COMMENTS

THE PRESUMPTION OF INNOCENCE: AN ESSAY ON THE JURISPRUDENCE ON THIS HUMAN RIGHT

GIUSEPPE MIFSUD BONNICI

1. This study is directed at an analytical review of certain aspects of the application and interpretation of the Presumption of Innocence in the European Court of Human Rights [ECHR] and of a salient judgment of the Maltese Constitutional Court, up to 31 December 1995.

2. It is unanimously recognised that the great difficulty of Criminal trials lies in the transition which, he who has to judge, has to undertake to move from the initial stage of simple suspicion to the final finding of guilt or innocence. There is no doubt that for centuries this represented the accepted *forma mentis* of those who had to judge. It is of course true, and important to underline, that the basic rules of Evidence in judicial proceedings which were generally followed were those which were bequeathed by the Roman Tradition "ei incumbit probatio qui dicit non qui negat" [L.2 D. XXII. 3] and "actore non probante reus est absolvendus etiamsi ipse nihil praestet" [L.23 Cod. de Prob.]. However, observance of these rules in civil proceedings was one thing, but it was another in penal matters. Here the inevitability of "suspicion" as being an essential first ingredient of the proceeding had an inordinate weight. It is not intended here to trace the historical iter which eventually brought about, practically in this century, the recognition that in order to obviate against this it was

necessary to redress the balance by proclaiming as a basic rule of criminal procedural justice that the accused is to be presumed innocent of all the charges proferred against him, until the contrary is proved according to law.

3. For our present purpose it is sufficient to note that in the Universal Declaration of Human Rights approved by the General Assembly of the United Nations on 10 December 1948, Article 11 proclaimed that:-

> "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

and thereby the right to the presumption of innocence acquired a formal universal recognition as a "human right" distinguishing it from other "rights" not so qualified.

4. Less than two years later, on 4 November 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome and in Article 6 [2] it was enunciated that:-

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

5. The wording used in the Constitution of Malta of 1964 in Article 39 [5], is not so simple:-

> "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty:
> Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts."

6. The proviso in the Constitution brings immediately into play the procedural problem of the burden of proof, as this is closely connected with the presumption of innocence. In fact, the presumption means that in a criminal trial the accused is not called upon to prove his innocence. The presumption even exempts him from making even a simple declaration of innocence or a simple denial of guilt. Articles 390 {1} and 392 {1} {c} and {5} of the Criminal Code prescribe that at the beginning of every criminal proceeding "the court shall examine without oath, the party accused" and "shall ask the accused if and what he wishes to reply to the charge" and "If the accused stands mute, the court shall note down the circumstance and shall proceed with the case as if the accused has pleaded

not guilty." The burden of proving the guilt of the accused falls upon the prosecution.

7. After these introductory paragraphs, what now follows is a general overview of what the jurisprudence of the ECHR has contributed to the application, interpretation and implementation of the principle. In addition, special reference will be made to a judgment, on this matter, delivered by the Maltese Constitutional Court.

1. "Trivial" guilt

8. The judgment of 26 March 1982 in the Adolf Case [Adolf vs. Austria][1] can from a chronological point of view be considered as the first judgment which examined in some depth the problem of the general aspects which are involved in the implementation of the presumption of innocence as set out in the Convention.

Mr. Gustav Adolf, an accountant and financial consultant, living in Innsbruck, Austria, was reported to the public prosecutor by a Mrs. Irmgard Proxauf for having caused her an injury when he threw at her a bunch of keys. The federal police were asked to investigate. They heard the witnesses of the complainant and also Adolf himself but not the witnesses he indicated. The investigation file was registered with the District Court which ordered that a medical report should be added. When this was completed the public prosecutor requested the court to apply Article 42 of the Austrian Penal Code, which states:

> "[1] Where an act requiring public prosecution as a matter of course, involves liability to no more than a fine, a custodial sentence, not exceeding one year, or both, the act shall not be punishable [*strafbar*] if:
>
> 1. the guilt [*Schuld*] of the author of the act is slight [*gering*];
> 2. the act had no or only trifling consequences, and if in addition;
> 3. punishment is not necessary in order to deter the author of the act or other persons from committing criminal offences [2] The decision whether or not the conditions of paragraph [1] hereof are met shall be taken by the court; where the court decides in the affirmative, it shall bring the proceedings to a close no matter what stage they may have reached." [para. 22].

On the basis of the investigation file of the police and the medical

---

[1] Adolf Case. 26/3/1982. A. Vol.49.

report, the District Court by a decision of 10 January 1978 applying Article 42, deemed that the conditions therein specified had been met and accordingly declared that the proceedings were terminated.

Adolf's appeal to the Regional Court was rejected on 23 February 1978, as according to law appeals from the decisions of the District Court, based on Article 42, could only be entered by the prosecutor [*Anklager*].

On 7 June 1978 Adolf applied to the European Commission of Human Rights which on 6 July 1979 declared his application admissible. However, on 25 January 1980 the *Generalprokurator* attached to the Supreme Court of Austria applied to that Court for the annulment of the decision of the District Court. This request was however rejected on 28 February 1980.

The Supreme Court declared that the decision of the District Court in applying Article 42 is based on the existence of a state of suspicion and that even where the description of the conduct of the suspect takes the form of findings of fact the statements in question cannot be regarded as judicial findings within the meaning of what is provided for in the Code of Criminal Procedure. That kind of decision can only be understood to mean that further proceedings are to be avoided because even at that stage it is clearly recognised that the matter is of a trifling nature and therefore any further consideration would be a waste of time for the Court.

Nothing in that decision could be considered as equivalent to a finding of guilt and it could in no way harm the person affected i.e. Adolf.

9. Adolf maintained that both decisions, that of the District Court and that of the Supreme Court, had violated his right to be presumed innocent and that in effect even if, as the Supreme Court held, the first decision could only be understood to mean that he was only suspected of having committed a trifling fault and not guilty of an offence still this was not compatible with that innocence to which he was entitled.

10. The Court, by a close majority of four votes against three,[2] held that no violation had occured.:-

---

[2] President G. Wiarda and Judges F. Matscher, B. Walsh and Sir Vincent Evans formed the majority, while Judges J. Cremona, L. Liesch and L. Pettiti dissented. However, Judge Matscher in a concurring opinion, in explaining his vote with the majority, inter alia, said:- "On the other hand I well understand the way of thinking of my colleagues who have felt unable to concur with the majority. In point of fact, the present case is the result of a chain of unfortunate circumstances and of mishandling on the part of the relevant authorities, something which can make it difficult in the particular event to reach the conclusion that there is no breach of Article 6[2] of the Convention." {page 22}.

"The Court recognises that the District Court's reasoned decision dated 10 January 1978 must be read with the judgment of the Supreme Court and in the light of it. That judgment has cleared Mr. Adolf of any finding of guilt and thus the presumption of his innocence is no longer called into question. By reason of the nature of section 42 of the Penal Code, the proceedings, on that section being applied, did not, and could not terminate with any finding of guilt; it was therefore not necessary for the District Court to proceed with any hearing in the case or examination of evidence." [para. 40].

11. The dissenters after noting, *inter alia*, that the decision of the District Court had concluded that:-

"The injury found is insignificant as it does not exceed the three-day limit; the fault [*Verschulden*] of the accused may be described as insignificant and his character gives cause to expect that he will conduct himself properly in future".

They, on their part, observed:-

"In our view that reasoning clearly amounts to a judicial finding, in the context of a criminal charge, that the applicant [i.e. Adolf] inflicted bodily harm on another person and that he was in a state of guilt in doing so. The net result is that notwithstanding the applicant's persistent denial of the allegations made against him, and without holding a public trial, hearing any witnesses and giving the applicant the opportunity to challenge the aforesaid medical opinion, that Court made findings establishing both the disputed facts and his contested guilt." [page 20].

12. It is difficult not to agree with this dissension. There is no doubt that the District Court did not respect the presumption of innocence enjoyed by Adolf because if it had done so it would juridically follow that that presumption can only be overcome by the proof of guilt and that prove of guilt could only be reached according to the rules of a proper trial. The majority relied on the attenuation of the District Court decision by the 'explanation' offered to that first judgment by the Supreme Court but that again is not satisfactory because after that extenuating explanation, the first decision was confirmed without amendment, and therefore that confirmed decision was not cancelled and that registers Adolf's 'fault'. Finally, it is to be noted that the attenuating intervention of the Supreme Court came about only incidentally, following the application of the *Generalprokurator* to have the first decision annuled

by the Supreme Court. Adolf himself did not even have that remedy at his disposal. And that intervention, in fact, occured more than six months after Adolf's application to the European Commission of Human Rights had been declared admissible by that Commission [para. 14].

Of course the whole affair was trivial and insignificant but if this is a juridically valid consideration then surely it should have been brought to an end by the police or by some juridical form, similar to a 'nolle prosequi', immediately after the police preliminary investigation had come to an end, and thereby Adolf's innocence would have been maintained. But brushing away a person's innocence because of the triviality of a person's *fault* cannot be satisfactory. Especially to the person concerned; and it is his human right which is being considered and it is that human right which, if violated, is to be protected.

13. The first encounter of the presumption of innocence with the ECHR did not come off as well as one would have expected.

2. Violation by implication

14. In the next case the Court had to consider the claim of a person who submitted that he was a victim of an indirect violation, by implication, of the presumption of innocence which he should have been accorded.

15. A Swiss journalist by the name of Minelli[3], was charged with defamation in the press [libel] by Tele-Reportoire S.A, and its director Mr. Vass, before the Uster [Zurich] District Court. The complaint was filed on 29 February 1972. The company and its director had already filed a similar complaint against a Mr. Fust for an article published by the latter in a daily called "Blick". This case came up before the 1st. Criminal Chamber of the Canton of Zurich, a higher Court. Mr. Vass requested the District Court to suspend the proceeding against Minelli, pending the proceedings in the higher court, and this request was accepted and the proceedings were suspended on 3 July 1974.

The 1st Criminal Chamber, on 2 September 1975, found Mr. Fust guilty and fined him, 200 SF, and condemned him to pay 1400 SF to Mr. Vass as compensatory damages and a further 1400 SF for court costs.

Even before that judgment was delivered, on 22 August 1975, Mr. Vass requested the District Court to resume the hearings of the proceedings

---

[3] Minelli Case [vs. Switzerland] 23 March 1983. A Vol. 62.

against Mr. Minelli and pointed out that the case had to be terminated before the end of February 1976 to avoid the extinction of the proceedings owing to the four year absolute term of prescription of the action as provided by Swiss Law. On 12 September 1975 this request was accepted. However, now, the District Court, on Minelli's request, relinquished jurisdiction in favour of the Assize Court.

The Prosecution Chamber of the Zurich Higher Court, directed that the case be remitted to the Canton of Zurich Assize Court, but Minelli appealed this decision before the Federal Court. The appeal was dismissed on 6 January 1976, but by now it was too late to allow the Assize Court to reach a decision before the February deadline. However, that Court, in view of the impending deadline asked the parties to make submissions as to the question of the costs. Written submissions were filed but Minelli also requested the Court to obtain certain evidence.

On 12 May 1976 the Zurich Assize Court decided that it could not hear evidence because of the time bar, but decided also that Minelli should bear two-thirds of the court costs and to pay to each of the complainants 600SF compensation in respect of their expenses. This decision was reached on the strength of article 293 of the Zurich Code of Criminal Procedure, which provided that the losing party is to bear the costs of the proceedings and compensate the other party for his expenses unless special circumstances indicated a different adjudication.

The Chamber rested its decision on the consideration that it "depend[s] on the judgment which would have been given had there not been limitation", [para. 13] and in settling the matter of the possible judgment, the Chamber referred to the finding in the case of Mr. Fust, successfully concluded in favour of Mr. Vass and his company.

Appeals by Minelli failed and his position was even worsened by the final decision of the Federal Court.

16. When the case came up before the ECHR there was no doubt about what was at stake and what had to be decided:-

> "The applicant and the Government agreed that the case raised a question of principle: is it consonant with the presumption of innocence to direct that a person shall pay court costs and compensation in respect of expenses where he has been acquitted or where the case has been discontinued, discharged or, as here, terminated on account of limitation?" [para. 34].

To this question the Court unanimously answered as follows:-

"In the Court's judgment, the presumption of innocence will be

barred, according to German Law. The District Court held that, on the basis of the file Lutz 'would most probably have been convicted of an offence' if the case had continued and the Regional Court, in confirming what had been decided by the District Court, remarked that if the proceedings had continued "the defendant would almost certainly have been found guilty of an offence" [para. 17]. It is difficult to conclude that the presumption of innocence which Lutz should have enjoyed, was respected when these Courts reached those conclusions. Moreover, it was as a consequence of those findings that the German Treasury was not ordered to pay Mr. Lutz's costs and expenses, which would indeed have been ordered if no fault against Lutz, would have been found. [pages 28 to 30].

On this last matter, it appears that it was not convincing on Lutz's part to argue that the fact that he had to bear his costs and expenses amounted to 'a penalty'. This is not so, as one can agree with the Court that the German Courts, in this respect, acted on an equitable basis [para. 63] but, in any case, the absence of a penalty or other punitive measure does not exclude the incidence of the presumption of innocence in the proceeding as a whole.

23. The Englert Case was not substantially different. Englert, a German citizen, had a criminal record. In February 1981 he was arrested on suspicion of extortion with threats, bodily harm and rape. He was tried by the Heilbronn Regional Court for extortion accompanied by menaces of homicide and rape. He was on 2 November 1981 found guilty of extortion but acquitted of the charge of rape. He was sentenced to one year and three months imprisonment. On appeal, the Federal Court of Justice set aside the judgment and remitted the case for retrial to a different Chamber of the Regional Court. This was done because the Regional Court had not heard evidence from a parish priest to whom, as alleged by the defence, the victim had said that she had consented to the sexual intercourse. This did not materialise however as the priest refused to testify unless he was authorised to do so by the victim. At this stage, the public prosecutor moved for a stay of the proceedings as provided by Article 154[2] of the German Code of Criminal Procedure [para. 19]. The Court stayed the proceedings and ordered that the court costs should be borne by the Treasury, but that Englert was to bear his own costs and expenses. This was clearly envisaged by Article 467[4] of the same Code [para. 20]. Moreover, it refused Englert's claim for compensation for the prejudice he may have suffered on being detained on remand.

Englert appealed but the Stuttgart Court of Appeal declared the appeal inadmissible.

24. When Englert brought his case to the ECHR his claim that by its last decision the Heilbronn Regional Court had violated his right to be presumed innocent unless he is declared guilty at the termination of a trial according to law, was rejected by sixteen votes to one.[9] The reasoning was similar to that of the Lutz judgment and in conclusion it stated:-

> "The competent court, acting on an equitable basis and having regard, among other things, to the strong suspicions which seemed to it to exist concerning him, did not impose any sanction on him but merely refused to order that the said costs and expenses or any compensation should be paid out of public funds. And, as the Court has already pointed out, the Convention - more particularly Article 6[2] - does not oblige the Contracting States, when a prosecution has been discontinued, to indemnify a person 'charged with a criminal offence' for any detriment he may have suffered" [para. 40].

25. The third of these series of cases was that of Nolkenbockhoff. Only the facts of this case were slightly different from those of the Englert case. The applicant was a widow who was claiming the costs and expenses which her husband had to incur in a trial at the end of which he, along with three others, was convicted of breach of trust, criminal bankruptcy and fraud. He appealed but died before the appeal was heard. This automatically terminated the proceedings and the widow filed her claims. The outcome in the German Courts, which this time included the Constitutional Court, was the same as that of the previous cases. The ECHR pronounced the same decision as those of the other cases in this triology.

26. In conclusion it can be stated that the ECHR, in these cases, held that the presumption of innocence does not protect a person from being considered as a suspect of having committed a criminal offence or to put it in the same words as those of the Court, for that Court to "having regard to the strong suspicions which seemed to them [the German Court] to exist concerning Mr. Nolkenbockhoff" [para. 40]. The decisions of the German Courts not to exempt a person suspected of having committed a crime from having to pay the costs and expenses which that suspicion involved and not to grant any compensation for detention on remand to a person who is only suspected of having committed a crime, do not imply that the presumption of innocence has not been respected or that, albeit indirectly, that human right has been violated.

---

[9] Once again Judge J. J. Cremona was the only dissenter, in the three cases.

27. In the Sekanina[10] judgment however, the Court found that it could not follow the same path for, although in similar circumstances, the presumption of innocence this time, had not been respected and no amount of lingering suspicions after a trial could justify its neglect by the Court.

Mr. Karl Sekanina was tried for the homicide of his wife but acquitted as the jury considered that there was no conclusive evidence to justify a conviction. Mr. Sekanina claimed reimbursement of the costs he had incurred and also compensation for the period he was kept in detention. These claims were rejected and the Court of Appeal concluded:-

> "Having had regard to all these circumstances, the majority of which were not disproved at the trial, the jury took the view that the suspicion was not sufficient to reach a guilty verdict; there was, however, no question of that suspicion being dispelled" [para. 13].

28. The ECHR, this time did not accept the pleas of the Austrian Government that it should follow what had been decided in the Lutz, Englert and Nolkenbockhoff cases, and pointed out the difference between those cases and the instant one. Here the decisions for refusing the claims of Sekanina were indirectly or by implication founded on the non-recognition of the presumption of innocence:-

> "Despite the fact that there had been a final decision acquitting Mr. Sekanina, the courts which had to rule on the claim for compensation undertook an assessment of the applicant's guilt on the basis of the contents of the Assize Court file. The voicing of suspicions regarding the accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once acquittal has become final. Consequently, the reasoning of the Linz Regional Court and the Linz Court of Appeal is incompatible with the presumption of innocence. Accordingly there has been a violation of Article 6[2]." [paras. 30-31].

3. Disciplinary charges and proceedings

29. Whenever the right to the presumption has been invoked, the first task of the ECHR has been taken to be that of establishing whether the claimant was indeed charged with a criminal offence and subjected to

---

[10] Case of Sekanina vs. Austria. 25 August 1993. A. Vol. A 266.

criminal proceedings. As already noted a number of claims founder on this first hurdle.

30. In this context, 'disciplinary charges and proceedings', have created difficulties which have not received concordant solutions. Is a disciplinary charge a criminal charge? Are disciplinary proceedings equal to criminal proceedings? The answers to these questions will establish whether the person who faces a disciplinary charge and is subjected to disciplinary proceedings is entitled to be presumed innocent of that charge until proved otherwise. Therefore what follows is a review of cases where the principal issue is the solution of the preliminary question as to whether the facts qualify as "criminal" or as "civil" for the purposes of Article 6 of the Convention. It is only when that hurdle is mastered and the "criminal" element is selected that the presumption of innocence may come up for consideration. It is from this point of view that the relevance of this section to the general theme of this study, is to be gauged.

31. These questions came up in the Case of Engel and Others against The Netherlands of 8 June 1976, already mentioned.

The applicants were all conscript soldiers serving in the Netherlands Armed Forces. They committed various offences against military discipline and received punishments for the same, through their commanding officers.

32. The Court devoted great attention to the problem of whether disciplinary charges can be considered as equivalent to criminal charges for the purposes of Article 6 of the Convention, but at the end of a lengthy and cautious consideration [paras. 80 to 85], it came down to taking into account only the 'specificity' of military service and the facts in the case, and opted for a finding that with regard to two of the applicants there was a breach of Article 6[1] 'insofar as hearings before the Supreme Military Court took place *in camera* ' [clause 11 of the operative part, page 45.]. {contrary to that publicity of trial which is a general civil / criminal guarantee,} but excluded any relevance to the problem of having to consider Article 6 in its 'criminal' context, in those disciplinary proceedings.

33. It can safely be said that the problems connected with disciplinary proceedings were left wide open and unprejudiced. A minority among the judges were not happy with the 'criminal content' exclusion, but of this later.

34. As was to be expected, the same or similar questions came up again in the Case of Albert and Le Compte[11], of 28 May 1982.

Dr. Alfred Albert, a medical practitioner, was asked to appear before the Brabant [Belgium] Provincial Council of the *Ordre des medecins* [Medical Association] in order to explain allegations that he had issued certificates of unfitness for work without a proper examination and without having at his disposal the relative medical record of the patients concerned. The Council found against Dr. Albert and suspended him from the practice of his profession for two years, "a very severe sanction" imposed in view of "the very serious disciplinary record" of Dr. Albert [para. 9]. Appeals to the Appeals Council and the Court of Cassation were dismissed. Dr. Herman Le Compte, also a medical practitioner, was informed by the West Flanders Provincial Council that an Inquiry had been ordered against him on the grounds of improper publicity and contempt of the *Ordre*. He had given three interviews to magazines and wrote a letter to the President of the Council.

Dr. Le Compte challenged all the members of the Council, but the latter, after rejecting his comprehensive challenge of the members of the Council, found against him and suspended his right to practice medicine for two years.

Dr. Le Compte appealed but the Appeals Council not only rejected it but ordered that the name of the applicant should be struck off the register of the *Ordre des medecins*. On his further objection to this decision, he lodged a challenge against the members composing the Appeals Council, but both were rejected by the Council. The appeal to the Court of Cassation was also rejected [para. 16].

35. Before proceeding with the consideration of this judgment however, it is necessary to go back in time to a decision of the Court in the Case of Le Compte [the same person of the previous case], Van Leuven and De Meyere of 23 June 1981.[12] The applicants were medical practitioners who had been, for different reasons and for different periods of time, suspended from exercising their profession by decisions of Councils of the *Ordre des medecins*. The first question before the Court was whether matters of this kind attracted problems of determination of civil rights and obligations or were problems which involved criminal charges against the person concerned, in terms of Article 6 [1] of the Convention; that is to say, how and in what way is that article applicable.

---

[11] Case of Albert and Le Compte [vs. Belgium] 28 May 1982. A. Vol. 58.

[12] Case of Le Compte, Van Leuven and De Meyere. [vs. Belgium] 23 June 1981. A. Vol. 43.

The reply was the following:-

"..... disciplinary proceedings as such cannot be characterised as 'criminal'; nevertheless, this may not hold good for certain specific cases [Series A no. 22, pp. 33-36, paras. 80-85].[13]

Again, disciplinary proceedings do not normally lead to a *constestation* [dispute] over "civil rights and obligations" [ibid., p. 37, para. 87 in fine]. However, this does not mean that the position may not be different in certain circumstances. The Court has not so far had to resolve this issue expressly; ..... [para. 42]."

And in fact, in that case the Court decided that Article 6[1] of the Convention was applicable in so far as its 'civil' aspect is concerned and resolved the case on that basis without having to get to grips with the 'criminal' aspect, which would then call into play all the guarantees which that article invokes for criminal proceedings.

36. Now in the Albert case, 11 months after the Le Compte judgment, the Court once again elected to be non-commital. Once again it considered by fourteen votes to four, that only the 'civil' element of Article 6 was applicable, although it did consider, briefly, in para. 40, the presumption of innocence claim, just enough to say that it does not stand up to examination [para. 40], as the fact to which objection was raised, in this respect, was that the applicant's previous record was taken into consideration only for fixing the sanction [para. 40].

37. The majority of the Court - sixteen out of twenty judges - found that Article 6[1] was "applicable to the hearing of the case {in French '*cause* '} and that there was a breach of this guarantee because the cases {in French '*causes* '} were not heard in public by the Appeals Council and the judgment was not pronounced in public [clauses 2 and 3 of the operative part, page 22].

Judges J. J. Cremona and D. Bindschedler-Robert concurred with the majority but were of the opinion that the proceedings concerned the determination of a criminal charge, while Judges L. Liesch, F. Matscher, J. Pinheiro Farinha and Sir Vincent Evans, for different reasons, all held that the matter does not come in at all under Article 6, it being neither "civil" nor "criminal" in terms of the Convention. All these judges were thus confirming the opinions they expressed in the previous similar case

---

[13] The reference of the Court is to the Engel Case.

of Le Compte, Van Leuven and De Meyere. Judge Thor Vilhjalmsson who was in their company in that case, now voted in favour of applicability.

4. The burden of proof

38. With the Salabiaku Case of 7 October 1988[14], we arrive at the consideration of the presumption of innocence in connection with the broader issue of the burden of proof in criminal trials, to which reference has been made in paragraph 2 of this study.

39. Mr. Amosi Salabiaku, a Zairese, lived in Paris. He went to Roissy Airport and collected from there a trunk with which he passed the "nothing to declare" channel at the Customs. Before Mr. Salabiaku boarded the bus for Paris, Customs officials forced the lock of the trunk and in a welded false bottom found 10kg. of herbal and seed cannabis.

The Tribunal de Grand Instance, Bobigny, found Salabiaku guilty of [a] illegally importing narcotics, and [b] of smuggling prohibited goods. He was sentenced to two years imprisonment, fined 100,000 FF and prohibited from residing on French territory. On appeal, the finding of guilt for the illegal importation of narcotics was set aside while the other finding was confirmed. Salabiaku now appealed to the Court of Cassation, principally on the ground that the Paris Court of Appeal when deciding that:-

> "..... he cannot plead unavoidable error because he was warned by an official of Air Zaire ..... not to take possession of the trunk unless he was sure that it belonged to him, particularly as he would have to open it at customs. Thus, before declaring himself to be the owner of it and thereby affirming his possession within the meaning of the law, he could have checked it to ensure that it did not contain any prohibited goods;
>
> ..... by failing to do so and by having in his possession a trunk containing 10kg. of herbal and seed cannabis, he committed the customs offence of smuggling prohibited goods ....."

it had placed upon him an "almost irrebuttable presumption of guilt" as Article 392[1] of the Customs Code provided that "the person in possession of contraband goods shall be deemed liable for the offence" [paras. 10-15].

---

[14] Salabiaku Case [vs. France.] 7 October 1988. A. Vol. 141.

40. The ECHR observed that presumptions of fact or of law operate in every legal system and the Convention only requires the States to remain within certain limits in this respect, as regards criminal law. Thus "persons in possession" are deemed liable for the offence but a possessor is not without a means of defence as he is accorded the benefit of extenuating circumstances and he can establish *force majeure*. Accordingly, the task of the Court is to determine whether the presumption of liability as applied to the applicant is done in a manner which is compatible with the presumption of innocence. In the instant case the Court found that no automatic presumption of liability was applied against the applicant and therefore there was no breach of Article 6[2]. The French Courts had, in practice accorded the benefit of the doubt even where the offence was one of strict liability.

41. This is a particularly important judgment for the Maltese position vis-à-vis the Convention. On signing the Convention on 12 December 1966 and in the instrument of ratification which followed and which was deposited on 23 January 1967 a Declaration of Interpretation was made as follows:-

> "The government of Malta declares that it interprets paragraph 2 of Article 6 of the Convention in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts."[15]

No such declaration will be possible under Protocol 11 and therefore it is judgments such as the Salabiaku one which will have to guide the Maltese legal operators.

5. The right to remain silent

42. A corollary of the right of every person to be presumed innocent until he is proved to be guilty according to law is the right of that same person to remain silent and not be compelled to prove his innocence as long as he is shielded by the presumption.

43. Up to 1909 according to the Maltese Criminal Code the accused was not an admissible witness in a criminal trial. However, what occured

---

[15] European Convention on Human Rights. Collected texts. Council of Europe Press 1994. page 97. The declaration reflects the proviso of article 39[5] of the Constitution of Malta, 1964. Vide para. 5 supra.

in the Christian Affair induced the government to amend the law and Article 634 of the Criminal Code was introduced, which as amended in 1911, now reads as follows:-

"[1] The party charged or accused, shall at his own request, be admitted to give evidence on oath immediately after the close of the prosecution, saving the case where the necessity of his evidence shall arise also at a subsequent stage, or the court sees fit to vary the order of the evidence; and such party may be cross-examined by the prosecution, notwithstanding that such cross-examination would tend to incriminate him as to the offence charged.

Provided that the failure of the party charged or accused to give evidence shall not be made the subject of adverse comment by the prosecution.

[2] The provisions of the law relating to witnesses shall apply to the accused who gives evidence on oath.

[3] The provisions of subsection [1] of this section shall not apply to cases on appeal."

The proviso just quoted pays due homage to the presumption of innocence and affords a concrete procedural consequential safeguard to its application. However, it does not go the whole way as it allows adverse comment by the judge presiding the trial and this can have a decisive influence on the verdict of the jury.[16] Respect for the presumption of innocence should not allow even the possibility of adverse comment by the court or the jurors as such a comment implies that the accused cannot rest on his innocence in silence but has to expressly proclaim it; if not actually prove it by his own testimony under oath.

44. All European legal structures seem to expect the accused, in certain circumstances to have to prove certain *facts*, when *other facts*, as proved by the prosecution, would of themselves, involve the liability of the accused because of those facts. There are quite a number of such provisions in the Maltese Criminal Code, as, for example Article 290:-

"Whosoever shall purchase or otherwise receive from any other person or shall be found to have in his possession any article bearing any

---

[16] Vide the criticism and suggestions for reform by extending the proviso in order to join in the prohibition also the court and the jurors; Prof. Dr. Carmelo Mifsud Bonnici: "A proposito della testimonianza dell'imputato" in "Scientia" Anno IV. No. 4. pp. 383-390. "Empire Press" 1938, and reproduced in "De Jure" Vol. 1 No. 2 June 1983 pag. 49. with an introductory note on the same lines by Dr. U. Mifsud Bonnici. Sixty years later the position has not changed.

mark or sign denoting such article to be the property of the Republic of Malta, or any article which the possessor knows to be the property of the Republic of Malta, for the disposal of which no written permission shall have been given by the competent authority, and *shall fail to give a satisfactory account as to how he came by the article or thing found in his possession*, shall, on conviction ....."

In this and similar provisions certain facts shift the burden of proof on to the accused and in all these cases a neat but strict balance has to be struck between the respect of the presumption of innocence and a legitimate expectation to have from every person, no factual indication which is "prima facie" incompatible with that innocence. It is the facts which compel the accused to have to defend his innocence and not a merely unfounded suspicion of the prosecution.

45. It appears therefore sufficiently safe to conclude that the right to remain silent will not serve the accused in those cases where certain facts are proved by the prosecution and those facts are presumed, in themselves, to burden the accused with a consequent and essential, and perhaps necessary, liability. This is the reasoning which underlies the Salabiaku Case [paras 39-40, supra] and the quite similar Pham Hoang vs. France Case which came later.[17]

46. Certain aspects of this matter were in issue before the ECHR, in the Funke Case[18], where however, it appears to this writer that the necessary prejudicial and preliminary facts which have to be proved by the prosecution were not in fact present and that therefore Salambiaku and Pham Hoang could not be followed.

Mr. Jean-Gustave Funke, a German national lived in Strasbourg. In January 1980 three customs officers and a police officer arrived at his residence, and that of his wife, to obtain "particulars of their assets abroad" for tax purposes. The officers requested Funke to produce statements for the preceeding three years of various accounts from banks in Germany, Poland and Switzerland and also of his share portfolio in a Kiel bank. In 1982 the Strasbourg District Court ordered Funke to produce to the customs authorities the documents requested and imposed a fine of 20 FF per day for any delay and a fine of 1,200 FF. The Colmar Court of Appeal confirmed the first judgment with a slight variation in the list of

---

[17] Case of Pham Hoang vs. France. 25 September 1992. A. Vol. 243.

[18] Funke vs. France. 25 February 1993. A. Vol. 256 A.

documents to be produced but also increased the per day penalty for delay to 50 FF. The Court of Cassation rejected Funke's further appeal. At all levels, Articles 65-1 and 413 bis of the Customs Code were applied:-

> "Customs officers ..... may require production of papers and documents of any kind relating to operations of interest to their department." [Article 65-1]

While article 413 bis makes any refusal to produce documents and any concealment of documents, in the case contemplated in Article 65-1, and others, punishable by imprisonment [paras. 30 and 13].

47. Clearly the cumulative effect of the provisions of the French Customs Code was that of compelling the suspected person of producing documents to prove that he was innocent of certain criminal charges connected with fiscal matters of which he was suspected. And the Court said as much:-

> "The Court notes that the customs secured Mr. Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law ..... cannot justify such an infringement of the right of anyone 'charged with a criminal offence', within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminating himself.
>
> There has accordingly been a breach of Article 6 [1].
>
> The foregoing conclusion makes it unnecessary for the Court to ascertain whether Mr. Funke's conviction also contravened the principle of presumption of innocence" [paras. 44-45].

It is usual for the Court to proceed in this way, that is, of finding that it is not necessary to answer all the claims for alleged violations, especially after finding a violation on the first claim. But sometimes this way of proceeding lacks a principle of guidance as to what facts, in the Court's judgment, would constitute a violation of a human right. In this particular instance on the strength of what is said in paragraph 44, in the operative part we read:-

> "2. Holds by eight votes to one that, for want of a fair trial, there has been a violation of Article 6[1];
>
> 3. Holds by eight votes to one that it is unnecessary to consider the other complaints raised under Article 6;"

Now the want of a fair trial is here identified in that Funke was denied the right 'to remain silent and not to contribute to incriminating himself'. But this is not a satisfactory account of what right was breached in the whole proceeding. It may very well have happened that Mrs. Funke [as in the meanwhile, Mr. Funke had died] did eventually produce the documents which did not have an incriminating value. Even the element of silence comes into consideration only if that concept is given a very wide interpretation. On the contrary, what was really wrong in the whole aspect of the Funke affair was the juridical pretension of the Customs Code that in the circumstances, *on mere suspicion*, Funke was compelled to produce documents to prove that he was innocent of the suspected infringements and those alleged infringements would be proved by the supposed existence of those documents, as the Court in fact found and stated in paragraph 44. What this really violates is the presumption of innocence and not its corollary - the right to remain silent - precisely because one is safely within the tower of innocence.

6. Who can violate the presumption of innocence?

48. Strangely enough, in this writer's opinion it is this last question to be considered, which has caused certain unexpected difficulties.

In the early Wemhoff Case of 27 June 1968[19], Judge Zekia, in his dissenting opinion had, apropos of paragraph 2 of Article 6, remarked;

> "This is a fundamental provision. It clearly implies that until a man is proved guilty he is entitled to be treated as innocent. This should constantly be borne in mind in dealing with persons kept in custody pending trial."

It may be asked whether *all* the persons who are somehow or other connected with the custody of a person pending trial can commit a breach of the presumption of innocence. There is no doubt that the judge [in Malta, in the preliminary stages, a Magistrate] or other officer authorised by law to exercise judicial power before whom the person in custody has to be brought[20] has to respect that presumption and therefore he can be guilty of its violation. But the same cannot be said of the prosecuting police officer or of the Attorney General or Public Prosecutor as they are

---

[19] "Wemhoff" Case [vs. Germany] 27 June 1968. A Vol. 7. page 39.

[20] Article 5[3] of the Convention.

set to prove their suspicion, if not conviction, that the person in custody is the perpetrator of the crime with which they are charging him.

49. In the Deweer Case of 27 February 1980[21] , the Court, although it did not have to consider paragraph 2 of Article 6, did say *en passant*, that:-

> "The presumption of innocence embodied in paragraph 2 and the various rights of which a non-exhaustive list appears in paragraph 3 ["minimum rights", '*notamment* '] are constituent elements, amongst others, of the notion of *a fair trial in criminal proceedings* .....", but it would not be safe to understand this in the sense that the Court is here delimiting the area of applicability of the presumption *in so far as the violation of a human right is concerned*, to the field of criminal proceedings. However, it is also worthwhile to note that those are the natural areas of reference for the Court, whenever the presumption comes up before it; as for example, in the fairly recent case of Barbera', Messegue' and Jabardo[22], when it said:-

"The presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law, a judicial decision concerning him reflects an opinion that he is guilty. In this case, does not appear from the evidence that *during the proceedings, and in particular the trial*, the *Audencia Nacional* or the presiding judge had taken decisions or attitudes reflecting such an option."

It would appear, indeed, that all this is not only obvious but also definite. However, there are difficulties.

50. On 13 April 1972 Giuseppina Formosa was killed by an explosive charge placed in her residence in Tarxien, Malta. On 28 April 1972, the Commissioner of Police attended by two Superintendents and two Inspectors from among his officers, held a press conference at the Police Headquarters and amongst other matters, he announced that Emmanuel Formosa, the husband, had been arrested, that he had confessed to the killing of his wife and had requested Police protection as he was afraid of the reaction which could be expected from his wife's relatives. The next day 29th April 1972 he was brought before the inquiring Magistrate and formally charged with the homicide.

---

[21] Deweer Case [vs. Belgium] 27 February 1980. A Vol. 35. para. 56.

[22] Case of Barbera', Messegue' and Jabardo. 6 December 1988. A. 146. para. 91.

On the same day Formosa sought and obtained free legal aid and immediately gave notice that he was going to proceed with an application before the First Hall of the Civil Court to obtain a remedy for the flagrant violation, by the Commissioner of Police, of his right to be presumed innocent until proved guilty [vide para. 5 supra].

The First Hall rejected the application finding no violation principally because although it was proved that the Commissioner had given to the press a detailed account of the case and that Formosa confessed to the crime when he was faced with the evidence mastered by the Police he had also said that it was now up to the Court to say whether Formosa was guilty or otherwise.[23]

On appeal, the Constitutional Court confirmed the first judgment and declared that everything considered, it formed the conviction that a valuation of the incident itself and all the relevant circumstances, "including naturally the wisdom of the usual directives which the presiding judge shall give to the jurors" are not such that it can be said that they are 'likely' to amount to a violation of the applicant's constitutional rights and therefore no violation has in fact occured.[24]

Formosa was convicted of the homicide of his wife on 13 July 1973.

51. It is difficult to accept these judgments. The first judgment seems to say that the Commissioner of Police balanced the matter out when he

---

[23] Emmanuel Formosa vs. Kummissarju tal-Pulizija. 16 ta' April 1973. Qorti Kostituzzjonali tal-Maestà Tagħha r-Reġina. Deċiżjonijiet Kostituzzjonali. Għaqda Studenti tal-Liġi. 1979. Vol. I. pp. 341-359. This operative part of the first judgment is at page 352 and in the original reads as follows:- "Wara li qieset il-provi kollha li ngiebu, din il-Qorti tiddikjara li ma ssib xejn antikostituzzjonali fl-aġir tal-Kummissarju tal-Pulizija, għalkemm huwa verament ta diversi dettalji dwar dan il- każ, u semma ukoll il-fatt li meta ir-rikorrent ġie rinfaċċjat bil-provi li l-pulizija kienet ġabret huwa konfessa, però huwa wissa ukoll lil kull min kien preżenti għal dik l-intervista li issa kien imiss lill-Qorti li tgħid jekk l-imputat kienx ħati jew le; ....."

[24] The Constitutional Court at the time was composed of five judges: Prof. Dr. J. J. Cremona, President; Prof. Dr. J. Xuereb, Dr. M. Caruana Curran, Dr. E. Magri and Dr. V. R. Sammut. The original of the conclusive paragraph reads:- Kollox meqjus, din il-Qorti ifformat il-konvinċiment illi l-inċident lamentat, valutat kif imiss fih innifsu għal dik li hi l-entita tiegħu u fl-isfond taċ-ċirkostanzi kollha nkluża naturalment is-saġġezza tad-direttivi li soltu jingħataw lill-ġurati mill-Onorevoli Imħallef li jkun jippresjedi l-ġudizzju, ma huwiex tali li jista' jingħad li hu 'likely' [l-espressjoni tal-artikolu 47[1] tal-Kostituzzjoni li ġiet sottolineata mill-appellant fir-rikors tiegħu quddiem din il-Qorti] li jivvjola d-dispożizzjonijiet kostituzzjonali tad-drittijiet tal-bniedem invokati mill-istess appellant, u ma jistax fil-fehma tal-Qorti jingħad li ġiet fil-fatt kommessa vjolazzjoni ta' dawn id-dispożizzjonijiet. L-appel għalhekk ma jistax jiġi milqugħ." [pages 358-359.]

first said that Formosa had confessed to the crime and then later said that it is up to the Court to say whether he is guilty or innocent when the whole point is whether the first statement spread out to the whole country by the media of the guilt of the person held in custody by a Commissioner of Police violates the presumption of innocence. It could be said that the Court implied that there was a violation, but then considered that violation was atoned for by the Commissioner when he said that the Court will be deciding on the guilt or innocence. The second judgment, taking up an argument already mentioned by the first court, held that the applicant would not suffer from one of the possible effects of that press conference, the prejudice which it may have sown in the minds of those who will be the jurors in the case, by the naive consideration that this prejudice will not occur simply because the presiding judge, as is customary, will address the jurors in the sense that they have to decide only on the evidence presented in the trial.

On the basis of these arguments no violation was found and the applicant was even condemned to pay the costs of the proceedings.

52. It is pertinent to mention that in the second judgment the Court made reference to the problem of media comments when criminal proceedings are still going on and before judgment is delivered. It refers to proceedings taken for contempt of court especially when there is a breach of any court decree forbidding publication of the proceeding or of parts of it. Unfortunately, the court does not notice that at least some of those prohibitions are motivated by the possible prejudice which the accused may suffer when a potential juror before he is chosen reads, hears or sees material which appears to stay with him even after the judge's final exhortations. The Maltese judgments insist all along on speculating as to whether there is going to be any future harm to the applicant as a consequence of the press conference rather than examining whether what had already happened had indeed violated the applicant's right to be presumed innocent. This approach is not very logical, or rather, it confuses cause and effect, where the potential effect is set to eliminate the actual cause.

From the juridical point of view, every violation of a human right is harmful in itself. The estimation of that harm concerns the *remedy* which is called for, but does not have any relevance to the question whether a violation has been committed or not. In the concrete case, in finding a breach the Court could only have said that the judgment itself is a satisfactory remedy. But that would have been not only ephemeral but even harmful; although it is doubtful whether this is permissible according to the Maltese Constitution which in art. 46 (2) enjoins the Court to enforce

or secure the enforcement of any one of the protected human rights. The writer is of the opinion that there was no violation simply because only a Court, a judge or a juror can breach the presumption of innocence and not the Commissioner of Police. The Constitutional Court came very near to this when it said that although it finds that there was no violation, its judgment was not to be taken as an encouragement for the pronouncement of superfluous and unnecessary remarks by the Police, but it stopped short of saying that the Police, when they do so may be committing a crime but they are not violating the constitutional "human right".

It is a particularity of the Maltese Constitution [art. 46 (1)] that any person who has grounds to fear that one of his human rights is *likely* to be violated - not an actual but merely a potential violation - he may request the Court for adequate measures to avoid that the applicant will suffer a violation; that he has grounds to fear that this is likely to happen when he is put on trial and this fact added to the difficulties of the Courts, who could not therefore be guided by usual principles of concreteness and actuality.

The applicant had claimed both an actual as well as a potential violation.

53. An almost identical case came up before the ECHR; the Case of Allenet de Ribemont vs. France.[25]

Mr. Jean de Broglie, a Member of Parliament and former Minister, on 24 December 1976 was murdered in front of the residence of Mr. Allenet de Ribemont, who was arrested by the Police on 29 December. On the same date Mr. Michel Poniatowski, the Minister of the Interior, held a press conference on the police budget for the coming years, but eventually the subject of the murder which had just been committed became the topic of the conference. The Minister was accompanied by Mr. Jean Ducret, the Director of the Paris Criminal Investigation Department, and by Superintendent Pierre Ottavioli, the Head of the Crime Squad. On questions by the journalists present, the following statement, among others, was made:-

> "Mr. Ducret - The instigator, Mr. De Varga, and his acolyte, Mr. de Ribemont, were the instigators of the murder." [para. 11].
> De Ribemont was on 14 January 1980 charged with aiding and abetting the homicide, but, after some months, on 21 March 1980, he was released and was not put on trial.

54. On the strength of Article 6[2] of the Convention, de Ribemont

---

[25] Case of Allenet de Ribemont vs. France. 10 February 1995. A. Vol. 308.

sought compensation from the French Government for the damage he had suffered following the press conference, but he was unsuccessful from start to finish, as the final judgment against his claim was delivered by the Court of Cassation on 30 November 1988.

Before the ECHR, the French Government

> "..... maintained that the presumption of innocence could be infringed only by a judicial authority, and could be shown to have been infringed only where, at the conclusion of proceedings ending in a conviction, the court's reasoning suggested that it regarded the defendant as guilty in advance." [para. 32].

55. The court rejected this submission as:

> "..... the scope of Article 6[2] is not limited to the eventuality mentioned by the Government." [para. 35]

and no doubt this is quite correct in so far as it refers to the second limb of the Government's submission where it is claimed that the violation can only be ascertained at the conclusion of the proceedings. Clearly, if a violation is detected during the proceedings it is incumbent that it should be estirpated there and then, as long as this is possible and thus avoid the greater harm which can ensue if nothing is done until the conclusion of the trial. In fact it is difficult to understand why the Government's pretension was taken so far.

56. It is otherwise with the first contention of the Government, that the presumption of innocence can only be infringed by a judicial authority; although the great majority of the Court rejected this as well by eight votes to one; the present writer being the sole dissenter [Clause 2 of the operative part, [page 24].

In fact the Court in the most important paragraph of the whole judgment said:-

> *"The Court considers that the presumption of innocence may be infringed not only by a judge or court by also by other public authorities."* [para. 36]

This is a very important enunciation indeed. No previous judgment or even obiter statement came anywhere within this precision in prescribing the obligatory force of the presumption of innocence upon all those persons who are somehow vested with public authority. On this wide spreading of the net it is manifest that in the Maltese case the Commissioner of Police had breached the presumption and no amount of considerations of

surrounding facts could possibly justify that blatant violation which on the facts, at least, is hardly distinguishable from the French case.

57. It is here important to note that this pronouncement of the Court was preceeded by another one which the Court considers as a confirmation of previous enunciations:-

"Moreover, the Court reiterates that the Convention must be interpreted in such a way as to guarantee rights which are *practical and effective* as opposed to theoretical and illusory ..... That also applies to the right enshrined in Article 6[2]" [para. 35].

The judgment was the expression of a vast majority:-

> "1. Holds by eight votes to one that there has been a breach of Article 6[2] of the Convention" [page 24]."

the only dissenting opinion [pages 25-26] being that of the present writer.

58. The dissension is based on the reflection that if, besides judges and jurors, even "other public authorities" can be found to have violated the presumption of innocence, it is not possible to expect that the right can be upheld in a "practical and efficient" way. No practical and efficient remedy is possible in breaches by public officials while practical and efficient remedies are clearly available when the violation is committed by a judge or a juror.

This is clearly illustrated by the two cases just mentioned. In the Maltese case where, by Convention standards, at least, the violation was as clear and as blatant as that of the French case, what practical and efficient remedy was available once the violation by the public authority, the Commissioner of Police, occured *before* criminal judicial proceedings had commenced but immediately after the person's arrest? In the French case the ECHR, judging the matter *a posteriori* could and did provide a remedy in the form of a pecuniary compensation, which may be considered as practical but, even here, hardly efficient; but this was because that Court was not faced with the immediacy of a remedy before the trial; the problem which faced the Maltese Constitutional Court. This is, in the writer's opinion an insurmountable difficulty caused by the inclusion of public authorities among the possible perpetrators of violations of the presumption of innocence. This inclusion appears to be incorrect because it loses sight of the fact that the presumption is there to insure the preliminary judgment which all those who have to judge do or may form, before and during the proceedings until their final decision. Public authorities do not come within this decisional area of activity and they should not be considered as being within the circle of relevance of the presumption.

59. Of course, this is not to say that interventions of the type just considered by public authorities should be allowed to happen without a proper criminal sanction, once it is considered that this kind of behaviour is reprehensible, and the appropriate insertion in the Criminal Code should be considered. This in fact may be based on the consideration that certain public interventions by this or that category of persons, is an undue interference in the administration of Justice. It would be similar to the present situation vis-à-vis the commentaries in the media before and during criminal proceedings, where the usual formula used is that of contempt of Court which has proved to be not very satisfactory, in any case.

But the main point remains that neither the European Convention nor the Maltese Constitution are concerned with punishing violations of what they pronounce to be 'human rights' but rather with providing remedies by protecting or compensating.

7. Conclusions

60. These comments on the 1995 case of de Ribemont conclude this survey on the jurisprudence on the presumption of innocence.

Summing up concisely what so far is the jurisprudence of the ECHR on article 6(2) on the Convention it can be said that:-

A A person who, without undergoing a proper trial is nevertheless considered by a judicial authority to have been in criminal proceedings, at fault, albeit trivial and inconsequential cannot claim that his right to be presumed innocent has been violated.

Comment - Practical but juridically unsatisfactory.

B (i) the right can be breached even indirectly or by implication when a judicial decision is reached on the basis of residual suspicions of guilt persisting after a previous judgment of absolution.

Comment - Satisfactory

(ii) there is however no indirect violation by implication when the consequential judicial decision is based on the residual suspicions or suppositions following criminal proceedings which were terminated for other causes other than absolution.

Comment - Doubtful

C Disciplinary charges and proceedings do not automatically qualify as criminal charges and proceedings and every specific case has to be examined on it's own merits to establish whether the person charged was protected by the presumption.

Comment - Uncertain as still wide open.

D When the accused is expected to disprove certain proved facts which taint him with liability, no breach of the presumption is involved. It is otherwise when in the absence of those facts the accused is expected to answer mere suspicions and provide proofs, even documentary, against those suspicions.

Comment - Satisfactory

E The right to the presumption has to be upheld and enforced in a practical and efficient manner.

Comment - Satisfactory

F The right can be breached not only by a judge or a court but also by other public authorities.

Comment - Extremely difficult to reconcile E with the remedies available when "violations" are committed by "other public authorities" other than by any one who is vested with criminal jurisdictional authority or any Court or tribunal vested with that jurisdiction.

Giuseppe Mifsud Bonnici *is lecturer and Professor in Philosophy of Law at the University of Malta since 1966; Judge of the Superior Courts, 1988; Chief Justice, President of the Constitutional Court and of the Court of Appeal 1990-1995; Judge of the European Court of Human Rights since 1992.*