half - test, which included a semi - guilty verdict and a half - punishment with light sentences. It was only at the beginning of the modern period that it was reaffirmed by the decision: "I do not understand," wrote Hobbes, "How can you talk about crime without a decision being made, and how is it possible, always without a previous trial, to be punished". And if Pufendorf included in the definition of the "point" itself the imposition of the "post cognition en delictis", Beccaria affirmed that "a person can not be held guilty before a judge's decision, nor may the company remove public protection unless it is decided that he has violated the agreements he has agreed to"<sup>5</sup>. The presumption of innocence of the defendants was definitively sanctioned by Article 8 of the Constitution of Virginia and Articles 7 and 9 of the Declaration of Human Rights of 1789<sup>6</sup>.

**Key words:** presumption, individual guarantee, punishment, innocence, principle, etc.

## INTRODUCTION

The presumption of innocence of the accused is effectively determined by Paulesu's "guarantee of interesting backgrounds and major problematic horizons"<sup>7</sup>. It is true that if we look at the principle in its current formulation, it constitutes a rule so rooted in social consciousness that can be presented as a synthesis of the entire procedural system, rather than a principle a simple guide, for which, in fact, are basic direct warranties, how to protect the accused as to protect the fairness of the process. This result is almost impossible, if referring to the fascist period in Italy, when Justice Minister Alfredo Rocco labeled the presumption of innocence as a "surplus from those forbidden concepts in the Report on the Preliminary Draft of the Criminal Procedure Code of 1930, based on the principles of the French Revolution, where the most exaggerated and incompatible individual guarantee guarantees arise"<sup>8</sup>. In order to capture the present value that has assumed the presumption of innocence in our procedural rules we can not in fact overlook these "problematic horizons", all the difficulties that marked the fate of the principle in question since its inception and that we still perceive its effects today, especially in relations with Europe. We can allow ourselves to receive absolutely absolute and indisputable what Cordero writes: "We are all exposed to the power to punish, guilty or not," which clearly

<sup>1</sup> Lauzè Di Peret P.I., Individual Guarantee Treaty, Paris, 1884, P. 39

<sup>2</sup> Pagano F.M., Considerations on the Criminal Process, Laterza, Bari, 1972, p. 29

<sup>3</sup> "Let the clear, simple laws and all nation forces be condensed to protect them ... Make people fear them and them. Fear of the laws is healthy, but fatal and productive for crimes is that of man in man. The slaved men are more courageous, cheaper, more cruel than the free men ". Beccaria C., Dei delitti and Peniche, Milan, Mondadori, 1991, P. 97.

<sup>4</sup> Cordero F., Plague Factory, Laterza, Bari, 1984, p. 217

<sup>5</sup> Beccaria C., Dei delitti e Peniche, Milano, Mondadori, 1991, P. 38

<sup>6</sup> "No one can be deprived of liberty, except under the law of the country and after the judgment of his peers. "Virginia's Declaration of Human Rights, Sect.8" No one can be charged with being arrested or detained unless specified by law and according to the forms he has described. "The French Declaration, Article 7, 1789

<sup>7</sup> M.p. Paulesu, Prejudice not guilty to the accused, Torino, 2009

<sup>8</sup> A. Rocco, Report on the Preliminary Draft of the Criminal Prosecution Code, Preparatory Work on Criminal Code and Criminal Procedure Code, Rome, vol. VIII, 1929, p. 22

makes us think that we can not give one the procedural assumption of the matter even if we are based on Article 27, paragraph 2 of the Italian Constitution. But precisely on this clarity, unfortunately only apparently, that the main exponents of the classical and the positive schools were "clashed", this eternal discussion was begun by the imitation of Cesare Beccaria, who wrote in early 1764 in the criticism of his most extensive torture case that was able to bring the innocent into a worse condition than the guilty one, in a presumption of innocence until the conviction of the accused. The overwhelming view at the time, he wanted an indictment process based on a presumption of guilt, and therefore the principle of no punishment without trial seemed to be dramatically overturned without trial, no punishment, making it necessary and immanent to punish during trial. This was confirmed by the lack of a clear distinction between the accused and the culprit in the framework of the indictment process, the gathering of procedural functions (judges and prosecutors) with the same judge, lack of oratory and publicity, abuse of a detention that was considered torture and used *et corporis dolorem to erundam veritatem*<sup>9</sup>. The theories of the liberal and classical schools had a divisive influence on the models of thought-provoking type: they appeared for a long time in the form of a direct controversy against the procedural system of the ancient regime. A prominent Tuscan lawyer, Giovanni Carmignani, theorized the presumption of innocence as a result of a probabilistic assessment, sure that "the basis of the presumption is what happens normally: but more often people are leaving the perpetration of a crime, rather to commit the crimes. So law sanctifies and protects the presumption of innocence for all citizens"<sup>10</sup>. Nicolini, however, retains the principle of classical tradition<sup>11</sup>, referring to an expression of a familiar passage of Digesto "satis ata impunitum relinqui facinus nocentis, quam innocentem damnare"<sup>12</sup>. In this turbulent assessment, the relativity of the value attributed to the formula becomes even more unclear, but it is clear from Carrara's view that he saw the presumption of innocence as a precursor principle of a wider principle of due process. This, Carrara specifies, should not be used to stop the accusation and punishment movements, but rather "to limit these moves to the ways that relate to a series of rules which hinder arbitrariness, errors, and thus protect that individual"<sup>13</sup>. According to the author, the criminal process has its basis and impulse to a "suspicion" that sees as a potential participant an "individual" protected by the presumption of innocence which will be used to limit the movements of those who conduct investigations without using the initiative of the process. Bearing this in mind, Francesco Carrara raised the presumption of innocence in a fundamental postulancy of the criminal proceedings, merging all the conditions of the legitimacy of the proceedings. However, it is necessary to add that, beyond the usual stereotyped formulas known by all, it can be suspected that different perpetrators, even contradicting each other, intend exactly the same when they speak of the presumption of innocence<sup>14</sup>. "Lack of solid legal references in support of such reformist aspirations"<sup>15</sup> did not allow the presumption of innocence to develop significantly and effectively, apparently confirmed by the lack of clear reference to the guarantee as in the Albert Albert Statue of 1848, as in the first Italian single code<sup>16</sup>. This explains the lack of regulatory action outside the classroom ideologies, because in Italy the work of renewal had to operate in view of Napoleon's mixed system, lacking a rights charter that would seal the guarantee or an accusatory law that in the fact was present in the French tradition. It was in contrast to the ideals of the classical school that had a different view from the positive school, which relies on an idea that crime is like a social pathology and accusing classical liberal doctrine to support a fair process instead of excessive protection of the accused. With Lucchini the controversy escalated to the point of denouncing the rule of Doubt that the crime was committed in terms of the "inventive ability of a supposed criminal who is disguised as a lawmaker," and therefore considered the presumption of innocence as a principle "paradoxical"<sup>17</sup>. "He considered the process of uncivilized, non-coherent and unobtrusive legality a process that was not designed to provide the innocent, "basically founded to investigate and punish criminals, not to distinguish and to ascertain honesty"<sup>18</sup>. Very reactionary was shown to Raffaele Garofalo, one of the most famous "alarming" or "disturbing" school of crime<sup>19</sup>. He had the idea that the principle weakened the state's punitive actions and confirmed it by saying, "Those who repeat the same old, empty and absurd phrase of the presumption of innocence until the final judgment, say that many times the judgment is foreseen, and the punishment given by the court of public opinion"<sup>20</sup>. Less drastic was the position of Hell in favor of a re-dimensioning, though apparent, of the principle, and he knew some "truths" unless it was the case for people repeating the crime or people caught in flagrancy<sup>21</sup>. The common thread in the ideologies of these different authors can easily find the common purpose of drastically canceling or limiting the principle of crime in favor of the proceeding and of combating the excessive guarantee of the liberal individualistic era in favor of the prevalence of rights of the society for individual interests. These multiple and conflicting beliefs created an environment of insecurity in general for the principle and the recognition of the presumption until a formal treatment takes place without real practical applications. Alessandro Stoppato, for example, believed that the presumption of innocence should be "rationally understood, because favored overrun is just as risky as excessive opposition", then denying in practice this cautious and formal recognition, and declaring contrary to all the most famous canoes of the prosecution process<sup>22</sup>. However, he continued to perceive the relationship between the principle of consideration and the dualistic theory of the process, which saw the criminal procedure as a citizen's guarantee against abuse of power, at a time of clear disagreement between the interests of the state in the crime of crime and that of citizens unfairly accused. The controversy over the principle in question and its

<sup>9</sup> Ulpiano, nē D. 47.10.15.41

<sup>10</sup> G. Carmignani, Elements of Criminal Law, vol. I, Malta, 1848, p. 249

<sup>11</sup> N. Nicolini, From criminal proceedings in the kingdom of two Sicilies, II, Livorno, 1843, p. 895

<sup>12</sup> D., 48.19.5

<sup>13</sup> F. Carrara, Criminal Procedure Criminal Law, Criminal Justice Brochures, Vol. V, Prato, 1881, f. 17

<sup>14</sup> See G. Illuminati, Presumption of innocence of the Accused, Bologna, 1979, p. 15

<sup>15</sup> M.p. Paulesu, op. cit., 2009, p. 42

<sup>16</sup> This legislative silence F. Carrara (outlines the criminal law practice, Rome, 1874, p. 47) to make a comparison between Italy "nowadays live under the presumption of guilt" and "he life of Tuscany in the presumption of innocence" thanks to the Code Leopold (1786) who have proved the value of the collateral by providing compensation in the case of unfair imprisonment for those who "no purpose or negligence of some (...) but only for certain fatal or miserable combinations will be judged, will be punished, and then be declared innocent, and as such released

<sup>17</sup> L. Lucchini, The simplists of the criminal law, Turin, 1886, p. 246

<sup>18</sup> L. Lucchini, Elements of Criminal Procedure, Florence, 1908, p. 12

<sup>19</sup> R. Garofalo, Preventive Detention, at the School of Vocation, vol. II, Turin, 1892, p. 199

<sup>20</sup> Ibid

<sup>21</sup> E. Ferri, Criminal Sociology, IV ed., Torino, 1900, p. 728

<sup>22</sup> A. Stoppato, Report of the Chamber of Deputies Committee, in Code Commentary, vol. III, Turin, 1915, p. 192

wording was also developed during the preparatory work of 1913 of the procedural code, where the ones that define the principle "one of those rhetorical formulas that are destiny to satisfy a larger number are emphasized because they give emphasis and worth the discussion", adding more diligently" that the code of criminal procedure is not the law that protects the innocent, but, in essence, a social protection against crime<sup>23</sup>". The ruling opinion judged the presumption of innocence as "a vulgar, dangerous mistake" which had pushed "to see every defendant a potential victim of wrongdoing and wickedness, thereby calming the criminal justice and lack of effectiveness from all its organism and its action against the expansion and advancement of criminality". Vincenzo Manzini outlined the ideas that were later formalized in the 1930 Code, where it was easy to determine the principle of presumption of innocence as "paradoxical and contradictory" before the facts of some procedural institutions of the inquisitive era, such as preventative arrest, secrecy of the pre-trial stage, or the lawsuit itself. He believed that, as for all the presumptions, it should be considered "a means of indirect evidence that raises a certain absolute or relative conviction from common experience" and, thus doing so, was seen the full contrast to the reality of facts in it which most of the defendants are considered to be guilty, and not the opposite<sup>24</sup>. Clearly, it is the character of this reasoning that considers the presumption of innocence from a purely phenomenological point of view, as the Illuminati notes, regardless of the true nature of the principle, the informative criterion, potentially capable of leading the judge towards justice more sensitive and able to assess and respect the difference between the defendants and the accused. This Manzini theory depends on what is the central point of his thought: criminal laws are not directed at protecting the innocence, but in the repression of the crime, by which he fully implies the purpose, if we consider that for the author "the lawsuit [...] constitutes [...] necessarily a presumption of guilt". A prominent lawyer, Mortara, who with Manzini divided the ideological bases, expressed in terms that would have great luck: "Another is to say that the accused should not be considered guilty, and another is to say that they should be considered innocent. It is clear the exaggeration of the second formula, which violates the first concept<sup>25</sup>".

## CONCLUSIONS

This particular aspect has traditionally been considered as a result of a dual origin. In fact, the presumption of innocence, as a rule of thumb, comes from the Anglo-Saxon tradition (from a Common Law system), and as a treatment experience of the accused under European continental (or Civil Law) dates back to the Enlightenment and the French Revolution. However, taken in a simple and schematic manner, this type of position means shadowing the entirety of the guaranteed needs expressed in the presumption of innocence and that, however, engaging in significant changes within individual systems, though it must consider the specificity of the normative realities of different countries, which compare these guarantee needs.

In conclusion, it can be said that if, on the one hand, the presumption of innocence attracts the enrichment and support of a number of structural values of "regular proceedings", such as the right to recognize the accusation, the right of evidence, the right to taciturn, the accused's right to confront the accuser, impartiality of the court, opposition as an epistemological technique, and on the other hand, the same presumption should be met with two values, the efficiency of the process and the involvement in the game, to con in the "regular process" area, which, as we will see, appears sensitive to reviewing the boundaries and core values. Once a contextual framework has been defined, it is necessary at this point to describe the individual thematic fields of current research. Based on the ideological debate that accompanied the evolution of the presumption of innocence in our system, first of all we are discussing the actual space-time dimension of this guarantee, understood as a rule of treatment.

What current weight plays today, the presumption of innocence in the dynamics of the application, and how much remains rhetoric, routine, virtual, gimmick, in access to this guarantee<sup>26</sup>". In fact, it can not be denied that the presumption of innocence constitutes such a "challenging" principle that is sometimes hard to manage at a concrete level. But the fact remains that the gap between law in the books and the law in action still seems to be very important in this matter, to the point that the presumption seems destined to remain trapped in some oblivion, suspended two ways between being and it must be<sup>27</sup>.

The phenomenon of the phenomenon is complex. Some problems have long strained and there are also cultural limitations, a constant and chronic difficulty from the principle rooted in collective conscience, media distortions, exaggerations, and cyclical justice pulps over the particular cruelty of some crimes. Other problems are of recent, but not least, uncomplicated procedural solutions, the construction of a sort of "double path" in terms of being cautious and evidence-processing the criminal case structured in a risk of lack of evidence at the expense of the accused, up to the last limits, which are articulated in the tendency to increasingly predict the type of state intervention through the use of preventive mechanisms to address the most complex and dangerous forms of crime, which may have significant consequences at the level of jurisdictional guarantee. In short, a number of factors that can not agree with the idea of protecting the allegedly innocent person. These brief summaries would suffice to convince that the application of the presumption of innocence constitutes an issue open to question.

<sup>23</sup> The expression is contained in the Senate speech L. Mortara (March 5, 1912), in the Commentary of the Criminal Procedure Code, directed by L. Mortara and Others, vol. III, Turin, 1915, p. 153

<sup>24</sup> V. Manzini, Italian Criminal Procedure Manual, Turin, 1912, p. 53 s. 20 See G. Illuminati, op. Cit., P. 18

<sup>25</sup> Mortara, op. cit., p 153

<sup>26</sup> Illuminati G., Presumption of the Innocent of the Accused, Zanichelli, Bologna, 1979, p. 21

<sup>27</sup> "However, those who look across the border will be disappointed, hoping to find only consensus with the guarantee. The convictions suffice to report the skepticism of those who, after assessing the value of" the fundamental right", then recognize in it a fraud and in The allegation of this assumption is cited by the legal presumptions against Reum provided for in English law and French law, unmotivated convictions issued in different jurisdictions, the limitations of personal liberty provided for the person to be considered innocent. Koering R., The presumption of innocence, a fundamental right? In La presumption d'innocence en droit comparé, Paris, 1998, p. 19

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