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The Presumption of Innocence in Canon 1321§1

A canonical and historical analysis in
dialogue with the Australian criminal
law

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May this thesis contribute to a greater understanding of the laws of God and of His Holy Church, and to an increased observance thereof. *Ipsi gloria, et imperium in saecula saeculorum. Amen.* (1 Pet. 5:11)

Timothy Patrick Garvey

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Abstract (English/Dutch)

This thesis analyses the presumption of innocence in canon 1321§1 of the *Code of Canon Law* and seeks to understand its rationale and function. Canon 1321§1 was introduced by the apostolic constitution *Pascite Gregem Dei* in 2021, and Chapter 1 of this thesis analyses that document and its surrounding context. Next, Chapter 2 examines the development and role of the presumption of innocence within the canonical tradition. Special attention is paid to the rights of defendants under the natural law, and to the link between the presumption of innocence and the burden of proof. In Chapter 3, a comparative analysis is undertaken with the development of the presumption of innocence in the Australian criminal law. This analysis corroborates certain key aspects of the canonical tradition, while also providing new insights into the practical consequences of the presumption of innocence. The case of Cardinal Pell is examined as an illustration of the presumption of innocence at work. This thesis distils key principles conveyed by the presumption of innocence, and so clarifies the role of canon 1321§1 within the framework of the new ecclesiastical penal law. It also identifies some other provisions of the *Code of Canon Law* and documents of the Roman Curia which may require further consideration to ensure that they are coherent with this newly restated universal norm of the Church.

Deze thesis analyseert het vermoeden van onschuld uit canon 1321§1 van de *Codex Iuris Canonici* en poogt zijn ratio legis en functie te begrijpen. Canon 1321§1 werd ingesteld door de apostolische constitutie *Pascite Gregem Dei* in 2021. Hoofdstuk 1 van deze thesis analyseert dit document en zijn context. Vervolgens onderzoekt Hoofdstuk 2 de ontwikkeling en de rol van het vermoeden van onschuld in de kerkrechtelijke traditie. Er wordt speciale aandacht geschonken aan de rechten van de verdediging volgens het natuurrecht en de link tussen het vermoeden van onschuld en de bewijslast. In Hoofdstuk 3 wordt een rechtsvergelijkende analyse uitgevoerd met de ontwikkeling van het vermoeden van onschuld in het Australisch strafrecht. Deze analyse bevestigt bepaalde kernaspecten van de kerkrechtelijke traditie en voorziet ook nieuwe inzichten in de praktische gevolgen van het vermoeden van onschuld. De zaak van kardinaal Pell wordt onderzocht als illustratie van het vermoeden van onschuld in de praktijk. Deze thesis verzamelt de kernprincipes van het vermoeden van onschuld en verheldert zo de rol van canon 1321§1 in het kader van het nieuwe kerkelijke strafrecht. Ook worden andere bepalingen uit de *Codex Iuris Canonici* en documenten van de Romeinse Curie beschouwd, die eventueel verdere aandacht behoeven om er zeker van te zijn dat ze coherent zijn met deze nieuwe hervormde universele norm van de Kerk.

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List of Abbreviations

AAS – *Acta Apostolicae Sedis*.

CDF – Congregation for the Doctrine of the Faith.

CIC – *Codex Iuris Canonici* (1983).

DDF – Dicastery for the Doctrine of the Faith.

PCLT – Pontifical Council for Legislative Texts.

PGD – Apostolic Constitution *Pascite Gregem Dei*.

I. Introduction

On 23 May 2021, Pope Francis issued the Apostolic Constitution *Pascite Gregem Dei* (“PGD”) which reformed Book VI of the *Codex Iuris Canonici* (“CIC”) regarding penal law.¹ In PGD, the Holy Father acknowledged “*the right to self-defence*” as a fundamental issue of criminal law. One of the new provisions inserted into the CIC by the apostolic constitution is canon 1321§1, which reads “[q]uilibet innocens censetur donec contrarium probetur.”² In English, this provides that “[a]ny person is considered innocent until the contrary is proved.”³ This canon contains a presumption of innocence which was not explicitly present in the CIC of 1983 prior to the reform of 2021. This thesis aims to understand the role of the presumption of innocence in the current version of the CIC. In particular, it will seek to analyse its rationale and find practical ways in which it should influence individual judicial proceedings.

Canon 17 of the CIC provides that “[e]cclesiastical laws must be understood in accord with the proper meaning of the words considered in their text and context. If the meaning remains doubtful and obscure, recourse must be made to parallel places, if there are such, to the purpose and circumstances of the law, and to the mind of the legislator.”⁴ To seek to understand the context, purpose and circumstances of PGD and the mind of the legislator, Chapter 1 of this thesis will examine statements from ecclesiastical authorities and academic commentaries concerning the new Book VI, and in particular canon 1321§1. For this analysis, publicly available primary and secondary sources in English were examined. Some texts in French and Spanish were also examined, however an exhaustive review of texts in those languages was not undertaken. Although some relevant commentary will be discussed in Chapter 1, this research

¹ FRANCIS, “Apostolic Constitution *Pascite Gregem Dei*”, 23 May 2021, in *L’Osservatore Romano: Weekly Edition in English*, 23(2021).

² FRANCIS, “Liber VI De Sanctionibus Poenalibus in Ecclesia”, 1 June 2021, in *Bollettino*, B0348(2021).

³ FRANCIS, “New Book VI of the Code of Canon Law”, 1 June 2021, in *Bollettino*, 210601b(2021), canon 1321§1.

⁴ *Code of Canon Law*, Latin-English Edition, Translation under the auspices of the Canon Law Society of America, Washington, Canon Law Society of America, 1999, canon 17. All subsequent quotations of or references to canons of the CIC in English are from this translation.

discovered that very little commentary specifically concerning the new canon 1321§1 exists.⁵ Perhaps many canonists consider that the presumption of innocence is so obvious that it needs no further explanation. This thesis will aim to fill this lacuna to ensure that this fundamental tenet of criminal jurisprudence is not minimised.

Canon 6§2 of the *CIC* provides that “[i]nsofar as they repeat former law, the canons of this Code must be assessed also in accord with canonical tradition.” Chapter 2 of this thesis will examine the long history of the presumption of innocence within the canonical tradition, for the purposes of shedding light on canon 1321§1. For this chapter, a review of publicly available secondary literature in English was undertaken. Where this secondary literature referred to relevant primary sources, the original primary source was consulted and analysed.⁶ Although an exhaustive review of primary sources was not attempted, the sources examined elucidate key principles and themes within the canonical tradition which should influence the application of the present canon 1321§1.

As the author is a qualified Australian lawyer, Chapter 3 of this thesis will review the development of the presumption of innocence within the Anglo-Australian legal tradition and compare it with the canonical tradition to clarify the operation of canon 1321§1. Although Australian law is not directly relevant to the interpretation of a norm of canon law, a dialogue between these two sophisticated legal systems should provide new perspectives on principles of common importance. For the purposes of the historical analysis, a review of publicly available secondary literature in English was undertaken. Where this secondary literature referred to relevant primary sources, the original primary source was examined in its original language. In considering the contemporary role of the presumption of innocence, authoritative primary sources in the form of legislation and court decisions were examined.

⁵ For example, the following sources concerning the new Book VI were reviewed, and they lack substantial commentary on canon 1321§1: PUJOL, J., “El contexto eclesiológico y los principios que guiaron la revisión del Libro VI del CIC”, in *Ius Canonicum*, 61(2021), 865–885; BAMBERG, A., “Procédures pénales canoniques. Une synthèse après *Pascite gregem Dei*”, *HAL*, <<https://hal.archives-ouvertes.fr/hal-03387923>>, last accessed on 19-12-2022; KIMES, J., “Reclaiming “Pastoral”: *Pascite gregem Dei* and Its Vision of Penal Law”, in *The Jurist* 77(2021), 269–289; SÁNCHEZ-GIRÓN RENEDO, J., “El Nuevo Derecho Penal de la Iglesia”, in *Estudios Eclesiásticos* 96/379(2021), 678; BORRAS, A., “Un nouveau droit pénal canonique?”, in *Nouvelle Revue Théologique* 143/4(2021), 649; DALY, B., “What is changed in the 2021 Revision of Penal Law?”, in *The Canonist* 12/2(2021), 208–209; POLAND, J., “The Aspects and Aims of Penal Law in the Revised Book VI”, in *The Canon Law Society of Great Britain and Ireland: Newsletter* 200(2021), 64–80; ARRIETA, J., “A Presentation of the New Penal System of Canon Law”, in *The Jurist*, 77(2021), 251.

⁶ In a small number of cases noted in the relevant footnote, the original source could not be consulted.

Throughout this thesis, the close interrelation of the presumption of innocence with the observation of due process and the burden of proof will be examined. Indeed, it will be seen that in Australian law the presumption of innocence is not distinct from the burden of proof. The privileged position of the presumption of innocence under the natural law and in civil society will be demonstrated. Finally, even though aspects of the presumption of innocence were already present in the *CIC* before *PGD*, it will be seen that some parts of the canonical legal system beyond Book VI may benefit from further attention to see whether they are truly coherent with the presumption of innocence now explicitly expressed in canon 1321§1.

II. Chapter 1: The presumption of innocence in *Pascite Gregem Dei*

1. Introduction

This chapter will examine *PGD* and its immediate context, which provide the most authoritative and proximate means of interpreting canon 1321§1. To this end, it will examine statements by the Pope and officials of the Holy See, as well as academic commentaries. It will be seen that these sources are of limited value in defining the role and operation of the presumption of innocence.

2. The law immediately before *Pascite Gregem Dei*

Before turning to the reforms of *PGD*, the canonical context in which it was published must be noted. Prior to *PGD*, there was no explicit presumption of innocence in the *CIC*. However, writing shortly before the publication of *PGD*, Professor John Renken asserted the existence of a presumption of innocence in these terms:

*“The accused does not have the obligation to prove that the alleged offense did not take place, although such proactive self-defense would be beneficial (particularly if it demonstrates that it is impossible for the accused to have committed the alleged offense). Indeed, until the occurrence of the alleged offense is certain, natural justice requires that the accused be considered innocent.”*⁷

A number of canons already in force before *PGD* partially covered the field of operation of the presumption of innocence, which have been examined by Ronny Jenkins.⁸ Canon 1526§1 provides that “[t]he burden of proof rests upon the person who makes the allegation”.⁹ A tribunal is obliged by canon 1726 to forcefully declare an accused’s innocence “[i]f at any grade and stage of the penal trial it is evidently established that the accused did not commit the delict ...”. However, absolution of a charge on the basis that the burden of proof has not been discharged is also possible (*non constat*), and Jenkins has argued that this does not always amount to a declaration of or presumption of innocence.¹⁰ He notes that lesser measures may

⁷ RENKEN, J., “The Canonical Rights of Those Accused of the Delict of Sexual Abuse”, in *Studia Canonica* 54(2020), 228.

⁸ JENKINS, R., “The Charter and Norms Two Years Later: Towards a Resolution of Recent Canonical Dilemmas”, in *CLSA Proceedings* 66(2004), 116–120.

⁹ This is distinct from the presumption of imputability in certain cases contained within then canon 1321§3, which is not a substitute for a penal process: RENKEN, J., *The Canonical Rights ...*, 228–229.

¹⁰ JENKINS, R., *The Charter ...*, 118.

still be taken by authorities in such cases.¹¹ Jenkins' distinction is consistent with the praxis of the Congregation for the Doctrine of the Faith ("CDF"), which in July 2020 issued a *Vademecum* concerning penal process in relation to cases of alleged clerical sexual abuse of minors.¹² This *Vademecum* is a manual or handbook of process, and it did not issue new norms or change canonical legislation in force.¹³ It identified three types of decisions which could conclude a penal process, one of which *must* be mentioned in the sentence or decree: a conviction ("*constat*"), an acquittal ("*constat de non*"), and a dismissal ("*non constat*").¹⁴ While an acquittal ("*constat de non*") occurs where "*with moral certainty the innocence of the accused is established*", a dismissal ("*non constat*") occurs "*whenever it has not been possible to attain moral certainty with regard to the guilt of the accused, due to lack of evidence or to insufficient or conflicting evidence that the offence was in fact committed, that the accused committed the offence, or that the delict was committed by a person who is not imputable.*"¹⁵ In June 2022 (subsequent to *PGD*), the now Dicastery for the Doctrine of the Faith ("DDF") issued a revised version of the *Vademecum*, however none of these provisions were changed.¹⁶

A distinct but related right is that to one's good reputation, which is protected by canon 220: "[n]o one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy."¹⁷ Jenkins observed that "[t]his right is of natural origin, is absolute, it does not expire, nor can it be taken from a person ... We presume persons do, in fact, have a good reputation until it is otherwise legitimately established, through fact or law."¹⁸

One limitation on the aforementioned protections is canon 223§2, which provides that "[i]n view of the common good, ecclesiastical authority can direct the exercise of rights which are

¹¹ *Ibid*, pp. 118–119.

¹² CONGREGATION FOR THE DOCTRINE OF THE FAITH, "Vademecum on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics: Ver 1.0", 16 July 2020, in <https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_en.html>, last accessed on 02-04-2023.

¹³ *Ibid*, p. 0.

¹⁴ *Ibid*, p. 84.

¹⁵ *Ibid*.

¹⁶ DICASTERY FOR THE DOCTRINE OF THE FAITH, "Vademecum on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics: Ver. 2.0.", 5 June 2022, in <https://www.vatican.va/roman_curia/congregations/cfaith/ddf/rc_ddf_doc_20220605_vademecum-casi-abuso-2.0_en.html>, last accessed on 31-03-2023.

¹⁷ Violating this right was punishable under canon 1390§2.

¹⁸ JENKINS, R., *The Charter ...*, 119.

proper to the Christian faithful.” This canon has been invoked by bishops to exclude clerics from public ministry due to public scandal (which may not be due to any fault of the particular cleric) or a perceived threat to minors, even where an accusation has not led to penalties through a criminal action.¹⁹ Problematic aspects of this canon will be considered in the next section of this chapter.²⁰

3. *Pascite Gregem Dei* itself and statements by officials

With the existing lay of the land in mind, we will now examine the comments of Pope Francis and other officials surrounding the new Book VI. In *PGD*, Pope Francis does not refer to the presumption of innocence. He does list some other changes made which protect the rights of defendants, referring to them as “technical” improvements:

*“The text has also been improved from a technical aspect, especially with regard to fundamental issues of criminal law, such as the right to self-defense, the prescription of penal action, and the need for greater precision in the determination of penalties, consonant with the requirements of penal law, thus providing ordinaries and judges with objective criteria for identifying the most appropriate sanction in individual cases.”*²¹

Unfortunately, *PGD* itself thus gives no practical assistance in understanding the new canon 1321§1. However, in an important speech in 2020 to participants in a plenary assembly of the Pontifical Council for Legislative Texts (“PCLT”), the Pope linked penal law, including the rights of defendants, to the pastoral mission of the Church:

“Making the laws of the Church known and applying them is not a hindrance to the presumed pastoral “effectiveness” of those who want to solve problems without law, but rather a guarantee of the search for solutions that are not arbitrary, but instead truly just and, therefore, truly pastoral. By avoiding arbitrary solutions, the law

¹⁹ *Ibid*, pp. 120–121; CONNOLLY, P., “‘Our Children, Our Church’ – significant problems”, in *The Furrow* 57/6(2006), 333.

²⁰ Additional analysis in the context of the natural law will also take place in Chapter 2 section 3.

²¹ *Pascite Gregem Dei*.

becomes a valid bulwark in defence of the least and the poor, a protective shield for those who risk falling victim to the powerful."²²

The Pope here emphasises that the excuse of “pastoral effectiveness” cannot justify solving problems by ignoring the law. He opposes “arbitrary solutions”, and states that truly pastoral solutions must also be “truly just”. Without mentioning criminal defendants specifically, he continues that the law is “*a valid bulwark in defence of the least and the poor, a protective shield for those who risk falling victim to the powerful.*” It would seem incongruous if the Pope meant the materially poor and literally weak. Since those who “risk falling victim” to “powerful” authorities in penal processes are accused persons, I consider that the Pope identifies accused persons with “the least and the poor”. Indeed, they are metaphorically poor and least, having been stripped to an extent of their reputation and liberty. Although this speech does not refer to the presumption of innocence, it is a helpful interpretative lens through which to view the new Book VI which was promulgated shortly after by the Pope. In this speech, the *mens legislatoris* clearly recognizes the importance of procedural safeguards for criminal defendants who are indeed at risk of falling victim to powerful judges and ordinaries if they do not strictly respect defendants’ rights. It will be seen that similar sentiments have been expressed by Australian jurists.

At a press conference on 1 June 2021 to present the new Book VI, Archbishop Filippo Iannone, President of the PCLT, said that the reform had the aim *inter alia* of rendering the penal law “*more congruent with the requirements of justice*”.²³ He also stated that “[i]t is also worth mentioning the explicit affirmation in the text of the fundamental principle of the presumption of innocence”, but did not elaborate any further. At the same press conference, Bishop Juan Ignacio Arrieta, Secretary of the PCLT, stated the following objective of the reform:

“The third objective is to provide the Pastor with the necessary means to be able to prevent offences, and to be able to intervene in time to correct situations which could become more serious, without however renouncing the necessary precautions for the

²² FRANCIS, “Address of His Holiness Pope Francis to Participants in the Plenary Assembly of the Pontifical Council for Legislative Texts”, 21 February 2020, in *Bollettino*, 200221a(2020); PUJOL, J., *El contexto ...*, 880.

²³ IANNONE, F., “Intervention at Press Conference to Present the New Book VI of the Code of Canon Law”, 1 June 2021, in *Bollettino*, 210601e(2021).

*protection of the presumed offender, as a guarantee of what is now stated in canon 1321 §1: “everyone is presumed innocent until the contrary is proven”.*²⁴

His Excellency implies that the presumption of innocence should limit a Pastor when seeking to prevent offences or correct situations which may become worse. This is a clear indication that the presumption of innocence should have practical operation and not be relegated to the position of an abstract principle ignored in practice. Immediately following this statement, in the context of administrative sanctioning procedures, Bishop Arrieta observed that the reformed canons emphasise “*the need ... to achieve moral certainty regarding the final decision*”, which connects the related issue of the burden of proof with the presumption of innocence.²⁵ Hence, the presumption of innocence emphasises the importance of judges truly reaching the standard of moral certainty before punishing an accused person, avoiding the temptation to punish on the basis of persuasive though insufficient evidence. Although this was already clear from canon 1608§1,²⁶ the restatement of the presumption of innocence brings this principle of the burden of proof clearly to the fore. The connection between this presumption and the burden of proof is further strengthened by canon 1585, which provides that “[a] person who has a favorable presumption of law is freed from the burden of proof, which then falls to the other party”.

These statements of the Pope and his officials show a desire that the presumption of innocence should restrain bishops to ensure that they respect the rights of the accused. In light of this, whether canon 223§2 is truly compatible with the presumption of innocence may need to be reconsidered. As discussed earlier in Chapter 1 section 2, canon 223§2 has in fact been invoked by bishops to exclude clerics from public ministry who have been subjected to a canonical process with the charges dismissed.²⁷ These episcopal “directions” occurred before there was an explicit statement of the presumption of innocence in canonical legislation, which raises the question of whether such directions are in fact a moderation of the presumption of innocence. However, if canon 223§2 were invoked under the current law in a case where canonical charges had been dismissed, it would be intervening directly in the subject matter of the presumption of innocence, and so it would be a direction at least implicitly moderating that right. A right to

²⁴ ARRIETA, J., “Intervention at Press Conference to Present the New Book VI of the Code of Canon Law”, 1 June 2021, in *Bollettino*, 210601e(2021).

²⁵ *Ibid.*

²⁶ “*For the pronouncement of any sentence, the judge must have moral certitude about the matter to be decided by the sentence.*”

²⁷ JENKINS, R., *The Charter ...*, pp. 120–121; CONNOLLY, P., ‘*Our Children ...*’, 333.

be presumed innocent could be completely undermined if it is subject to the direction of an authority, so it seems logical that such a right should not be subject to direction. This analysis is strengthened by canon 87§1, which provides that a bishop “*is not able to dispense, however, from procedural or penal laws*”. If a bishop cannot dispense from the presumption of innocence, he should not be able to infringe it by directing its exercise. It is true that an ordinary is explicitly empowered by canon 1348 to impose penal remedies or otherwise provide for the common good in cases where canonical charges have been dismissed. However, if this is done, it should be done in reliance on canon 1348, not as a purported exercise of canon 223.

4. Secondary sources considering canon 1321§1

Judith Hahn has analysed various procedural changes introduced by *PGD*, including the presumption of innocence.²⁸ She suggests that a strong motivation behind inserting canon 1321§1 was to respond to the recent multitude of penal processes against clerics accused of sexual abuse, noting that some U.S. bishops in the early 2000s may have come close to adopting a form of presumption of guilt in these cases.²⁹ Hahn buttresses the link between the presumption of innocence and cases of alleged clerical sexual abuse by citing the recent apostolic letter *Vos Estis Lux Mundi* of 2019, which also includes an explicit presumption of innocence in article 12§7: “[a]lla persona indagata è riconosciuta la presunzione di innocenza.”³⁰ This apostolic letter dealt with sexual abuse and related investigations and reporting. Hahn’s argument seems highly persuasive, since the fact that the legislator saw fit to include the presumption of innocence in a *motu proprio* dealing with a very specific area of law suggests that the legislator was concerned about the application of the presumption of innocence in that specific context. Unfortunately, at the time of promulgation in May 2019, neither the Pope nor officials of the Holy See commented further on the presumption of innocence in art 12§7.³¹ In March 2023, Pope Francis reissued an updated version of this apostolic letter, which contains a slightly reformulated presumption of innocence in art 13§7: “[a]lla persona indagata è sempre riconosciuta la presunzione di innocenza e la legittima

²⁸ HAHN, J., “Sex Offenses – Offensive Sex: Some Observations on the Recent Reform of Ecclesiastical Penal Law”, in *Religions*, 13/4(2022), <<https://doi.org/10.3390/rel13040332>>, last accessed on 06-03-2023.

²⁹ *Ibid*, pp. 10–11; JENKINS, R., *The Charter ...*, 116–121; see also AUSTIN, B., “Due Process of Law and the USCCB Essential Norms”, in *Studia Canonica*, 51(2017), 78.

³⁰ FRANCIS, “Apostolic Letter *Motu Proprio Vos Estis Lux Mundi*”, 7 May 2019, in *AAS*, 111(2019), 823–832, art 12§7.

³¹ See e.g.: *Vos Estis Lux Mundi*, 7 May 2019; HOLY SEE PRESS OFFICE, “Holy See Press Office Communiqué”, 9 May 2019, in *Bollettino*, 190509d(2019).

tutela della sua buona fama.”³² In this formulation, the Pope adds a new reference to the legitimate protection of an accused’s good reputation, as well as strengthening the presumption of innocence through the addition of the word “*sempre*” (always). The fact that this specific instance of the presumption of innocence was modified and strengthened in 2023 suggests that the presumption of innocence in the context of sexual offences remains an issue of great importance in the mind of the Pope.

John Paul Kimes has analysed terminological changes introduced by *PGD* seeking to reduce the discretion open to authorities as to whether to punish criminals.³³ Bishop Arrieta has also noted that the *CIC* gave much discretion to ecclesiastical authorities regarding whether to punish criminal conduct.³⁴ He observed that “[t]he system ... seemed to place absolute trust in the enlightened ability of the ordinary to choose the means to be used appropriately in the case in question and to judge them.”³⁵ Kimes refers to the example of the change in language in canon 1394 from *puniri potest* to *puniri debet* as an illustration of a provision which may dissuade bishops from the idea that they have an excessive discretion as to whether to punish an offender.³⁶ However, Kimes considers that the principal intention of this change is to reduce the discretion as to available penalties, rather than as to whether to impose any penalty at all.³⁷ A preference to leave control of the substance and process of penal cases in the hands of the ordinary prior to *PGD* may explain why it was not felt necessary to clearly enunciate certain rights of defendants including the presumption of innocence. However, Kimes notes that the strengthening of the language in various canons may lead a bishop “to a different kind of abuse of the law, encouraging one to ignore procedural rights and considerations prescribed by the law when imposing penalties”.³⁸ This explains the importance of clearly restating the presumption of innocence. If *PGD* is an attempt to encourage bishops and superiors to be more proactive in investigating and punishing criminals, their increased zeal must be checked by a clear statement of the basic rights of defendants which must not be transgressed. Hence, the

³² FRANCIS, “Apostolic Letter *Motu Proprio Vos Estis Lux Mundi*”, 25 March 2023, in *L’Osservatore Romano*, 71(2023), art 13§7.

³³ KIMES, J., *Reclaiming “Pastoral”* ..., 279–281.

³⁴ ARRIETA, J., *A Presentation* ..., 248.

³⁵ *Ibid*; quoting BOTTA, R., *La Norma Penale nel Diritto della Chiesa*, Bologna, il Mulino, 2001, 99.

³⁶ Nevertheless, canon 1344 provides that, even when the law uses obligatory words, a judge may defer, reduce or abstain from imposing a penalty in various circumstances in a particular case “*according to his own conscience and prudence*”.

³⁷ KIMES, J., *Reclaiming “Pastoral”* ..., 280–281.

³⁸ *Ibid*, p. 281.

inclusion of an explicitly stated presumption of innocence is a reminder to ecclesiastical authorities to scrupulously follow the requirements of penal and process law.³⁹

No other commentary examined in accordance with this thesis' methodology treats canon 1321§1 in any useful depth.⁴⁰

5. Conclusion

In this chapter, we have examined the immediate context of canon 1321§1 and its promulgation. *PGD* was issued at a time when it was felt necessary to stimulate the bishops to take more action to promote penal discipline, which correspondingly elicited an increased clarification of the rights of accused persons to avoid abuses through excessive judicial zeal. However, contemporary guidance as to the precise role of canon 1321§1 is limited, and it is necessary now to turn to a historical examination of the presumption of innocence within canon law, which will be the subject of the next chapter.

³⁹ This is also emphasised in canon 221§3: “[t]he Christian faithful have the right not to be punished with canonical penalties except according to the norm of law.”

⁴⁰ See *supra* note 5.

III. Chapter 2: The presumption of innocence in canonical tradition

1. Introduction

Pursuant to canon 6§2 of the *CIC*, canon 1321§1 should be interpreted in light of canonical tradition. This chapter will not attempt to detail the entire history of the development of the presumption of innocence. Rather, it will focus on key developments and themes which are useful in shedding light on the presumption of innocence as it currently exists.

This chapter will first examine the development of the articulation of the presumption of innocence from the late first millennium until the fourteenth century, when it reached a form similar to that known today. It will then examine the theoretical basis for the presumption of innocence in the natural law. Finally, it will analyse the close relationship between the presumption of innocence and the burden of proof.

2. The early development of the presumption of innocence

An expression linked to the presumption of innocence appears in 866 A.D., when Pope St Nicholas I wrote a letter to the Bulgars, subsequently included in Gratian's *Decretum*, which considered whether the faithful should receive sacraments from an adulterous priest.⁴¹ Saint Nicholas wrote that “[p]rius, quam audias, ne iudicaueris quemquam, atque ante probationem accusationis illatae neminem a communione tua suspendas, quia non statim qui accusatur reus est, sed qui conuincitur criminosus.”⁴² That is, “someone is not immediately guilty when accused, but rather someone who is convicted is a criminal”.⁴³ “Not immediately guilty” is not necessarily synonymous with “innocent”, as there is a difference between a judge positively affirming someone's innocence (e.g. pursuant to canon 1726) and a judge finding charges to have been insufficiently substantiated to permit a conviction. In the latter case, a cloud of suspicion around the accused may remain, and some intermediate measures may still be taken.⁴⁴

⁴¹ NICHOLAS I, “Epistle ad consulta Bulgarorum”, 866, in FRIEDBERG, A. (ed.), *Corpus Iuris Canonici: Decretum Magistri Gratiani*, 2nd ed, Lipsiensis, Graz Akademische Druck und Verlagsanstalt, 1959, 760–761 (C.15 q.8 c.5).

⁴² *Ibid.*

⁴³ My translation.

⁴⁴ For example, penal remedies and penances pursuant to canons 1339–1340. Further, an Ordinary may employ warnings, other solicitous means or even penal remedies under canon 1348. However, commentary on canon 1348 (left unchanged by *PGD*) suggests that it cannot be applied in cases where an accused has been declared innocent under canon 1726: GREEN, T., “Part I: Delicts and Penalties in General”, in BEAL J., CORIDEN, J. and GREEN, T. (ed.), *New Commentary on the Code of Canon Law*, New York/Mahwah, Paulist Press, 2000, 1563.

In the former case, where an accused has been positively declared innocent (i.e. *constat de non*), it seems logically necessary that he or she cannot be subjected to measures on the basis of a fact or crime which has been positively judicially determined not to exist. It is possible that the accused's behaviour which is the subject of the *constat de non* may be merely sinful (but not a crime) or may amount to a *different* crime than that of which the accused was found positively innocent, in which case the person might be subjected to measures on the basis of the sinful conduct or suspicion of the *different* crime. Nevertheless, it is not clear whether St Nicholas had the distinction between "innocent" and "not proven guilty" in mind. However, he indirectly states that someone is not considered guilty until conviction, and asserts that a conviction is required before the full consequences of criminality may be imposed (such as suspending the accused from communion).

This same maxim was quoted in almost identical terms by an unknown decretalist in the 1180s in *Summa Et est sciendum* when considering the question of a pope suspected of heresy: "*Non enim qui accusatur reus est [sed] qui conuincitur criminosus ...*".⁴⁵ Richard Fraher has noted that this principle was generally recognised among decretalists of that period.⁴⁶ The maxim was also included in William Durandus' *Speculum Iuris* published in the 1270s, which is a procedural textbook which had significant influence in the fourteenth century and beyond.⁴⁷ Durandus gives a slightly different version, but one identical in substance: "*quia non eo ipso ... quis accusatur, reus est, sed quia conuincitur ...*".⁴⁸

The French canonist Cardinal Johannes Monachus, who died in the early fourteenth century, formulated the presumption of innocence in a form very similar to that present in canon 1321§1: "[i]tem quilibet presumitur innocens nisi probetur nocens ... et ius est promptius ad absoluendum quam ad condemnandum".⁴⁹ That is, "just as anyone is presumed innocent unless

⁴⁵ *Summa Et est sciendum*, to D.40 c.6, quoted in TIERNEY, B., "Pope and Council: Some New Decretist Texts", in *Mediaeval Studies* 19(1957), 215. See also FRAHER, R., "Ut nullus describatur reus prius quam convincatur: Presumption of innocence in medieval Canon law?", in KUTTNER, S. and PENNINGTON, K. (ed.), *Proceedings of the Sixth International Congress of Medieval Canon Law*, Città del Vaticano, Biblioteca Apostolica Vaticana, 1985, 501–502.

⁴⁶ FRAHER, R., 'Ut nullus ...', 502–503.

⁴⁷ *Ibid*, pp. 503–504.

⁴⁸ DURANDUS, G., *Speculum Iuris: Pars Tertia & Quarta*, Lugduni, Sumptibus Philippi Tinghi, 1577, 4 (*De Accusatione* §1.28–29).

⁴⁹ MONACHUS, J., *Gloss on Extravag. com. 2.3.1 (Rem non novam)*, <<http://legalhistorysources.com/Due%20Process%20Rome%202004/JohannesMonachus1.htm>>, last accessed on 27-02-2023; PENNINGTON, K., "Innocent until Proven Guilty: the Origins of a Legal Maxim", in *The Jurist* 63(2003), 115–116.

he is proved guilty ... and the law is more prompt to absolve than to condemn”.⁵⁰ The statement that the law is more prompt to absolve than to condemn is a practical consequence of the presumption of innocence. It recognises that the presumption of innocence is a maxim which affects the substance of the judicial process and influences the outcome of a trial.

Monachus’ articulation of the presumption of innocence occurred at the same time as a strong countervailing tendency in the criminal law, driven by the principle that it is in the public interest that crimes should not remain unpunished.⁵¹ This principle had recently been expressed by Pope Innocent III in the early thirteenth century in his decretal *Ut famae*, which had in turn been included in Gregory IX’s *Decretales*: “*publicae utilitatis intersit, ne crimina remaneant impunita*”.⁵² It had been used to justify limits on traditional protections for defendants, including in the context of notorious crimes.⁵³

Notorious crimes did not require the citation or full trial of a defendant before a judge could impose a punishment: the fact of notoriety was sufficient.⁵⁴ The concept of notorious crimes entered canon law in the twelfth century through Gratian’s *Decretum*, the *pars secunda* of which discussed notorious and manifest crimes at length.⁵⁵ Richard Fraher has suggested that the development of notoriety may have been a response to the traditional accusatorial procedure which protected defendants so effectively that it became inefficient in curbing criminal behaviour.⁵⁶ In 1198, Pope Innocent III described the concept of notorious crimes in his decretal *Tua nos* which dealt with the problem of clerics in public concubinage:

⁵⁰ My translation.

⁵¹ For further analysis of the history of this principle, see: FRAHER, R., “The Theoretical Justification for the New Criminal Law of the High Middle Ages: “*Rei Publicae Interest, Ne Crimina Remaneant Impunita*”, in *University of Illinois Law Review* 3(1984), 577–595; VARALDA, C., “Il Contributo di Innocenzo III alla Formazione della Cultura Giuridica Occidentale: in Particolare in Relazione al Noto Principio «*Rei Publicae Interest ne Crimina Remaneant Impunita*»”, in *Vergentis* 3(2016), 145–169; LANDAU, P., ““*Ne crimina maneat impunita*.” Zur Entstehung des öffentlichen Strafanspruchs in der Rechtswissenschaft des 12. Jahrhunderts”, in SCHMOECKEL, M., CONDORELLI, O. and ROUMY, F. (ed.), *Der Einfluss der Kanonistik auf die europäische Rechtskultur: Bd. 3: Straf- und Strafprozessrecht*, Köln, Böhlau, 2012, 23–35.

⁵² INNOCENT III, “Decretal *Ut famae*”, 1203, in FRIEDBERG, A. (ed.), *Corpus Iuris Canonici: Decretalium Collectiones*, 2nd ed, Lipsiensis, Graz Akademische Druck und Verlagsanstalt, 1959, 904 (X. 5.39.35).

⁵³ FRAHER, R, *The Theoretical ...*, 580–581.

⁵⁴ *Ibid*, p. 581; PENNINGTON, K., *Innocent ...*, 114.

⁵⁵ FRIEDBERG, A. (ed.), *Corpus Iuris Canonici: Decretum Magistri ...*, 445–449 (C.2 q.1 cc.15–21); BRUNDAGE, J., “Full and Partial Proof in Classical Canonical Procedure”, in *The Jurist* 67(2007), 64–65. See also FRAHER, R., ‘*Ut nullus ...*’, 498–500.

⁵⁶ FRAHER, R., ‘*Ut nullus ...*’, 504–505.

*“si crimen eorum ita publicum est, ut merito debeat appellari notorium, in eo casu nec testis nec accusator est necessarius, quum huiusmodi crimen nulla possit tergiversatione celari. Si vero publicum est, non ex evidentia, sed ex fama: in eo casu ad condemnationem eorum sola testimonia non sufficiunt, quum non sit testimoniis, sed testibus iudicandum.”*⁵⁷

This decretal does not, however, precisely define the word notorious. Some renowned jurists of this period had severe reservations about the use of notoriety, such as Tancred and Cardinal Hostiensis.⁵⁸ When Durandus and Cardinal Monachus were writing their works in the thirteenth and fourteenth centuries, as learned jurists they would have been well aware of the debates regarding the principle of notoriety, including around what was precisely meant by the term “notorious”. The contrast between the developing presumption of innocence on the one hand, and the concepts of notoriety and the public utility of avoiding unpunished crimes on the other, reveals a tension within the canon law of the middle ages. However, this contrast between starkly conflicting contemporaneous principles may suggest that each had a role in balancing the other, with the presumption of innocence attempting to curb excessively zealous tribunals from seeking convictions. If that is the case, it is not dissimilar to one of the rationales for the reforms of *PGD* considered in Chapter 1.

3. A principle of the natural law

Following in the tradition of canonists of the prior two centuries, Cardinal Monachus based the presumption of innocence in the natural law, such that even the Pope was bound by it.⁵⁹ In the twelfth century, the jurist Paucapalea linked a new system of proofs (“*ordo iudiciarius*”, which replaced trial by judicial ordeal) with God’s trial of Adam in the book of Genesis.⁶⁰ In asking Adam “*where are you?*”, Paucapalea argued that God established that, even though He is omniscient, even He must summon and hear defendants.⁶¹ By extension, human judges must also afford procedural rights to defendants.⁶² Paucapalea found further evidence of the antiquity of the *ordo iudiciarius* in the rule of proof by two or more witnesses expressed by

⁵⁷ INNOCENT III, “Decretal Tua nos”, 11 May 1198, in FRIEDBERG, A. (ed.), *Corpus Iuris Canonici: Decretalium ...*, 456 (X. 3.2.8).

⁵⁸ BRUNDAGE, J., *Full ...*, 65–66.

⁵⁹ PENNINGTON, K., *Innocent ...*, 113–116; EICHBAUER, M., “Medieval Inquisitorial Procedure: Procedural Rights and the Question of Due Process in the 13th Century”, in *History Compass* 12/1(2014), 78.

⁶⁰ PENNINGTON, K., *Innocent ...*, 113.

⁶¹ *Ibid.*

⁶² *Ibid.*

Moses in the book of Deuteronomy.⁶³ Jurists following Paucapalea developed on this idea, and gradually began to identify rules of procedure with the natural law, rather than mere positive law.⁶⁴

Near the end of the sixteenth century, Prospero Farinacci published his *Praxis et Theoricae Criminalis: Libri Duo in Quinque Titulos Distributi*, which was highly influential in Roman-law countries on the subject of criminal law.⁶⁵ Farinacci was a renowned advocate, and held various positions at the Papal court.⁶⁶ Farinacci considers the situation of contumacious defendants condemned *in absentia* who subsequently fall into the hands of the court.⁶⁷ He opines that such absent defendants may indeed be punished, however they must be given the opportunity to prove their innocence if they request it.⁶⁸ Farinacci considers that this “exception of innocence” is privileged by law and cannot be removed by statute except in cases of unjust or calumnious defences.⁶⁹ Further, Farinacci grounds this right in the natural law such that even the Prince (supreme legislator) cannot remove it.⁷⁰ Farinacci’s assertion that protections which are “privileged by law” or founded in the natural law cannot be abrogated by statute suggests that all provisions in the *CIC* must be interpreted subject to the natural law and lack any force if they are contrary to it. Grounding the presumption of innocence within the natural law raises a further problem for canon 223§2. If a person always has a right to be presumed innocent under the natural law, then it seems a mere positive law episcopal direction cannot infringe that right.

Modern canonists have also acknowledged that procedural rights may be grounded in natural law. Philip Brown has analysed jurisprudence of the Roman Rota and the Apostolic Signatura considering various procedural rights of defendants under both natural and positive law,

⁶³ *Ibid*; PENNINGTON, K., “Due Process, Community, and the Prince in the Evolution of the *Ordo iudiciarius*”, in *Rivista internazionale di diritto comune* 9 (1998), 19.

⁶⁴ PENNINGTON, K., *Innocent ...*, 114–115; PENNINGTON, K., *Due Process ...*, 19–37.

⁶⁵ PENNINGTON, K., *Innocent ...*, 120.

⁶⁶ *Ibid*, pp. 120–121; THE EDITORS OF ENCYCLOPAEDIA BRITANNICA, “Prospero Farinacci”, *Britannica*, <<https://www.britannica.com/biography/Prospero-Farinacci>>, last accessed on 11-03-2023.

⁶⁷ FARINACIUS, P., *Praxis et Theoricae Criminalis: Libri Duo in Quinque Titulos Distributi*, Francofurtensis, M. Zacharias Palthenius, 1597, 140 (Lib. 1, Tit. 1, q.11).

⁶⁸ *Ibid*, pp. 140–141.

⁶⁹ *Ibid*, p. 141.

⁷⁰ “*Et si tu subtilis diceres; ergo Princeps isto casu tollit exceptionem, et defensionem innocentiae? Quae tamen cum sit de iure naturae, nec a Principe, nec a statuto tolli potest*”: *ibid*, pp. 143–144.

however the presumption of innocence is not specifically considered.⁷¹ For example, in 1987, the Apostolic Signatura confirmed that a sentence can be null if fundamental procedural rights under either natural law or positive ecclesiastical law are denied.⁷² In considering nullity under the natural law, the tribunal said:

*“Iure naturae processus nullus est quando parti contradictorium fuit denegatum, quippe quod hoc essentialiter constituat iudicium. «Non concipitur iudicium seu iudicialis disceptatio nisi adsit contradictorium seu facultas utrique parti concessa se defendi adversus alterius partis assertiones et allegationes» ...”*⁷³

This principle was also quoted by the Roman Rota in 1955,⁷⁴ which echoes the work of Farinacci in the sixteenth century. However, the Signatura requires that a denial of legitimate defence contrary to the natural law must affect the substance of the trial in order to render the trial and sentence null.⁷⁵ Furthermore, a right granted without the ability to exercise it *in concreto* equates to a denial of the right itself.⁷⁶ Applying the same reasoning, if the presumption of innocence is founded in the natural law, then a denial of it in a way which affects the substance of a penal proceeding may render the proceeding null. Care must also be taken that the presumption of innocence is not acknowledged in theory but denied *in concreto*.

As a principle of the natural law,⁷⁷ further consequences flow from Book I (General Norms) of the *CIC*. First, no custom contrary to the presumption of innocence can obtain the force of law (unlike other customs *contra legem* which may in certain circumstances): canon 24§1. Second, canon 22 provides that “[c]ivil laws to which the law of the Church yields are to be observed

⁷¹ BROWN, P., “The Right of Defense and Due Process: *Fulcrum* of Justice, Heart of the Law”, in *Studia Canonica* 52(2018), 321–324.

⁷² SUPREMUM TRIBUNAL SIGNATURAE APOSTOLICAE, prot. nr. 15301/88 GG, 17-01-1987, in DANIEL, W. (ed.), *Ministerium Iustitiae: Jurisprudence of the Supreme Tribunal of the Apostolic Signatura*, Montréal, Wilson & Lafleur, 2011, 49.

⁷³ *Ibid.* The same source gives this translation in parallel: “By natural law, a process is null when the judicial exchange (*contradictorium*) has been denied a party, since this essentially constitutes a trial. “One cannot conceive of a trial or judicial debate without a judicial exchange, that is, the opportunity given to both parties to defend oneself against the assertions and allegations of the other party ...”.

⁷⁴ CORAM WYNEN, 9 March 1955, in *Decisiones seu Sententiae*, 47(1955), 220.

⁷⁵ “*Praeterea, non omnis negatio legitimae defensionis importat iudicii atque sententiae nullitatem, sed solummodo illae quae eiusdem iudicii substantiam afficiunt*”: SUPREMUM TRIBUNAL SIGNATURAE APOSTOLICAE, prot. nr. 15301/88 GG, 50.

⁷⁶ *Ibid.*, p. 52.

⁷⁷ For the purposes of the *CIC*, the natural law is a type of divine law (the other type being divine positive law): HUELS, J., “Book I: General Norms”, in BEAL J., CORIDEN, J. and GREEN, T. (ed.), *New Commentary* ..., 55–56.

in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise.” As the presumption of innocence is asserted to be part of the divine natural law, civil laws and procedures which violate it cannot be “canonised”. This pertains to any ecclesiastical legislation seeking to canonise civil law at either the universal or particular level, both present and future. For example, ecclesiastical officials should be cautious in outsourcing disciplinary measures to civil authorities or recognising without scrutiny the judgments of civil criminal courts. The case of Cardinal Pell, considered in Chapter 3, is a cautionary tale in this respect.

4. Link with the burden of proof

Many jurists throughout the Roman law and canon law traditions have linked the presumption of innocence with the burden of proof. For example, in 533 A.D., the *Digest* of Justinian was promulgated by the eponymous Roman emperor in Constantinople.⁷⁸ This text aimed to collect the classical legal science, and it consisted of a collection of extracts from around forty Roman jurists.⁷⁹ The *Digest* was introduced as law in Italy by the Emperor at the request of Pope Vigilius in 554.⁸⁰ However, from the donation of Sutri in 728 onwards, the administration of justice in Rome was fully independent of the Eastern Empire, leading to legal divergence.⁸¹ The influence of Roman law in the West after this period is somewhat unclear,⁸² however by the eleventh century the *Digest* was used in legal education at the newly established universities.⁸³ Canon law partly developed out of, and was strongly influenced by, the Roman law.⁸⁴ The *Digest* does not clearly state the presumption of innocence. However, it does include an extract from *De Officio Proconsulis* by the jurist Ulpianus (died 228 A.D.)⁸⁵ dealing with the punishment of absent criminals: “*Absentem in criminibus damnari non debere divus Traianus ... rescripsit. sed nec de suspicionibus debere aliquem damnari ...: satius enim esse*

⁷⁸ WAELKENS, L., *Amne Adverso: Roman Legal Heritage in European Culture*, Leuven, Leuven University Press, 2015, 76, 78.

⁷⁹ *Ibid*, p. 78.

⁸⁰ *Ibid*, p. 81.

⁸¹ *Ibid*, pp. 91–92.

⁸² *Ibid*, p. 89.

⁸³ *Ibid*, pp. 79, 97.

⁸⁴ *Ibid*, pp. 95–99; GREENBERG, J. and SECHLER, M., “Constitutionalism Ancient and Early Modern: The Contributions of Roman Law, Canon Law, and English Common Law”, in *Cardozo Law Review* 34(2013), 1026.

⁸⁵ THE EDITORS OF ENCYCLOPAEDIA BRITANNICA, “Ulpian”, *Britannica*, <<https://www.britannica.com/biography/Ulpian>>, last accessed on 21-03-2023.

inpunitum relinqui facinus nocentis quam innocentem damnari".⁸⁶ That is, "the Divine Trajan wrote back that an absent person should not be convicted. But neither should anyone be convicted out of [mere] suspicions: for it is better that the crime of a guilty person be left unpunished than to convict an innocent person."⁸⁷ This implicitly includes a sort of presumption of innocence, because it requires a substantial proof (i.e. not "mere suspicion") before anyone may be convicted, in addition to mentioning "*innocentem*" in the next phrase. It also states a consequence of this, viz that it is better that the guilty go unpunished than that the innocent are convicted. This is an exhortation to avoid short-cuts in the judicial process in order to achieve convictions.

In the thirteenth century, the influential Durandus reiterated that it is better that the guilty go free than that the innocent are condemned: "*et melius est nocentem absolvere quam innocentem condemnare*".⁸⁸ He then immediately drew a link with the issue of proof, demanding very open and clear proofs before someone could be proved guilty, except in the case of violent presumptions: "*Ubi ergo reus negat, contra eum probetur per apertissimas et claras probationes: quia tales in criminibus requiruntur ... et non per praesumptiones, nisi sint violentae*".⁸⁹ Subsequent canonists have also linked the presumption of innocence with the burden of proof.⁹⁰

At the end of the fourteenth century, Pope Boniface IX ratified with his apostolic authority an acquittal by Giovanni de Pogiali, a judge of the inquisition, of a Jewish man accused of seduction by means of heresy.⁹¹ The inquisitor applied a version of the presumption of innocence:

"non invenit contra ipsum Salomonem fore iuridice et legitime probatum, videlicet quod ipse talia verba protulerit aut alia supradicta commiserit vel fecerit,

⁸⁶ D. 48.19.5pr., in KRUEGER, P. and MOMMSEN, T. (ed.), *Corpus Iuris Civilis: Volumen Prius*, Berolini, Weidmannos, 1872, 813.

⁸⁷ My translation.

⁸⁸ DURANDUS, G., *Speculum Iuris* ..., 4 (*De Accusatione* §1.28).

⁸⁹ *Ibid.*

⁹⁰ For example, in 1631, the Jesuit jurist Frederick von Spee considered the question of whether someone may be condemned who had not confessed under torture, and wrote that: "[s]uppono damnari neminem posse nisi certo de eo constet culpam sustinere: neque enim innocens occidi debet, innocens autem omnis esse praesumitur, qui nocens esse nescitur": VON SPEE, F. (published anonymously), *Cautio Criminalis, Seu De Processibus contra Sagas Liber*, Rinthelii, Petrus Lucius, 1631, 262–263; PENNINGTON, K., *Innocent* ..., 121–122.

⁹¹ SIMONSOHN, S., *The Apostolic See and the Jews: Documents: 492–1404 (Studies and Texts 94)*, Toronto, Pontifical Institute of Medieval Studies, 1988, 527–528.

*considerans fore melius facinus impunitum relinquere quam innocentem
condempnare ...*⁹²

Here, de Pogiali articulates that the charges were not legitimately proved (*legitime probatum*) in a juridical forum, and that it is better to leave someone unpunished than to condemn an innocent person. This echoes the extract of Justinian's *Digest* considered earlier. It may be inferred that Salomon is innocent precisely because the charges were not legitimately proved, which is in substance a presumption of innocence. This case demonstrates that the presumption of innocence continued to be applied in at least some judicial fora of this period.

Hence, in the canonical tradition, the presumption of innocence has often been linked to the issue of the burden of proof. The presumption of innocence exhorts judges to ensure that they are satisfied of guilt to the requisite standard before convicting an accused person. In Chapter 3, it will be seen that the presumption of innocence in Australian law has a very similar function.

5. Conclusion

In this chapter, we have seen that the presumption of innocence, in various formulations, has a long tradition in canon law spanning from at least the middle ages. Indeed, related principles can be traced back into the Roman Empire and the jurisprudence of the Church in the first millennium. The presumption of innocence has been articulated by canonists as a part of the natural law, such that not even the supreme earthly legislator can derogate from it, and violations of it can nullify a sentence. Jurists have emphasised the close relationship between the presumption of innocence and the burden of proof, such that it emphasises the importance of sufficient proof before a conviction may be made in a judicial process. The corollary of this has also appeared, that the law should be more prompt to acquit than to condemn.

⁹² *Ibid*, p. 528; see also PENNINGTON, K., *Innocent ...*, 118.

IV. Chapter 3: The presumption of innocence in Australian law

1. Introduction

In this chapter, key aspects of the historical development of the presumption of innocence in the Australian criminal law will be examined. A comparison with the canonical tradition will identify similarities and differences, helping to clarify the role of the presumption of innocence within canon law. This comparison will also offer new perspectives on how canon 1321§1 may operate in practice.

The presumption of innocence presently finds expression in Australia in both legislation and court decisions, which are both authoritative in the common law tradition. For example, in the State of Victoria, s 25(1) of the *Charter of Human Rights and Responsibilities Act 2006* provides that “[a] person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.”⁹³ In the same State, section 141(1) of the *Evidence Act 2008* provides that “[i]n a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.”⁹⁴ For federal crimes, the same principles are expressed in the *Commonwealth Criminal Code*.⁹⁵ However, for a deeper analysis, it is necessary to have recourse to court decisions which have provided further elaboration.

A historical analysis of Australian law also necessitates an analysis of English law. The Commonwealth of Australia was formally established in 1901, having been earlier settled as a series of distinct British colonies from the late eighteenth century onwards.⁹⁶ In 1992, Justice Brennan of the High Court of Australia explained the relationship between the laws of the two nations:

“Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the [British] hierarchy ... The law which governs Australia is Australian law ... Here [with the High Court of Australia] rests the

⁹³ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1).

⁹⁴ *Evidence Act 2008* (Vic) s 141(1).

⁹⁵ *Criminal Code Act 1995* (Cth) sch 1 ss 13.1(1) and 13.2(1).

⁹⁶ PARLIAMENTARY EDUCATION OFFICE, “The Australian Constitution in focus”, *Parliamentary Education Office*, <<https://peo.gov.au/understand-our-parliament/how-parliament-works/the-australian-constitution/the-australian-constitution-in-focus/>>, last accessed on 16-03-2023.

ultimate responsibility of declaring the law of the nation. Although this Court is free to depart from English precedent which was earlier followed as stating the common law of this country ... it cannot do so where the departure would fracture what I have called the skeleton of principle."⁹⁷

Hence, the common law of Australia developed out of the law of England, and the latter remains directly relevant even if not absolutely binding.

2. Due process and the burden of proof

The early historical development of the presumption of innocence is tied closely to the need to observe due process before convicting or punishing anyone. An analysis of relevant principles of the ancient English law may begin with the *Magna Carta*, although this charter is not the beginning of the English criminal law. The *Magna Carta* is, however, one of the most famous legal documents in English history, being an agreement originally signed by King John in 1215 in response to agitation and discontent among his nobles.⁹⁸ It has a complex history, having been variously annulled by Pope Innocent III, revised as to its terms, supported by Pope Innocent IV, and confirmed by kings on over thirty occasions.⁹⁹ In the first half of the seventeenth century, Sir Edward Coke wrote his *Institutes of the Laws of England*, which includes a commentary on the *Magna Carta*. Coke was at various times an advocate, Lord Chief Justice of England, and a member of parliament.¹⁰⁰ Four hundred years after it was first composed, Coke wrote that the *Magna Carta* was so called "*not that it is great in quantity, for there be many voluminous Charters commonly passed ... but in respect of the great importance, and weightinesse of the matter, as hereafter shall appeare*".¹⁰¹ Section 29 of the 1297 version of the *Magna Carta* (still in force in the United Kingdom today) provides that:

"Nullus liber homo capiatur vel imprisonet, aut disseisiatur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlaget, aut exulet, aut aliquo

⁹⁷ *Mabo v Queensland (No 2)* [1992] HCA 23, [29] (BRENNAN J) (citations omitted).

⁹⁸ HELMHOLZ, R., "Magna Carta and the *ius commune*", in *The University of Chicago Law Review* 66/2(1999), 297–298.

⁹⁹ *Ibid*, pp. 299, 362–363; GREENBERG, J. and SECHLER, M., *Constitutionalism ...*, 1035–1036.

¹⁰⁰ JONES, G., "Sir Edward Coke", *Britannica*, <<https://www.britannica.com/biography/Edward-Coke>>, last accessed 20-03-2023.

¹⁰¹ COKE, E., *The Second Part of the Institutes of the Laws of England*, London, John Streater, Henry Twyford and Elizabeth Flesher, 1671, Proeme.

*modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale
judicium parium suorum, vel per legem terre ...*¹⁰²

Commenting on this provision, Coke opines that “but by the Law of the Land” means “*without due process of Law ... that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner ...*”.¹⁰³ Although this provision of the *Magna Carta* does not say that someone is presumed innocent until proven guilty, it comes close in substance. No one may be treated as if guilty (i.e. punished) unless first convicted by a jury with due process observed (i.e. proved guilty in accordance with law). Richard Helmholz has suggested that this provision may have been influenced by similar recent developments in canon law.¹⁰⁴

In the thirteenth century, only a few years after the *Magna Carta* was first published,¹⁰⁵ the English jurist Henri de Bracton stated a presumption that every man is good until the contrary is proved: “*de quolibet homine praesumitur, quod sit bonus homo, donec probetur in contrarium*”.¹⁰⁶ Bracton knew of and was influenced by the thirteenth century Bolognese glossator Azo,¹⁰⁷ demonstrating a degree of cross-pollination in legal thought between England and continental Europe. Indeed, at this period, the *ius commune* was actively studied in England.¹⁰⁸ Bracton’s work appeared in the same century in which Durandus affirmed the extant principle that someone is not guilty simply by being accused.¹⁰⁹

In the modern period, the presumption of innocence has continued to be linked closely with due process and the burden of proof. In the 1980 decision of *Howe v R*, the High Court of Australia described the presumption of innocence in these terms:

“The presumption of innocence in a criminal trial is relevant only in relation to an accused person and finds expression in the direction to the jury of the onus of proof that rests upon the Crown. It is proof beyond a reasonable doubt of every element of

¹⁰² *Magna Carta 1297* (Eng) s XXIX. The same source provides an English translation: “*NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land ...*”.

¹⁰³ COKE, E., *The Second ...*, 50.

¹⁰⁴ HELMHOLZ, R., *Magna Carta ...*, 356–357.

¹⁰⁵ THE EDITORS OF ENCYCLOPAEDIA BRITANNICA, “Henry de Bracton”, *Britannica*, <<https://www.britannica.com/biography/Henry-de-Bracton>>, last accessed on 20-03-2023.

¹⁰⁶ BRACTON, H., *De Legibus et Consuetudinibus Angliae*, vol III, London, Longman and Trübner, 1880, 250.

¹⁰⁷ GREENBERG, J. and SECHLER, M., *Constitutionalism ...*, 1024; WAELEKENS, L., *Amne Adverso ...*, 103.

¹⁰⁸ HELMHOLZ, R., *Magna Carta ...*, 305–306.

¹⁰⁹ See Chapter 2 section 2.

an offence as an essential condition precedent to conviction which gives effect to the presumption.”¹¹⁰

This clear link between the presumption of innocence and the prosecution’s burden of proof is logical, as the presumption of innocence applies only insofar as it is not successfully rebutted by contrary proof of the requisite standard. In the 2011 case of *Momcilovic v The Queen*, Chief Justice French of the High Court adopted this formulation of the presumption of innocence and observed that: “[t]he presumption of innocence has not generally been regarded in Australia as logically distinct from the requirement that the prosecution must prove the guilt of an accused person beyond reasonable doubt”.¹¹¹

The presumption of innocence in Australia is *not* that an accused is “not guilty” of an offence, but rather that an accused is innocent.¹¹² However, in Australian law, “not guilty” and “innocent” are functionally identical, and there is no intermediate position analogous to the “*non constat*” of canon law. This is evidenced by the legal rule that the substance of the presumption of innocence is sufficiently given effect to by directions to a jury that the burden of proof remains on the prosecution throughout the trial and the defendant must be acquitted unless the essential elements of the alleged offence are proved beyond reasonable doubt.¹¹³ Hence, a “presumption of innocence” is in substance an entitlement to be found “not guilty” unless convicted in accordance with law.

In summary, the Anglo-Australian legal tradition strongly emphasises that the presumption of innocence demands that an accused is convicted within due process and, in particular, according to the requisite standard of proof, before being considered guilty. This same idea has also been identified as a component of the presumption of innocence by some jurists in the Roman and canon law traditions, as evidenced in Justinian’s *Digest* and the works of Durandus and de Poggiali. It is also consistent with the more recent work of Jenkins just prior to *PGD*, with Pope Francis’ exhortation in 2020 to avoid “arbitrary solutions”, and with Bishop Arrieta’s intervention regarding *PGD*.

¹¹⁰ *Howe v R* (1980) 32 ALR 478, 483 (GIBBS, STEPHEN, MURPHY, AICKIN AND WILSON JJ).

¹¹¹ *Momcilovic v The Queen* [2011] HCA 34, [54] (FRENCH CJ).

¹¹² *R v Palmer* (1992) 64 A Crim R 1, 7 (FINLAY J); JUDICIAL COLLEGE OF VICTORIA, “1.7 – Onus and Standard of Proof”, *Criminal Charge Book*, <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1291.htm>>, last accessed on 19-03-2023, [2].

¹¹³ *R v Palmer* (1992) 64 A Crim R 1, 6–7; *Momcilovic v The Queen* [2011] HCA 34, [54].

3. It is better that the guilty escape than that the innocent are punished

In the fifteenth century, Sir John Fortescue, former Chief Justice of the King's Bench, wrote *De laudibus legum Angliae* for the instruction of Edward, Prince of Wales.¹¹⁴ Expressing a similar sentiment to that of Justinian's *Digest* one millennium earlier, and to that of Boniface IX and de Pogiali in the fourteenth century, Fortescue wrote that: "[i]ndeed I would rather wish twenty evill doers to escape death through pittie, then one man to bee unjustly condemned."¹¹⁵ In the eighteenth century, the judge Sir William Blackstone set this number at ten, writing that "the law holds, that it is better that ten guilty persons escape, than that one innocent suffer."¹¹⁶ Such is Sir William's renown, that this ratio of ten-to-one has taken his name as the "Blackstone ratio".¹¹⁷ However, in setting a number to this ratio, jurists acknowledge that this principle of leniency is not absolute.

It may be suggested that this principle is inapplicable in canon law since the Anglo-Australian legal system has an excessive focus on individual liberty, whereas canon law has more of a focus on the common good: *ne crimina remaneant impunita*. However, Anglo-Australian law is also concerned to protect the public from criminals and threats to the stability of the state. Additionally, we have seen that the presumption of innocence in canon law is a restraint on the tendency to punish too easily. Monachus opined that "*ius est promptius ad absoluendum quam ad condemnandum*".¹¹⁸ Ulpianus, Justinian, Boniface IX and de Pogiali explicitly stated the same principle as that expressed by Fortescue and Blackstone. Hence, the idea that it is better that the guilty escape punishment than that the innocent are condemned has been respected in both canon law and Australian law, even though it was contested at some stages by the competing concepts of public utility and notoriety. This means that the law should not be so concerned with seeking absolute truth in an individual case that it punishes a person found not-guilty and hence presumed innocent by leaving suspicion after the conclusion of a trial.

In light of this principle of canon law which canon 1321§1 now connotes, it may be necessary for documents prepared by departments of the Roman Curia to be examined to ensure that they are consistent with canon 1321§1. For example, the DDF's revised *Vademecum* issued on 5

¹¹⁴ THE EDITORS OF ENCYCLOPAEDIA BRITANNICA, 'Sir John Fortescue', *Britannica*, <<https://www.britannica.com/biography/John-Fortescue>>, last accessed on 20-03-2023.

¹¹⁵ FORTESCUE, J., *De Laudibus Legum Angliae*, London, Abel Roper, 1660, 63.

¹¹⁶ BLACKSTONE, W., *Commentaries on the Laws of England: in Four Books*, 3rd ed, New York, Banks & Brothers, 1890, 1027.

¹¹⁷ WILKINSON, J., "The Presumption of Civil Innocence", in *Virginia Law Review* 104/4(2018), 599.

¹¹⁸ MONACHUS, J., *Gloss*

June 2022 does not refer to the new canon 1321§1, and it retains the pre-*PGD* classification of penal decisions of *constat*, *constat de non* and *non constat*.¹¹⁹ It seems logically inconsistent that a person who has not been convicted with moral certainty can be both presumed innocent under canon 1321§1 and yet also impugned with a sentence of *non constat* which in itself conveys a continuing suspicion. This is because a sentence of *non constat* necessarily conveys that it is not “*evidently established that the accused did not commit the delict*”, otherwise a sentence of *constat de non* would be required in accordance with canon 1726. A narrower interpretation of the presumption of innocence, which merely requires that a person presumed innocent may not be subject to penal sanctions and yet may still be subject to suspicion, would render the presumption of innocence practically redundant. The situation in canon law would be the same if canon 1321§1 did not exist at all: a person subject to a sentence of *non constat* would both remain under suspicion and yet also not be punished through penalties requiring a judicial finding of guilt. As the *Vademecum* was issued after *PGD*, it should have considered the new canon 1321§1, yet it makes no reference to this canon. Before *PGD*, there may have been room for the intermediate sentence of *non constat*. However, as canon 1321§1 now specifically imports a positive presumption of innocence, perhaps the sentence of *non constat* should be reconsidered. Retaining the sentence of *non constat* risks punishing those who are innocent in fact.

4. A privileged position in the law

Without using the term “natural law”, Australian courts have given a prominent and privileged position to the presumption of innocence which protects it where possible from legislative encroachment. In *Momcilovic v The Queen*, Chief Justice French discussed the interaction of the common law, which he called “*the ultimate constitutional foundation in Australia*”, with the principle of legality, which is “*a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate*.”¹²⁰ He then applied the principle of legality to the presumption of innocence in these terms:

“The common law “presumption of innocence” in criminal proceedings is an important incident of the liberty of the subject. The principle of legality will afford it such protection, in the interpretation of statutes which may affect it, as the

¹¹⁹ DICASTERY FOR THE DOCTRINE OF THE FAITH, *Vademecum* ..., 84.

¹²⁰ *Momcilovic v The Queen* [2011] HCA 34, [42]–[43] (FRENCH CJ) (citations omitted).

*language of the statute will allow. A statute, which on one construction would encroach upon the presumption of innocence, is to be construed, if an alternative construction be available, so as to avoid or mitigate that encroachment ...*¹²¹

However, his Honour acknowledged that the principle of legality, as a “*presumed legislative intention*”, cannot protect the presumption of innocence when statutory language only leaves open interpretations which infringe it.¹²² While accepting that the presumption of innocence can be infringed by a direct attack from the legislature, French CJ explains that courts will do all that they can to interpret laws in such a way that an infringement of the presumption of innocence is avoided or minimised.¹²³ His Honour’s analysis has been cited and adopted subsequently in numerous judgments.¹²⁴

The situation under the English common law (before modification by modern treaties) was much the same. In the 1935 decision of the House of Lords in *Woolmington v Director of Public Prosecutions*, Viscount Sankey called the presumption of innocence a “*golden thread*” in the English criminal law and yet acknowledged that it may be overruled by legislation.¹²⁵ His Lordship then asserted that, nevertheless, “[*n*]o matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”¹²⁶

The rationale for the presumption of innocence in Anglo-Australian law has been described in various ways. In *Momcilovic*, French CJ describes it as “*an important incident of the liberty of the subject*”, without using the language of natural law or natural rights.¹²⁷ In 2004, Lord Bingham stated that the English rationale for the presumption of innocence is “*that it is repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and*

¹²¹ *Ibid*, [44].

¹²² *Ibid*, [45].

¹²³ Note that international human rights treaties cannot override Australian legislation which may offend the presumption of innocence, on the basis that the making and ratification of treaties is within the role of the Executive, whereas it is the Legislature which makes laws: *Minister of State for Immigration & Ethnic Affairs v Teoh* [1995] HCA 20, [25] (MASON CJ AND DEANE J).

¹²⁴ See e.g.: *The Queen v Beckett* [2015] HCA 38, [62] (NETTLE J); *Hopkins v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 33, [18] (LOGAN, WIGNEY AND GLEESON JJ).

¹²⁵ *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481 (SANKEY LC).

¹²⁶ *Ibid*, pp. 481–482.

¹²⁷ *Momcilovic v The Queen* [2011] HCA 34, [44] (FRENCH CJ).

punishment if he fails to do so.”¹²⁸ In 2014, the High Court of Australia also attributed it to a kind of fairness or balance, unanimously adopting the language of *Woolmington*:

*“Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law ... is that the prosecution is to prove the guilt of an accused person. ... The principle is so fundamental that “no attempt to whittle it down can be entertained” albeit its application may be affected by a statute expressed clearly or in words of necessary intendment ... The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.”*¹²⁹

Similar to Pope Francis’ speech in 2020,¹³⁰ the High Court draws attention to the vulnerability of someone accused of a crime, emphasising the importance of the law’s protection of an accused. As does the canon law tradition, the Australian law strongly identifies the presumption of innocence with the rights of individuals, whether it be due to considerations of liberty or fairness. Although described as an aspect of the “accusatorial nature” of Australian criminal proceedings, the High Court does not give any reason as to why the presumption of innocence should not apply also in inquisitorial or mixed proceedings.

While Australian law accepts that the presumption of innocence may in theory be infringed by the legislature, the canon law natural law tradition asserts that the natural law may not be violated even by the supreme legislator. A complex situation in practice would arise if the Pope, who is the supreme earthly judge and legislator,¹³¹ sought to legislate a norm contrary to the natural law. That situation, and the validity of such a norm, is beyond the scope of a short thesis such as this. Nevertheless, both the Australian and canon law traditions emphasise the immense importance of the presumption of innocence, and the secular law of Australia in practice partially corroborates the natural law analysis of the canonists.

5. Practical consequences of the presumption

In his *Institutes*, Coke proclaims that “*the Law of England is a Law of mercie, Lex Angliae est lex misericordiae*”, on the basis that accused persons must be dealt with quickly and treated

¹²⁸ *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [9] (BINGHAM LJ).

¹²⁹ *Lee v The Queen* [2014] HCA 20, [32] (FRENCH CJ, CRENNAN, KIEFEL, BELL AND KEANE JJ).

¹³⁰ FRANCIS, *Address*

¹³¹ Canon 333§3 provides that: “[n]o appeal or recourse is permitted against a sentence or decree of the Roman Pontiff.” Canon 1404 provides that “[t]he First See is judged by no one.”

humanely.¹³² Coke gives details of how the presumption of innocence has practical consequences. He states that “*the innocent shall not be worn and wasted by long imprisonment, but ... speedily come to his trial*”,¹³³ implying that swift justice is the handmaid of the presumption of innocence. He continues that “*prisoners for criminall causes, when they are brought to their triall, be humanely dealt withall; for «Severos quidem facit Justicia, inhumanos non facit»*”,¹³⁴ requiring that accused persons may not be inhumanely punished before their guilt is established. Finally, “*the Judge ought to exhort him to answer without fear, and that justice shall be duly administred to him*”,¹³⁵ which requires that an accused must be given confidence that justice shall be done and that the tribunal will give a fair hearing.

Coke’s writings thus suggest that the presumption of innocence should influence the practical operation of a trial. By implication, the presumption of innocence should also inform all aspects of judicial discretion during a penal process. For example, canon 1527§1 provides that “[p]roofs of any kind which seem useful for adjudicating the case and are licit can be brought forward.” However, a judge has a certain discretion to reject proofs.¹³⁶ In exercising this discretion, a judge should constantly bear in mind the presumption of innocence and the need to ensure that an accused receives, and is seen to receive, a fair trial. For example, in the state of Victoria, “[i]n a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.”¹³⁷ Although this provision exists in the context of a criminal system which employs juries, and it may be hoped that professional canonical judges would be able to make a just and accurate assessment of the relevance and probative value of specific evidence, nevertheless judges should be cautious in exercising their discretion as to admitting evidence. Furthermore, they should be cognisant to uphold the visible integrity of canonical tribunals as Coke exhorts.

Another example of judicial discretion consists in the setting of procedural time limits: “[w]hen the law in no way establishes time limits for completing procedural acts, the judge must define them after having taken into consideration the nature of each act.”¹³⁸ In setting these time

¹³² COKE, E., *The Second ...*, 315; QUINTARD-MORÉNAS, F., “The Presumption of Innocence in the French and Anglo-American Legal Traditions”, in *The American Journal of Comparative Law* 58/1(2010), 126.

¹³³ COKE, E., *The Second ...*, 315.

¹³⁴ *Ibid*, pp. 315–316.

¹³⁵ *Ibid*, p. 316.

¹³⁶ Canon 1527§2; COX, C., “Part II: The Contentious Trial”, in BEAL J., CORIDEN, J. and GREEN, T. (ed.), *New Commentary ...*, 1669. Additionally, a judge may curb an excessive number of witnesses: canon 1553.

¹³⁷ *Evidence Act 2008* (Vic) s 137.

¹³⁸ Canon 1466.

limits, the judge should simultaneously keep in mind the defendant's natural law right to offer an effective defence and the defendant's right to have his or her case swiftly adjudicated as articulated by Coke. A judge is able to extend time limits before they have lapsed "*for a just cause*" under canon 1465§2, but canon 1465§3 states that "*the judge is to take care that such an extension does not overly prolong the litigation*". This is a further affirmation of the importance of persons presumed innocent not being subject to a penal process for any longer than is necessary.

6. The case of Cardinal Pell

The recent case of Cardinal George Pell provides an illustration of the presumption of innocence in practice, and is of particular interest because it involved a prince of the Church charged with crimes which were also relevant in a canonical penal context. The response of the ecclesiastical authorities throughout the trial and appellate process is also illuminating.

Cardinal Pell was convicted of five sexual offences by a jury in 2018 in the County Court of Victoria.¹³⁹ In delivering his sentencing remarks, Chief Judge Kidd noted that there had been "*extraordinary and widespread publicity and public comment*" around Cardinal Pell for years, and that "*in some sections of the community [Cardinal Pell was] a publicly vilified figure.*"¹⁴⁰ In analysing the intense public climate, and expressing similar sentiments to those of Pope Francis in his 2020 speech,¹⁴¹ Chief Judge Kidd stated that:

*"[O]ver the last period we have witnessed, outside of this court and within our community, examples of a 'witch-hunt' or 'lynch mob' mentality in relation to Cardinal Pell. I utterly condemn such behaviour. That has nothing to do with justice or a civilized society. The Courts stand as a bulwark against such irresponsible behaviour."*¹⁴²

Both the Chief Judge and Pope Francis recognise the importance of seeking solutions in accordance with justice, not solutions dictated by the powerful or a lynch-mob. Both use the word "bulwark" to describe the protection which the law and the courts should provide to accused persons against those seeking tangible results and arbitrary convictions more than truth and justice. After his initial conviction, Pope Francis confirmed precautionary measures

¹³⁹ *DPP v Pell (sentence)* [2019] VCC 260.

¹⁴⁰ *Ibid*, [5].

¹⁴¹ FRANCIS, *Address*

¹⁴² *DPP v Pell (sentence)* [2019] VCC 260, [13].

imposed on Cardinal Pell which prohibited him from exercising public ministry or having voluntary contact with minors, while awaiting a definitive judgment pending appeals.¹⁴³

The conviction was upheld on initial appeal in the Court of Appeal of the Supreme Court of Victoria by a majority of two judges to one.¹⁴⁴ Significantly, Justice Weinberg (in dissent on appeal) observed that “*in the present case, there was a significant body of cogent evidence casting serious doubt upon the complainant’s account, both as to credibility and reliability.*”¹⁴⁵ He stated that “[h]aving had regard to the whole of the evidence led at trial, and having deliberated long and hard over this matter, I find myself in the position of having a genuine doubt as to the applicant’s guilt.”¹⁴⁶ Commenting directly on the onus of proof, Justice Weinberg observed that:

*“The prosecution had to prove the applicant’s guilt beyond reasonable doubt. The defence had to prove nothing at all. It did, however, point to a substantial body of evidence that, it submitted, left open at least the ‘reasonable possibility’ that the complainant’s allegations fell short of the standard of proof required for conviction. In my view, [the defence’s] submission that the defence had succeeded in making good that proposition should be accepted.”*¹⁴⁷

This is the presumption of innocence being applied in practice. The prosecution had the obligation to prove Cardinal Pell’s guilt beyond reasonable doubt, which Justice Weinberg considered it had failed to do. On that basis, the presumption of innocence had not been rebutted. Justice Weinberg, having found “*a significant possibility*” that the alleged offences did not take place, concluded that the Cardinal must be acquitted.¹⁴⁸ Nevertheless, the two other appellate judges upheld the Cardinal’s conviction, considering that on the evidence of the case “*it was open to the jury to be satisfied beyond reasonable doubt that Cardinal Pell was*

¹⁴³ GISOTTI, A., “Declaration of the “ad interim” Director of the Holy See Press Office, Alessandro Gisotti”, 26 February 2019, in *Bollettino*, 190226e(2019).

¹⁴⁴ *Pell v The Queen* [2019] VSCA 186.

¹⁴⁵ *Ibid*, [1058] (WEINBERG JA).

¹⁴⁶ *Ibid*, [1051] (WEINBERG JA).

¹⁴⁷ *Ibid*, [1105] (WEINBERG JA).

¹⁴⁸ *Ibid*, [1111] (WEINBERG JA).

guilty of the offences charged".¹⁴⁹ At this stage, neither the Pope nor the CDF took further actions, preferring to wait until the conclusion of all available civil appeals.¹⁵⁰

In April 2020, more than a year after Cardinal Pell's original conviction, the seven judges of the High Court of Australia unanimously acquitted the Cardinal of all charges.¹⁵¹ The judges of the nation's highest court said that "*it is evident that there is "a significant possibility that an innocent person has been convicted because the evidence did not establish guilt to the requisite standard of proof"*".¹⁵² Further, the High Court declared that "*the Court of Appeal majority's findings ought to have led to the appeal being allowed*",¹⁵³ meaning that the Victorian Court of Appeal *on its own findings* should have acquitted Cardinal Pell.

This decision is a recent application by the highest court in Australia of the fundamental right of a defendant to be presumed innocent until the burden of proof is met by the prosecution. The fact that lower courts reached contrary or divided positions serves to draw out even more clearly that an accused person must never be convicted until proof is reached, in the language of the Australian criminal system, *beyond reasonable doubt*. This case is also a stark reminder that courts and tribunals must endeavour to apply the correct criminal procedure in its fullness even when under extraordinary external pressure, whether it is due to a "*witch-hunt*" or "*lynch mob*" mentality in the public sphere, or due to internal ecclesiastical pressure to achieve tangible results against clergy accused of canonical delicts.

This case also illustrates why canon 22 of the *CIC* should not be applied without further enquiry in cases where there is a material risk that the presumption of innocence may not have been respected. Although canon 22 was not in fact applied in the case of Cardinal Pell, in some circumstances ordinaries or indeed the Roman authorities may be tempted to make use of civil criminal proceedings, whether through applying existing provisions of the *CIC* or through novel precepts or decrees. Indeed, if someone is convicted in a civil court, it seems unlikely that such a conviction would be completely ignored or treated as irrelevant by an ecclesiastical authority. If canonical sanctions had been imposed on Cardinal Pell in reliance on the seemingly robust decisions of the trial court or the first appellate court, those sanctions would have been imposed

¹⁴⁹ *Ibid*, [14] (FERGUSON CJ and MAXWELL P).

¹⁵⁰ DICASTERIUM PRO COMMUNICATIONE, "Australian court dismisses Cardinal Pell's appeal", *Vatican News*, <<https://www.vaticannews.va/en/church/news/2019-08/australia-cardinal-pell-appeal-decision.html>>, last accessed on 17-03-2023.

¹⁵¹ *Pell v The Queen* [2020] HCA 12.

¹⁵² *Ibid*, [9] (citation omitted).

¹⁵³ *Ibid*, [10].

on the basis of a process which was ultimately found in substance not to have respected the Cardinal's natural law right to a presumption of innocence. It seems unlikely that the initial conviction and appeal could have provided moral certainty to ground ecclesiastical penal sanctions, since the serious flaws in the Cardinal's conviction were clearly articulated by Justice Weinberg during the first appeal, and may have also been clear to an impartial observer at the initial trial. This case is a clarion call to the ecclesiastical penal system to exercise its own independent enquiry in cases where individuals are accused of acts which are simultaneously penal delicts and civil crimes.

7. Conclusion

We have seen that, for at least 800 years, the law of England has required an accused to be convicted in accordance with law before he or she may be punished. This is the presumption of innocence in substance, and it necessitates various protections for all accused persons both before and *during* a trial, even for those who are subsequently found guilty. That is, all persons are treated as if they are innocent (i.e. presumed innocent) until they are proven guilty. Further, there is witness to the principle that it is better that the guilty escape than that the innocent are punished in both the Australian and canonical traditions. The Anglo-Australian law has given strong protection to the presumption of innocence, and acknowledged its uniquely important place in the legal system, somewhat though not perfectly akin to a natural law right. Even though courts accept that the legislature may infringe the presumption of innocence by direct attack, they will endeavour to interpret legislation so as not to infringe this presumption where possible. This provides an important example for judges in the canon law system: canonical judges should interpret laws and make all decisions in such a way as to uphold the presumption of innocence.

V. Conclusion

The presumption of innocence in canon 1321§1 is not a novel concept. Although Pope Francis felt it necessary to restate this principle in the context of modern problems, its roots stretch back into the first millennium after Christ, and perhaps even into the Garden of Eden. We have seen that aspects of the presumption of innocence were explicitly included in the *CIC* before 2021, especially in relation to the burden of proof and the right to one's good reputation. Although statements of the Holy Father and his officials do not shed much light on the rationale and scope of the new canon 1321§1, it seems that the current climate surrounding clerical sexual abuse and the strengthening of the penal law in general required a clear restatement of certain rights of defendants to prevent disciplinary excess.

Canonical tradition, however, was of much greater assistance in understanding this modern-day canon. We have seen that the presumption of innocence gradually developed in canon law up until the fourteenth century, by which time it had reached a form substantially similar to that known today. Over that period, it contended with strong countervailing tendencies in the form of notoriety and public utility which sought to punish criminals at the cost of full legal process. Then, as today, the presumption of innocence served as a bulwark to protect vulnerable defendants against the strong coercive power of authorities. From the middle ages until the present day, various canonists have grounded procedural rights such as the presumption of innocence in the natural law, strengthening them against infringement and leading to consequences for the creation of customs and the canonisation of civil laws. The presumption of innocence has been linked to the burden of proof since the time of the Roman law and throughout the canonical tradition, emphasising the importance of judges reaching the requisite standard of certainty before punishing the accused.

An analysis of the presumption of innocence in the Australian law corroborated key aspects of the canonical tradition, especially the presumption's protected position and its link to the burden of proof. Both legal systems have at various times embraced the principle that it is better that the guilty escape than that the innocent are punished, although this was sometimes contested in canon law. Further, the comparative exercise revealed several consequences of the presumption of innocence which can help to ensure that it is usefully applied within modern canonical practice. Finally, an analysis of the case of Cardinal Pell has illustrated many of these ideas in practice. Both the Pope and Australian judges have emphasised the importance of courts resisting external pressure and ensuring justice according to law.

We have seen that the work of *PGD* may yet be unfinished, in that some reforms beyond Book VI of the *CIC* may need to be considered to ensure that the Code is coherent with the new canon 1321§1 and all that it connotes. Additionally, curial documents such as the DDF's *Vademecum* should be reviewed to ensure that they conform to the law in the *CIC* which governs them. Although the Holy Father has sought to strengthen penal discipline and enforcement, it is clear that both the Pope and canonical tradition demand that this does not come at the cost of the fundamental rights of defendants including their right to the presumption of innocence.