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The presumption of innocence: A golden thread always to be seen

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THE PRESUMPTION OF INNOCENCE: A GOLDEN THREAD ALWAYS TO BE SEEN

Although the presumption of innocence is fundamental to the modern criminal justice system, there is little clarity on what it is and how it applies. This essay argues that "innocence" in the criminal justice system should be confined to legal innocence and not factual innocence. Accordingly, the presumption of innocence should be confined to presuming the legal innocence of an accused. It follows then that the presumption of innocence cannot apply to any part of the criminal process apart from the trial itself. Further, jurisprudentially, given that the presumption of innocence is best understood as a procedural aspect of the right to a fair trial, the existing law needs to be reformed in some aspects so as to accommodate such a conception of the presumption. To that end, this essay proposes some possible reforms as a way to move forward.

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I. Introduction

1 For something supposedly as fundamental as the presumption of innocence, there is surprisingly little clarity as to what it actually is and entails in Singapore's criminal justice system.[1] There has to be a deeper understanding beyond the pithy summary, "innocent until proven guilty." The questions proceeding from such a confusion are not minor ones, but have significant impact on the way the legal system understands the presumption, both as a matter of practice, and as a matter of jurisprudence. To date, the presumption has largely been taken for granted, with the Singapore courts mentioning it and making references to the *Woolmington* conception, but without authoritatively setting out a

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[1] Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 79.

clear and undisputed definition of the presumption.[2] In this regard, while foreign jurisdictions have gone a little further in this aspect, the debate over its content continues, with prominent academics holding different views.[3]

2 The questions this essay answers are thus threefold. First, how should "innocence" be understood in the context of Singapore's criminal procedure and as a corollary, what should "presuming innocence" mean? Second, when should the presumption apply, and what should it apply to? Third, what sort of preliminary reforms should be undertaken so as to best give effect to and accommodate the presumption so defined?

3 To that end, the thesis of this essay is threefold. First, "innocence" in the criminal trial process should be confined to probatory innocence, as opposed to material innocence. Second, given that definition, it follows that the presumption does not applies to any point in the criminal process *outside* of trial. Nor should the presumption be used to adjudicate on the substance of the criminal law. Finally, possible reforms could be undertaken to accommodate this understanding of the presumption, including the recalibration of certain rules of evidence that reverse the burden of proof, *e.g.*, the presumption of trafficking in the Misuse of Drugs Act ("**MDA**"),[4] as well as reconceptualising the privilege against self-incrimination as a right. Ultimately, the presumption of innocence should be understood as more akin to a procedural right rather than as a substantive human right.

II. Woolmington and the Basis of the Presumption

4 Our discussion begins first with the presumption. Few paragraphs are more famous with regards to the presumption of innocence than Viscount Sankey LC's judgment in *Woolmington v Director of Public Prosecutions* ("***Woolmington***"):[5]

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2 Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 79.

3 See, *e.g.*, the differing views of Andrew Stumer, Richard Lippke, and Larry Laudan who argue for a procedural view of the presumption of innocence, against that of Ho Hock Lai and Chen Siyuan, who are of the view that the presumption ought to be more substantive in nature. See also Lippke's and Laudan's disagreement on what the concept of "innocence" should be.

4 Misuse of Drugs Act (Cap 185, 2001 Rev Ed).

5 *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481.

> "Throughout the web of the English Criminal Law ***one golden thread is always to be seen***, that it is the duty of the prosecution to prove the prisoner's guilt … If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution of the prisoner … the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, ***the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained***." (emphasis added)

The *Woolmington* conception is therefore understood to be a statement on the presumption of innocence. The burden of proof ("**BOP**") is on the Prosecution to prove the guilt of an accused person, and the standard of proof ("**SOP**") is beyond a reasonable doubt.

5 The most obvious rationale for the presumption is the need to protect innocent people from wrongful conviction.[6] As the court in *Jagatheesan s/o Krishnasamy v PP*[7] recognised, "It would be wrong to visit the indignity and pain of punishment upon a person … unless and until the Prosecution is able to dispel all reasonable doubts that the evidence … may throw up."[8] Therefore, because of the weighty impact criminal sanctions have on the accused's finances, liberty or life, the burden is laid on the Prosecution to prove his guilt beyond a reasonable doubt, which is an exceptionally high standard. Furthermore, placing the burden on the Prosecution also goes some way towards normalising the disparity in positions between the parties when entering a criminal trial, given that the Prosecution has historically always had the better "resources to investigate, prosecute and obtain evidence".[9]

III. The State of the Presumption

6 The *Woolmington* conception has been cited approvingly in the Singapore courts. Indeed, *XP v PP* ("***XP***")[10] described the presumption as "the cornerstone of the criminal justice system and the bedrock of the

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6 Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing, 2010), 28.

7 *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45.

8 *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45, [60].

9 Chen Siyuan and Denise Wong, "Civil and Criminal Litigation" in *The Legal System of Singapore: Institutions, Principles and Practice* (Gary Chan Kok Yew & Jack Tsen-Ta Lee gen ed) (LexisNexis, 2015), 292.

10 *XP v PP* [2008] 4 SLR(R) 686.

law of evidence. As trite a principle as this is, it is sometimes necessary to restate that every accused is innocent until proven guilty."[11]

7 A quick survey of various international instruments shows that other jurisdictions have committed to entrenching this right to the presumption of innocence. For instance, under Art 14 §2 of the *International Covenant on Civil and Political Rights*,[12] everyone charged with a criminal offence "shall have the right to be presumed innocent until proved guilty according to law." The same applies for the *European Convention on Human Rights* ("[e]veryone charged with a criminal offence shall be presumed innocent until proven guilty according to law"),[13] as well as the *American Convention on Human Rights* ("[e]very person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law").[14] These three representative instruments seem to follow the *Woolmington* conception, and additionally accord the right to be presumed innocent substantive human right status. There also does not appear to be any large disagreement over the SOP of the Prosecution's case (*viz*. that the case against the accused must be proved beyond a reasonable doubt).

8 Nevertheless, this right to be presumed innocent does not appear to enjoy constitutional status in Singapore. The Singapore Constitution,[15] unlike the abovementioned three documents, does not explicitly define or affirm the presumption.[16] No local case has thus far also declared the presumption of innocence to be a constitutional right.[17] To muddy the waters further, none of the three international instruments cited above provide any guidance as to how we should understand the concept of "innocence", which continues to cast the scope of the

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11 *XP v PP* [2008] 4 SLR(R) 686, [91].

12 International Covenant on Civil and Political Rights (16 December 1966) (entered into force 23 March 1976).

13 European Convention on Human Rights (1950), Art 6 §2 (entered into force 3 September 1953).

14 American Convention on Human Rights (22 November 1969), Art 8 §2 (entered into force 18 July 1978).

15 Constitution of the Republic of Singapore (1999 Reprint).

16 Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 81. Although an argument could be made that Art 9(1) of the Constitution provides such a presumption, Chen argues that Lord Diplock did not read the presumption of innocence into Art 9(1).

17 Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 82.

presumption in doubt. This lack of clarity as to what "innocence" or "guilt" entails leads to further confusion: what exactly should we be presuming? If the presumption is a substantive right, does it mean that the presumption can be used to adjudicate on the substance of the criminal law? And what kind of criminal justice system would best fit such a presumption?

IV. The Concept Of "Innocence" and the Corollary Definition of the Presumption

9 Bearing these issues in mind, this essay first points out the two prevailing theories of "innocence", so that a clear understanding of what "innocence" means will lead to a clearer conception of what "presuming innocence" would entail.

A. The Two Meanings of Innocence

10 According to Professor Laudan, there are two meanings of "innocence", linked together with two meanings of "guilt" – either material or probatory.[18] He defines them as such:[19] first, *material innocence*, where an accused is factually innocent as he did not commit the offence so defined, or has an available defence. The flipside to this is *material guilt*, where the accused is factually guilty in that he committed the offence so defined, without any available defence. Second, there is *probatory innocence*, where an accused is legally innocent as the Prosecution's case did not reach or exceed the standard of proof. The flipside, again, is *probatory guilt*, where the accused is legally guilty in that the Prosecution's case has reached or exceeded the standard of proof. In essence, material innocence or guilt refers to *factual* innocence or guilt, whereas probatory innocence or guilt refers to *legal* innocence or guilt. For the man on the street, it is likely that the conventional notion of "innocence" is simply confined to material guilt: a simple question of whether the accused is guilty or not.

11 Laudan then goes on to explain the asymmetry between the two concepts. Whereas a finding that one is probatively guilty may possibly support the truth that one is *in fact* materially guilty (due to the factual

[18] Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333.

[19] Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 339.

matrix passing the requisite standard of proof), a finding that one is probatively innocent does not at all lead to the inference that one is factually innocent.[20] In this author's view, this is because a finding by the court that one is probatively innocent is simply a finding of "not guilty" – the court is not actually making a pronouncement on the truth or veracity of the assertion that one is in fact innocent. Indeed, this is recognised in s 45A(3) of the Evidence Act ("**EA**"),[21] which considers a person convicted to possess the requisite *mens rea* and *actus reus* of the offence respectively.

B. Excursus: Where Does Singapore Seem To Stand?

12 The question then, is where Singapore stands with respect to the *latter* logic, *i.e.*, the distinction between factual and legal innocence. In 2008, an Attorney-General's Chambers ("**AGC**") spokesman was reported as having said that:

> "[t]here is often confusion…[of] what an acquittal means. The prosecution [must] prove the case beyond a reasonable doubt. This means that if there is any reasonable doubt, the accused gets the benefit of it … [it] does not mean that the accused was innocent in the sense that he did not do the deed."[22]

However, his distinction between legal and factual innocence drew some furore. Although not explicitly referring to the comment, V K Rajah JA (as he then was) said in *XP*:[23]

> "***If the evidence is insufficient to support the Prosecution's theory of guilt***, and if the weaknesses in the Prosecution's case reveal a deficiency in what is necessary for a conviction, ***the judge must acquit the accused***, and with good reason: it simply has not been proved to the satisfaction of the law that the accused is guilty, and ***the presumption of innocence stands unrebutted***. ***It is not helpful, therefore, for suggestions to be subsequently raised about the accused's "factual guilt" once he has been acquitted. To do so would be to undermine the court's finding of not guilty and would also stand the presumption of innocence on its head*** … the

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20 Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 339 – 340.

21 Evidence Act (Cap 97, 1997 Rev Ed).

22 K C Vijayan, "When acquittal is bitter-sweet", *The Straits Times*, 8 May 2008. However, the comment ought to be considered in the context of the interview, which focused on the issue of compensation; the spokesman was "explaining why compensation could not be paid to everyone who gets acquitted, by pointing out that not everyone who gets acquitted is necessarily innocent".

23 *XP v PP* [2008] 4 SLR(R) 686, [94].

> decision of guilt or innocence is constitutionally for the court and the court alone to make … there is only one meaning to "not proved" and that is that it has not been established in the eyes of the law that the accused has committed the offence with which he has been charged." (emphasis added).

13 In this regard, it is noteworthy that while Rajah JA disapproved of the AGC making comments on the material guilt of the accused, his definition of an acquittal was not explicitly defined as a finding of material innocence; all he had said was that where probative guilt was not proven, then no further suggestions of the accused's material guilt ought to be made, so as to prevent any aspersions cast upon the court's pronouncement of the absence of guilt.

14 The Minister for Law (K. Shanmugam) however, in a reply to questions posed by certain Members of Parliament, defended the AGC's statement in Parliament. He cited then AG Chan Sek Keong,[24] stating that the courts do not concern themselves with the question of material innocence. The Minister went onto define an acquittal as "the prosecution [failing] to prove the case beyond reasonable doubt."[25] The sitting Government of the day thus held that the criminal process ought only to be concerned with probative innocence, stating that a person may have committed a crime (*i.e.*, be materially guilty), but yet still obtain an acquittal in court (*i.e.*, not probatively guilty).[26] On balance therefore, it would appear that Singapore's understanding of "innocence" leans more towards *probative* innocence as compared to *material* innocence.

C. Argument for the Probatory Theory Of "Innocence"

15 Proceeding on the assumption that the Singapore legal system's understanding of "innocence" in the criminal justice system is simply probative innocence, it should remain that way. This is especially so if we consider the criminal trial process, the relationship between the civil and criminal domains, the resulting lack of clarity in the content of the presumption otherwise, and the epistemic state of the court.

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[24] Chan Sek Keong, "The Criminal Process – The Singapore Model" [1996] Singapore Law Review 434, 471.

[25] *Singapore Parliamentary Debates, Official Report* (25 August 2008) vol 84, col 2983 (K Shanmugam SC, Minister for Law).

[26] *Singapore Parliamentary Debates, Official Report* (25 August 2008) vol 84, col 2984 (K Shanmugam SC, Minister for Law).

(1) Decisions in the Criminal Trial Process and the Meaning of an Acquittal

16 First, consider the criminal trial process. Although trials are often understood as "fact-finding" processes, arguably, trials are more strictly concerned only with the establishment of sufficient facts which are probative enough to support a *legal* decision. Thus, while the trial process may deal with issues of fact, the decision to acquit or convict is ultimately a *legal* (or probatory) one that is only borne out after a factual matrix has been established to be sufficient for such a decision. This can be seen by how the Supreme Court defines an "acquittal" to be "a decision of a judge that an accused is not guilty or a case is not proven".[27] When a judge therefore acquits a person, he is making a declaration that in the eyes of the law, the accused is not guilty, in the probatory sense.

17 The criminal trial process *therefore* does not understand an acquittal to be a finding of material innocence (in that the accused did not truly commit the crime). In fact, for a factfinder to sufficiently know enough to decide on the question of whether one is materially innocent or guilty, he requires, as a minimum, one of three things: (a) to be a witness to the actual offence, (b) to possess omniscience, or (c) the accused confesses. Neither of these three methods are achievable. The first requires the judge to recuse himself; the second is impossible; and for the third, although a guilty plea is strong evidence of material guilt, there is nothing which guarantees the material truth of a confession. Thus, in *Muhammad bin Kadar v PP* ("***Kadar***"),[28] though one of the accused initially confessed to killing the deceased,[29] he was ultimately acquitted by the Court of Appeal as the evidence did not bear up in trial.[30]

18 Therefore, it is only sensible and logical to confine the decisions made within a criminal trial to the legal sense, *i.e.*, an acquittal is merely a finding of probative innocence. This would mean that the accused is not guilty in the eyes of the law, simply because the Prosecution's case has not met or exceeded the standard of proof.

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27 Supreme Court website, "Glossary of Legal Terms" <https://www.supremecourt.gov.sg/services/self-help-services/glossary-of-terms> (accessed 22 October 2020).
28 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205.
29 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205, [15].
30 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205, [194].

(2) Potential for Subsequent Civil Suits to be Successful

19 Second, the fact that the victim of a crime can still bring a civil suit against the accused and potentially succeed on a lower standard of proof lends weight to the proposition that the term "innocence" in the criminal law context ought to refer to *probative* innocence. Consider the following scenario, where *A* is charged for stabbing *B* and killing him. The Prosecution adduces circumstantial evidence, such as DNA traces belonging to *A* on the knife. However, the defence succeeds in casting reasonable doubt on the method in which the DNA evidence was obtained, and *A* is acquitted on grounds that the Prosecution has failed its case beyond a reasonable doubt. Subsequently however, *B*'s estate sues *A* for battery. Given the lower standard of proof in civil trials, *i.e.*, a balance of probabilities, *B*'s estate succeeds in its claim and obtains damages from A. The fact that *A* can be acquitted in a criminal trial but yet still found liable for damages in a civil trial based on the same factual matrix is indicative that the acquittal was never a finding of material innocence. If this scenario sounds familiar, it probably is. The case involved O. J. Simpson, who while acquitted for the murder of his ex-wife and another man on grounds of reasonable doubt (over the DNA evidence adduced),[31] was still found liable for wrongful death and battery against the man and his ex-wife.[32]

20 Of course, the civil trial could involve an action that is vastly different from the offence disclosed in the criminal trial. Nonetheless, such a scenario is not implausible. An accused may, *ex hypothesi*, not be found guilty of criminal negligence, and yet still liable for civil negligence due to differences in the standard of proof.[33] When one further considers that our courts have previously declared that the "degree" of negligence required in criminal and civil cases are one and the same,[34] the conclusion here must be that any "additional elements … to be proved"[35] is merely an *incident* of legislation, and not due to *substantive* differences in the cause of action. Consequently, it is possible for an acquitted person, whose probative innocence has been

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31 BBC website, "1995: OJ Simpson verdict: 'Not guilty'", 3 October 1995 <http://news.bbc.co.uk/onthisday/hi/dates/stories/october/3/newsid2486000/2486673.stm> (accessed 22 October 2020).

32 B. Drummond Ayres Jr., "Jury Decides Simpson Must Pay $25 Million in Punitive Award", *The New York Times*, 11 February 1997.

33 *Lim Poh Eng v PP* [1999] 1 SLR(R) 428, [27].

34 *Lim Poh Eng v PP* [1999] 1 SLR(R) 428, [20].

35 *Lim Poh Eng v PP* [1999] 1 SLR(R) 428, [27].

declared, to still be guilty factually, as reflected by a successful civil trial proved against him on a different standard of proof. Thus, the best way to reconcile this difference is to understand the acquittal in the criminal trial as a finding of probative, and not material innocence. Such an approach is superior to chalking up the difference as reflective of systemic injustice and abuse.

(3) Lack of Clarity of Content of Presumption otherwise

21 A third reason as to why the term "innocence" should be treated as legal as opposed to factual innocence lies in a counterfactual scenario. Consider this: if one agrees that "innocence" should be understood as probative innocence, it follows that the presumption of innocence must refer to a presumption of probative, and not material innocence (*i.e.*, the accused's probative guilt has not yet been proved before a court of law). However, should the presumption be understood as a presumption of material innocence, as some have advocated for,[36] there is little clarity on what exactly is to be presumed. Here, Laudan is instructive.[37]

22 Suppose that *A* is charged for allegedly stabbing *B* and killing him. What is the court to presume? Is the court supposed to begin the trial disbelieving that (a) *A* never stabbed *B*; (b) *A* never waved the knife at *B*; (c) *A* never intended to stab *B*; (d) *A* was acting in private defence, (e) *A* had diminished mental capacity; or (f) *A* was not negligent? Simply put, is the court supposed to begin the trial disbelieving *every* single possible element of the offence or is it sufficient that it disbelieves at least one?[38]

23 Conventional wisdom dictates that it is the former.[39] Yet, if the presumption refers to the presumption of material innocence, then that goes further than what the presumption actually demands of the court, since *A* is materially innocent so long as *one* element is false.[40] Moreover,

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[36] Richard L. Lippke, *Taming the Presumption of Innocence* (Oxford University Press, 2016).

[37] Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 346.

[38] Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 346.

[39] Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 346.

[40] Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 346.

it is impossible to disbelieve all possible elements at the same time, since *A* not stabbing *B* would logically rule out stabbing him but with diminished mental capacity.[41]

24 However, if the presumption is understood as referring to the presumption of probative innocence, there would not be a need for such extremes. All the court has to believe is that the elements of the offence have not been proven, since probative innocence simply means that probative guilt remains unproven. Any notion that the court may have with respect to the factual innocence or guilt of the accused is not relevant to the presumption of innocence.

(4) Better Consistency with the Epistemic State of the Court

25 The final reason is that such an approach would be more consistent with the epistemic state of the court. Consider the scenario where the court has to presume the material innocence of an accused. If so, the court must put out of its mind the thorough investigations performed and the preliminary evidence obtained by the Prosecution in making any finding against the accused. Laudan furthermore goes on to say that any fact-finder that decides that it already has sufficient information to determine factual guilt or innocence (which is what the presumption of material innocence demands) is suspect in that there is already bias,[42] even though the opinion remains rebuttable. Contrariwise, if the court were to presume probative innocence, all it would have to do is to "accept the thesis" or believe that there is not yet any evidence of probative guilt. This better reflects the epistemic state of the court, as it is difficult for any court to be truly agnostic about material guilt, given the time the accused has spent in the criminal process. It is however significantly *easier* for the court to be agnostic about probative guilt, as it has to be proved.

V. Applying the Presumption of Probative Innocence

26 Having established that "innocence" ought to be understood as "probative innocence", and the presumption ought to refer to the presumption of probative innocence, the following questions arise. First,

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41 Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 347.

42 Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11(4) Legal Theory 333, 350.

when should the presumption apply in the criminal process? A parallel question is – to *whom* should it apply? Second, *what* should the presumption apply to?

A. When the Presumption Ought to Apply

27 Those who believe that the presumption ought to be a substantive human right have, more often than not, advocated for it to apply beyond the trial context, in particular, the pre-trial phase, where officials have to justify their investigations and their detention of suspects.[43] Arguably, however, the presumption only makes sense within the context of trial, regardless of whether one perceives the presumption as referring to material or probative innocence.

(1) The Pre-Trial Context

28 Consider the pre-trial context. In the ordinary case, if a complaint is made, or an offence is discovered in some way, the matter will be investigated by the law enforcement agencies ("**LEAs**"). Once evidence is unearthed, the wheels of the criminal system will start to turn (*e.g.*, a statement is taken, the person is detained if need be, he is charged, granted bail if possible, or otherwise remanded). Nevertheless, whether or not one refers to the presumption of material innocence or probative innocence, neither would make sense in the pre-trial context.

29 If say, the presumption refers to material innocence, it will be conceptually challenging to apply. For one, how would it operate in the pre-trial context? If LEAs have to *presume* that an accused is truly innocent as a matter of *fact*, would that require them to not take any conduct against the accused (*e.g.*, detention, investigations, and statement recording), for fear of breaching the presumption of innocence? Clearly not, because in such a case, LEAs would become redundant and utterly out of place in a criminal process that *refuses* to suspect anyone – the criminal process itself becomes toothless, and this is clearly absurd.

30 Even then, even if conduct is taken against the accused, the accused is *still* considered *factually* innocent. This is because the fact that he is being investigated as opposed to being thrown into jail

[43] Hamish Stewart, "The Right to Be Presumed Innocent", (2013) 21 Criminal Law & Philosophy 407, 413.

(immediately) shows that the criminal process of establishing guilt, whether one views it as factual or probative guilt, is still ongoing. Of course, this is not to say that such conduct does not come at a cost for the accused when he is finally acquitted, but at the very least, he is still considered innocent, in whatever sense of the word. Therefore, there is nothing to presume.

31 Similarly, if the presumption here refers only to probative innocence, it will still be superfluous in the pre-trial context, since there is no probative innocence for the LEAs to presume. The accused *is* probatively innocent – his probative guilt has not yet been proven in a court of law. To that end, the relevant actions taken by the LEAs would be permissible. No other action is required – one need not presume that which is already true.

32 A possible rebuttal to this analysis is that the presumption of probative innocence would be superfluous even in the trial process, since at any point of time in the trial before the court makes a decision, the accused *is* probatively innocent and thus, there is similarly nothing for the court to presume. However, the presumption here ought only to apply to the judge,[44] in that the judge must empty himself of any presuppositions by examining the evidence produced *in the trial alone* with a neutral view, believing only that probative guilt is not yet proven. This is because the judge is the one who makes the decision to convict or acquit. Therefore, as part of some sort of "moral assurance"[45] that the decision is based solely on the sufficient evidence adduced by the Prosecution and not on his own presuppositions, there must be an additional layer of "security" predicated of the judge's epistemic state: he *must* presume the probative innocence of the accused, something that LEAs do not require.

(2) The Post-Trial Context

33 For completeness, the presumption also ought not to apply to the post-trial context. Consider the counterfactual scenario where it does. If it does, who should the presumption apply to? It cannot be the courts,

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[44] This argument applies to the fact-finders in both jury and bench trials, though in Singapore's context, the criminal process is purely bench.

[45] Richard L. Lippke, *Taming the Presumption of Innocence* (Oxford University Press, 2016). Lippke's use of "moral assurance" in his book is modified for the context of this paragraph.

given that unless and until an appeal is brought, the case will never appear before the courts again. The only logical answer is the Prosecution. Yet if the Prosecution is supposed to presume the probative innocence of an accused, would bringing an appeal against an acquittal be contrary to the presumption? Worse, if the accused ends up being convicted, at what point do we stop presuming the probative innocence of an accused? The confusion is only deepened if the presumption is understood as referring to material innocence.

B. What the Presumption Ought to Apply to

34 If properly understood as probatory, the presumption ought then to only apply to the *procedure* of the trial. Some voices have however called for the presumption to be used to adjudicate on the substance of criminal law.[46] As *Tadros* argues, the presumption ought to "place substantive constraints on the criminal law".[47]

35 However, the presumption of innocence, as properly understood, would only logically apply procedurally and not substantively. Since the presumption only requires the Prosecution to prove beyond a reasonable doubt the probative guilt of the accused, there is nothing about it that would apply *ex hypothesi* to the substance of criminal law; the presumption in and of itself is fundamentally a procedural rule of evidence.

36 It cannot be used by Parliament to decide on its criminal theory before enacting it as criminal law.[48] For instance, how will the presumption help Parliament in deciding the kind of harmful acts to criminalise? There is nothing that conceptually links the presumption to the adjudication of the substantive criminal law.

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[46] See for example Victor Tadros, "The Ideal of the Presumption of Innocence" (2014) 8(2) Criminal Law and Philosophy 449; Victor Tadros, "Rethinking the Presumption of Innocence" (2007) 1(2) Criminal Law and Philosophy 193 and JC Jeffries & PB Stephan III "Defences, Presumptions and the Burden of Proof in Criminal Law" (1979) 88(7) Yale Law Journal 1325.

[47] Richard L. Lippke, *Taming the Presumption of Innocence* (Oxford University Press, 2016), 50.

[48] For a deeper answer as to the problems of a substantive approach to the presumption, see Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing, 2010), 61 – 63.

37 This is not to say that there is *no* mechanism for the courts to adjudicate on the substance of criminal law: judicial review of the substance of criminal law (and by extension Parliament's criminal theory) seems to be a sounder alternative jurisprudentially, as compared to using the presumption to constrain legislative criminal theory.

VI. Addressing Concerns About Probative Innocence

38 That being said, there are concerns over a probatory theory of innocence, as it seems to conceive the scope of the presumption of innocence as "thin", which does not sit so well with the rationale of the presumption: to protect the materially innocent from wrongful conviction.

A. Weaker Protection for Accused Persons

39 The first concern therefore is that if the presumption merely refers to probative innocence, then there is insufficient protection for accused persons, given its "thinner" nature as compared to a presumption that presumes material innocence (which is necessarily the more robust of the two). Furthermore, since the presumption of probative innocence does not apply to the pre-trial context, there is reduced prevention of wrongful arraignment.

40 On closer inspection however, while an accused's rights ought to be treated with utmost gravity and protected fiercely, a presumption of probative innocence may not be the only means to that end. This concern can be addressed by other mechanisms that do not necessitate a more robust presumption, or much less even engage the presumption of probative innocence. For instance, one does not need recourse to the presumption to explain why LEAs ought to justify their arrest or investigations of suspects: the basic right to liberty as enshrined in Article 9(1)[49] provides a far firmer basis to ground the demand for LEAs to explain their pre-trial conduct towards suspects. After all, the presumption has never been treated with equal constitutional status as the positive fundamental liberties found in the Constitution.

[49] Constitution of the Republic of Singapore (1999 Reprint), Art 9(1).

41 Recent local jurisprudence already reveals a trend of the courts holding LEAs to greater levels of accountability for their actions,[50] without any reference at all to the presumption. In *Lim Boon Keong v PP*,[51] the court held that the Health Sciences Authority had a duty to review its procedures such that its tests would "accurately reflect the legal regime under which it operates".[52] In *Ong Pang Siew v PP*,[53] the court criticised the Prosecution's expert witness for failing to meet the professional standard required of him.[54] It would seem, therefore, that there is no need for any reference to the presumption. In any event, any concern about the scope of protection fails to consider that the presumption of probative innocence *has* protected the rights of accused persons. In *AOF v PP*,[55] the court acquitted the accused of raping his daughter after "extremely granular scrutiny of the evidential gaps".[56] The presumption, in demanding a high standard of proof (to discharge the burden of proving probative guilt), can prove to be sufficient protection when the courts impose exacting examination on the Prosecution's evidence.

42 Finally, if the presumption can be understood as being part of a right to a fair trial,[57] then it would be the principle of fair trial operating at its core – the presumption would no longer be the definitive way of securing protection for the accused, but be seen as one aspect of a larger rule that seeks to preserve the integrity of the criminal process by according the accused's rights sufficient weight.

B. Imbalance of Power Between Prosecution and Accused

43 A second concern (which is but another manifestation of the first) is that a "thinner" theory of the presumption may yet not adequately even the balance of power between the Prosecution and an accused.

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50 Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 95.

51 *Lim Boon Keong* [2010] 4 SLR 451.

52 *Lim Boon Keong* [2010] 4 SLR 451, [42].

53 *Ong Pang Siew v PP* [2011] 1 SLR 606.

54 *Ong Pang Siew v PP* [2011] 1 SLR 606, [72].

55 *AOF v PP* [2012] 3 SLR 34.

56 Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 95.

57 This essay does not take a position on this issue, although the Strasbourg Court treats the PI as an *equivalent* to the general principle of fair trial: see Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing, 2010), 95.

However, there is nothing to prove that a presumption of material innocence will go any way in evening out the scales better than a presumption of probatory innocence. In the end, whether the courts presume material or probatory innocence, the balance will always be tilted in favour of the Prosecution, so long as the Prosecution continues to have the State's machinery at its disposal. This is the reality, regardless of any theory of innocence.

44 Moreover, the courts *have* recognised the advantage the Prosecution holds. In *Kadar*, the court set out a framework for evidence disclosure by the Prosecution to the defence, including evidence detrimental to the Prosecution's case,[58] while referring to the presumption of probative innocence:[59] the court recognised that to require the defence to disclose evidence would run contrary to the presumption, which it defined as "the Prosecution [proving] its case beyond reasonable doubt".[60] Thus seen, the presumption *can* go some way in balancing the power between the parties. Although the Prosecution will always retain the advantage, as long as the legal system respects the presumption and continues to demand that the Prosecution prove its case beyond a reasonable doubt, there will naturally be results which have the effect of giving the accused some advantages.

V. Possible Legal Reforms

45 With these concerns addressed, there nonetheless needs to be several reforms to the law so as to give the presumption greater coherence. This essay deals with three potential examples.

A. Recalibration of Rules that Reverse the Burden of Proof

46 To start off, the presumption of probative innocence is given effect to with *Jayasena v R* ("***Jayasena***")[61] interpreting all burdens of proof imposed by the EA as persuasive (or legal) burdens, thereby placing the burden of proving probative guilt on the Prosecution.

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58 The evidence had to be of two kinds, (a) if admissible, reasonably regarded as credible and relevant to the guilt and innocence of the accused; (b) if inadmissible, would provide a real chance of pursuing a line of inquiry that led to type (a) evidence: see *Muhammad bin Kadar v PP* [2011] 3 SLR 1205, [113].

59 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205, [108].

60 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205, [108].

61 *Jayasena v R* [1970] AC 618.

47 Yet, the EA contains exceptions to this and these exceptions may "cripple the protection offered by the presumption of innocence".[62] For example, s 108 EA places the burden of proof on the accused to prove any fact within his knowledge. With the *Jaysena* rule that all burdens in the EA are persuasive burdens, it detracts from the protection that the presumption of probative innocence ought to provide for the accused. To that end, to provide the presumption with more coherence, Professor Hor's proposal is illuminating: should Parliament wish to derogate from the presumption by reversing the burden of proof, it ought to do so explicitly in the relevant legislation.[63] This is to provide assurance that it has directed its mind to the matter.[64] Adopting Prof Hor's proposed reform will do well in ensuring that the Prosecution is not unduly inconvenienced in its task of administering justice, while also ensuring that any derogations from the presumption is properly thought out and implemented without compromising on prevention of wrongful convictions.

B. Rethinking the Presumption of Trafficking In The MDA

48 Due to Singapore's harsh stance towards drug-related offences, there are several presumptions in the MDA in the Prosecution's favour, found in ss 17 and 18 MDA.[65] While these presumptions are usually justified by the severity of drug abuse in Singapore's society and thus provide a greater need for conviction, these presumptions do not sit well with a presumption of innocence, since they ease the burden on the Prosecution and also reallocate the burden to the accused.

49 The most troubling of the presumptions is that found in s 17 MDA, which provides that where an accused is found with beyond a certain weight of specified drugs, the accused is then presumed to

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62 Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) LAWASIA Journal 78, 84.

63 Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century: A Model Code for Singapore* (Academy Publishing, 2013), [2.1.5].

64 Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century: A Model Code for Singapore* (Academy Publishing, 2013), [2.1.6].

65 Section 17 provides that anyone proven to have certain kinds of drugs above a certain amount is presumed to have those drugs in his possession for the purposes of trafficking. Section 18 provides that anyone proven to have possession of anything containing a controlled drug is presumed to be in possession of that drug and known the nature of the drug.

possess the relevant drugs for the purposes of trafficking.[66] This is more serious than a mere presumption of knowledge, as the presumption of trafficking is a presumption of an entire offence under s 5 MDA, whereas the presumption of knowledge is only a presumption of an *element* of the relevant drug-related offence (*i.e.*, knowledge of the drug's nature). The presumption of trafficking is also far more serious than the presumption of possession, as the offence of possession under s 8 MDA does not carry the mandatory death penalty.

50 Therefore, in order to recognise the need for the presumptions and simultaneously give greater effect to the presumption of innocence, it is the view of this author that the presumption of trafficking requires some reconsideration. Arguably, the presumption of trafficking is not as justifiable as the presumption of knowledge and/or possession, given the former's complete nature and heavier consequences following a conviction on that ground. To that end, if it is incumbent for the Prosecution to prove that the accused had the drugs to traffic following the presumption of innocence, then the Prosecution ought to bear the full burden in proving the offence, *intention to traffic included*.

C. Reconceptualising the Privilege Against Self-Incrimination as a Right

51 Finally, Singapore does not recognise the privilege against self-incrimination as a right, but considers it as another evidentiary rule.[67] The closest Singapore has to such a right is found in s 22(2) of the Criminal Procedure Code ("**CPC**"). Yet even under that rule, there is no need to expressly inform the accused of this right.[68] Perhaps it is time now to reconceive it as a procedural right of the same kind as the presumption of innocence, the same kind that includes a corresponding right for the accused to be informed Barring a few exceptions,[69] every accused person ought to have a right against self-incrimination, since it would help protect the accused from incriminating himself, given that he can be lawfully denied access to counsel during the first

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66 Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2nd Ed, 2018), 255.

67 *PP v Mazlan bin Maidun* [1992] 3 SLR(R) 968, [13] – [37].

68 *PP v Mazlan bin Maidun* [1992] 3 SLR(R) 968, [37].

69 An example would be offences under the Prevention of Corruption Act (Cap 241, 1993 Rev Ed).

investigations. This might go some way in buttressing the presumption of innocence in its bid to protect the accused.

VI. Conclusion

52 In closing, the presumption of innocence has not enjoyed much clarity as to its definition and this has resulted in confusion as to its scope, meaning and application. This essay has sought to contribute to the debate by proposing a theory of innocence, and therefore the presumption of innocence, as probatory (or legal) in nature. To recapitulate, the presumption demands that the judge presume that the accused's probative guilt is not yet proven, by emptying himself of all and any presuppositions and applying a rigorous examination of the Prosecution's evidence to ensure that the case minimally reaches the required standard of proof.

53 It has been argued that a probatory theory of innocence better reflects the nature of Singapore's criminal process as well as the larger fabric of the law. A probatory theory of the presumption also comports better with the reality of adjudication in defining more clearly the content of the presumption and recognising the true epistemic state of every court hearing a trial. However, a probatory theory necessarily leads to the conclusion that the presumption cannot logically apply anywhere beyond the criminal trial. While such an approach would raise certain concerns regarding the protection of accused persons, such concerns can be dealt with by ensuring that the other mechanisms in place are robust enough to provide sufficient protection from wrongful conviction, and by reforming the law in certain troubling areas to give greater coherence to the presumption.

54 To that end, it may be time for lawmakers to provide greater clarity to the presumption by definitively stating a theory of innocence and the presumption of innocence. This essay has sought to provide a preliminary suggestion that could lead to further and richer discourse over a principle so crucial, yet so taken for granted. It is, beyond reasonable doubt, time to relook the presumption and consider it for all its import and significance, for it is that one golden thread that must always be seen in our criminal justice system.