The Presumption of Innocence and the Human Rights Act

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There has recently been a proliferation of case law dealing with potential inroads into the presumption of innocence in the criminal law of England and Wales, in the light of article 6(2) of the European Convention on Human Rights. This article is concerned with the nature of the presumption of innocence. It considers two central issues. The first is how the courts should address the question of when the presumption of innocence is interfered with. The second is the extent to which interference with the presumption of innocence may be justified on the grounds of proportionality. It is argued that the courts have not developed the appropriate concepts and principles properly to address these questions.

INTRODUCTION

The presumption of innocence has long been regarded as fundamental to protecting accused persons from wrongful conviction. The basic principle is that the accused is to be considered innocent until proven guilty of a criminal offence. The reason why this principle is considered fundamental is that it is generally seen as better for the guilty to go free than the innocent be convicted. This is sometimes articulated, though inaccurately, as the ‘10:1 principle’: it is as bad for one innocent person to be convicted of a criminal offence as it is for ten guilty people to go free. This is an erroneous way of expressing the more complex idea that a defendant ought only to be convicted of a criminal offence if it is known that he is guilty of that offence.

English criminal law has generally taken this principle to entail that the accused must be treated as innocent until proven guilty beyond reasonable doubt of all substantive questions that require to be answered in order to convict him of the criminal offence with which he is charged. Consequently, from the

* University of Edinburgh. Many thanks to Ian Leigh for thoughtful comments and suggestions.

1 ‘If any error is to be made in the weighing of the scales of justice it should be to the effect that the guilty go free rather than that an innocent person should be wrongly convicted.’ *R v Lambert* [2001] UKHL 37 at 156 per Lord Clyde; *R v Lambert* [2002] 2 AC 545 HL.

2 Knowing *p* does not imply that the knower is 100 per cent certain of *p*. I may know that the world is round without being 100 per cent certain that the world is round. Knowledge is probably better seen in qualitative rather than quantitative terms (see, for example, J. McDowell, ‘Knowledge by Hearsay’ in *Meaning, Knowledge and Reality* (Cambridge, MA: Harvard University Press, 1998), and it is for this reason that the statistical model ought only to be thought of as a rule of thumb. Consider a football stadium in which there are 1000 people. Only ninety people have paid the admission fee. The rest have jumped the fence. There is no further evidence that can be discovered for or against any particular person having a ticket. Surely it is wrong to convict all of the people in the stadium even though the 10:1 principle has been satisfied. It is also worth noting that a person may be justified in claiming that he knows something to be the case when he is in fact wrong. Hence, the standard of knowledge does not entail that there will be no wrongful convictions.

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The presumption of innocence is derived a more particular principle concerning the burden of proof. In general at least, the presumption of innocence is to be guaranteed by the burden of proof being placed upon the prosecution to determine all elements of a criminal offence, and to show that the accused does not fall within any defences that he might have; furthermore, the prosecution must determine those elements beyond reasonable doubt.

Since the coming into force of the Human Rights Act 1998 (the HRA), the presumption of innocence has been reinforced in domestic law by article 6(2) of the European Convention on Human Rights (the ECHR), whereby everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Generally the European Court of Human Rights (ECtHR) has endeavoured implicitly or explicitly to separate the procedural protections offered to the criminal suspect from the prerogative of the Member State to define the substantive terms of its own criminal law.3 On its surface article 6(2) appears clearly to be concerned with procedure. A person must be treated as innocent until proved guilty according to law, and it might be thought that the most natural interpretation of this principle is that the presumption of innocence protects an individual against laws which fail to respect evidential and perhaps other procedural requirements that surround existing criminal offences, without touching the content of such offences. On this reading, article 6(2) has no implications for the substance of criminal offences but only for the evidential requirements that govern the substance of those offences. The ECHR does contain rights which do have implications for the substance of criminal law, such as the protection of freedom of expression enshrined in article 10 and of freedom of assembly in article 11. But, on this reading, article 6(2) does not have those kinds of implications. Its implications are purely procedural. It is our purpose to challenge this reading.

The ECtHR addressed the operation of such presumptions in Salabiaku v France.4 The ECtHR accepted that ‘Presumptions of fact and law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law.’5 Addressing these limits, the Court first of all confirmed that the duty on Member States is not merely one of judicial impartiality in the conduct of legal proceedings. Otherwise, ‘the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance.’ In rejecting the notion that the presumption of innocence can be stripped down to the formality of the court process, the Court then fixed upon the phrase ‘according to law’, which appears at the end of article 6(2), and concluded that these words should not be ‘construed exclusively with reference of (sic) domestic law.’ Instead the object and purpose of article 6 as a whole must be taken into account; this purpose is to protect ‘the right to a fair trial and in particular the right to be presumed

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3 The ECtHR has held that it is for Member States to determine the content of criminal law unless this had an impact on substantive guarantees under the Convention. Salabiaku v France (1988) 13 EHRR 379.
4 n 3 above.
5 ibid para 28.
innocent’, a commitment which enshrines ‘the fundamental principle of the rule of law’. This passage in Salabiaku is tantalising. One reading of this statement is that the ECtHR is prepared to acknowledge that article 6(2) limits the way in which a criminal offence can be defined. However, the Court did not elaborate on what the ‘substantive’ content of article 6(2) might be. Instead it has left a vague test which requires that Member States confine presumptions of fact and law ‘within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence’.

This ‘reasonable limits’ test has been taken by the courts of England and Wales to require a balancing exercise between the egregiousness of the evil against which the law is intended to protect and the due process rights of the accused person. This balancing test was first articulated by Lord Hope in his seminal judgment in Kebilene: ‘As a matter of general principle … a fair balance must be struck between the demands of the general interest of the community and the protection of the fundamental rights of the individual’...

In this way the ECtHR’s reference to ‘the importance of what is at stake’ seems to have translated into English law as ‘the demands of the general interest of the community’.

Since Kebilene, the application of this balancing test to article 6(2) has been developed in both English and Scots law, with the most extensive development being offered by the House of Lords in R v Lambert, which has in turn led to a spate of further cases, most prominently Sheldrake v DPP. In that case, the Divisional Court outlined the way in which article 6(2) claims ought to be structured by responding to four questions.

The first question it addressed was whether a shift in the burden of proof in fact interferes with the presumption of innocence. As we shall see, this involves an investigation which goes beyond the question of whether there was a shift in the burden of proof in any element of offence or defence. If that question is answered in the affirmative, the second question is whether there is a justification for some interference with the presumption of innocence. This question is in part to be answered by reference to whether there is a particular problem posed by placing the burden of proof entirely on the prosecution, whether the element of the offence was something within the particular knowledge of the accused, and so on. As we shall see, this question more or less blends in with a third question.

If the answer to the second question is also affirmative, the third question is whether that interference is proportionate. This third question is controversial. It appeared to Clarke LJ in Sheldrake that the third question, while addressed in the speeches of Lord Steyn and Lord Hope in Lambert, was not a part of the judgements of Lord Slynn and Lord Clyde. According to the latter two judges, if there is an interference with the presumption of innocence, no further question of proportionality needs to be answered. However, in the judgement of Clarke LJ, the proper interpretation to be given to Lambert was that the proportionality issue

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8 n 1 above.
requires to be decided, for if the interference with the presumption of innocence is proportionate, it is justified, and hence there is no breach of the convention rights of the accused. Consequently, there is no need for any further action by the court. As we shall see, the appeal in *L v Director of Public Prosecutions (Lynch v DPP)*, which was decided prior to *Sheldrake*, and the post-*Sheldrake* reconsideration of the same question in *R v Matthews* each failed on the question of proportionality, despite the fact that it was decided in those cases that the presumption of innocence had been interfered with.

If the answer to the third question is in the negative, the fourth question is whether the provision can be ‘read down’ in such a way as to make it compatible with article 6(2). In *Lambert* the House of Lords concluded that section 28 of the Misuse of Drugs Act 1971 could be read down in such a way that only an evidential burden of proof is created, even where on its surface the legislation imposed a legal burden of proof on the accused. The distinction between the two is that a legal burden of proof requires the defendant to prove, normally on the balance of probabilities, that she falls within a particular defence or exception. An evidential burden of proof, on the other hand, requires the defence to produce only sufficient evidence to raise the issue of whether she falls within the defence or exception. If such evidence is produced, the burden of proof is then once again placed on the prosecution to prove beyond reasonable doubt that the accused did not fall within that defence or exception. ‘Sufficient’ evidence to raise the issue means ‘evidence that, if believed, and on the most favourable view, could be taken by a reasonable jury to support the defence’.

This paper is concerned with the general interpretation of article 6(2) in the context of criminal procedure. In the first part of the paper we will assess the proper interpretation that should be given to the question of whether the presumption of innocence has been interfered with. It will be shown that the sharp distinction between procedure and substance cannot be used to assess whether the presumption of innocence has been interfered with. It is argued that the whole approach to date, which focuses almost exclusively on the reversal of the burden of proof in defences and exceptions, is misguided, and undermines any real protection that the presumption of innocence might give to citizens against the state. It will be shown that the criminal courts of England and Wales have begun to develop the conceptual framework to recognise this issue, but have not understood it clearly. Reversals in the burden of proof, we will contend, do not always interfere with the presumption of innocence at all. On the other hand the mere fact that the burden of proof falls entirely on the prosecution for all elements of an offence does not in and of itself entail that there is no interference with the presumption of innocence. In other words, showing that the burden of proof has been placed on the prosecution with regard to some element of the offence is

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10 *ibid* 40.
12 [2003] EWCA 813 (Crim); [2003] All ER (D) 368. See also *Attorney General’s Reference (No 4 of 2002)* [2003] EWCA 762 (Crim); [2003] All ER (D) 342.
13 See particularly the judgement of Lord Hope in *Lambert* n 1 above 82–94.
neither a necessary nor a sufficient condition for showing that there has been an interference with the presumption of innocence. From this conclusion we will briefly consider interference with the presumption of innocence where there is no shift in the burden of proof, including an assessment of whether strict liability offences interfere with the presumption of innocence.

The second part of the paper will address the question of proportionality. We will argue that the conceptual problems we identify in the first part also affect the ways in which the courts approach proportionality. The need for the courts to ensure that the presumption of innocence guarantee contained in article 6(2) is not undermined requires judges to address the full effect which legislation has on the core right rather than approaching the issues in a formalistic way. Three issues which have been treated by the courts as relevant to the question of proportionality will be considered: the difficulty for the prosecution in proving something which is within the knowledge of the accused; the nature of the threat to the community; and the seriousness of the offence and of the penalty involved. Each of these will be assessed in the context of the core right contained within article 6(2), and it will be asked whether in light of these factors an inroad into the presumption of innocence is indeed ‘necessary’ in the broader public interest.

**INTERFERENCE WITH THE PRESUMPTION OF INNOCENCE: THE COLLAPSE OF THE DISTINCTION BETWEEN PROCEDURE AND SUBSTANCE AND ITS IMPLICATIONS**

**When has the presumption of innocence been interfered with?**

*The classical theory* of the presumption of innocence

The first question that is to be asked about the presumption of innocence is whether, and to what extent, it has been interfered with. The most common way in which this has been understood is in relation to the burden of proof. The reason why the burden of proof is regarded as important is that, in general, the presumption of innocence is thought to entail that the prosecution must prove beyond reasonable doubt that the accused is guilty of an offence. And this seems to be put in jeopardy if the burden of proof is placed upon the defence. Let us begin by sketching one familiar view of the relationship between the presumption of innocence and the burden of proof. We call this view ‘the classical theory’ of the presumption of innocence.

Consider a piece of criminal legislation that is constituted by some definitional elements. Some of those elements constitute the offence definition and others constitute either exceptions or defences. According to the classical theory, the extent to which the presumption has been interfered with is determined by the extent to which there are elements, either of offence or defence, for which the burden of proof is placed on the accused. Of course, the nature of the particular element might determine the extent of such interference, as might the question of whether the burden of proof is legal or merely evidential. Nevertheless, as there is an issue for the defence to raise, there is also some inroad into the presumption of innocence. However, the classical theory holds that if there is no definitional
element where the burden of proof is shifted, there is consequently no interference with the presumption of innocence.

On this view, the presumption of innocence does not have implications for the substance of the legislation itself. The presumption of innocence protects the right of the accused to have the legal burden of proof placed on the prosecution vis-à-vis the substantive elements of the offence, but does not have implications for the content of those substantive elements themselves. The purpose of this section is to show that the classical theory is mistaken for the reason that such a reading fails to provide citizens with any real protection from wrongful conviction. For, on such a reading, it would always be open for the state to redefine the offence in a way that would have the same implications as a reversal of the burden of proof.

This would create the following possibility, to be explained below: two statutes might distribute the evidential burdens between prosecution and defence in precisely the same way in every case. However, one statute would be compatible with the presumption of innocence where the other would not. Such a possibility surely is incompatible with the approach to the HRA suggested by Lord Woolf in the Court of Appeal in R v Lambert. The HRA, he argued, requires a court to take

a broad and purposive approach, not a rigid approach, to the language of the convention, an approach which will make the convention a valuable protection of the fundamental rights of individual members of the public as well as society as a whole.

Given that this must be the correct reading of the HRA, it suggests that the classical theory is mistaken.

In order to see that this is so, it is worth considering the origin of much of the debate in England and Wales, the case of R v DPP ex p Kebilene, and the extended defence of the classical theory by Paul Roberts in his analysis of that case. One central issue in Kebilene that need not detain us concerned the temporal effect of the HRA. Kebilene involved judicial review of a decision by the Director of Public Prosecutions to prosecute the accused under section 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989, as inserted by the Criminal Justice and Public Order Act 1994. This Section provided that a person is to be found guilty of a criminal offence if

he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with the commission, preparation or instigation of acts of terrorism to which this section applies.

The accused sought judicial review, arguing that the provision was incompatible with article 6(2) before the HRA came into force. In the Divisional Court the challenge of the defence was upheld, but that ruling was overturned by the House
of Lords. The decision of the Divisional Court was that the statutory offence under which the case was prosecuted was incompatible with article 6(2) and that, as a consequence, prosecution was not in the public interest. In overturning this decision, the House of Lords did not decide that section 16A was compatible with article 6(2), but rather found that it was at least arguable that it was compatible. Hence, the decision of the Lords did not determine in detail the approach to be taken by the courts of England and Wales to article 6(2). Amongst the Lords, only Lord Hope of Craighead found it necessary to discuss compatibility at length.  

Now, whilst it may seem at first sight as though the presumption of innocence has been breached on any theory, in fact section 16A is perfectly compatible with the presumption on the classical theory. The reason, as Roberts shows, is that the burden of proof in respect of all aspects of the offence falls squarely upon the prosecution.

Of course the prosecution does not have to prove beyond reasonable doubt that the defendant had an article in his possession which is to be used for a purpose connected with the commission, preparation or instigation of acts of terrorism. What the prosecution must prove beyond reasonable doubt is that the defendant had an article in his possession which creates the reasonable suspicion that it is to be used for a terrorist purpose. The conditions of the offence are satisfied, then, not by having articles in one’s possession which are connected with acts of terrorism, but rather having articles in one’s possession which create a reasonable suspicion that they are to be used for a terrorist purpose. That this is the nature of the offence was recognised by Lord Hope of Craighead in the course of rejecting the argument of the Divisional Court that article 6(2) had been breached by section 16A.  

As it turns out, however, citizens are entitled to have articles in their possession which create the suspicion that they are to be used for a terrorist purpose, so long as they are not to be used for such a terrorist purpose. Although the offence created by subsection 16A(1) has been committed by such a citizen, he would have a defence under subsection 16A(3) which provides that

> It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the article in question was not in his possession for such a purpose as is mentioned in subsection (1) above.

Hence, although the prosecution must prove all elements of the offence created by subsection 16A(1), the accused may rely upon a defence under subsection 16A(3). Since *Kebilene*, section 16A has been replaced by section 57 of the Terrorism Act 2000. Section 118 of that Act makes it clear that the burden of proof on the defence will be merely evidential rather than legal. But when *Kebilene* was heard, there was no reason to interpret subsection 16A(3) in that way.

According to the classical theory, then, subsection 16A(1) is compatible with article 6(2) in and of itself. If subsection 16A(3) had not been enacted, there would have been no relevant article 6(2) question. Furthermore, there is no obvious reason to think that subsection 16A(1) is otherwise incompatible with any other

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19 *Kebilene*, n 6 above 381–388.
20 *ibid* 387.
provision of the ECHR. On that theory, it is the existence of subsection 16A(3) which might make a human rights lawyer suspicious. However, as subsection 16A(3) is an exception to an existing offence, Roberts argues that it was compatible with article 6(2), even if a legal burden of proof was imposed on the defence through that subsection.\textsuperscript{21}

In the Divisional Court a different approach was taken to the implications of article 6(2); one that Roberts attempts to deconstruct. The argument in the Divisional Court was that the presumption of innocence concerns not the technical definition of the offence but rather what the court called the ‘gravamen’ of the offence. Lord Bingham of Cornhill argued that the gravamen of section 16A, which was for this purpose taken as a whole, was the possession of articles, in themselves innocent, for a terrorist purpose. He divided this gravamen into an \textit{actus reus} and a \textit{mens rea} in the following way:

The crucial ingredients of the offence are in reality possession (the \textit{actus reus}) and the terrorist purpose (the \textit{mens rea}).

He then went on to argue that neither of these ingredients of the offence needed to be proved in order to give rise to a conviction under section 16A, for reasons suggested above. And he concluded from this that the presumption of innocence had been interfered with, because ‘under section 16A a defendant could be convicted even if the jury entertained a reasonable doubt whether he knew that the items were in his premises and whether he had the items for a terrorist purpose.’\textsuperscript{22}

This interpretation of section 16A suggests that in order to discover the \textit{actus reus} and \textit{mens rea} of an offence, a degree of interpretation is required. We can, according to Lord Bingham, look behind the surface of the offence and discover what the \textit{actus reus} and \textit{mens rea} are in reality. Whilst it may appear from section 16A that the \textit{actus reus} of the offence is having certain articles in one’s possession which create the suspicion that they are intended to be used for a terrorist purpose, Lord Bingham suggests that the real \textit{actus reus} is having certain articles in one’s possession which are intended to be used for a terrorist purpose. And the presumption of innocence requires that the accused should not be convicted unless it can be proved beyond reasonable doubt that both the \textit{actus reus} and \textit{mens rea} of the real offence have been fulfilled. As section 16A allowed a conviction without the \textit{actus reus} and \textit{mens rea} being proved beyond reasonable doubt, Lord Bingham thought, article 6(2) had been infringed.

What are we to make of this claim about the difference between the ‘real’ \textit{actus reus} and \textit{mens rea} of the offence and the appearance created by section 16A? Part of the difficulty is knowing precisely what the Divisional Court was aiming to convey by the term ‘gravamen.’ Roberts interprets ‘gravamen’ as meaning ‘the wrong at which the offence is aimed.’\textsuperscript{23} He then goes on to argue that there are many quite proper offences which do not have as their central content the wrong they hope to deter. Roberts’ examples are: going equipped, possession of an

\textsuperscript{21} n 17 above 57.
\textsuperscript{22} Kebilene n 6 above 345.
\textsuperscript{23} n 17 above 53.
offensive weapon, possession of controlled drugs with intent to supply and so on. Such offences, Roberts claims, are created ‘in order to forestall more serious wrongs.’ They may or may not, according to Roberts, be wrongs in their own right, but the wrongs which they aim to control are ultimately the more serious wrongs to which they are attached, wrongs such as assault, murder, supply of controlled drugs and so on.

On Roberts’ interpretation of the word ‘gravamen’, then, the gravamen of possession with intent to supply is supply. The gravamen of possession of an offensive weapon is use (in what way?) of that offensive weapon, and so on. If that were true, and if the decision of the Divisional Court had stood on appeal to the House of Lords, all offences of this kind would be struck down as being incompatible with article 6(2) for the reason that they would each allow conviction of a criminal offence where the actus reus and mens rea of the gravamen of such offences had not been proved beyond reasonable doubt. Since it would undoubtedly be problematic to strike down all such offences, we appear to be thrust towards the classical theory.

Towards a new concept of ‘gravamen’: the purpose of the offence

But need we read the intentions of the Divisional Court in this way? Another possibility, which we defend here, is that we could read the word ‘gravamen’ as meaning ‘purpose.’ This is not, we recognise, a natural synonym, but it is an interpretation which is suggested by the recent case of Sheldrake v DPP. In that case, the defendant was charged with being in charge of a motor vehicle after drinking so much that the proportion of alcohol in his breath exceeded the prescribed limit contrary to section 5(l)(b) of the Road Traffic Act 1988. The case was concerned with the defence provided by section 5(2) of that act, which provides that it is a defence to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.’

Now, Clarke LJ in the Court of Appeal argued that in deciding whether the presumption of innocence had been interfered with by section 5, it was important to consider who the offence is aimed at. In this case, he agreed with Taylor LJ in the High Court that ‘the offence is aimed at those who may try to drive the vehicle while still unfit through drink or, differently expressed, put themselves in a situation where there is a risk that they may drive a vehicle while still unfit.’ The important question, on this reading, concerns not the wrong aimed at (ultimately in this case harming others on the road through driving whilst intoxicated) but rather the conduct which it is the purpose of the offence to control. In this case, the offence is not aimed at those who are in charge of a vehicle with excess alcohol in their blood even where there is no risk that they will drive the vehicle.’ Therefore, the
fact that there is a risk that the defendant will drive the car is part of the gravamen of the offence. The presumption of innocence is breached by the provision because it allows a conviction ‘even though the court is not sure that there is a likelihood or risk of his driving’, and if there is not such a likelihood or risk, the defendant is not a member of the class of individuals which the statute was intended to control.

The advantage of such an interpretation of the term ‘gravamen’ is that the purpose of a criminal offence is both clearer and more suitable for the purpose of assessing the presumption of innocence than that suggested by Roberts. Consider possession of drugs with intent to supply. There is a question about whether possession with intent to supply is a wrong in itself, or is rather aimed at the further wrong of supplying. We might think that possessing with intent to supply is wrong in itself, or we might think that it is not. The wrong aimed at, it is commonly thought, is supply.28 But a common feature of purposes is that the grand purposes or plans that we have are composed of smaller purposes which fill those plans out.29 All of this should be familiar to criminal lawyers, who are able to recognise the closely related phenomena that a person can intend to kill his rich uncle, whilst having the further intention of getting his hands on the inheritance. Similarly, in this case, whilst the purpose of the offence of possession with intent to supply is to prevent supply, it achieves this purpose by making it a criminal offence to possess with intent to supply.

Now we can see the difference between this example and section 16A. Just as the further purpose of the offence of possession with intent to supply is to prevent supply, the further purpose of section 16A is to prevent citizens assisting terrorists, or engaging in terrorist activity themselves. It achieves this by convicting those individuals who possess items that are intended to be used to support terrorist activity. But it is no part of the purpose of section 16A to convict those individuals who possess articles which, it might reasonably be suspected, are intended to be used to support terrorist activity, but who, in fact, are not in possession of those articles for that purpose. Conviction of some of those may be what criminal lawyers call a ‘foreseen side effect’ but it is not part of the purpose of the statute.

We can see this clearly if we consider carefully how the legislator ought to feel in the case of failure. As Antony Duff has noted,30 there is a close relationship

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28 Exactly how we are to identify and distinguish wrongs, and the extent to which salient moral distinctions between wrongs ought to be reflected in the categories of criminal offences, are thorny theoretical issues. Some progress on the issue has been made in criminal law theory. See, for example, J. Gardner, ‘Rationality and the Rule of Law in Offences Against the Person’ (1994) CLJ 502, and ‘On the General Part of the Criminal Law’ in A. Duff (ed), Philosophy and the Criminal Law: Principle and Critique (Cambridge: CUP, 1998); J. Gardner and S. Shute, ‘The Wrongness of Rape’ in J. Horder (ed), Oxford Essays in Jurisprudence: 4th Series (Oxford: OUP, 2000); J. Horder, ‘Rethinking Non-Fatal Offences Against the Person’ (1994) 14 OJLS 335.; V. Tadros, ‘The System of the Criminal Law’ (2002) 22 Legal Studies 448; and A.L. Bogg and J. Stanton-Ife, ‘Protecting the vulnerable: legality, harm and theft’ (2003) 23 Legal Studies 402. However, it is fair to say that, despite increasing interest in the question, fully coherent and well defended principles that could be used to identify and distinguish wrongs are yet to emerge, let alone principles that might govern incorporation of those distinctions into the criminal law.


between what a person intends and how that person tends to feel in the case of failure. An intention is to be distinguished from mere foresight by virtue of the fact that a person who intends an outcome, as opposed to foreseeing it, will generally be frustrated when that outcome does not come about. That relationship may be open to qualification, but it is at least a powerful indication that the individual has a particular intention. Much the same might be said about the closely related concept of purpose.

Now, suppose that the legislator discovers that the offence of possession with intent to supply has remained ineffective at achieving convictions where the defendant possesses with intent to supply, but where actual supply turns out to be impossible. However, it is effective against those defendants who actually had the opportunity to supply the drugs. Although Roberts may be right that the main wrong aimed at in the offence is supply rather than possession with intent, surely the legislator would properly feel frustrated that those who possessed with intent to supply, but whose supply would inevitably be prevented, would not be convicted of the offence. This shows that the purpose of the legislation is to convict those who possess with intent to supply whether or not they in fact supply. Similarly, consider the case where the legislator discovers that a large number of defendants who possess offensive weapons, and are convicted of such possession, will never use them. This should not be seen by the legislator as a loss to be regretted, as though those possessors have done no wrong. The primary purpose of the legislation is to convict as many people who possess offensive weapons as possible whether or not they are likely to use them.

This is quite different with regard to section 16A. Suppose that the legislator discovered that a large number of individuals who possess articles in circumstances which create the reasonable suspicion that they are intended for a terrorist purpose in fact possess such articles quite innocently. Surely the legislator would feel regret that such a large number of blameless people are potentially guilty of the offence. On the other hand, if the legislator discovered that the application of section 16A fortuitously did not result in the conviction of anyone who possessed articles in circumstances which reasonably created a suspicion that they were intended to support terrorist purposes, where those suspicions were in fact unfounded, surely the legislator would feel satisfied. And indeed we can see that this is so given the defence that is provided by section 16A(3), which is created precisely to ensure that at least some of those innocent individuals are not convicted under section 16A, albeit that the concern of the legislator is probably shown to be insufficiently great by the reverse burden of proof in section 16A(3).

Hence, we can see that the purpose of the legislation is not to convict those who have articles in their possession which create the reasonable suspicion that they will be used to support terrorist activity. It is to convict those who have

32 Hence, this account of the presumption of innocence is consistent with the existence of crimes that are *mala prohibita*: crimes whose definition at least includes conduct that is not wrong but for the existence of the prohibition. A sophisticated discussion of the relationship between *mala prohibita* and wrongful conduct is developed in R.A. Duff ‘Crime, Prohibition, and Punishment’ (2002) 19 Journal of Applied Philosophy 97.
33 That this is only probably so can be seen from the next section of this essay.
articles in their possession which are to be used to support terrorist activity. It must be considered an unfortunate side effect that this results in the conviction of some of those who have articles in their possession which are not to be used to support terrorist activity, but where that possession creates such a reasonable suspicion.

This was recognised by Lord Justice Laws in the Divisional Court in *Kebilene*. He argued that if the gravamen of the offence was to be considered possession of articles in circumstances which create a suspicion that they are intended to support terrorist activity, rather than possession of articles which are in fact so intended or known, ‘the policy of the statute must be taken to mean that a man is rightly to be exposed to a prison sentence of up to 10 years upon a reasonable suspicion only.’

This is indeed absurd. It would suggest that a person who possesses articles in circumstances which create the reasonable suspicion that they are intended to support terrorist activity, *but those articles are, in fact, not intended for any such purpose* may be liable to such a strict sentence. Given that such a claim is absurdly illiberal, such individuals can only be seen as the innocents of whom the legislator, through section 16A, warrants the conviction, individuals for whom there is no proper evidence of their wrongdoing, in order to ensure conviction of a greater number of the guilty: those who have such articles in their possession with the intention that they will support terrorist activity. And it is precisely this kind of trade off against which article 6(2) is designed to protect citizens.

The need for a ‘substantive’ reading of Article 6(2)

So far we have established that there is at least a plausible claim that article 6(2) should be read in the context of the purpose of the offence rather than merely in the context of its technical definition. If the technical definition of the offence fails properly to recognise that the defendant is to be presumed innocent until proven guilty of conduct which the creation of the offence was intended to deter or control, that offence interferes with the presumption of innocence. And this is so even if the prosecution is required to prove all elements of that offence as technically defined. To that degree, article 6(2), properly interpreted, does not provide the defendant merely with procedural protection, but also affects the substance of the criminal law.

To see how compelling this position is, let us consider a hypothetical example in which Parliament attempts to evade the protections provided by article 6(2). Through this example it will be shown that, where a criminal offence breaches the presumption of innocence, and is on that ground held to be incompatible with article 6(2), it will always be possible for Parliament to create a new offence which, under the classical theory, is compatible with article 6(2), but which requires the prosecution to prove exactly the same elements as it was required to prove under the incompatible offence, or perhaps even fewer elements. This could be done, for example, by making what is a mere evidential requirement of an incompatible offence a complete criminal offence in and of itself. Therefore, if the classical theory were correct, it would always be open to Parliament intentionally to evade the implications of article 6(2) by creating new criminal offences. In

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34 *Kebilene* n 6 above 356.
that case, the presumption of innocence would provide citizens with no protection against the state whatsoever. It would be capable of evasion merely by reconstructing the surface of the offence, leaving the underlying evidential requirements unchecked. For this reason, our reading of article 6(2) is to be considered preferable: it provides citizens with real protections against state power.

The example is to be developed around section 5 of the Misuse of Drugs Act 1971. This section creates a number of offences involving possession of controlled drugs. Now, suppose that in a series of instances, the police have some trouble in securing the conviction of a citizen (D) whom they believe to be purchasing large quantities of drugs. Suppose that in these cases the police have evidence that large sums of money have passed between D and some well known drug suppliers. The police suspect that D has a quantity of controlled drugs in her possession. However, they have not managed to discover where the drugs are. In that case any prosecution under section 5(1) for possession or section 5(3) for possession with intent to supply would undoubtedly fail. D would have to be treated as innocent of those offences until proven guilty, and it is difficult to see how it could be proven that she was guilty of possession of a controlled drug or possession of a controlled drug with intent to supply without finding the drugs. Were it not for the presumption of innocence, however, it may be possible to convict D without that evidence as her payments to the well known supplier provide at least some good evidence of possession.

Now, suppose that Parliament decides that it will repeal section 5(1) of the Misuse of Drugs Act 1971 and enacts the Misuse of Drugs Act 2004. Under section 5(1) of that Act, the prosecution will have to prove beyond reasonable doubt only that a substantial payment has been made to a known drug dealer. Once that has been proved, a legal burden is placed on the defence to prove that no drugs had come into his possession. Clearly on the classical theory (as well as any other credible theory), section 5(1) of the Misuse of Drugs Act 2004 would breach article 6(2) of the European Convention of Human Rights. For the fact that drugs had come into the defendant’s possession is clearly central to the offence. But the prosecution is not required to prove that the defendant was ever in possession of the drugs. Although reverse onuses of proof may be compatible with article 6(2), that will only be so where they are concerned with exemptions and exceptions to an offence rather than a central element of that offence, and that is clearly not the case with the new section. Hence, there would be perfectly good reason to declare that the new section 5(1) is incompatible with article 6(2).

Now let us contrast this scenario with an alternative. Suppose that rather than reversing the burden of proof of the existing offence in this way, Parliament decided to create an offence from an evidential plank of the existing offence. Section 1(1) of the new offence would make it a criminal offence to make a payment to a known drug dealer. Section 1(2) would create a defence, or exception, that the payment was made for a legitimate purpose. The burden of proof for section 1(1) would fall squarely on the prosecution which would be required to prove all elements of the offence, including that the person to whom the payment was made was a known drug dealer, and that a payment had been made. The Act would be called the Making Payment to a Known Drug Dealer Act 2004.
Now, it is not clear that, on the classical theory, the hypothetical Making Payment to a Known Drug Dealer Act 2004 interferes with the presumption of innocence. The prosecution is required to prove all elements of the offence. The burden of proof falls on the defence with regard to the exception, but given that the presumption of innocence, on the classical theory, cannot attack the substance of a criminal offence, there would appear to be no breach of the presumption even if section 1(1) were enacted without section 1(2). This could be done with the hope that prosecutorial discretion would operate to ensure that prosecutions were not brought against those whom the police did not suspect to be purchasing drugs.

There is nothing in the classical theory, as espoused by Roberts, that suggests that the hypothetical Making Payment to a Known Drug Dealer Act 2004 is incompatible with article 6(2). And yet, given the two examples, this must strike us as odd. For when we compare the practical effect of the two hypothetical Acts that we have described, they are much the same. In both cases the prosecution will be required to prove only that a payment was made by the defendant to a known drug dealer. In both cases the defence can only escape a criminal conviction by showing that no drugs came into his possession as a result of the payment. The burdens are, then, more or less the same in both offences, and indeed with a little more tinkering they could be made precisely the same. Furthermore, in both cases the new legislation was passed simply in order to evade the burden of proof that was placed on the prosecution in the original offence. The offences are directed at the same wrong with the same purpose. The difference between them lies almost entirely in their names and in the ways in which they are drafted.

Now we can see clearly why the classical theory must be rejected. The classical theory allows states to evade the putative protections provided by article 6(2) by creating new offences from evidential planks of existing offences. Whilst the burden of proof remains on the prosecution, what it is required to prove is substantially diminished in these circumstances. The practical effect of this is that a conviction for a criminal offence can result from the same degree of evidence that would have been required if the burden of proof in the original offence had been reversed. If this practice is thought compatible with article 6(2), it seems difficult to maintain the principle that article 6(2), in the words of Lord Woolf in Lambert, provides a valuable protection of the fundamental rights of individual members of the public as well as society as a whole. Those fundamental rights would be capable of being undermined simply by the creation of new criminal offences whose purpose (in our hypothetical scenario, possession of illegal drugs) is not reflected on the surface.

Consequently, where such a tactic is used by the legislature, the courts should hold that, concerning the first test suggested in Sheldrake, the presumption of innocence has been interfered with. It is this concern, it seems to us, that motivates consideration of the gravamen of offences rather than their mere surface definition. This shows quite clearly why the purposive approach to article 6(2) that we are proposing is preferable to the classical theory. The purposive approach allows the court to consider not just the form in which the offence was drafted but the

35 n 15 above.
purpose of the legislation. And where Parliament has attempted to evade the evidential strictures guaranteed by the presumption of innocence by failing to reflect the underlying purpose of the legislation in its actual terms, the courts should find that the presumption of innocence has been interfered with.

Furthermore, this approach should be taken whether or not the offence includes elements where the burden of proof is placed on the defence. That the prosecution must prove all elements of a particular offence should not make that offence exempt from challenges under article 6(2). Such an approach would have the perverse consequence that it would render an offence with a reverse burden exception susceptible to challenge under article 6(2), but the same offence unsusceptible if the exception was not present, and that cannot be correct. Legislation which deliberately encapsulates conduct which is not its intended target in order to ensure conviction of a greater number of those whom the legislation is really intended to control interferes with the presumption of innocence.36 Whether such an interference can ever be proportionate is a separate question that we will deal with shortly. Before addressing that issue, in the following section we will consider the implications which the theory of the presumption of innocence defended here has for the question of reverse onuses of proof in criminal law and, more briefly, offences of strict liability.

Reversing the burden of proof and strict liability offences

Reverse burdens of proof
The most fertile ground for debate over the presumption of innocence in recent times has concerned offences in which the burden of proof is placed on the defence, normally in relation to some defence or exception to an existing offence. The practice of imposing persuasive onuses of proof on the defence has been in evidence in a wide range of offences, both summary offences and indictable offences.37 European Court of Human Rights jurisprudence on this issue is quite open ended, as is clear from Salabiaku v France,38 although that case suggests that the Court is likely to be quite permissive, and given the following discussion perhaps too permissive, of Member States who place the burden of proof on the defence.

In English criminal law, this issue is now to be read in the light of the judgement of the House of Lords in R v Lambert.39 In that case the defendant was convicted of possession of a Class A controlled drug with intent to supply. Two kilograms of the drug were within a duffle bag in his possession. He claimed that, although he had been paid to collect the bag, he thought that it contained scrap jewellery. The trial judge directed the jury that once the prosecution had proved beyond reasonable

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36 It may be unclear to the courts what the gravamen (interpreted as purpose) of the offence, under our interpretation, is. Even if this is the case, it does not detract from the general principle that, insofar as possible, the gravamen of the offence should be identified in order to determine whether the presumption of innocence has been interfered with. Principles need not always have determinate answers. They structure the reasoning of the courts rather than compel decisions in every case.
38 n 3 above.
39 n 1 above.
doubt that the defendant was in possession of the bag, and that the drug was in the bag, the defendant must prove on the balance of probabilities that he did not know that the bag contained the controlled drug. The relevant defence was contained in sections 28(2) and (3)(b) of the Misuse of Drugs Act 1971.

The principal issue in the case concerned the implications of the Human Rights Act 1998, which had not come into force at the time of the original trial. The defendant argued that the House of Lords was obliged to decide the appeal in accordance with the Act, arguing that it had retrospective force. That argument was rejected by the House of Lords.40 Despite the fact that the principal issue would have been sufficient to dispose of the appeal, their Lordships took the opportunity to decide whether sections 28(2) and (3)(b) in fact breached article 6(2). It was held that, if possible, those subsections had to be read in such a way that was compatible with article 6(2) as read in the light of section 3(1) of the HRA. Such a reading, it was argued, was possible as long as those subsections were constructed in such a way that they imposed only an evidential burden on the defendant.

The full implications of Lambert are yet to be seen. Given the incorporation of the proportionality argument in Sheldrake, and the broad range of legislation with reverse burdens, it is likely that there will be much case law to come. It is becoming clear that some provisions will have to be 'read down' in the way that sections 28(2) and (3)(b) were in Lambert. However, other provisions will not be read down in this way, where the reverse legal burden is considered not to interfere with the presumption of innocence or where any interference is considered proportionate. In this section we will consider the circumstances in which reverse burdens of proof interfere with the presumption of innocence.

As noted, the presumption of innocence has often been taken to imply that the burden on the prosecution is to prove everything that is required for a conviction of a criminal offence. On this theory, for Andrew Ashworth (and others), this implies that reverse onuses of proof are objectionable in their failure properly to recognise 'that proving guilt means establishing the facts necessary to convict, that if the accused has a valid defence the prosecution will be unable to gain a conviction, and therefore that requiring a defendant to establish a defence is to lighten what should be the prosecutor's burden.'41

We should consider carefully the extent to which the principle of the presumption of innocence relates to the question of reverse burdens of proof. We are not aware of any exceptions or defences in the criminal law of England and Wales which do not interfere with the presumption of innocence. However, we will show that, as a matter of logic, it is possible that there are exceptions that do not so interfere. We will show this by the use of an abstract argument, and an unusual, but plausible, hypothetical example.

It is first worth reiterating the point that the fact that a criminal offence places the burden of proof squarely on the prosecution for all elements of that offence, and all defences, does not entail that the presumption of innocence has not been interfered with. As we suggested in the previous section, that question depends upon whether the surface construction of the offence properly reflects the purpose

40 4 to 1, Lord Steyn dissenting.
for which that offence was created. If a piece of legislation is constructed in such a
way that it warrants conviction of defendants for conduct that it is not designed to
control, the presumption of innocence has been interfered with. And this may be
true even though all elements of the offence and all defences require to be proved
by the prosecution.

From that it might seem that all offences which place legal burdens of proof on
the defence automatically interfere with the presumption of innocence, even if
those burdens operate only within defined exceptions, for the following reason.
In such cases, the offence element of the legislation obviously includes more forms
of conduct than the offence is designed to control. And this, the argument con-
tinues, can be seen from the very existence of the exception. If the offence defini-
tion was designed to control all of the conduct which falls within it, there would
be no need for an exception. So the existence of the exception immediately im-
plies that, at least as far as the offence definition goes, the state is deliberately in-
cluding within the definition of the offence a broader range of conduct than it
wishes to control with that offence, and it is precisely that, we have argued, which
entails interference with the presumption of innocence.

Therefore, it might be thought that, where the legal burden of proof is placed
on the defence, the presumption of innocence is inevitably interfered with. The
reverse burden of proof places the burden on the defence to show on the balance
of probabilities that the defendant falls within the exception. The problem arises
for defendants who in fact fall within the exception but are unable to prove this
on the balance of probabilities. However, some of those defendants may be able to
prove that there is some significant chance that they fall within the exception.
And if there is such a chance that they fall within the exception, then it has not
been shown beyond reasonable doubt that they do not do so. Hence, the argu-
ment goes, the presumption of innocence has been interfered with.

However, once again, this argument confuses the target of the presumption of
innocence, which is the conduct which the offence is designed to control, with
the surface way in which the offence is constructed. The reason why the argument
does not succeed is as follows. The boundaries of the exception may not corre-
spond to the boundaries of the gravamen of the offence. The fact that there are
defendants who may fall within the exception, but who are unable to prove that they
do so on the balance of probabilities, does not entail that there are defendants who
may be innocent of the conduct which the legislation is designed to control, but who can be
convicted with that evidence of the offence.

The reason why the former claim does not entail the latter can be shown by the
following abstract argument. Suppose that we wish to know whether a proposi-
tion, $p$ (the gravamen of the offence), is true beyond reasonable doubt. In order to
show that, we normally need very powerful evidence (or some other good argu-
ment), $e$, to believe that $p$. Depending upon the nature of $p$, in the absence of
countervailing reasons not to believe that $p$, where we have $e$, we may have no
reason to doubt that $p$. For example, if I see the lion in the cage and there is no
reason to believe that the lion is not in the cage, it is beyond reasonable doubt that
the lion is in the cage.

Now suppose the following three things. First, that where $q$ obtains, $e$ does not
show that $p$ obtains. Secondly, in circumstances where we are aware of $e$, it is very
unlikely that \( q \) obtains. Thirdly, showing a reasonable possibility (less than proof on the balance of probabilities) that \( q \) obtains does not amount to a reasonable doubt about \( p \). Only evidence on the balance of probabilities of \( q \) would confirm a reasonable doubt that \( p \) obtains. In such circumstances, where we are aware of \( e \), \( p \) is true beyond reasonable doubt unless \( D \) proves \( q \) on the balance of probabilities. If the state criminalizes \( e \), creating an exception concerning \( q \), which the defence must prove on the balance of probabilities, and \( p \) is the purpose of the offence, there is no interference with the presumption of innocence.

At first sight, it might be thought that this argument does not hold for the following reason. Suppose that \( D \) has to prove \( q \) on the balance of probabilities. When cases arise in which \( D \) has shown a mere possibility, less than the balance of probabilities, that \( q \) is the case, those cases would result in convictions, and through warranted application of the law. But if \( D \) has shown a mere possibility that \( q \) obtains, those convictions will arise even though there is a reasonable doubt about the guilt of \( D \). That argument is false. It would be true if a mere possibility that \( q \) obtains entails a reasonable doubt about \( p \). But that is not necessarily the case in the above argument. A mere possibility that \( q \) obtains might not entail a reasonable doubt about \( p \). For \( q \) is merely evidentially related to \( p \). In other words, \( q \) does not constitute part of the gravamen of the offence, in the sense that we have outlined, it merely constitutes evidence of the gravamen of the offence. The fact that a particular piece of evidence that \( p \) does not exist does not of itself generate a reasonable doubt that \( p \) obtains where there is other evidence that \( p \) obtains, in this case \( e \).

To see this, consider the following example. Suppose that there are two chemicals, \( M \) and \( N \), which are the only substances that both produce a green gas at exactly 50 degrees. \( M \) is very common (90 per cent of cases). \( N \) is very rare (10 per cent of cases). In experiment, a green gas is seen at exactly 50 degrees. Harry, a lab assistant, is then told to perform a perfectly reliable test for the substance and reports that it is \( M \).

Now, it may be shown that there is a reasonable possibility that Harry is not telling the truth (10 per cent). Perhaps it can be shown that Harry has been known, very occasionally, not to bother testing the substances. But a reasonable possibility that Harry is not telling the truth about his test does not amount to a reasonable doubt that the substance is \( M \). There is a very small chance that the green gas is \( N \), which might, without anything further, constitute a reasonable possibility about it not being \( M \). And there is a possibility that Harry has not performed the test. But the substance will only be \( N \), the only other possibility, in the very unlikely circumstances that both the green gas is indicative of \( M \) and Harry has not performed the test (1 per cent). The likelihood of these both being the case may be sufficiently small that Harry reporting that the substance is \( M \) where the green gas is produced is sufficient to constitute proof beyond reasonable doubt that the substance is \( M \). On the other hand, showing on the balance of probabilities (50 per cent) that Harry has not performed the test may be sufficient to show that there is a reasonable doubt (5 per cent\(^{42} \)) about the substance being \( M \).

\(^{42} \) There may be debate about the relationship between a reasonable doubt and the probability we have assigned. We simply use these figures to highlight our example. Nothing turns on the exact proportion for the cogency of the argument.
Given the cogency of this argument, we can see why some exceptions which have reverse burdens of proof do not interfere with the presumption of innocence, even if that burden of proof is legal rather than merely evidential. Suppose that parliament wishes to control possession of M. It criminalizes possession of a substance which produces a green gas at exactly 50 degrees, and whose chemical composition has been ratified by a certified lab assistant as being M. It is a defence to show on the balance of probabilities that the lab assistant has not performed the relevant test. This does not breach the presumption of innocence. For showing a reasonable possibility that the lab assistant has performed the test does not amount to a reasonable doubt that the substance is M.

To generalise concerning exceptions with reverse burdens of proof, such exceptions will interfere with the presumption of innocence unless all of the following things are the case. First, if the conditions of the offence are satisfied, and no other evidence is presented, it is known beyond reasonable doubt that the defendant falls within the gravamen of the offence (as defined above). Secondly, even where that body of evidence exists, it still may be the case that the defendant is in fact innocent of that conduct. Thirdly, proof on the balance of probabilities that D falls within the exception will generate a reasonable doubt that D has not performed the gravamen of the offence. Fourthly, if D shows anything less than proof on the balance of probabilities that he falls within the exception, no reasonable doubt is created about him having performed the gravamen of the offence.

The above argument shows that it is possible to fulfil these four conditions. If these conditions are fulfilled, there will be no case in which the prosecution prove all elements within the offence definition, the defence fail to prove on the balance of probabilities that they do not fall within the exception, and yet the defendant does not fall within the gravamen of the offence. This shows that it is possible for a piece of legislation to include an exception which places a legal burden of proof on the defence but which does not interfere with the presumption of innocence.

However, this argument cannot be used to defend the vast majority of exceptions and defences – in fact any exceptions and defences of which we are aware. For, in the vast majority of cases, the exception or defence is created precisely for the reason that the conduct to which it refers is not within the purpose of the statute. Hence, very few exceptions and defences do not interfere with the presumption of innocence unless the burden that they impose is merely evidential rather than substantive.

In the light of that argument, let us investigate a case in which it was held that an exception did not constitute part of the gravamen of the offence, the case of Attorney General’s Reference (No 4 of 2002)44. In that case, the accused was charged with being a member of, and professing to be a member of, a proscribed organisation, contrary to section 11(1) of the Terrorism Act 2000. The accused in the case from which the reference arose was acquitted after he raised a defence under the Act. Section 11(2) provides that it is a defence under section 11(1) to prove

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43 On which, see the discussion below.
44 n 12 above [2003] All E R (D) 342.
a) That the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and

b) That he has not taken part in the activities of the organisation at any time while it was proscribed.

Unlike the defences under section 57, the defence in section 11 is not mentioned in section 118 of the Act, which, as noted above, ensured that only an evidential burden was imposed on the accused with regard to the defence. Hence, on ordinary principles of construction, all parties accepted that the burden imposed on the accused was legal as far as the defence was concerned.

The Court of Appeal considered both the question of whether there had been interference with the presumption of innocence, and whether that interference was proportionate. They came to the conclusion that there had been no interference with the presumption of innocence, and that even if they were wrong about that, any interference that there was with the presumption of innocence was proportionate. We will consider only the first question here, the general issue of proportionality is considered below.

The Court of Appeal approached the question of interference using the conceptual framework first developed by the Divisional Court in *Kebilene*, considering the gravamen of the offence. However, in this case, the court argued that the subsection did not constitute part of the gravamen of the offence. After reviewing the issue determined by previous authority, Latham LJ argued as follows:

In our view, section 11(1) defines the gravamen of the offence, even read together with section 11(2). That is because section 11(2) identifies a very specific exception applicable to a limited class of defendants which does not, in our judgement, in any way affect or infect the criminal offence fully identified in section 11(1). It is in our judgement quite clear that Parliament intended that a person should be guilty of an offence under section 11(1) irrespective of whether or not he had played an active part in the organisation. Section 11(2) therefore does not infringe the presumption of innocence so as to breach Article 6(2) of the Convention. 45

That reasoning is quite mistaken. In creating an exception under subsection 11(2), it is clear that Parliament intended that those who fell within the exception ought not to be convicted of the offence. It may be that the exception is more limited than other exceptions considered in other cases, but nevertheless, it is clearly beyond the purpose of the offence under section 11(1) to control those who fell within section 11(2). In that case, if our interpretation of the term ‘gravamen’ is correct, as far as the offence created by section 11 is concerned, those falling within subsection 11(2) are to be considered innocent. If citizens who in fact fall within that subsection may be convicted without proof beyond reasonable doubt that they do not so fall, the presumption of innocence has been interfered with. That the subsection is limited in scope makes no difference to this conclusion.

The proper question to be asked is as follows: does proof beyond reasonable doubt that the defendant meets the conditions of the offence under subsection

45 *ibid* 38.
11(1) also constitute proof beyond reasonable doubt that he is one of the class of persons that the offence was designed to control, unless he could prove on the balance of probabilities that he does fall within the exception? For it is only if that is the case that the absence of such proof, in circumstances where the offence conditions have been fulfilled, shows beyond reasonable doubt that the defendant is in fact not innocent. In the absence of that situation there has been an interference with the presumption of innocence.

But as the subsection was intended precisely to provide a defence for those who have no active part to play in organisations which they had joined before they were proscribed, this cannot be the case for this statute. Of course, where the accused is a member of a proscribed organisation and there is no reason to think that he joined before the organisation was proscribed, there will often be proof beyond reasonable doubt that he joined after the organisation was proscribed. For it will often be difficult to see how there can be a doubt that he fell within the subsection without any evidence of that being presented, and without any explanation as to why it was not presented. However, as defined at present, the subsection warrants the conviction of defendants who can show that there is a reasonable doubt whether they fall within the subsection. The reverse burden of proof can only have been created because there are such defendants. What would have been its purpose otherwise? And as such, it interferes with the presumption of innocence.

A consequence of the preceding argument is that an evidential burden on the accused in subsection 11(2) could be justified. In fact, such an evidential burden hardly needs to be made explicit, other than to facilitate the court process. The point of such burdens is simply that the absence of any evidence that the defendant falls within a defence or exception generally constitutes proof beyond reasonable doubt that he does not: otherwise why can he not raise any credible evidence to suggest that he does not fall within the defence? But without the burden on the prosecution to prove beyond reasonable doubt that the defendant does not fall within the subsection, which goes with mere evidential burdens, a conviction would be possible where there was a reasonable doubt (or even a more substantial doubt) whether he fell within the subsection. It is difficult to see how this could possibly be considered not to interfere with the presumption of innocence.

Strict liability offences
This argument also sheds light on whether strict liability offences interfere with the presumption of innocence. There may be strict liability offences which do not interfere with the presumption of innocence. Strict liability offences are offences which do not require proof of mens rea. One common objection to such offences is that they potentially make criminal conduct in circumstances in which the

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46 As is clear from the investigation of the creation of the defence in the judgement of Latham LJ.
47 If that were not the case, there would be no practical effect in the court interpreting the legal burden as merely evidential. In that case, it should be so interpreted.
48 Evidential burdens do have the advantage of making explicit the fact that where there is no evidence that the defendant falls within a defence, it has normally been proved beyond reasonable doubt that he does not. This potentially prevents bad practice on the part of the defence.
defendant is not morally at fault.\textsuperscript{49} Often, the reason why an offence is made an offence of strict liability is the difficulty of proving \textit{mens rea}. In such circumstances, warranting conviction of some individuals who are not morally at fault may be regarded as justified, by the legislature at least, in order to ensure conviction of more of those who are morally at fault. On the argument presented here, that trade-off, if it is being made, interferes with the presumption of innocence. This is a point not properly recognised either by the European Court of Human Rights or the courts of England and Wales as yet.\textsuperscript{50}

In \textit{Salabiaku v France}, it was argued that strict liability offences are permitted ‘under certain conditions’, a phrase that has caused some confusion in the courts. However, the artificial distinction between procedural and substantive protections has been used to argue that no challenge to strict liability offences is possible under article 6(2). For example, in \textit{Barnfather v London Borough of Islington Education Authority}\textsuperscript{51} the classical theory of the presumption of innocence was followed. Barnfather was charged under subsection 444(1) of the Education Act 1996, which provides: ‘If a child of compulsory school age who is a registered pupil at a school fails to attend regularly at school, his parent is guilty of an offence.’

The offence is one of strict liability. However, that was held, by the Divisional Court, to be compatible with article 6(2). It was argued that, as long as the prosecution has to prove beyond reasonable doubt that all elements of the offence have been committed, it matters not, as far as article 6(2) is concerned that there is no fault element in the offence. Article 6(2), it was argued, is concerned with procedure regarding offences, not with their substance which remained a matter for national legislatures.\textsuperscript{52} That leads to the absurd conclusion that a reverse onus of proof in a defence to an offence of strict liability may be held incompatible with article 6(2) where \textit{the very same offence} will be regarded as compatible as a whole if no such defence exists \textit{at all}.

Of course, there may be offences of strict liability that are justifiable. Whether the potential penalty is only of a monetary nature, as is often the case in strict liability offences, might help to determine whether the offence is compatible with

\textsuperscript{49} Whether \textit{mens rea} can really play the role of attributing fault is a contested issue. We only claim that offences of strict liability warrant convictions without moral fault. Whether \textit{mens rea} conditions in fact distinguish defendants who are morally at fault and those who are not, it is at least true that offences of strict liability are potentially objectionable on the grounds that they permit conviction of those who are not morally at fault.

\textsuperscript{50} Strict liability offences are permitted ‘under certain conditions’ in \textit{Salabiaku} n 3 above 27, although see \textit{Hansen v Denmark} (Applicn No 28971/95 16 March 2000) for evidence that the ECtHR was prepared, in some circumstances to hold that strict liability offences breach art 6(2). \textit{Salabiaku} resulted in a dismissive approach to a claim that a strict liability offence breached the presumption of innocence in the decision by Clarke LJ in \textit{R (On the application of Grundy & Co Excavations Ltd) and another v Halton Division Magistrates Court and another} [2003] EWHC 272 (Admin). Given that Clarke LJ recognised the importance of the gravamen of the offence in \textit{Sheldrake}, which was handed down on the same day as \textit{R v Halton Division Magistrates Court}, the brevity of that analysis is quite surprising.

\textsuperscript{51} [2003] EWHC 418 (Admin).

\textsuperscript{52} A different approach has been taken in Scotland in \textit{O’Hagan v Rae} 2001 SLT (Sh Ct) 30 in which it was held that a slightly more liberal provision in the Education (Scotland) Act 1980 was incompatible with art 6(2).
article 6(2) on grounds of proportionality. Where the burden of proof rests on the defence, the test that is used is whether the shift is necessary, not merely reasonable. And there is no reason why the same should not apply to strict liability offences. But it should not be assumed that this is never the case, given that ‘necessary’ can mean necessary effectively to regulate the conduct concerned without imposing an enormous financial burden on the state.

Furthermore, there may be offences of strict liability which do not interfere with the presumption of innocence at all. For there may be offences which are intended to result in convictions not only of those who are morally at fault but also those who are not. For such offences, those falling within the latter category are not to be regarded as unintended victims of the legislation. That Parliament intends convictions without moral fault may be considered objectionable in principle, and may interfere with other Convention rights, but that does not entail that the presumption of innocence has been interfered with. However, it is probably rare that Parliament intends that those who perform the actus reus of an offence will be convicted where they have no moral fault at all.

As far as the Education Act 1996 is concerned, there is clearly interference with the presumption of innocence. The Act can only have been designed to ensure that parents will take all reasonable steps to ensure that their children regularly attend school. But convicting parents who have taken all such reasonable steps, but whose children do not regularly attend school, is not a means by which that can be achieved: it is not directly intended, it is only a foreseen side effect of the statute, that some parents who take all reasonable steps to ensure that their children regularly attend school will be convicted of the offence. One can only conclude that Parliament has warranted the conviction of such parents in order to ensure the conviction of a greater number of parents who fail to take all reasonable steps to ensure that their children attend school. And that interferes with the presumption of innocence.

In the last section we showed that there may be criminal offences which interfere with the presumption of innocence that do not involve a reversal of the burden of proof. In this section we have shown that there are criminal offences which involve a reversal of the burden of proof with regard to some elements of the offence, but which do not interfere with the presumption of innocence. It is against this backdrop that the question of whether interference with the presumption of innocence is proportionate should be addressed.

53 There was disagreement about that issue in Barnfather, Maurice Kay J arguing that it was proportional to make the offence one of strict liability and Elias J contending that it was not. However, as both agreed that there was no interference with art 6(2), no reading down was necessary, or indeed possible.

54 This is hotly debated, both in the criminal law and in tort law. The idea that one’s legal responsibility rests entirely on what one actually does, regardless of fault, is far from inconceivable on moral grounds. See J. Gardner, ‘Obligations and Outcomes in the Law of Torts’ in P. Cane and J. Gardner, Relating to Responsibility: Essays for Tony Honore (Oxford: Hart, 2001). Regulation in this way may be appropriate, though it is doubtful that the criminal law is an appropriate institution for such regulation. See A. Ashworth, n 41 above 118, for an argument about taking such regulation outside the realm of the criminal law.
When might an inroad into the presumption of innocence be justified? In Sala-biaku the Court found that such presumptions of fact and law should be confined ‘within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.’ It was noted in the introduction that the ‘reasonable limits’ test has been taken by the House of Lords to require a balancing exercise between the seriousness of the evil against which the law is intended to protect and the due process rights of the accused person. Furthermore, the notion of ‘reasonable limits’ is generally applied in terms of a necessity test. As Lord Steyn expressed it in Lambert: ‘The burden is on the state to show that the legislative means adopted were not greater than necessary.’

It seems that under the necessity test the court should ask whether it is in fact necessary, in order to effect the purpose of the legislation, to warrant the conviction of innocent persons, persons who are not intended, in the sense developed earlier, to be caught by the legislation. In other words, judges should clearly articulate what is at stake on both sides of the scales. They should be clear as to the extent of the inroad into the presumption of innocence, because only then will they be in a position properly to consider what factors might make that inroad justified.

The burden on the prosecution to show that such an inroad can be proportionate is surely an onerous one. The right contained in article 6(2) is fundamental, and hence any limitation must require strong justification. Certainly the courts have accepted that the presumption of innocence is not absolute and that necessary limitations might apply. In this context Lord Hope developed the ‘discretionary area of judgment’ doctrine in Kebilene. The courts must recognise that difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion

55 Simon Brown L J in Roth: ‘Judges nowadays have no alternative but to apply the HRA. Constitutional dangers exist no less in too little judicial activism as in too much.’ International Transport Roth GmbH v Secretary of State for the Home Dept [2002] 1 CMLR 52.

56 Sala-biaku n 3 above 28.

57 Lord Steyn took the view that the relevant sections of the Misuse of Drugs Act made it possible for the accused to be convicted even if the judge had a doubt as to his guilt. On this basis the relevant provisions interfered with the presumption of innocence in a disproportionate way. Lord Steyn in Lambert n 1 above 37.

58 This term was first formulated by Lord Lester and David Pannick, e.g. in (1999) Human Rights Law and Practice, 73–76; it is cited approvingly by Lord Hope in Kebilene, 994. See also D. Pannick, ‘Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment’ (1998) PL 545; and P. Craig, ‘The Courts, the Human Rights Act and Judicial Review’ (2001) 117 LQR 589. The principle of proportionality was given one of its classic enunciations by the ECtHR in Soering v United Kingdom: ‘inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.’ (1989) 11 EHRR 439, 468.
of the elected body or person whose act or decision is said to be incompatible with the Convention.\textsuperscript{59}

However, Lord Hope also makes it clear that application of this doctrine is less appropriate in respect of ‘high constitutional rights’. It is difficult to conceive of a constitutional right of higher importance than the right of the citizen to be presumed innocent of criminal offences with which he is charged. There are several factors which the courts have taken into account which might weigh on the scales as necessary justifications for interfering with the presumption of innocence in the general public interest. We will address three of these issues in turn.

**Difficulty for the prosecution in proving something which is within the knowledge of the accused**

The first issue concerns the difficulty for the prosecution in proving a particular fact. In other words, the inroad is necessary because the prosecution cannot prove the crime. This in itself, however, cannot be taken to justify an inroad as necessary. The difficulty in proving that the defendant has committed a criminal offence is a general problem faced by the prosecution in many cases; in fact it is commonly a consequence of the presumption of innocence that crimes may well be difficult to prove given that the burden is generally upon the prosecution to prove the accused’s guilt beyond reasonable doubt.

The courts have, however, been open to arguments that when a crime is difficult to prove, and the problematic element refers to something that is within the accused’s knowledge, then the inroad into the presumption of innocence may be justified. In recent cases the knowledge of the accused has been the basis upon which legal burdens have been found to be proportionate. Two examples are *L v Director of Public Prosecutions (Lynch v DPP)*\textsuperscript{60} and *R v Matthews*.\textsuperscript{61} In those cases the defendants were charged under section 139 of the Criminal Justice Act 1988 with having a bladed article in a public place. General and specific defences have been created under sections 139(4) and 139(5) of that Act. The former provides a general defence for those who can prove that they had the bladed article for good reason or lawful authority. The latter provides a defence for those who have the article for use at work, for religious reasons or as a part of national dress. For both defences, the burden of proof is on the defence to show that this is so.

In both cases it was argued that section 139(4) did not contravene the presumption of innocence. The central reason that was given in *L v DPP* to distinguish section 139 from section 28 of the Misuse of Drugs Act 1971, as interpreted in *Lambert*, was that ‘the defendant is proving something within his own knowledge’,\textsuperscript{62} or, as it is put in *Matthews*, ‘the reason for which an accused has a bladed article in a public place is something peculiarly within the knowledge of the accused’.\textsuperscript{63} The same issue was crucial in the *Attorney General’s Reference* case.\textsuperscript{64} The idea that it is proportionate to

\textsuperscript{59} *ibid*. Note this was paraphrased by Lord Woolf as his third test in *Lambert*.

\textsuperscript{60} n 11 above.

\textsuperscript{61} n 12 above.

\textsuperscript{62} n 1 above 27.

\textsuperscript{63} n 12 above 16.

\textsuperscript{64} n 12 above per Latham LJ 42.
make inroads into the presumption of innocence when the issue relates to something which is likely to be within the accused person’s own knowledge is surely wrong. The fact that an element is peculiarly within the knowledge of the accused is only an indication of something that is potentially relevant: that the element poses evidential problems for the prosecution. There is nothing special about the element being peculiarly within the knowledge of the accused in this regard. There may be many other things which are difficult for the prosecution to prove.

Furthermore, the fact that something is difficult for the prosecution to prove cannot very often constitute good grounds for placing the burden of proof on the accused. Supposing otherwise would be dangerous. For example, it is notoriously difficult to convict defendants of the offence of rape. Are we to conclude from this fact that there is good reason to place the burden of proof on the defence with regard to some elements of the offence of rape?

Presumably the reason why the courts refer to the knowledge of the accused in juxtaposition to the difficulty the prosecution has in proving a particular point is due to an implicit assumption that something which is within the accused’s knowledge is thereby easy for him to prove.65 In other words, this issue concerns the degree of interference rather than proportionality. But the argument that since the element was in the particular knowledge of the accused, interference with the presumption of innocence is itself limited is false. The degree of interference with the presumption of innocence may be very great even if the element concerned is peculiarly within the knowledge of the accused. That the defendant knows \( p \) to be the case does not entail that it is easy for him to prove that \( p \) is the case. For example, the fact that the accused knows why he had the blade does not make it easy to prove why he had the blade even if in fact he had it for a perfectly lawful reason.

Similarly a person may know when he joined a proscribed organisation but may find it difficult to prove that fact. Such organisations tend to be clandestine and even before they are proscribed members may be unlikely to keep a written record of their membership. To call upon witnesses to attest to one’s membership may be difficult given the risk of incrimination for the witnesses in question. Furthermore, the idea as articulated by the courts has far too broad a scope. For example, it could be used with regard to most \( \textit{mens rea} \) terms, for most \( \textit{mens rea} \) terms are peculiarly within the knowledge of the accused.66 In the previous section we suggested that where a person knows \( p \) and \( p \) is easy for him to prove then an inroad may be justified. But that is only because, where that is true, the degree of interference with the presumption of innocence is less. It is both wrong and dangerous to assume that knowledge of \( p \) and the ability to prove that \( p \) are related.

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65 Knowledge and ease of proof are conflated in this way, problematically in our view, by Lord Nicholls of Birkenhead in \textit{R v Johnstone} [2003] UKHL 28, 50.

66 There are exceptions. Objective recklessness, for example, is not particularly within the knowledge of the accused: it refers to what the reasonable man would have realised about risks rather than what the accused actually did realise. But in general most issues of \( \textit{mens rea} \) concern facts within the knowledge of the accused.
The nature of the threat

The second issue which the courts use in determining whether a particular inroad into the presumption of innocence is necessary in the general interest of the community is ‘the nature of the threat faced by society which the provision is designed to combat’.67 By this argument, the danger facing the community is so great in this area that the legislation may be justified in restricting the presumption of innocence of a particular accused person. In other words, the risk of convicting innocent persons is one which is more justifiable in combating particularly serious social evils; the risk of miscarriages of justice may be a proportionate outcome given the extent to which the community will benefit from the effective enforcement of the law and the concomitant reduction in the threat to society posed by the evil in question. There are several problems with this notion.

As noted earlier, the presumption of innocence is a fundamental constitutional right. On this basis it seems difficult to argue that this right should be restricted in order to pursue a general policy initiative, even one of great importance; after all, the purpose of the presumption of innocence is to protect the individual from wrongful conviction by the state even when the state may have worthy objectives in seeking that conviction.

There is a second reason why the argument is problematic. The crimes created by such legislation are also likely to be very serious, and the more serious the criminal conduct with which the accused person is libelled, the greater the potential for harm in a wrongful conviction. A South African case, Coetzee, makes the point well:

The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, house-breaking, drug smuggling, corruption … the list is unfortunately almost endless and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.68

The third difficulty is that the courts may take a fairly superficial approach to the whole question of the purported threat faced by society. When legislation covers certain broad areas of important social policy (such as combating drug trafficking or terrorism), courts can immediately become conditioned to accept a purported societal interest without careful consideration of several important questions. First, whether there is in fact any empirical evidence to support the contention that the legislation itself, and more specifically the limitation of the presumption of innocence protection, serves the purpose Parliament intends. Secondly, the extent of the inroad into the presumption of innocence – here the balance between

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67 Lord Hope in Kebilene and referred to by Clarke LJ in Sheldrake, n 9 above 43.
68 Coetzee cited in HMA v McIntosh [2000] SLT 1280, 1286. This case has since been cited also by Lord Steyn in Lambert, n 1 above 34, by Clarke LJ in Sheldrake, n 9 above 17 and by Lord Nicholls of Birkenhead in R v Johnston, n 65 above 49. See also the extended discussion of this passage in Ashworth n 41 above 112–116.
the real interest to the community and the potential damage to the core right must be rigorously considered. And thirdly, whether the same purpose could have been served by way of a less draconian device.69

Certain cases suggest a propensity for excessive deference on the part of the judiciary to the policy goals of Parliament. For example, in Lambert the fact that the case involved drug trafficking set the tone for the Court of Appeal. As Lord Woolf comments: ‘there is a clear social objective in discouraging the trading both in hard drugs and … softer drugs’.70 It seems that the drug-related nature of the subject matter supplements Lord Woolf’s analysis of the structure of the offence and helps him to reach his conclusion that the modification of the burden of proof was justified.71 Another example of how the issue of drugs was so important to Lord Woolf’s position arises in his refutation of Glanville Williams’s celebrated critique of reverse burdens of proof in statutory defences of this kind. Such a reversal says Lord Woolf

has been imposed by the legislature deliberately for policy reasons it considered justified. Since 1971 that justification has increased … There is an objective justification in the case of drugs for the choice and it is not disproportionate.72

What is notable from Lord Woolf’s judgment in Lambert is that there is little attempt to draw anything but very general cross-references between the nature of the subject matter and the consequent justification for limiting the presumption of innocence. To say there is an ‘objective justification’ is simply not enough. Any limitation must be necessary not merely justifiable.73

In order to emphasise the importance of protecting the core right judges should, in developing a doctrine of deference vis-à-vis the HRA, note first and foremost the duties which courts have under this Act.74 It ought not to be

69 Lord Steyn in Lambert, n 1 above 37.
70 Lambert, n 1 above 25. This also caused him to address the legislative history of the provision. ‘Prior to the 1971 Act the increasing international concern over the supply of drugs had been reflected in treaties to which this country was a party. When the statutory history of the sections is then into account… it is clear that Parliament had deliberately chosen to produce the result set out already.’ At 23. See also R. Edwards, ‘Judicial Deference under the Human Rights Act’ (2002) 65 MLR 864, 859–882.
71 Lambert ibid 25.
72 ibid 26.
73 Richard Edwards criticises the approach taken by Lord Woolf in Lambert on this basis. In general Edwards has attacked the doctrine of deference which as currently conceived by the judiciary ‘is a flawed and unprincipled doctrine’. He argues persuasively that deference should only be applied when the courts have a clear idea of the nature of the core right and of its importance: ‘There is a difference between affording the legislature an area of discretion under the most stringent part of the proportionality test and the broader form of deference which the executive and Parliament has, on occasion, been granted by the British courts, in some cases before any form of limitation analysis is undertaken.’ Edwards, n 70 above 863.
forgotten when human rights conflict with other policy choices that the passage of the HRA by Parliament was itself a policy choice, and that through the HRA Parliament requires a rigorous assessment by the courts of other legislative provisions when these run counter to ECHR rights including the presumption of innocence. To assess rigorously the proportionality of measures which impugn fundamental rights is not to enter into conflict with Parliament, but rather to defer to its policy choice as expressed in the HRA.

A fourth problem with the ‘threat to society’ argument is that in certain cases the reason for accepting the inroad into the presumption of innocence, although presented in terms of combating a particular social evil, is in fact quite different; for example, the difficulty for the prosecution in proving the offence. In other words, the ‘threat to society’ can be used to mask a far more prosaic problem for the prosecution. This can be seen in the case of Salabiaku. Here the French government argued before the ECtHR that a shift in the burden of proof was justified ‘by the very nature of the subject matter’ of the law in question. This seems to be an indirect reference to drug trafficking, but it seems that on closer inspection this reference to the nature of the subject matter can lead to confused and perhaps disingenuous reasoning.

Salabiaku had taken possession of a trunk with no name or address at Roissy Airport in France. He was arrested and the trunk searched. Based on the trunk’s contents S was convicted first of the illegal importation of narcotics and secondly of smuggling prohibited goods. The first conviction was over-turned but the second was upheld by the Paris Court of Appeal. The court accepted that the first charge was not proven since it was not impossible that the trunk was for someone else, and so there existed a doubt from which he was entitled to benefit. However, the offence of smuggling was constituted simply by possession of goods which he had not declared to customs. In other words, the nature of the smuggling offence was effectively one of strict liability, whereas that of importing narcotics carried a defence available to S.

On this basis it seems impossible that the French government could argue that placing the burden of proof on the defence was justified by the drug-related nature of the subject matter since the social evil of drug smuggling carried greater procedural protection than smuggling per se. The reason for the reverse burden seems to be justifiable only in terms of the difficulty in proving smuggling of socially harmless goods. The Court ought to have considered whether such a practical consideration really did justify the reversal of the burden of proof. However, no such discussion takes place in the judgment and the ‘nature of the subject matter’ was left in the air as though drug smuggling was the issue when clearly it was not.

**Seriousness of the offence and of the penalty**

A third factor on the scales which the courts take into account in determining if a particular inroad may be justified as necessary is that the cost to the accused

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75 Salabiaku, n 3 above 26.
76 ibid.
person from a wrongful conviction may not be very great either in terms of the seriousness of the offence with which he is convicted or in terms of the penalty which results from conviction. This issue can be decisive of proportionality. For example, in *Davies v Health and Safety Executive* a legal burden imposed upon the accused was found to be ‘necessary, justified and proportionate’, and the issue of penalty was a central factor in the court’s decision. The legislation involved (health and safety legislation) was regulatory and not stigmatic, and as a consequence penalties were fairly minor with no risk of imprisonment.

The argument for the approach taken in *Davies* is that an inroad is proportionate because any injustice to the accused is likely not to be severe. Seriousness of the offence or of the penalty may well be a relevant factor which can help determine the proportionality of an inroad. However, there are problems with the way in which this factor has been applied.

The first problem concerns when an offence is serious or a penalty high. So far English courts have not reached any principled position on that question. There are two distinct issues at stake here. On the one hand there is the question of the degree of penalty attached to an offence. On the other, there is the question of the degree of stigma that the offence carries. Often the courts have taken the first issue seriously, whilst failing to recognise the full significance of the second.

Consider *Sheldrake* where Clarke LJ distinguished *Davies* on the question of the seriousness of the offence in question. Drink-related driving offences, he argued, were serious criminal offences and in respect of such an offence the reversal of a legal burden was much harder to justify. Henries JJ in his dissent, however, disagreed. He considered not so much the nature of the offence, but rather the penalties imposed: the penalties for drink-driving were fairly low compared to those for drugs-related offences such as were at issue in *Lambert*. This conclusion, therefore, helped him reach his decision that the legal burden in *Sheldrake* was not disproportionate.

The degree of stigma attached to a particular offence is a complex issue which ought not to be underestimated by the courts. Conviction for a seemingly trivial offence which carries an apparently moderate penalty may still have a serious psychological effect on some defendants. For example, one person may consider a conviction for drink-driving to be stigmatic, whereas another may be less psychologically affected by a conviction for a seemingly more serious offence. Also a conviction for what appears to be a minor offence can have knock-on consequences. A conviction for drink-driving may not result in a prison sentence but it may lead to the loss of employment for the convicted person.

Another possible ramification can be the ostracisation of the person within his or her community. For example, the issue of presumption of innocence has arisen in respect of proceeds of crime legislation. In this situation the person is not convicted of a new offence, is not given a prison sentence and is not even fined.

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78 Clarke LJ in *Sheldrake*, n 9 above 81. In the same case Jack JJ also concluded that ‘taking account of the comparative seriousness of the offence, it is not necessary and proportionate that s 5(2) of the 1988 Act should impose a legal burden on a defendant’ 162.
79 ibid 96.
Instead property attributed to previous unspecified drug-related activity is confiscated. This may not seem to be a severe penalty, or indeed to be a penalty of any kind. But in fact the ramifications can be serious for the individual concerned. If during sentencing for a drugs related conviction a person is found by the court to have received proceeds from other unspecified drugs-related activities, this in effect labels the person as a persistent drug dealer. Aside from any confiscation order imposed by the court, such a conclusion serves to stigmatise; he may feel the opprobrium of the community and this can manifest itself even in terms of victimisation and endangerment to his personal safety.

In interpreting a statute, the courts must recognise that that statute may be applicable to a broad range of individuals in a broad range of contexts, and the degree of stigma may vary widely between individuals and contexts. The courts ought to determine the proportionality question against the most serious effect which wrongful conviction could potentially have.

For all these reasons the issue of penalty as a factor which might justify inroads into article 6(2) ought to be approached very cautiously. Perhaps the only area in which a strong argument can be made for regarding interference with the presumption of innocence as clearly proportionate concerns crimes that all members of the community would regard as regulatory and of a trivial nature, and which carry only minor penalties. For minor road traffic offences, for example, the practical difficulties in securing convictions seem to demand that the presumption of innocence be compromised; given the overwhelming public interest in a properly functioning traffic system these inroads would appear to be necessary on the basis that the offences in question, and the penalties attached, are very minor. Beyond that, in the vast majority of circumstances, interference with the presumption of innocence is unwarranted.

CONCLUSIONS

This article has focused principally upon two questions. First, how are we to assess the degree to which the presumption of innocence has been interfered with? Secondly, what principles ought to guide English courts in establishing whether interference with the presumption of innocence is proportionate?

In answer to the first question, we argued that the proper way to determine the degree to which the presumption of innocence has been interfered with concerns the purpose of the offence. It should be for the prosecution to prove all elements of the offence in order to demonstrate that the defendant’s behaviour is criminal in terms of the purpose of that offence; if it cannot do so, the presumption of innocence has been interfered with. And this is so whether or not there is a reversal of the burden of proof, and regardless of how the offence is constructed on the surface. Certain criminal offences are created by statute in order to escape the evidential strictures to which they should properly be subjected; and in such a situation, where the surface construction of the offence does not properly reflect the purpose for which it was enacted, the courts ought to declare that the offence interferes with the presumption of innocence. In this article we have explored several examples of such offences as they have arisen in recent caselaw. While
we have not engaged in a systematic study of the extent of this problem in English criminal law, we suspect that there are many offences of this type, including many offences of strict liability.

In terms of the second question, we looked critically at the criteria that the courts have used to consider the question of proportionality. The courts, we contend, are failing to address the issue of proportionality in a sufficiently principled way, particularly insofar as they defer to Parliament excessively when it creates criminal offences designed to deal with certain specific social problems. For example, whereas the courts seem prepared to accept that interference with the presumption of innocence is proportionate with regard to offences concerning illegal drugs, they have not articulated carefully how a distinction is to be drawn between such offences and the central offences of the criminal law, such as murder and rape, where presumably interference with the presumption of innocence would be looked on sceptically. We have not exhausted consideration of the question of proportionality, but we suggest that interference with the presumption of innocence ought to be considered proportionate only for a very limited category of offences. Those are offences which carry low penalties. Even here the issue of ‘low penalty’ ought to be approached cautiously, since many offences with seemingly low penalties can bear serious ancillary consequences such as social stigma.81

There is also a broader constitutional issue which emerges from this account. The problems which the courts have faced in dealing with the presumption of innocence stem largely from the way in which the relationship between courts and Parliament has changed under the HRA. It may be argued that our understanding of the presumption of innocence is one which invites English courts to undermine the sovereignty of Parliament, and that our account, by promoting judicial activism, is insufficiently sensitive to the principle of democratic accountability. The argument for judicial deference was made by Lord Nicholls of Birkenhead in R v Johnstone82 where, in the context of article 6(2), he suggested that ‘Parliament, not the court, is charged with the primary responsibility for deciding, as a matter of policy, what should be the constituent elements of a criminal offence.’ Hence, he concluded, ‘the court will reach a different conclusion from the legislature only when it is apparent the legislature has attached insufficient importance to the fundamental right of an individual to be presumed innocent until proven guilty’.83

In response to this objection it should be noted that, in passing the HRA, Parliament has compelled the courts, where possible, to read statutes in a way compatible with Convention rights.84 Although this requires of the courts a rigorous approach to statutory interpretation, it should not be confused with a judicial usurpation of Parliament’s role. Where a court finds a violation of the presumption

81 See also Ashworth n 41 above, who is forthright about the problems with the balancing approach, particularly with regard to serious offences. Ashworth, at 118, also suggests that serious consideration ought to be given as to whether there should not be a separate category of ‘regulatory’ offences, which do not carry the stigma or the sanctions of criminal offences, and which accordingly need not carry the same protections in terms of human rights. We agree.
82 n 65 above.
83 ibid 51.
84 HRA s 3(1).
of innocence and concludes that the statute in question will not permit an HRA-compatible reading, the court may not strike down the provision in question but may only declare it to be incompatible with Convention rights. 85 This balance between a rigorous application of Convention rights and Parliament's desire to retain its own supremacy was one created by Parliament itself; and in this sense, far from undermining Parliament, a principled application of the presumption of innocence guaranteed by article 6(2) is expressly required by Parliament through the HRA in order to provide citizens with real protections against state power.

Furthermore, the approach that we have developed regarding the presumption of innocence does accept that Parliament is the appropriate body to define the substance of English criminal law. By our account of the presumption of innocence, Parliament has the power to create criminal offences in pursuit of any purpose without thereby violating article 6(2). 86 What it cannot do is to pursue a particular purpose by warranting the conviction of citizens for aspects of their behaviour which it is not the purpose of the offence to control. If Parliament wishes to criminalize a certain type of behaviour, it ought to do so directly. In particular it must not, motivated by the reason that the behaviour it wishes to criminalize is difficult to prove, attempt to evade the demanding standards of the criminal law, by criminalizing something else. It must not cast the net of the criminal law more widely than the purpose of the offence demands. For that would warrant conviction of the innocent, those not intended to be controlled by the offence, as well as the guilty. If it does this, and we suggest that it commonly does, it interferes with the presumption of innocence. And, we contend, there are few offences for which such net-widening is proportionate. It is the duty of the courts in such circumstances either to interpret the legislation in such a way that would make it compatible with the presumption of innocence, or, if this is not possible, to declare it incompatible with article 6(2).

85 HRA s 4(1). There is of course a danger that, by applying s 3(1), the courts can go too far and read down legislation in a way which effectively re-writes legislative provisions. In such a situation s 4 will become redundant. For example in R v A (No 2) [2001] 2 WLR 1546 Lord Steyn suggested that a court should find it possible to interpret a legislative provision in a Convention-compatible way unless 'a clear limitation on Convention rights is stated in terms'. Lord Hope, however, suggested that the purpose of the Act as a whole should be addressed in determining whether a compatible reading was possible; Parliament's clear purpose should not be usurped by the courts. See F. Klug and K. Starmer, 'Incorporation through the "front door": the first year of the Human Rights Act 1998' [2001] Public Law 654; F. Klug, 'Judicial Deference under the Human Rights Act 1998' [2003] EHRLR 125–133; and Nicol, n 74 above.

86 The way in which Parliament constructs offences may of course conflict with other provisions of the ECHR, but that is a separate question.