

Criminal and Procedural Fairness: Some Challenges to the Presumption of Innocence

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Abstract The presumption of innocence (POI) requires all judges, juries, and other officials in a trial, to presume and treat any accused of criminal wrongdoing as innocent, until he or she is proven guilty. Although a POI lacks an authoritative definition, this overarching principle of procedural fairness is so robust and vital for the exercise of legal power in matters of criminal law that one rarely finds anyone questioning its standing. In this article I examine the rationale behind the POI from a different perspective. The basic assumption is that this procedural standard captures the tenor of a broader principle which seeks to ensure fairness in criminal proceedings as well as in criminal law doctrine. I argue that honouring a principle of fairness is not exclusively a matter of criminal procedural law but also something that is deeply rooted in other areas of criminal law doctrine. Hence: not maintaining a principle of fairness in criminal law doctrine could lead to the POI being compromised or even undermined. In the article, I draw attention to three areas in which I believe that criminal law policies threaten a principle of fairness: criminalising remote harm, doctrine of ignorance of law and inverted presumptions of guilt. My conclusion is that some solutions to so called doctrinal problems in criminal law, are questionable and their practical consequences (on a general level) are, at least partially, equal to treating an individual (in a trial) as guilty for something for which he or she ought not to be accountable. Hence: gaining the support of a POI could thus work as principle for keeping the use of criminal law moderate and in accordance with a principle of fairness.

Keywords Presumption of innocence · Fairness · Fair imputation · Remote harms · Ignorance of law

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