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THE CONSEQUENCES OF THE LACK OF DEFINITION OF THE PRESUMPTION OF INNOCENCE IN FINNISH LAW

Undergraduate Thesis

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I hereby declare that I am the sole author
of this Bachelor Thesis and it has
not been presented to any other
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Introduction

The presumption of innocence is a principle which states that person is innocent until proven otherwise. This presumption is one of the most important principles in respect of human rights and a fair trial.[1] The purpose of this principle is to give the person under investigation the benefit of the doubt, "presumed innocent until proven guilty". The burden of proof is on the prosecution and therefore, if there is any chance of the accused being innocent, they should be freed of charges.

However, in many countries, including Finland, the presumption of innocence is not well defined in national law but it is mainly referred to through international human rights treaties. In Europe the most important of those is the European Convention on Human Rights as this convention is legally binding in the Member States of the Council of Europe and it is supported by strong enforcement mechanisms. As the treaty does not include any detailed definition of the presumption of innocence, the meaning and interpretation of the principle are mainly defined through legal cases in the European Court of Human Rights.

The aim of the author's research is to summarize the basis of the presumption of innocence in Finnish national law and how the international conventions are incorporated in Finnish law. The presumption of innocence should be applied to every court session and to every investigation but if its definition is unclear, it is possible that the principle can sometimes be stranded and that may lead to convictions without undeniable evidence. The author will analyse legal cases where the presumption of innocence has been taken into account during the proceedings in criminal courts at some stage, whether it is in the original judgements, in the appeals court or the Supreme Courts, and how the principle has been interpreted in these cases during the legal process.

The focus of the author's research is in Finland but the author will also compare the role of the presumption of innocence in Finland with two other countries, Sweden and England. Sweden was chosen for this comparison as Finland and Sweden share the basis of the legislation from the time when Finland was part of Sweden but later the legislation has evolved somewhat differently. England was chosen for the comparison for two reasons. For the first the presumption of innocence has a long history in British written national legislation and secondly

[1] Smith, R. Textbook on International Human Rights. Oxford, Oxford University Press 2014, p 277.

England represents Common law tradition whereas Finland and Sweden represent the Civil law tradition. One of the main features of Common law is the use of juries in criminal courts. When analysing the consideration of the presumption of innocence it is interesting to discuss the possible consequences of the jury making the decision about guilt instead of professional judges.

The research question of the thesis is: **Does the lack of definition of the presumption of innocence lead to a situation where the presumption is being ignored in judgements?** The author's sub-questions is: Can prejudiced views bypass the presumption of innocence in judgements? The hypothesis is: **Ignoring of the presumption of innocence is more likely to happen when 1) the judges are not sufficiently familiar with the presumption of innocence and 2) if there is particular outside pressure on the judges and/or the jury to convict someone of the crime.**

In the first chapter of this work, the author will shortly go through the historical background of the presumption of innocence in European law and in the international human rights documents and treaties. In the second chapter, the author will describe the content and basic principles of the presumption of innocence and the debate concerning the definition of the presumption. In the third chapter, the author will study how the presumption of innocence is interpreted in legal practice and especially in the European Court of Human Rights. The case law from this Court forms the basis for legal praxis in human rights issues in all European countries.

In the fourth chapter, the author will look at the legal basis and procedural use of the presumption of innocence in Finland, Sweden and England. What is the role of this presumption in national law and legal practice and how is the presumption of innocence taken into account in legal proceedings. What are the similarities and differences in the role of the presumption of innocence under different legislation and different types of legal traditions. In the final conclusion chapter, the author will reflect the research findings, both generally and especially from the point of view of the original research questions and research hypothesis.

The author has used in this research mostly analytical research methods. Moreover, the used methods the author has used in writing have been analysing of legal literature concerning the research subject, the presumption of innocence and qualitative research.

The subject chosen for this research has been studied quite little and narrowly throughout the years. The presumption of innocence is relatively underexplored part of criminal law in itself which has influenced on the fact that there is relatively very little research done on more specific subjects within it or how it works under certain legislations. As sources for the thesis the author has used books and articles about the role of the presumption of innocence or more generally the role of human rights conventions in criminal courts. Unfortunately almost all the literature considering these questions in Finnish legislation and legal praxis are available only in Finnish and in the case of Sweden, they are only available in Swedish. The author speaks both languages and has therefore used Finnish and Swedish sources.

The author has also conducted two qualitative interviews. The interviews were used to gather information on the role of the presumption of innocence in practice in two stages of the criminal process in Finland. The Head District Prosecutor of the district of central Finland was interviewed about the recognition and use of the presumption of innocence during the prosecution stage of the criminal proceeding. The Chief Justice of the District Court of Central Finland was then interviewed about the role of the presumption of innocence during the trial phase in the court of the first instance.

The scope of the subject chosen for this research addresses the presumption of innocence, its history and its place as a basic human right, its basic principles and the debate of its definition. The research also covers the procedural scope of the presumption of innocence, its interpretation in the legislation and its scope in the European Court of Human Rights. Finally, the research covers the comparative point of view by examining the presumption of innocence in national legislations and courts in Finland, Sweden and England.

1. Legal basis of the presumption of innocence

1.1. The history of the presumption of innocence

The idea for the presumption of innocence, and more specifically that the prosecutor has the burden of proof, comes from the Roman times.[2] Some argue, that the idea originates from even earlier times and from the Babylonian law.[3] In written form the presumption of innocence can be found in the *Corpus Juris Civilis* collection from around the year 530 BC. This work is a compilation and selection of earlier Roman law and its oldest parts are originated from the year 100 BC. According to the Justinian Code the prosecutor was obligated to prove the accusations and the evidence had to be definite and unquestionable.[4]

Modern law systems can be roughly divided into two different traditions, which are Civil law and Common law. Civil law is the basis of legal systems in continental European countries, as well as in their previous colonies around the world, whereas Anglo-American tradition, Common law, is somewhat differed from the continental traditions.[5] Also the historical basis of the presumption of innocence differs between these traditions. Of the countries that are examined in this research, Finland and Sweden represent the Civil law tradition, while England represents Common law tradition.

The continental European legal systems represent Civil law and their basis is more or less directly drawn from ancient Roman law and also the presumption of innocence has been adopted from Roman law. The most prevalent feature of Civil law tradition is that the core principles and norms are coded in a referable collection. Civil law has been the major legislative system in continental Europe since the late Middle Ages, at first together with religious Canon law.[6]

During earlier medieval times the principles of Roman law were, however, displaced by religious law. There was no use for requiring conclusive proof as the final assertion of the guilt of the

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2 Stumer, A. The Presumption of Innocence – Evidential and Human Rights Perspectives. Oxford, Hart Publishing 2010, p 1.
3 Sassoon, J. Ancient Laws and Modern Problems: The Balance between the Justice and a Legal System. London, Third Millenium 2001, p 42 cited in Stumer (Stumer A. The Presumption of Innocence – Evidential and Human Rights Perspectives. Oxford, Hart Publishing 2010, p 1).
4 Justinian Code, Book IV, Title 19, Clauses 23 and 25. George W. Hopper Law Library, College of Law, University of Wyoming. www.uwyo.edu/lawlib/blume-justinian/ajc-edition-1/book-4.html (24.4.2017)
5 The Robbins Collection. The Common Law and Civil Law Traditions. School of Law, University of California at Berkeley. www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html (24.4.2017).
6 *ibid.*

accused was left by the procedure of trial to the unerring decision of God.[7] However, in 1215, the lawyers needed to acquire principles and procedures to make sure fact-finding was accurate with the elimination of the trial by ordeal pursuant to an order of the Lateran Council.[8] For Canon law lawyers the Roman law was a valuable source when for comprehending the proof related principles and found that guilt should not be presumed but proved.[9]

Common law tradition has its roots in early medieval England when power and law began to be consolidated to kings. As kingdoms grew in size it was impossible for the king to personally to make a statement about every possible legal problem and the courts were given authorisation to apply legal principles to new situations. Common law absorbed many principles and practices from the Roman law but it is more based on tradition and precedential case law than definitive legal principles.[10]

Within Common law tradition the person who specifically referred to a "presumption of innocence" was a canonical lawyer named Johannes Monachus who died in 1313.[11] In England, the final decision concerning the guilt of the accused was made by a jury and there probably was a possibility to acquire a conviction even without any real evidence other than the accusation of the grand jury.[12] [13] Ideas of proof in Roman law, however, placed the foundation for the acknowledgement of the principle that a person should not be convicted without strong evidence of the guiltiness.[14]

In his famous collection Commentaries on the Laws of England first published in 1765, Sir William Blackstone recognised that convicting the innocent was a serious injustice and it also

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[7] Thayer, J. A Preliminary Treatise on Evidence at the Common Law. London, Sweet and Maxwell 1898, pp 34-39 cited in Stumer (Stumer A. The Presumption of Innocence – Evidential and Human Rights Perspectives. Oxford, Hart Publishing 2010, p 2).
[8] Fraher, R. Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof. Law and History Review 1989, 7(1), p 23 cited in Stumer (Stumer A. The Presumption of Innocence – Evidential and Human Rights Perspectives. Oxford, Hart Publishing 2010, p 2).
[9] Stumer, *supra* nota 2, p 2.
[10] The Robbins Collection. The Common Law and Civil Law Traditions. School of Law, University of California at Berkeley. www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html (24.4.2017).
[11] Pennington, K. Innocent Until Proven Guilty: The Origins of Legal Maxim. The Jurist 2003, 63, pp 106-124, p 115.
[12] Stumer, *supra* nota 2, pp 2-3.
[13] Baker, J. Criminal Courts and Procedure at Common Law 1550-1800. Crime in England 1550-1800. Cockburn, J. *et al*. London, Methuen, 1977, pp 15, 39 cited in Stumer (Stumer A. The Presumption of Innocence – Evidential and Human Rights Perspectives. Oxford, Hart Publishing 2010, p 3).
[14] Stumer, *supra* nota 2, p 3.

expressed a powerful need for certainty in the proof of guilt.[15] As legal representation became more customary in criminal trials by the middle of the 18th century, the concept of the presumption of innocence became to be commonly used by defence counsel to express the need for the proof of guilt.[16] Judges however, were slower to adopt the presumption of innocence or even acknowledge that the accused should receive the benefit of the doubt when facing charges or even facing their guilt.[17] *Ergo*, once the prosecutor had made their case and presented evidence that proved that the crime did happen and the accused is guilty, the accused had the burden to present exonerative facts that would prove their innocence. This made into a rule that the accused had the burden of proof with respect to any "exception, exemption, proviso, excuse or qualification".[18] This meant that an innocent person could get a conviction even if there were reasonable doubt of their innocence.[19] The justification for the burden of proof of the accused was found in on the basis where the thought was that the burden of proof of the prosecutor would raise a presumption towards the accused.[20]

The history of the presumption of innocence is somewhat different in Civil law and Common law traditions but since the end of the 18th century it has been recognised and used in legal proceedings within both traditions. The role and importance of the presumption did, however, gain its present status only during the 20th century with the modern basic human rights ideology.

1.2. Presumption of innocence as basic human right

The presumption of innocence is commonly recognised as a basic human right and it is registered in all important international human rights documents and declarations. One of the most important early Human Rights documentation is the Declaration on the Rights of Man which was given in France after the revolution in 1789. Presumption of innocence is one of the basic human rights defined in this declaration that has had a great impact on the development of modern democracies.[21]

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15 Blackstone, W. Commentaries on the Laws of England: Book the Fourth. Oxford, Clarendon Press 1769, p 352 cited in Stumer (Stumer A. The Presumption of Innocence – Evidential and Human Rights Perspectives. Oxford, Hart Publishing 2010, p 3).
16 Stumer, *supra* nota 2, p 3.
17 Stumer, *supra* nota 2, p 4.
18 Stumer, *supra* nota 2, p 5.
19 Stumer, *supra* nota 2, p 5.
20 Stumer, *supra* nota 2, p 5.
21 Smith, *supra* nota 1, p 277.

In 1948 the newly formed United Nations gave the Universal Declaration of Human Rights where in the Article 11(1) it is said 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."[22] The same phrasing of the presumption of innocence can be also found in The International Covenant on Civil and Political Rights in the Article 14(2).[23] This multilateral treaty was adopted by the United Nations General Assembly in 1966 and is currently signed and ratified by 169 countries. However, even though the Covenant is monitored by the United Nations Human Rights Committee there are no strong legal sanctions to endorse the Covenant and therefore malpractices are common in many countries.

The newly formed Council of Europe drafted in 1950 the European Convention on Human Rights and unlike the United Nations declaration this convention is an international treaty that is legally enforced in all Member States of the Council of Europe. In the second part of the Article 6 of this treaty it is noted that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".[24] This convention is the most important human right documentation in the European Council Member States as they are also legally obliged to conform to this treaty.

The European Union has also documented human rights in the Charter of Fundamental Rights of the European Union where the presumption of innocence is written in the Article 48. The formulation of this article is almost the same as in the European Convention on Human Rights. This convention was first formulated in 2000 in the meeting of Nice but it became legally binding only in 2009 when the Treaty of Lisbon[25] was put into force.

Although there is no unanimity amongst the believers of human rights, there has arisen certain kind of consensus that basic human rights are grounded in the requirement of securing welfare and liberty interests that uphold the complicated capacity for human rights.[26] As the presumption of innocence has a spot in every human rights document, it is believed to be one of the least

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[22] United Nations, General Assembly. The Universal Declaration of Human Rights, 10.12.1948.
[23] United Nations, General Assembly. The International Covenant on Civil and Political Rights, 16.12.1966.
[24] Council of Europe. European Convention on Human Rights, 4.11.1950.
[25] European Union. Treaty of Lisbon. Amending the Treaty on European Union and the Treaty Establishing the European Community. 2007/C 306/01, 17.12.2007.
[26] Waldron, J. Rights. A Companion to Contemporary Political Philosophy (Eds. Goodin, R. *et al.*) Oxford, Blackwell 1993, pp 575-585 cited in Lippke (Lippke R. Taming the Presumption of Innocence. New York, Oxford University Press 2016, p 37).

disputed rights.[27] There might be an objection that if the presumption of innocence were to be interpreted only as a procedural right, then it might be too easy to set aside when authorities regard a person as dangerous or guilty of horrendous crimes and have a need to convict them.[28] When the goal of the authorities is to protect the basic substantive rights of others, or to stand for them symbolically by convicting and penalizing the guilty, it might get too tempting to dispense with rigorous and fair adjudication procedures.[29]

Presumption of innocence is regarded as a principle which cannot be restricted because of its phrasing in the European Convention on Human Rights Article 6(2) "shall be presumed innocent" as for the same Convention's Article 6(1), the phrasing says "is entitled to".[30] Therefore, Article 6(1) as a whole is not regarded as absolute as the presumption of innocence.[31] Because of the absolute formatting of the presumption of innocence it has also been held that accused cannot competently abjure the rights guaranteed by the principle.[32]

The European Court of Human Rights has described the right to a fair trial as central to the rule of law.[33] The presumption of innocence is one of the specific requirements of the fair trial and therefore it is also a key element of the rule of law.[34] The rule of law is a concept that refers to the ideal manner of organising the society through law.[35] The key functions and aims of the rule of law include both providing society with stable rules by which people can live and protecting individuals from arbitrary power.[36] There is a close relation between the rule of law and human rights and in European legal systems the protection of human rights is considered to be a key element of the rule of law.[37] In European countries only legal systems and governments that value and respect human rights are considered as legitimate.

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27 Ashworth, A. Four threats to the presumption of innocence. The International Journal of Evidence and Proof 2006, 10 (4), pp 241-279, p 243.
28 Lippke, R. Taming the Presumption of Innocence. New York, Oxford University Press 2016, p 38.
29 *ibid*, p 38.
30 Jääskeläinen, P. Syyttäjä tuomarina. Rikos- ja prosessioikeudellinen tutkimus seuraamusluonteisen syyttämättä jättämisen ja rangaistusmääräysmenettelyn ehdoista Suomessa ja Ruotsissa. Helsinki, Suomalainen lakimiesyhdistys 1997, p 213.
31 *ibid*, p 213.
32 *ibid*, p 213.
33 Lautenbach, G. The Concept of the Rule of Law and the European Court of Human Rights. Oxford, Oxford University Press 2013, p 125.
34 *ibid*, p 126.
35 *ibid*, p 1.
36 *ibid*, pp 21-22.
37 Lautenbach, *supra* nota 34, p 54.

By the end of the 20th century almost all the countries in the world have signed the basic human rights treaties of the United Nations and have therefore also recognised the presumption of innocence to be respected in their judicature. In many countries the presumption of innocence is not necessarily put into practice as complying the international treaties is not controlled. The European Convention on Human Rights is, however, supported by a very strong enforcement mechanism and therefore also the presumption of innocence is one of the basic legal principles in all the member countries of the Council of Europe and the European Union, including the three countries studied in this research.

2. Content and the scope of the presumption of innocence

2.1. The basic principles of the presumption of innocence

However, the content of the presumption of innocence is not well defined in the human rights treaties. According to Trechsel the vagueness of the content of the concept can be seen especially in the legal literature where there are a number of defined lists of the elements of the presumption of innocence, which however differ from each other radically.[38] In Europe the interpretation *de facto* of the content of the presumption of innocence in European countries is formed in the decisions of the European Court of Human Rights.

A good formulation of the presumption of innocence is included in the judgment of the European Court of Human Rights of the case *Barberà, Messegué and Jabardo v Spain*. In this case, which is presented in more detail in the chapter 3.3.1, the Court did not find a breach of the Article 6 (2) but this case defines the presumption of innocence itself a bit further as follows;

"When carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him."[39]

Conforming the legal praxis of the European Court of Human Rights, the presumption of innocence *ergo* protecting the innocent does not only include the obligation to regard the accused as innocent until proven otherwise in a criminal process but also the burden of proof of the prosecutor and *in dubio pro reo* principle, which is obligation to evaluate unclear evidence in favour of the accused.[40] When these three principles are combined that secures the accused a right to be proven innocent and lays very strong requirements for the prosecution before the court can found the accused guilty of a crime.

In the legal literature, the burden of proof of the prosecutor is regarded as one of the most important parts of the presumption of innocence. The burden of proof in the criminal procedures

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[38] Trechsel, S. *et al.* Human Rights in Criminal Proceedings. Oxford, Oxford University Press 2006, p. 163 cited in Lippke (Lippke, R. Taming the Presumption of Innocence. New York, Oxford University Press, 2016, pp. 35).
[39] ECHR 6.12.1988, 10590/83, *Barberà, Messegué and Jabardo v Spain*, para. 77.
[40] Lappalainen, J. *et al*. Prosessioikeus. Helsinki, Sanoma Pro 2012, p 219.

means whose responsibility is to show the proof of the case facts that they are going to appeal in the court to and who is carrying the consequences if the proof is not enough. The burden of proof is for the most part solely the responsibility of prosecutors and conviction requires that the guilt of the accused can be proven without reasonable doubt.[41] According to Ferguson, the burden of proof and presumption of innocence are actually treated as synonymous for example by the United States and the United Kingdom's Supreme Courts.[42] Ferguson makes a distinction between "factual guilt" and "legal guilt".[43] Legal guilt means that the prosecution was able to prove that the accused performed the criminal act and factual guilt means that the accused did perform the criminal act.[44] The presumption of innocence means that a factually guilty person is legally not guilty if the prosecutor is not able to present sufficient proofs beyond a reasonable doubt.[45]

According to Mueller and Kirkpatrick the presumption of innocence includes that the burden of proof lies totally on the prosecution and that the defendant does not have any burden of proof whatsoever. The defendant has no obligation to testify or call witnesses or present any other evidence, and if the defendant elects not to testify or present evidence, this decision cannot be used against them.[46] The accused has no burden of proof and they should not be obligated to proof their innocence.[47] Talking about dividing the burden of proof cannot really be spoken about and providing the burden of proof to the prosecutor has been strengthened with human rights conventions.[48]

In dubio pro reo principle means that if there is not enough evidence or if the case is otherwise unclear, the judgement should be made for the benefit of the accused.[49] *In dubio pro reo* can be based on both the presumption of innocence and the burden of proof of the prosecutor and it has been called as a procedural reverse of the rule of law of criminal law. It can also be seen as a reverse of the threshold of judgement. The basic requirement for a conviction is that there is evidence beyond reasonable doubt that the accused is not innocent. When there is any doubt, the

41 Ferguson, P. The presumption of innocence and its role in the criminal process. Criminal Law Forum 2016, 27 (2), pp 131-158, p 133-134.
42 Ferguson, *supr*a nota 42, p 134.
43 Ferguson, *supr*a nota 42, p 137.
44 Ferguson, *supr*a nota 42, p 137.
45 Ferguson, *supr*a nota 42, pp 137-138.
46 Mueller, C., Kirkpatrick, L. Evidence. Aspen, Wolters Kluwer 2009, pp 133–134.
47 Lappalainen *et al*. *supra* nota 41, p 867.
48 Lappalainen *et al*. *supra* nota 41, p 686.
49 Ervo, L. Oikeudenkäynnin oikeudenmukaisuusvaatimus. Juva, WSOY Pro 2008, p 350.

case has to be judged according to *in dubio pro reo* principle for the benefit of the accused. The principle can be said to have gotten itself a strong position in the concept of constitutional state.[50]

Of the elements of the presumption of innocence the burden of proof of the prosecution has caused some problems in the legal proceedings especially in Common law countries, including England. There has been discussion about the burden of proof of the accused, as in reversed burden of proof, in several countries, like Finland.[51] The reversed burden of proof has been in use especially under Common law, and it is not so straightforward and easy to change legal traditions that have been in force for several centuries; these difficulties will be discussed in more detail in chapter 4.4.

2.2. Debate over the definition

Even though the presumption of innocence is protected by human rights conventions and other documents, there still is a debate over the definition of the principle. Ferguson makes a distinction between broad and narrow application of the presumption of innocence: according to the narrow definition the presumption applies only during the trial while according to the broad definition the presumption of innocence should also be applied also pre-trial and post-trial.[52]

Ferguson suggests the broad application of the presumption and quotes the Declaration of the Rights of Man and of the Citizen which was given after the French revolution in the year 1789. The Article 9 of this Declaration states;

"As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law."[53]

According to Ferguson the presumption of innocence should be applied not only during the trial but also during pre-trial as well as post-trial, meaning that acquitted persons should be treated innocent and not only persons for whom the guilt could not be proved beyond reasonable

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50 Jonkka, J. Syytekynnys. Tutkimus syytteen nostamiseen vaadittavan näytön arvioinnista. Helsinki, Suomalainen lakimiesyhdistys 1991, p 119.
51 Pölönen, P. Henkilötodistelu rikosprosessissa. Helsinki, Suomalainen lakimiesyhdistys 2003, p 136.
52 Ferguson, *supr*a nota 42, pp 140-143.
53 Declaration of the Rights of Man and of the Citizen 1989 cited in Ferguson (Ferguson, *supr*a nota 42, p 141).

doubt.[54] On the other hand Weigend, advocates for the narrow definition for the presumption of innocence in the fear that it might lose its effect if it were to be over-extended.[55]

In order to try to avoid disputes between the advocates of the broad and narrow definitions of the presumption of innocence, Duff suggests that we should talk about several presumptions of innocence that operate in different contexts, with different effects and are defeasible in different various ways, instead of only one presumption of innocence.[56] Ulväng stated that this would lead to a situation where we would have a variety of principles that would be applicable in various different contexts.[57] Van Dijk brings yet another solution to the table by suggesting that the discussion of the broad and narrow presumption of innocence, could benefit from a use of different terminology.[58] The "playing field" as he says it, would become more even if all the topics that are under discussion, were to be classified according to what they really are.[59] What it provides in contrast to Duff's point of view, van Dijk's suggestion for the presumption of innocence would remain constant in all contexts, whereas Duff's leaves room for many presumptions of innocence in various contexts.[60]

It has also been suggested that the right to the presumption of innocence should not obligate only the authorities but also the general public, all of us.[61] According to Duff, all people should, as a matter of civic benefit consider and respect other people as receptive to moral and provident considerations and thus, presumably law-abiding.[62] Nance's opinion to this is similar as he argues for demanding a prudently optimistic stance towards other people according to which they are presumed innocent of serious violations and he calls it a "principle of civility".[63]

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54 Ferguson, *supr*a nota 42, p 142.
55 Weigend, T. There is Only One Presumption of Innocence. Netherlands Journal of Legal Philosophy, 2013. 3 (42), p 193, 196.
56 Duff, A. Presumptions Broad and Narrow. Netherlands Journal of Legal Philosophy 2013, 3 (42), p 268.
57 Ulväng, M. Presumption of Innocence Versus a Principle of Fairness. Netherlands Journal of Legal Philosophy 2013, 3 (42), p 214.
58 van Dijk, A. Retributivist Arguments against Presuming Innocence. Netherlands Journal of Legal Philosophy 2013, 3 (42), p 250.
59 *ibid*, p 250.
60 *ibid*, p 250.
61 Stewart, *supra* nota 83, p. 36.
62 Duff, A. Who Must Presume Whom to Be Innocent of What? Netherlands Journal of Legal Philosophy 2013, 3 (42), pp 10-192, pp 180-182.
63 Nance, D. Civility and the Burden of Proof. Harvard Journal of Law and Public Policy 1997, 17, pp 647-690.

The lack of definition has also been noted by the legislators in many levels and the European Union adopted a new Directive[64] in the year 2016 to strengthen the presumption of innocence. This Directive brings up the importance of the presumption of innocence but the Directive does not go far enough.[65] Firstly, there is not enough empirical understanding towards the criminal justice systems and what makes them fail but instead, the Directive is built on assumptions of them.[66] In spite of the non-regression clause in Article 13[67], the Directive does not prop up the basic requirements of the European Convention on Human Rights and its case law enough.[68] Thirdly, the Directive does not reference enough to the previously agreed EU instruments to create a framework that is all-encompassing to protect the fundamental human rights.[69]

64 Directive (EU) 2016/343 of the European Parliament and of the Council of March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ No L65/1, 11.3.2016.
65 Sayers, D. The new Directive on the presumption of innocence: protecting the 'the golden thread', 2015 www.eulawanalysis.blogspot.fi/2015/11/the-new-directive-on-presumption-of.html (25.4.2017).
66 *ibid.*
67 Directive EU 2016/343, *supra* nota 60.
68 Sayers, *supra* nota 61.
69 Sayers, *supra* nota 61.

3. Presumption of innocence in juridical practice in Europe

3.1. The role of the European Court of Human Rights

In addition to international documents, conventions and declarations of Human Rights and such, the international case law is essential when figuring out the real definition and meaning of the presumption of innocence. In the member states of the Council of Europe, the European Convention on Human Rights is an exceptionally important treaty compared to most of the other treaties of human rights as it has its own very strong enforcement mechanisms.[70] The European Court of Human Rights is a permanent court situated in Strasbourg. The court is composed of 47 full-time judges so that there is one judge from each member state.[71]

Every Member State of the Council of Europe can appeal to the Court if it considers that another Member State does not follow the European Convention on Human Rights. Most importantly every individual person or group of people can appeal to the court if they regard that their human rights have been violated by national courts. The court decides according to applications whether it should be accepted for consideration.[72] If the application is accepted, the court decides on a judgement whether there has been a breach of the convention or not.[73] The judgements of the court are binding in international law.[74] Furthermore, they are binding upon the parties to the case.[75] Even the member states have committed to respect the judgments of the European Court of Human Rights national courts have no obligation whatsoever to give them direct effect under the Convention.[76] The national law of the respondent state of the case is free to implement the judgements of the European Court of Human Rights in accordance with the rules of its national legal system.[77] However, if the European Court of Human Rights considers that the reason of the human rights violation lies in the national legislation, the Court can also make a suggestion that the national law should be changed in order to avoid violations in the future.[78]

There are several procedures for ratification of legally binding international treaties. In some countries the distinction between national law and international treaties remains also after

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70 Harris, D. *et al.* Law of the European Convention on Human Rights. Oxford, Oxford University Press 2014, p 6.
71 *ibid*, p 6.
72 *ibid*, p 6.
73 *ibid*, p 6.
74 *ibid*, p 6.
75 *ibid*, p 30.
76 *ibid*, p 30.
77 *ibid*, p 30.
78 Pellonpää, M. *et al*. Euroopan ihmisoikeussopimus. Helsinki, Talentum 2012, p 251-255.

ratification.[79] In some countries these treaties become after ratification automatically part of the national legislation whereas in other countries the incorporation of the treaties into national legislation requires new national laws.[80] What makes the international human rights guarantees most beneficial is when they are enforceable in national law, even when speaking about as successful international human right guarantee as for the European Convention on Human Rights. Although, the countries undertake the responsibility to secure the Convention's freedoms and rights to people within their jurisdiction, there is no requirement for the states to incorporate the Convention into their national laws which lead to the natural way of thinking that the right to the presumption of innocence is only procedural.

Even though the states are not obligated to give the judgements direct effect, the adoption of the judgments is supervised by the Committee of Ministers of the Council of Europe.[81] The national courts may not have an absolute obligation to change their judgments but in many countries this is done. Most importantly the case law from the European Court of Human Rights guides the work in the national courts by creating precedent cases and model for interpretation the European Convention on Human Rights. The case law from the European Court of Human Rights has helped to define the presumption of innocence more closely, and it continues to do so, as the article itself is very narrowly written and needs clarification so that it can be thoroughly understood.

However, it should be kept in mind that an individual person can make an appeal to the European Court of Human Rights only after using all the domestic remedies.[82] If a national Appeal Court or Supreme Court does not see the unfairness of the trial and therefore does not take the appeal under reconsideration, the violation will not find its way to the European Court of Human Rights in the first place.[83]

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79 Pellonpää *et al*. *supra* nota 76, pp 55-55.
80 Pellonpää *et al*. *supra* nota 76, p 50-54.
81 Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, The supervision process. www.coe.int, s /en/web/execution/the-supervision-process (25.4.2017).
82 Pellonpää *et al*. *supra* nota 76, p 171.
83 Harris, *supra* nota 66, p 467.

3.2. Resolutions of the European Court of Human Rights

3.2.1. Innocent until proven guilty

In this chapter the author will present the interpretations of the main features of the presumption of innocence through the judgments of the European Court of Human Rights. The basic content of the presumption of innocence is formulated in the European Convention on Human rights as ”Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.[84] The phrasings of the article may suggest that the right to the presumption of innocence becomes to exist when a person has already been accused of a criminal violation.[85] Keeping this in mind, there are also scholars who think that in spite of the phrasings of the international documents, the right to the presumption of innocence is a substantive human right no matter if the person has been accused of a criminal violation formally or not.[86] A right of this nature obliges that the authorities justify the violations of people’s basic rights autonomy, liberty or privacy progressively as they are investigating crimes and formally taking on action against the ones that are suspected of committing the crime.[87] The right to be presumed innocent does not only obligate fair trial rights[88] but it also obligates the authorities to protect the interests of the accused relating to reputation.[89] This means that the prosecutor nor the police should not act or give statements that would imply that the accused is guilty before they have been acquitted by the courts or they are actually convicted.[90]

At what stage of the legal process the presumption of innocence is taken into account can vary from one country to another but The European Court of Human Rights have taken a clear position that if any judge or public officer who is somehow involved in or in charge of the legal process takes a clear stand condemning the accused as guilty before or during trial that is seen as violation of the presumption of innocence.

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84 Council of Europe. European Convention on Human Rights. 4.11.1950.
85 Lippke, *supra* nota 28, p 35.
86 Ho, H. The Presumption of Innocence as a Human Right. Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions. Roberts, P (ed.). Oxford, Hart Publishing 2012, pp 259-281, p 266.
87 Stewart, H. The Right to Be Presumed Innocent. Criminal Law and Philosophy 2014, 8, p 413-414 cited in Lippke (Lippke R. Taming the Presumption of Innocence. New York, Oxford University Press 2016, p 36).
88 Campbell, L. Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence. Modern Law Review 2013, 76(4), pp 681-707. p 685.
89 Trechsel, S. *et al*. Human Rights in Criminal Proceedings. Oxford, Oxford University Press 2006, p 36.
90 Lippke, *supra* nota 28, p 36.

First of these primary cases from the European Court of Human Rights is *Barberà, Messegué and Jabardo v Spain*[91], in which the applicants Mr. Barberà and Mr. Messegué had been convicted of murder, and for the illegal possession of guns and explosives etc. and Mr Jabardo for assisting the murder. Applicants stated that they were convicted only on the basis of their confessions to the police which they gave without any defence lawyer being present. They also stated that the Audiencia Nacional had prejudice against them. However, the terms of the judgements of the Supreme Court and the Constitutional Court, the Government professed that the Audiencia Nacional had other evidence before the confessions. Therefore the European Court of Human Rights ruled that there did not appear to be any evidence that during the trial or investigation, that the presiding judge or the Audiencia Nacional had taken attitudes or made decisions reflecting that opinion. In this case the Court did not find a breach of the Article 6 (2) but this case defines the presumption of innocence itself a bit further as presented in chapter 2.1 of this research.

As for the statements that are made outside of the courtroom, in the case of *Allenet de Ribemont v France*, in which the applicant was accused of assisting the intentional homicides of two politicians who were killed in front of his house, the European Court of Human Rights found a breach of Article 6(2). The Minister of the Interior with others made comments on a press conference before the arrest of the applicant, stating the guilt of Mr. de Ribemont. These statements in the press conference were a breach of Article 6(2) which the Court stated to be a clear declaration of the guilt of the accused and further, which the court stated as follows; "[t]his was clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority".[92]

There was also a breach of Article 6(2) in the case *Lavents v Latvia*.[93] Aleksandrs Lavents had been the chairman of the biggest bank in Latvia which went bankrupt in 1995. The highest management of the bank was charged with contributing to the events leading to the insolvency which led to hundreds of thousands of bank's customers, including the state of Latvia, to lose their savings. The principle of presumption of innocence was violated when the trial judge gave statements during the trial in the press interviews stating that she did not know whether she was

[91] ECHR 6.12.1988, 10590/83, *Barberà, Messegué and Jabardo v Spain,* para. 77.
[92] ECHR 10.2.1995, 15175/89, *Allenet de Ribemont v France*, para 41.
[93] ECHR 28.11.2002, 58442/00, *Lavents v Latvia*.

going to convict the accused on all charges or just some of them and stated that she was astounded that the accused denied his guilt.

Third case concerning statements made in the media was *Butkevicius v Lithuania* in which the applicant, who was the Minister of Defence and a member of the parliament, Seimas at the time, was accused of taking a bribe in a hotel lobby where he was seen to accept an envelope which contained a huge amount of US dollars. He was later on convicted of attempting to obtain property by deception but before he was convicted of any crime the Prosecutor General and the Chairman of the Seimas made statements in interviews with the press and in a context that was independent of the criminal proceedings themselves. These statements included Seimas saying he had no doubt of the guilt of Mr. Butkevicius taking bribes, that it was clear that he took money in return for criminal services and the Prosecutor General's statement that he had enough sound evidence towards the applicant. The European Court of Human Rights found a breach of the Article of 6(2) as it was clear that the applicant was declared guilty by public officials who "served to encourage the public to believe him guilty and prejudged the assessment of the facts by the competent judicial authority".[94] The Court also saw that the Chairman of the Seimas lifted the parliamentary immunity of Mr. Butkevicius to enable criminal proceedings to be constituted against him.[95]

In all previous cases the person condemning the accused as guilty before a legitimate verdict has been a public officer or judge but the same requirement for impartiality concerns also the members of the jury. In case *Sander v The United Kingdom* the applicant was accused with two other people of conspiracy to defraud. During the trial one member of the jury complaint to the judge that several other jurors had prejudices against the accused because of their Asian origin and had made openly racist remarks and jokes. The defence asked the judge to dismiss the jury, but after discussing the complaint with the jurors, the judge had decided not to discharge the jury. The jury found the applicant guilty and he imposed a sentence of five years' imprisonment. The jury, however, acquitted the other Asian accused person. The European Court of Human Rights saw that there was a violation of Article 6 (1) as the jury had been biased.[96]

[94] ECHR 26.3.2002, 48297/99, *Butkevicius v Lithuania*, para 53.
[95] ECHR 26.3.2002, 48297/99, *Butkevicius v Lithuania*.
[96] ECHR 9.5.2000, 34129/96, *Sander v The United Kingdom*.

3.2.2. The burden of proof

The European Court of Human Rights has taken a clear stand in requiring that the burden of proof is solely on the prosecutor and the accused has no obligation to prove their innocence. If the prosecution is not able to prove a person guilty it means that the accused cannot be convicted of the crime however strong suspicions.

Some of the main judgements on reversed burden of proof are *John Murray v the United Kingdom*[97] and *Telfner v Austria*[98]. In the case *John Murray v the United Kingdom*, the applicant was convicted of assisting a false imprisonment of a police informer as he refused to tell the authorities why he was in the place of the crime appealing to his right to remain silent which lead for the trial court to draw inferences of the guilt of the accused. The court held that there was no breach of Article 6(2) and stated that;

"[H]aving regard to the weight of the evidence against the applicant, as outlined above, the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide an explanation for his presence in the house was a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances. […] Nor can it be said, against this background, that the drawing of reasonable inferences from the applicant's behaviour had the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence."[99]

In the case of *Telfner v Austria* the applicant was sentenced of causing injury by negligence in a minor accident where the victim was struck by a car. The authorities' only evidence towards the applicant was that he was the main user of the car and that he was not home at the night of the accident. The Court did find a breach of Article 6(2) as the court held that the accused had been accused of the crime without proper evidence and that the evidence the authorities had was not of the kind to need an explanation from the accused. As there was no proper evidence and the District Court and the Regional Court even speculated that the applicant was driving under the

[97] ECHR 18.1.1994, 18731/91, *John Murray v the United Kingdom.*
[98] ECHR 20.3.2001, 33501/96, *Telfner v Austria*.
[99] ECHR 18.1.1994, 18731/91, *John Murray v the United Kingdom*, para 54.

influence without any proof of this, it was clear to the European Court of Human Rights that the courts had prejudiced views of the guilt of the applicant.[100]

However, the European Court of Human Rights recognises the reverse burden of proof in some particular circumstances. In the case *Salabiaku v France* the applicant was convicted of smuggling as for a violation of French Customs law as he had picked up a suitcase that had drugs inside. European Court of Human Rights stated that if the state stays inside of particular lines and it was examined through a test of reasonable limits. As the French Customs law stated that a person that has been caught with drugs in his custody were to be regarded as responsible. However, if the accused can prove his innocence, they can be freed of charges. So, the presumption is to regard a person who has drugs in their custody as guilty. European Court of Human Rights stated that presumptions like these, are not violations of the European Convention on Human Rights Article 6(2) as the conviction is not an automatic consequence of the inventive rule of this presumption.[101]

The adequate degree of the threshold of judgement is legislated at the national level as the European Court of Human Rights has not wanted to editorialise it. However, it is said in the judgements of the European Court of Human Rights that the European Convention on Human Rights should be interpreted in a way that it protects, not only seemingly, but de facto the rights it guarantees. Therefore it can be said that the European Court of Human Rights editorialises the degree of the threshold of judgement implicitly as if it were too low, it would mean that no other right in the Article 6 would have any real meaning as they would be only theoretical rights.

3.3. Aspects and problems of putting the theory into practice

3.3.1. Reversed burden of proof

On the grounds of internationally strong-binding norms of the presumption of innocence, it would seem that reversed burden of proof would not be theoretically possible. Based on the reversed burden of proof, it would be the accused who was responsible for presenting evidence that is in favour of their case but what is mainly available to themselves.

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100 ECHR 20.3.2001, 33501/96, *Telfner v Austria*.
101 ECHR 7.10.1988, 10519/83, *Salabiaku v France*.

However, there has been conversation if there is a burden of proof of the accused to some degree. Pölönen has analysed different burdens of proof which the accused could have.[102] Firstly, the accused could have the practical burden of proof to some degree which means that the accused would end up in an unfavourable position if they do not bring up aspects of the case which could speak for their innocence.[103] Secondly there has been conversation about secondary burden of proof of the accused which would not remove the primary burden of proof of the prosecutor, for example burden of information which arises in situations where the accused does not bring forward facts which do not appear in the materials of the trial and would be favourable to the accused.[104] This would help the authorities to investigate the matter of the case further but the accused is the one who has the burden to bring the matter to the authorities since the court cannot take into account something they do not know about.[105] The accused may also have the burden of reification which is related to a situation where accused has presented an argument but has not concretised it enough so the court would be able to investigate the authenticity of the argument.[106] In this case it would help the case of the accused if they were to concretise their claim with proper arguments.[107]

It has also been stated that the burden of proof on the prosecution might not always be in the best interest of the accused as it leads to situation where the suspect and the defence have a very passive role in the criminal process which may justify that the society gives only minimal resources to the public defence while all the resources are given to prosecution.[108] Whilst the accused has no reversed burden of proof that might still be in his best interest. The evidence presented in a criminal trial is largely aimed to prove the defendant guilty of the crime.[109]

3.3.2. The threshold of judgement and *in dubio pro reo*

The threshold of judgement is not an actual element of the presumption of innocence but it is still something that should be examined. The rules of the burden of proof would be empty and unnecessary if there were no knowledge on how strong evidence the prosecutor needs to present

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[102] Pölönen, *supra* nota 52, p 136.
[103] Pölönen, *supra* nota 52, p 136.
[104] Pölönen, *supra* nota 52, p 136.
[105] Pölönen, *supra* nota 52, p 136.
[106] Pölönen, *supra* nota 52, p 136.
[107] Pölönen, *supra* nota 52, p 136.
[108] Naughton, M. How the Presumption of Innocence Renders the Innocent Vulnerable to Wrongful Convictions. Irish Journal of Legal Studies 2011, 2 (1), pp 40-54, p 41.
[109] *ibid*, p 46.

to fulfil the burden of proof, to achieve the threshold of judgement and to abolish the presumption of innocence.[110]

If the threshold of judgement was really low, the presumption of innocence with other demands of legal proceedings would not have practical significance and convictions could be given with only low justifications.[111] Therefore, a high threshold of judgement protects the innocent against wrongful convictions but it also restricts the function of control of a criminal process as the threat of punishment diminishes and it restricts the possibility of judgements of tangible truth as the number of wrongful acquittals increases. On the other hand, a system that would allow and would be neutral towards wrongful convictions cannot be accepted because of point of views that are concerned with criminal policy and consequences of preventing judgements, especially when wrongful convictions would most probably have a negative effect on the trust that citizens have towards the state and the will to comply the laws.[112]

Ferguson emphasises that judges and jurors should take a particularly sceptical approach to certain types of evidence which have been shown to be unreliable.[113] These types of evidence include fleeting glance identifications and jailhouse informants, but even scientific evidence is susceptible to human errors.[114] According to the presumption of innocence and *in dubio pro reo* principle, all the evidence that may be denied or interpreted in different ways must be taken into account in favour of the defendant.

Ferguson criticises strongly a common allegorical personification of justice as a woman who is holding a set of balance scales.[115] In this allegory the evidence of the prosecution is to be weighed against the evidence of the accused and that the accused proves guilty if the scale tilts so heavily in favour of the prosecution that there remains no reasonable doubt about the guilt of the accused.[116] Ferguson, however, states that the presumption of innocence requires that in the starting situation the scales are heavily tipped in favour of the accused.[117] Ferguson's article is written in the framework of British Common law using jury which emphasises the importance of

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110 Jonkka, J. Rikosprosessioikeuden yleisistä opeista. Helsinki, Helsingin yliopiston rikos-ja prosessioikeuden laitos 1992, p 98.
111 Jääskeläinen, *supra* nota 30, pp 240–241.
112 Jääskeläinen, *supra* nota 30, pp 240–241.
113 Ferguson, *supra* nota 42, p 144.
114 Ferguson, *supra* nota 42, p 144.
115 Ferguson, *supra* nota 42, p 146.
116 Ferguson, *supra* nota 42, p 146.
117 Ferguson, *supra* nota 42, p 146.

her notions about the allegorical scales. Ferguson stresses that the jury should not be neutral or open-minded about the accused's guilt or innocence, but rather the jury should believe that the accused is not guilty and the prosecution should try to convince the opposite.[118]

3.4. Blackstone ratio – a fair price to pay for justice?

The main purpose of the presumption of innocence is to protect innocent people to get convicted of crimes that they have not committed. But the other side of this presumption is a possibility that a guilty person is not convicted. Sir William Blackstone formulated the ideology behind the presumption of innocence in the 1760s by writing "It is better that ten guilty persons escape than that one innocent suffer."[119] As we must accept that no justice system can be infallible that means that the presumption of innocence leads undoubtedly to situations where guilty persons escape punishments for their crimes. From the human rights perspective wrongful convictions are, however, seen as a particularly grave injustice and must therefore be avoided.[120]

It is also considered that wrongful convictions would in fact have more damaging effect to the society than leaving a few guilty persons unpunished. Ashworth states that wrongful conviction causes substantial moral damage and is a profound injustice.[121] Ideally, to cure this, the possibility for errors would have to be removed but as it is not possible in reality, there should be a way of ensuring that there would be a proper evaluation of fundamental moral damages which include the right to not be convicted wrongfully.[122] This means there should be various procedural protections including the presumption of innocence and the principle in relation to this, the burden of proof of guiltiness by the prosecutor beyond a reasonable doubt, which does not mean absolute proof but a certainty of an adequately high degree.[123]

Based on several sources Ferguson summarises a number of negative effects of wrongful verdicts. The knowledge that an innocent person has been convicted reduces people's confidence in the criminal process, fewer crimes may be reported to the police, witnesses of crimes may be

118 Ferguson, *supra* nota 42, p 146.
119 Blackstone, *supra* nota 15, p 5.
120 Ferguson, *supra* nota 42, pp 147.
121 Ashworth, *supra* nota 27, p 247.
122 Ashworth, *supra* nota 27, p 247.
123 Ashworth, *supra* nota 27, p 247.

reluctant to come forward and therefore more crimes are not taken to court and less guilty persons are convicted of their crimes.[124]

[124] Ferguson, *supra* nota 42, pp 148-149.

4. Procedural scope in criminal courts in Finland, Sweden and the United Kingdom

4.1. Presumption of innocence in legislation in Finland, Sweden and England

4.1.1. Legislation and legal process in Finland and Sweden

The main focus of the author's research is to analyse the consequences of the lack of definition of the presumption of innocence in Finnish law. Therefore Finnish legislation and case law will be in the centre of the author's research. However, the Finnish situation is compared with two other countries, Sweden and England. First it is necessary to present the legislative basis of this presumption in these countries. It is important to note that Finland and Sweden represent Civil law tradition while England represents Common law tradition. These two traditions differ when looking at the role and significance of written normative law and case law but the role of the presumption of innocence should, at least theoretically, be the same in all three countries as they have all ratified the European Convention on Human Rights.

In Civil law the basis of the juridical system is in written core legislative norms which are organised as a unified code of law. In criminal court it is the duty of the judges to define which legal norm applies to each legal case, evaluate whether the act in question match the characteristic of the crime defined in the law and then give a verdict which is in accordance with the law. Even the specific legal norms constitute the core of the legislation, there can, however, also be found broader and less defined legal principles that represent the philosophical and ethical basis for the legislation even they are not necessarily written as specific norms. Legal principles play an important role in procedural law both in Finland[125] and Sweden[126] and the presumption of innocence is one of these basic principles.

The legislation in Finland and Sweden are very similar but not identical. Finland was part of the Sweden since early 13th century until the year 1809 and the basis of the legislation was laid during this period. Since 1809 both countries have had their separate legislation but in Finland the law that defines the legal proceedings is from the time of Swedish rule from the year 1734[127], and in Sweden the very same law was replaced in 1948[128], but even the new revised laws in both

[125] Lappalainen *et al*. *supra* nota 41, p 113-115.
[126] Nowak, K. Osyldighetspresumtionen. Stockholm, Norstedts Juridik AB 2003, p 34-42.
[127] Oikeudenkäymiskaari 4/1734. However, the content of the law is almost entirely rewritten and revised during the last 50 years.
[128] Rättegångsbalk (1942:740).

countries are still very similar to each other. Neither in Finland nor Sweden the national laws do not, however, include any specific notion of the presumption of innocence but this principle has been considered a legal "principle" for centuries in both countries.[129]

In both Finland and Sweden the laws about criminal procedure have for centuries included prosecutor's burden proof and very strict requirements even for formally charging a person of a crime. One feature of Swedish and Finnish criminal procedures is that a person is formally charged at a relatively late stage of the legal process. An indictment is made only after two separate stages of preliminary investigation of which the first is executed by the police and the second by the prosecutor. An indictment is made only if there are strong evidence of the guilt. These procedural requirements have meant that the presumption of innocence has been an important part of the process even if is not formally mentioned in the law.[130]

The presumption of innocence has entered the written law in both Sweden and Finland through the human rights treaties. In Finland the treaties are usually incorporated into the national law by so called blanket laws which mean that the national law has no other content but declaring that the international treaty is in force in Finnish legislation.[131] This kind of incorporation can also happen by governmental edicts.[132] The current European Convention on Human Rights was incorporated by a degree of the Ministry for Foreign Affairs in 1999.[133] Finland was able to join this convention only in 1989 after it became a full member of the Council of the Europe. Before that, full membership was not seen as politically possible as the Soviet Union was strongly against Finland's membership.

In Sweden, however, there is no specific tradition of incorporating the international treaties into national law. Even though Sweden was one of the first signers of the European Convention on Human Rights in 1953, this treaty was not part of the national law until 1995 when it was incorporated with procedures very similar to those used in Finland.[134]

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129 Finland got its first unified constitution in year 2000, and also the basic human rights - including the presumption of innocence - are listed in the new constitution. In Sweden there is no general constitution.
130 Wong C. Sweden. Toward a Prosecutor for the European Union. A comparative analysis, Vol 1. (Ed. Ligeti K.) Oxford, Hart Publishing 2012, pp 742-778, p 773.
131 Pellonpää *et al*. *supra* nota 74, p 58.
132 Pellonpää *et al*. *supra* nota 74, p 58.
133 Ulkoasiainministeriön ilmoitus Euroopan ihmisoikeussopimuksesta (Yleissopimus ihmisoikeuksien ja perusvapauksien suojaamiseksi) sellaisena kuin se on muutettuna yhdennellätoista pöytäkirjalla (SopS 85-86/1998).
134 Pellonpää *et al*. *supra* nota 74 pp 50-51.

Both in Finland and Sweden the judgments are made mainly by professional judges. In both countries there is, however, a tradition of using common people as judges, too. These lay judges work together with the professional judges but never alone. Even these lay judges are not, however, selected randomly as the members of a jury in Common law countries, but they are picked up from people who have shown special interest in governmental and legal matters. They are also given some training in legislation and the same people serve for several years. In Finland, the use of these lay judges has for the most part been abandoned as they are not considered to have sophisticated enough knowledge of the law and legal practice. According to a new law the use of lay judges is limited only to crime cases of "moderate" level: the minor cases are judged by one professional judge alone and the more demanding cases by three professional judges.[135]

4.1.2. Legislation and legal process in England

The United Kingdom represents Common law tradition which differs significantly from Civic law tradition of most continental European countries. Common law tradition is based more on case law, legal praxis and tradition than exact legal norms. The most important basis of the interpretation of law is to compare each legal case with previous legal cases and follow the rules that can be found in the legal tradition. In Common law there is no unified code of law but rather plenty of case law and examples that can and will be applied to each new legal case. The legal systems differ a bit between England and Wales compared to Scotland as Scotland has its roots from the Roman law with characteristics from common law. Because of these differences, the author will concentrate mostly on England and pure common law in this part of the thesis.[136]

In English law there are no specific legal norms about the presumption of innocence but the presumption of innocence is, however, recognised as an important legal principle since the days of Magna Carta in 1215. The importance of the presumption of innocence was specifically formulated by Blackstone in 1765.[137] In the modern days the presumption of innocence is stated in the case law and the presumption is often referred as Woolmington principle after the case of

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135 Laki käräjäoikeuden lautamiehistä 675/2016.
136 Scottish Affairs. How does the legal system in Scotland differ to the one in United Kingdom? www.scottishaffairs.org/how-does-the-legal-system-in-scotland-differ-to-the-one-in-united-kingdom (23.4.2017).
137 Blackstone, *supra* nota 15, p 5.

Woolmington vs. DPP where it was stated that the presumption of innocence is "the golden thread throughout the web of English criminal law".[138]

There has, however, been also a tradition of a reversed burden of proof in British law. The burden of proof was imposed on a defendant for example in cases where there is a criminal offence to do something or to be in a particular place, but the defendant may prove facts which will give him defence.[139] But this legal practice was to change as the European Convention on Human Rights does not recognise reversed burden of proof.[140] The Convention was incorporated into British national law by a specific law, Human Rights Act in 1998.[141] In addition to the international Convention this Act includes detailed definitions and instructions of how the European Convention on Human Rights should be taken into account in British courts. Additionally, as some previous practices in criminal proceedings were not in line with the Convention, a new Criminal Justice Act 1998 was given simultaneously.

When comparing legal proceedings in England, as of Common law tradition, with those in Finland and Sweden, as of Civil law tradition, several notable differences exist. In England the preliminary rulings are still one of the most important cornerstones of criminal proceedings and a person is formally charged at a much earlier stage of the proceeding than in Finland and Sweden. The other Common law feature in criminal trials is that the evaluation about the guilt of the accused is made by the jury that consists of randomly selected individuals having no specific knowledge of the law. In less serious cases, there are justices of peace instead of the jury.[142]

4.2. Procedural scope in Finland

Even though there are mistakes made by the authorities including judges as the author will demonstrate below, the presumption of innocence is mostly well applied in the Finnish criminal proceedings. According to the Finnish law the presumption of innocence is noticed already during the preliminary investigation. The public officers responsible for the preliminary investigation are responsible for collecting evidence in an objective manner and not only in order

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138 UKHL 1, 23.5.1935 *Woolmington vs. DPP*, 1935 AC 462.
139 Hoffman, D., Rowe, J. Human Rights in the UK. An Introduction to the Human Rights Act 1998. Harlow, Pearson Education Limited 2010, p 217.
140 *ibid*, p 217.
141 Human Rights 1998 Act, Article 6(2)
142 Howse T. England. Toward a Prosecutor for the European Union. A comparative analysis, Vol 1. (Ed. Ligeti, K.) Oxford, Hart Publishing 2012, pp 133-178, p 133.

to prove the suspect guilty. The latter part of the preliminary investigation is conducted by the prosecutor but they also have a responsibility to consider a person "innocent until proven guilty" and the suspect is formally charged only if the evidence gathered indicates the guilt so strongly that the suspect is likely to be convicted. The presumption of innocence can therefore be seen as one of the leading principles also in the work of the prosecutor.[143]

In Finland there are several laws that guide the legal proceedings in criminal cases and the legal norms are quite detailed. One law concerns the use of evidence and the role of witnesses[144], while there is another even more detailed law about the criminal proceedings[145] and a separate law which gives guidelines for the preliminary investigation[146].

Also in the court room the presumption of innocence is taken into consideration already in the lowest level, as it should be, in the district courts and judges take into consideration whether the charges are compatible with the evidence into a degree where the presumption of innocence can be abolished or are the charges too strict compared to the actual evidence and whether the case should be dismissed in whole or the conviction diminished to a lower degree.[147]

There are, however, cases where the court of the first degree or even the court of appeals have not taken the presumption of innocence into account in full but have for example disregarded the *in dubio pro reo* -principle. In most of these cases the Supreme Court has then overruled the convictions given in the lower courts.

One of the cases the Supreme Court has given was about parents who were accused of severely abusing their son of two and a half years.[148] The child had several bone fractures in his body that were caused by prominently great power targeted on the child's body. The parents denied to have harmed their child and the only explanation they could think of was a dog they had had in their care for a couple of weeks. The court with consulting the medical reports stated that the fractures had been caused by a great external force, which could have been for example a book case falling over the child and that all of the fractures were quite possibly from about the same time. What was questionable in this case was, whether the parents had abused their child

143 Visakorpi, M. (The head District Prosecutor of the district of central Finland.) Interview 10.4.2017.
144 Oikeudenkäymiskaari 4/1734. This law corcerns also the proceedings in civil processes.
145 Laki oikeudenkäynnistä rikosasioissa 689/1987.
146 Esitutkintalaki 805/2011.
147 Koppinen, T. (The Chief Justice of the District Court of Central Finland.) Interview 10.4.2017.
148 Korkein oikeus, KKO:2013:77, 23.10.2013.

together, whether the other of the two had done it but the other did not want to tell about it or was too scared to tell about it. The fractures could have also been a result of negligent care. However, the intention to hurt their child could not be proved and what external force it was that cause the fractures. The district court dismissed the charges as it would have been against the presumption of innocence to convict the parents. The child's trustee complained and the case was continued in the Court of Appeals which did not change the judgement of the district court as, even though there was no reasonable doubt whether the fractures was caused by the parents, there was still no evidence whether the parents caused the injuries together or whether it was just one of them, they could not be convicted of an aggravated assault. As the dog was not the cause of the injuries either, the charges of an aggravated cause of injury were also dismissed. The Supreme Court held that the parents could not be convicted of either of the crimes as it would be against the presumption of innocence to convict someone without proper evidence which this case lacked. Because of this, the compensation for the injuries had to be dismissed as well.

In another case from the Supreme Court of Finland, a child of three and a half years old, was brought to day care by his mother one morning while he had alcohol in his blood and showed symptoms such as exceptional tiredness, staggering and vomiting.[149] The child's mother had explained that the alcohol was from disinfectant that was used on his arm to clean it before taking blood tests but the district court ruled that the mother had given his son alcohol in an unknown way and convicted her of assault. The mother appealed to the Court of Appeals that she should be granted leave for continued consideration which she justified by stating that the alcohol was from the disinfectant and the exceptional behaviour of the child was because of his pharyngitis and the fever that the illness caused. However, the Court of Appeals denied the leave for continued consideration. The Supreme Court states that the basis for evaluation of the evidence is the presumption of innocence and the prosecutor or the plaintiff needs to prove the facts on which the charges are based on[150] and the accused is not obligated to give evidence against themselves. In this case it is also about whether the reversed burden of proof can be acceptable without violating the presumption of innocence. The Supreme Court regarded that there was not enough and not proper evidence to support the charges for proving that the mother gave his son alcohol. It states that the Court of Appeals should have had well-grounded reason to doubt the correctness of the judgement of the district court as the evaluation of evidence has been grounded on the matter that the mother's descriptions of the events, of his son's behaviour

[149] Korkein oikeus, KKO:2015:91, 10.12.2015.
[150] Oikeudenkäymiskaari 4/1734, 17:1.2.

and the alcohol found in blood, could not be regarded as believable and therefore enough as opposite evidence. Furthermore, the mother stated in her appeal that the preliminary investigation was inadequate as the possibility for an error, which was told to her by the hospital, that the disinfectant being the reason for the alcohol in the blood. In addition the police tried to question this possibility of error from the hospital but never got a reply. The mother also stated that the effects on the symptoms of her son were not investigated enough. The Supreme Court reverted the case back to the Court of Appeals stating that it should have granted the mother leave for continued consideration.

The Supreme Court of Finland had a very similar case as one from the European Court of Human Rights. In this Finnish case the district court convicted a man inter alia of an aggravated endangering of traffic safety without proper evidence.[151] The case was about the reversed burden of proof and whether it was applicable without violating the presumption of innocence. The district court regarded the man guilty because a witness had stated that a person of same age and sex as the accused, had driven the car and that the narrative of the accused was not believable. The man appealed to the Court of Appeals to grant him leave for continued consideration which the Court of Appeals denied. The district court's conviction was based on the narrative of the police witness, who could only say that the age and the sex of the accused matched the driver, and that the narrative of the accused was not regarded as believable insofar as he denied he drove the car. The Supreme Court stated that according to the Finnish Code of Judicial Procedure, Chapter 17, Section 1(2), the prosecutor has to prove the facts on which the charges are based on.[152] However, there are times that the accused can be required to prove the facts that their defence is based on. The evidence in support of the charges in return has an effect on what kind of explanation can be required from the accused on the grounds of their reasoning. The European Court of Human Rights had regarded in the case *Telfner v Austria*[153] that the national courts had reversed the burden of proof from the prosecutor to the accused, and therefore violated the presumption of innocence as there was no proper evidence against the accused. The courts had convicted a person of causing injury by negligence in a minor accident, who was the main user of the car that was part of the accident and who had not further explained the denial of the charges. The Supreme Court stated that the police witness did not identify the driver to be the accused but a person whose age and sex matched him. Otherwise evidence was based on the

151 Korkein oikeus, KKO:2012:27, 29.12.2012.
152 Oikeudenkäymiskaari 4/1734.
153 ECHR 20.3.2001, 33501/96, *Telfner v Austria*.

facts that the accused owned the car and that it is mainly in his use. The Supreme Court regarded that the evidence which the charges were based on, was not so convincing that the accused should have explained further his argument that someone else borrowed and drove the car and that he himself was somewhere else at the time of the events. In the Court of Appeals the question was not only about the re-evaluation of the evidence for the support of the charges but also whether in a case like this, the burden of proof can be reversed to the accused without violating the presumption of innocence. This latter question, whether the burden of proof can be reversed and to what degree has an effect on the believability of the narrative of the accused. Therefore, the Supreme Court stated that there is a well-grounded reason to doubt the correctness of the judgement of the district court also in the light of the evaluation of the evidence. The Supreme Court ruled that the case were to be reverted to the Court of Appeals.

Even though the presumption of innocence should be a guiding principle in criminal proceedings in Finland and the judges, or prosecutors, should consider the evidence objectively and in favour of the defendant, that might not always be very easy even for professional judges. When asked whether there ever comes pressure from somewhere, such as media, colleagues, bosses, concerned citizens, for judges or prosecutors to convict or prosecute someone, both informants concluded that even though there should not be such pressure and even if there was, it absolutely should not be given notice, but they hesitantly admitted that there might be situations where totally dismissing this kind of pressure might be difficult.[154] [155]

What comes to violations of the presumption of innocence, there is specifically one big and widely known case, which caught the attention of the public and that has violated the presumption of innocence in Finland. The case is Ulvila murder case. In 2006 a man was murdered at his own home while his wife and children were in the house. In 2009, the prosecutor started the accusations towards the wife, the first judgement, which was an interlocutory judgement, the accused was stated not guilty[156] but in the judgement that was given a few months later, the accused was stated guilty of the murder of her husband. This started a round of appeals, further investigations and judgements[157] and the case went all the way through from district court to the Supreme Court twice and finally the murder charge was dismissed because of

[154] Koppinen, T. (The Chief Justice of the District Court of Central Finland) Interview 10.4.2017.
[155] Visakorpi, M. (The head District Prosecutor of the district of central Finland.) Interview 10.4.2017.
[156] Satakunnan käräjäoikeus, R /608, 22.6.2010.
[157] Vaasan hovioikeus, VaaHO:2015:2, 19.2.2015.

lack of evidence and the Supreme Court found that the presumption of innocence had been violated in several occasions during the proceedings.[158]

4.3. Procedural scope in Sweden

The basics of legal proceedings in Sweden are to the most degree identical to those in Finland which are described in section 4.2 of this research. Therefore the procedural scope in Sweden is introduced very briefly. There are, however, some differences in the structure of the law and in the wording of the legal norms. For the first, unlike Finland, Sweden has no separate criminal code but the Code of Judicial Procedure[159] covers provisions for criminal procedures as it does civil procedures. The presumption of innocence is mostly approached from a different angle, mainly the burden of proof of the prosecution which together with proof beyond reasonable doubt is believed to be equivalent to the presumption of innocence.[160] In Sweden, the evidence of the guilt has to be even a bit stronger than in Finland in order to give an indictment, because of a minor difference in the wording of the laws.

Respecting the presumption of innocence in criminal proceedings does not seem to cause any major problems in Sweden and it appeared to be difficult to find relevant Swedish appeal cases from neither Swedish Supreme Court nor The European Court of Human Rights. Of the few cases concerning the presumption of innocence the case *Janosevic v Sweden* is quite typical. In the case the applicant alleged that Swedish Tax Authority had levied oversized taxes to him and the taxi company he owned and therefore caused the bankruptcies of both. He appealed for the Tax Authority's action first in Swedish appeal courts and finally to The European Court of Human Rights but no court instance found any violation of the presumption of innocence.[161]

Both in Finland and Sweden a person is entitled to get compensation for the time they were kept in pre-trial detention if they are freed of charges.[162] Swedish Supreme Court has processed several cases where the compensation has been denied in lower courts or the appellant is not content with the degree of the compensation. Of these cases one is of particular interest as the original claim for compensation was made against a newspaper and not public officers or the

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158 Manner, J. Tapaus Auer asianajajan näkökulmasta, 2014. www.asianajajaliitto.fi/files/3044/Juha_Manner_Tapaus_Auer_asianajajan_na_ko_kulmasta.pdf (26.2.2017).
159 Rättegångsbalk 1942:740.
160 Wong, *supra* nota 127, p 773.
161 ECHR 23.7.2002, 34619/97, *Janosevic v Sweden*.
162 Rättengångsbalk 1942:740, Chapter 24, Section 24.

court. This judgment is important as it contains discussion about whether media should also respect the presumption of innocence.

In this case a man had been mistakenly suspected for the murder of the Swedish minister Anna Lindh. He was taken into custody for ten days until he was released as the evidence suggested that another person was indeed the murderer. During that time several newspapers and other media published articles were he was presented as guilty of the murder. One newspaper in particular wrote several articles about his background and personal life. The appellant had taken the newspaper to court for its actions and applied compensation for destroying his reputation and exposing things about his personal life. These compensations were, however, denied by both the court of the first instance and the Court of Appeals as the actions of the newspaper were seen to be protected by the freedom of the press. In addition, the appellant was ordered to cover the costs of legal proceedings of the newspaper. The Swedish Supreme Court, however, released the appellant from paying the legal costs, as it considered that despite the freedom of the press the newspaper had a moral responsibility for its action and the newspaper had seriously damaged the reputation of an innocent man.[163]

4.4. Procedural scope in England

One important starting point for interpretation of the presumption of innocence in English jurisdiction is the decision of the European Court of Human Rights *Salabiaku v France* from the year 1988.[164] This particular case has set an example for interpretation of the presumption of innocence and for the burden of proof of the prosecutor in all European countries. In England the case was of particular importance as the judgment from the European Court of Human Rights was in strong contrast with the reversed burden of proof that had been in wide use in criminal proceedings in England.

In this case, the applicant was convicted of smuggling as for a violation of French Customs law as he had picked up a suitcase that had drugs inside. European Court of Human Rights stated that if the state stays inside of particular lines and it was examined through a test of reasonable limits. As the French Customs law stated that a person that has been caught with drugs in his custody were to be regarded as responsible. However, if the accused can prove his innocence, they can be

[163] Högsta domstolen NJA 2012, p 336.
[164] Stumer, *supra* nota 2, p 54.

freed of charges. So, the presumption is to regard a person who has drugs in their custody as guilty. European Court of Human Rights stated that presumptions like these, are not violations of the European Convention on Human Rights Article 6(2) as the conviction is not an automatic consequence of the inventive rule of this presumption.[165] The importance of this case in the point of view of the United Kingdom, and other countries too for that matter, lies within the question whether Article 6(2) is applicable in the cases of strict liability.[166]

The whole of the United Kingdom has a very special characteristic in their law that has been interpreted since 1556 until very recently, that has sent innocent people to jail more than could be allowed. The characteristic is called joint enterprise and its meaning is that if you have been at the place of the murder even only as a witness, as long as the prosecution can place you there and can argue that the person could foresee the crime, you can be charged with murder accordance with the joint enterprise.[167] This legal praxis can be said to be a travesty of the presumption of innocence. Until the year 2016 the courts have convicted innocent people just by accordance of the joint enterprise, but this changed when the Supreme Court gave a new landmark judgement in *R. v Jogee*[168], where the court stated that the joint enterprise has been interpreted wrong for the last 30 years and gave all the wrongfully convicted people a new chance to appeal the court to nullify their verdicts but they need to show injustice of substantial nature.

As for this statement of interpreting joint enterprise wrong and otherwise sentencing people for crimes they did not commit, for reasons and evidence that were not properly investigated, there have been several cases over the last years, where innocent people can get their names cleared by courts. Two of these people were Sam Hallam and Victor Nealon.[169] Both of these men were convicted of criminal offences of serious nature, Hallam of a crime and Nealon of an attempted rape. In both cases the evidence was circumstantial and later on in Hallam's case, the two eye witnesses' identification of Mr. Hallam could not be trusted any longer. In addition it was suggested that he had not deliberately fabricated his alibi as had been thought. As for Mr. Nealon, there was new DNA evidence found on the victim's clothes, that surfaced in 2012 and that did not match Nealon's. Both of these men applied for compensation on the grounds of

165 ECHR 7.10.1988, 10519/83, *Salabiaku v France*.
166 Stumer, *supra* nota 2, p 54.
167 FitzGibbon, F. Joint Enterprise. London Review of Books 2016, 38(5), p 26.
168 UKSC 2015/0015, *R v Jogee* 18.2.2016.
169 EWHC 1565, *Nealon & Anor, R v The Secretary of State for Justic*e 8.6.2015, and EWCA Civ 355, *Hallam & Anor, R v The Secretary of State for Justice* 11.4.2016.

Section 133 of the Criminal Justice Act 1988 but they were both denied the compensation due they could not proof that they were innocent beyond reasonable doubt as is required in a test established in Criminal Justice Act 1988's 2014 amendment.[170] After being denied the compensation, both men submitted to the Divisional Court that the Criminal Justice Act 1988 Section 133(1ZA) is incompatible with the European Convention on Human Rights Article 6(2) and therefore the appeal concentrated on the term "miscarriage of justice" and its definition. The appellants stated that the Divisional Court should follow the judgement of the European Court of Human Rights *Allen v the United Kingdom*. In this current case pf Hallam and Nealon, Lord Justice Burnett dismissed the Court's judgement and arguments and decided to follow national case law where he drew from the case of *R (Adams) v Secretary of State for Justice*.[171] In that particular case it was stated that the term "miscarriage of justice" includes a *"new or newly discovered fact"* that "so undermines the evidence against the defendant that no conviction could possibly be based upon it." For Hallam and Nealon this meant that neither of them got the compensation they did seek for serving time in prison.

In the case of *Allen v the United Kingdom*[172] the applicant was convicted of the manslaughter of his own son in the form of shaken baby syndrome. He was later on acquitted in the English Court of Appeal in the light of new evidence that could mean that the applicant's son may have died due to another cause. Even though it was stated by several medical professionals that the applicant's son may have had another cause of death, the court stated that conviction of Mrs. Allen is not safe but underlining is that they regarded him as guilty. In this case, the European Court of Human Rights declared that the presumption of innocence ha not only one but two aims, where the first one is the procedural guarantee that is applied in the course of prosecution in criminal trials. The second one is to protect individuals who have been acquitted of criminal charges or against who the charges have been dropped and the criminal proceedings are discontinued. This protection is for the individuals against authorities and public officials who treat the individuals as guilty of the crime they were accused of and it the protection this aim offers is to protect the reputation of the individual.

The second dimension of the presumption of innocence does not require a formal decision of guilt but it is sufficient enough that the judgement shows satisfaction towards the guiltiness of

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170 Hitchcock, A. Wrongful Conviction and Compensation. 17.7.2015 (Article) www.keepcalmtalklaw.co.uk/wrongful-conviction-compensation-hallam-nealon/ (24.4.2017)
171 UKSC 18, *R (Adams) v Secretary of State for Justice* 11.5.2011.
172 ECHR 12.7.2013, 25424/09, *Allen v the United Kingdom*.

the accused.[173] This is stated in the decision of European Court of Human Rights in the case of *Yassar Hussain v the United Kingdom*.[174] In this particular case, the applicant was arrested on suspicion that he had supposedly intimidated witnesses. He was later on charged with several counts of doing acts tending and intended to pervert the course of public justice. The case was in the reliance of an eye witness who admitted being a heroin user and therefore unreliable as a witness. After identifying Mr. Hussain leading to his charges, the witness was very reluctant on giving evidence and did not show before the Crown court. The applicant was acquitted but he was refused the reimbursement of his costs. The Court held that there had been a violation of the Article 6(2) as the judge of the Crown court's comments for the refusal implied that even though the applicant was acquitted and the witness did not show, that there was clear and compelling evidence of the guilt of the applicant.

Similar to this case was the case of *Ashendon and Jones v the United Kingdom*[175] where the applicants were similarly to the case of Hussain denied of reimbursements of their costs. The first applicant, Mr. Ashendon, was charged with burglary, sexual assault and rape by digital and penile penetration. At the moment of the actions, the applicant was under the influence of alcohol and ecstasy and he had no memories of the night. He pleaded not guilty to the charges. There was no evidence found to prove the burglary and he was acquitted of the other charges. As for the first applicant's case the final question was whether the offence was rape or sexual assault and as he was under influence and could not tell anything of the night, the comment that the applicant had brought the trial upon himself as a justification for denying the costs, was not a violation of the Article 6(2) according to the European Court of Human Rights. The second applicant, Ms Jones was charged with money laundering, theft and fraud. When police were doing the investigation, the applicant stayed silent and opened up just in court giving evidence in reply of the prosecutor's found evidence in the shape of a tape which was the prosecutor's most compelling evidence. The applicant stated that the content on the tape was old and taken out of context. The jury acquitted the applicant but the judge denied her costs with justifications similar to Mr Ashendon. The judge stated that as Ms Jones did not cooperate in the first steps of the investigation, although advised by her solicitor in good faith, she brought the trial upon herself when she could have avoided it altogether. The European Court of Human Rights did not find a violation of the Article 6(2) as the justification was not stating the applicant as guilty. The Court

[173] Harris *et al*. *supra* nota 66, p 464.
[174] ECHR, 7.3.2006, 8866/04, *Yassar Hussain v the United Kingdom*.
[175] ECHR, 15.12.2011, 35730/07 and 4285/08, *Ashendon and Jones v the United Kingdom*.

continued that the first applicant's case should be separated from the case of *Yassar Hussain v the United Kingdom* as where the Crown court had stated that there was compelling evidence against him, even though there was no evidence called and it was found that Mr. Hussain had done nothing to bring the prosecution upon himself. As for the second applicant, the judge in trial accepted that Ms Jones had followed her lawyer's advice and exercised her right to remain silent but that the tape required for an explanation from the applicant which lead to a trial. The applicant could have avoided the prosecution by answering questions in the investigations.[176]

As the examples provided in this chapter show there have been plenty of cases in England where the national Common law tradition and the policy of the European Court of Human Rights have been in a collision. Usually the collision has been due to the burden of proof of the accused that had been widely used in English proceedings and which is acceptable according to the European Convention on Human Rights. It was only in 1998 when the Convention was incorporated into the national law in the United Kingdom with the Human Rights Act 1998. The much older national tradition lives still deeply rooted in the minds of British people, including jurors and even judges, that it may still take a while until the "new" interpretation of the presumption of innocence has replaced the "old" interpretation and until then wrongful convictions and several appeals to the European Court of Human Rights are plausible.

[176] ECHR 15.12.2011, 35730/07 and 4285/08, *Ashendon and Jones v the United Kingdom*, para 38-39.

Conclusions

In this thesis, the author has examined the history of the presumption of innocence and the basic human rights documents in addition to basic principles of the presumption of innocence and how it is applied to the national legislations and case law as well as the case law of the European Court of Human Rights.

The presumption of innocence is one of the central human rights that is registered in every human rights treaty and document. Many of these treaties, such as the United Nations Universal Declaration of Human Rights and The International Covenant on Civil and Political Rights are not endorsed with strong legal sanctions. The International Covenant on Civil and Political Rights has been ratified by 169 countries and even more have signed it. However, many of the countries violate human rights constantly. It is clear that in these countries where the government is guilty of violating human rights continuously and people can be convicted for long sentences in prison, or even to death, without proper evidence, without evidence at all, or even with makeshift arguments, that they also are guilty of violating the presumption of innocence.

The European Convention on Human Rights from the Council of Europe is exceptional human rights treaty as it is endorsed by a strong monitoring organisation. The Council of Europe has strong enforcement mechanism and its own court, the European Court of Human Rights, for monitoring the Convention. Every individual from the Member States can apply to the European Court of Human Rights in case their rights are neglected in their home countries. There are 47 Member States which include almost all of the European countries excluding Belarus. The presumption of innocence is defined very vaguely in the European Convention on Human Rights and therefore the case law from the European Court of Human Rights gives the actual guidelines from juridical practice in European countries. The ability and willingness of national courts for taking the presumption of innocence into account in criminal proceedings are then "tested" afterwards in the form of appeals made to the European Court of Human Rights.

According to legal literature and the case law of the European Court of Human Rights there are two main elements of the presumption of innocence: the burden of proof of the prosecutor and *in dubio pro reo* principle. The presumption of innocence includes that the burden of proof lies totally on the prosecution and if there is not enough evidence or if the case is otherwise unclear, the judgement should be made for the benefit of the accused (*in dubio pro reo*). It could be said

that *in dubio pro reo* is a natural and inseparable part of the presumption of innocence, but mentioning it also separately just stresses the importance of this principle.

It has also been stated that the burden of proof on the prosecution might not always be in the best interest of the accused as it leads to situation where the suspect and the defence have a very passive role in the criminal process and the evidence presented in a criminal trial is largely aimed to prove the defendant guilty of the crime. This might give an impression that the accused is indeed guilty, and especially jurors or less experienced judges might have difficulties to adhere to the presumption of innocence.

The research question of the thesis was: Does the lack of definition of the presumption of innocence lead to a situation where the presumption is being ignored in judgements? The author's sub-questions was: Can prejudiced views bypass the presumption of innocence in judgements? The author's hypothesis was: Ignoring of the presumption of innocence is more likely to happen when 1) the judges are not sufficiently familiar with the presumption of innocence and 2) if there is particular outside pressure on the judges and/or the jury to convict someone of the crime.

Based on the research material the author will conclude that the lack of definition of the presumption of innocence in national legal norms does not cause any particular problems as the content and scope of the presumption is defined and commented in detail in several cases of the European Court of Human Rights and its case law on the basis of legal praxis on human rights issues in all European countries. In Finland and Sweden there is no definition of the concept in national legislation but the presumption of innocence has been as a ventral legal principle in both countries for several hundred years. Being a Common law system, the legal norms do not play an important role in English legal practice but the presumption of innocence has been considered an important part of legislation for centuries. Therefore it cannot be concluded that the lack of definition of the presumption of innocence in national law would *per se* cause false convictions and ignoring the presumption of innocence in criminal proceedings but the possible violation of the principle have been due to other reasons that are related to the particular legal case.

There is, however, a great difference in how the presumption of innocence is being noticed in the legal proceedings in England compared to Finland and Sweden. The author will conclude that in Finland and Sweden the presumption of innocence is better noticed through the legal proceeding

as a whole, while in England it gets attention only in a court trial and even there it is stressed less than in Finland and Sweden. This is mainly due to the differences between Civil and Common law and to some specific features of Finnish and Swedish criminal proceedings.

In Finland and Sweden a person is formally charged at a relatively late stage of the legal process. An indictment is made only after two separate stages of preliminary investigation, and it is made only if there is strong evidence of the guilt. In England a person is formally charged at a much earlier stage of the proceeding after the preliminary rulings. These differences in proceedings make a huge difference when considering the role of the presumption of innocence. In Finland and Sweden a person is not even formally charged without strong evidence while in England the charges are made on much lighter grounds.

Other major difference between Civil law system, as of Finland and Sweden, and Common law system, as of England, is the composition of the courts of the first instance. In England the judgments are made by a jury formed of ordinary citizens while in Finland and Sweden professional judges are in charge of the judgements. This difference is very important when it comes to notifying the presumption of innocence. The professional judges have a much better knowledge and understanding of the presumption of the innocence than the members of the jury. When the lack of knowledge of this presumption is combined with the fact that in the court room mainly evidence of the prosecution is being presented, due to the burden of proof of the prosecution, it may lead to a situation where the members of the jury are more likely to see the accused as guilty than the professional judges.

The analysis of the research material gives support to the first part of the author's hypothesis that ignoring of the presumption of innocence is more likely to happen when the judges are not sufficiently familiar with the presumption of innocence. The members of the jury are more likely to ignore the presumption of innocence than professional judges, and professional judges in the Court of First Instance are more likely to ignore it than the judges in the Court of Appeal.

The analysis of the research material gives also support to the second part of the author's hypothesis that ignoring of the presumption of innocence is more likely to happen when there is a strong outside pressure on the judges or the jury to convict someone of the crime. It is evident from the case law from both Finnish courts as well as the cases from the European Court of Human Rights that even professional judges and other public officers can make judgments of the

guilt even before the actual proceedings and without giving enough attention to the presumption of innocence. This is more likely to happen with legal cases that are of particular importance either for the government, to the public or both. These legal cases may be connected to acts of terrorism or other extremely brutal or cruel crimes, or the accused may have a high status in the society or are of special public interest. In these cases there may be strong pressure to find and convict the guilty person and therefore the presumption of innocence may be ignored even by professional judges but the pressure may have even more impact on the members of the jury.

The three countries that were in focus in the author's research can in no mean be seen as having severe problems in either in human rights issues in general or in matters of a fair trial in particular. The author did, however, choose her native country Finland as the main focus of the research. The author then chose to make comparisons with Sweden and Finland for two particular reasons: first because of the similarities (Sweden) and differences (England) with the legislation in Finland, and secondly for the practical reason that the author was able to read legislative materials and documents in the native languages of these two countries. According to the statistics of the European Court of Human Rights[177] and Department for the Execution of Judgments of the European Court of Human Rights of Council of Europe[178], there are far more problems with a fair trial in countries like Turkey, Russia, Ukraine and Romania than in Finland, Sweden or The United Kingdom. However, as the author is not able to understand the native languages of these countries it was impossible for her to focus the research on them. The author does suggest that it would be important to analyse the role of the presumption of innocence also, and particularly, in these countries by someone with adequate knowledge of the language.

It would also be interesting to look at the role of the presumption of innocence in more detail also in Finland, Sweden and England, particularly in the judgments of the courts of the first instance. The author has based her analysis mainly on the cases of national Supreme Courts or of Court of Appeals or on the cases of the European Court of Human Rights as the documents and judgments of these cases are available on Internet databases. Going through the cases from the courts of the first instance would require going through the case files in local court archives.

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177 European Court of Human Rights. Statistics. www.echr.coe.int/Pages/home.aspx?p=reports&c= (25.4.2017) and European Court of Human Rights. Press resources. Country profiles. www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c= (25.4.2017).

178 Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, Factsheets. www.coe.int/en/web/execution/factsheets (25.4.2017).

One important line for further research on the presumption of innocence would be to analyse in more detail certain types of crime in which the burden of proof of the prosecutor and getting evidence beyond a reasonable doubt can be seen as particularly problematic. This is the case for example in sexual assaults and rapes and also in suspected violence towards small children.

During the last years Europe has also been targeted by terrorism far more often than during few previous decades. In order to be able to secure the national safety and the safety of the public it would be important to prevent the acts of terrorism in advance. But giving solid evidence on the intentions of people is almost impossible. What is the role of the presumption of innocence when it comes in conflict with the issues of public security? It is obvious that the "presumption of guilt" that was adopted in the United States after the terrorist attacks of 2011 was not acceptable. But what can European countries do when they want to secure the human rights and fair justice to everyone and yet want to be able to arrest and convict terrorists before they actually execute the terrorist act.

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