In 21st Century Australia, has the Presumption of Innocence become the Presumption of Guilt?

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Disclaimer: The author makes no judgment as to the innocence or guilt of any person mentioned in this editorial.

Introduction

On October 27, 2022, Brittany Higgins stood outside the Australian Capital Territory Supreme Court and made a statement to the media. Higgins said, "I was required to tell the truth under oath for over a week in the witness stand and was cross-examined at length. He [Bruce Lehrmann, the accused] was afforded the choice of staying silent in court, head down in a notebook, completely detached…He hasn't had to be publicly accountable for his actions or any part of his story".[1] Such a statement made following such an emotional and polarising trial frames the Australian legal system as a shield that protects the guilty at the expense of the innocent, and emphasises the need for a legal system that makes the presumably guilty responsible in proving their innocence.

The presumption of innocence, a major factor of the rule of law, is one of the greatest defenders of individual rights and freedoms. This editorial will examine why we require the presumption of innocence, and how the presumption of innocence, and its inclusion in legislature, has been compromised by 21st Century Australian media and the expanding manufacturing of ignorance of the presumption and its role in maintaining human rights.

What is the Rule of Law and The Presumption of Innocence?

The rule of law demands that all people, regardless of demographic or position, be treated equally by the law,[2] so as to prevent power from being wielded arbitrarily and oppressively.[3] Generally, the rule of law is interpreted as the principle that nobody is above the law, and when a person or state is examined under the microscope of the courts, the case brought against them must be proved, rather than them having to argue their way out of a penalty, regardless how big or small the penalty may be.[4] This is what is commonly called the presumption of innocence; a tool that, when employed, contributes to the upholding of the rule of law that protects Australia from the rule of power associated with dictatorial states. According to Nicholas Cowdery, the rule of law "is a complex and fragile beast, easily damaged…and when it is, it needs to be repaired."[5] The presumption of innocence is not synonymous with the rule of law;[6] it is a facet of the implementation of the rule of law that seeks to prevent undeserved, unproven imprisonment. The presumption of innocence has been found to be so significant that it has been historically known as the golden thread of criminal law.[7] The presumption of innocence is contained within the International Covenant on Civil and Political Rights article 14(2),[8] due to its character as a human right.[9] Further, this right is provided for in the European Convention for the Protection of Rights and Fundamental Freedoms Article 6(2),[10] and the Universal Declaration of Human Rights Article 11,[11] demonstrating its multinational application and gravity within the realm of human rights. The presumption of innocence has also been found to be an Australian constitutional right.[12] However, it must be noted that at a federal legislative level there is no clear recognition of the presumption of innocence,[13] which reflects Australia's general reluctance to consistently apply the presumption of innocence and reflects widespread public ignorance of this fundamental, protective human right.[14]

A Summary on The Reversal of The Onus of Proof

In the 21st Century post-9/11 world, there has been a greater public calling for security, especially against terrorists and other individuals that endanger public safety.[15] According to Shahram Dana and Ben White, "the presumption of innocence is being disregarded by Australian parliaments in the counter-terrorism context".[16] As a result, Australian legislature is more and more commonly reversing the onus of proof, thus placing the responsibility upon the defendant to prove their case under the justification that, essentially, desperate times call for desperate measures. Andrew Stumer states that this argument "carries the risk that these 'extraordinary measures' become normalised and seep into the general criminal law, potentially eroding rights and liberal democratic values". [17]

The presumption of innocence must be upheld in the conducting of pre-trial processes such as bail.[18] The purpose of granting bail is to enable the accused to exercise their liberty, rather than being imprisoned until a verdict is given.[19]

Presumption of innocence is undermined by alterations made to the Bail Act 2013 (NSW) by the Bail Amendment Act 2014 (NSW).[20] According to Justice Terry Connolly of the Supreme Court of the Australian Capital Territory, "Parliaments around Australia increasingly intervene to reverse the presumption in favour of bail, or indeed to expressly provide that bail is not an option for certain offences".[21] As examined by Dana and White, the Crimes Act 1914 (Cth) s 15AA dangerously reverses the onus of proof to the detriment of accused persons seeking bail.[22] According to the provision,[23] "a bail authority must not grant bail to a person covered by subsection (2) or (2A), in relation to an offence against a law of the Commonwealth, unless the bail authority is satisfied that exceptional circumstances exist to justify bail". Bail is something that is granted before any verdict as to the guilt of the accused; therefore, bail may be refused under s 15AA if the accused cannot prove the existence of "exceptional circumstances", despite there being no decision demonstrating whether the accused is guilty of the offence. Entirely innocent people may be denied bail under s 15AA, despite the fundamental purpose of bail being to protect the individual's right to liberty and to prevent punishment of the accused prior to a guilty verdict, if a guilty verdict is indeed decided.[24] Therefore, a person who has merely been accused of the crime is assumed to be too dangerous to be given their right to liberty, as hinged upon the supposition that they are guilty. This trend of reversing the onus of proof has snowballed, and likely will continue to snowball, throughout the 21st century; across New South Wales, Queensland and Victoria between 2009 and 2018, bail provisions have been altered twenty-two times to diminish the individual's ability to obtain bail.[25] This is significantly higher than six alterations made to bail provisions across the states to expand bail access.[26]

Reversal of the onus of proof must also be discussed in the context of a trial. According to the Australian Law Reform Commission, Commonwealth provisions that do reverse the onus of proof hinder the presumption of innocence,[27] thus they act directly against the rule of law that Australia boasts it has. An example of burden of proof reversal is Crimes Act 1900 (NSW) s 102(6), in which a person must prove that the funds they received were entirely for helping the organisation abide by Australian laws, or the funds were received for a legal representation purpose in proceedings concerning terrorist organisation offences.[28] This specifically requires the defendant to prove their innocence. Another example is Criminal Code 1995 (Cth) s 305.3, in which the defendant is presumed to have had the necessary intention or belief concerning the sale of the drug if they manufactured a particular amount of the drug. This places the responsibility upon the defendant to prove that they did not have the necessary intention or belief on a balance of probabilities, thus forcing the defendant to prove that they did not commit the offence, rather than the prosecution prove that the defendant did commit the offence.[29]

The Role of The Media in Undermining The Presumption of Innocence

The continual legislative undermining of the presumption of innocence has catalysed massive public doubt that detrimentally affects this human right. This doubt is largely flamed by the media, which has a greater focus on generating profits rather than protecting the rule of law that prevents the dictatorial use of power in Australia. Further, as explored by Ariana Tanoos, the press's freedom is generally prioritised over the presumption of innocence,[30] demonstrating an imbalance of rights treatment. Due to the repeated reversal and inconsistent treatment of the presumption of innocence, the media has been able to frame the presumption of innocence as an arguable and flawed principle, casting doubt over court decisions while the public takes the media's representations as irrevocably factual.[31] This creates a dangerous cycle; legislation is enacted that reverses the onus of proof, which causes the public to distrust the presumption of innocence due to the government's perceived distrust of the presumption of innocence, then consequently legislation follows this trend of public dismay and continues to reverse the onus of proof.

An example of the media undermining the presumption of innocence is the case of Hazem El Masri, who was charged with common assault and assault occasioning actual bodily harm against his wife.[32] Despite Masri only having had allegations made against him, with no offence proved in court, BBC News quoted the statement of Dave Smith, an NRL chief executive at the time, that "I don't know the details of that case but I can say that any ambassadorial role that he was playing with us, he's been stood down from", demonstrating an automatic assumption that he is guilty.[33] According to Masri, "A lot of people branded me guilty without even a presumption of innocence beforehand" and he recounted the terrible hardship that he and his family experienced,[34] despite the charges later being dropped.[35] George Williams has stated that due to public pressure and the legislative overturning of the presumption of innocence, "A long-standing principle protective of individuals and the truth is giving way to a regime based increasingly upon assumptions and premature judgment".[36]

Another serious example of the media compromising the public's perception of the presumption of innocence is Sarah Hathway's article "Gendered violence 'a disease in our workplaces" for the publication *Green Left Weekly*.[37] Hathway writes "Former Liberal Party staffer Brittany Higgins' decision to go public about being sexually assaulted in Parliament House two

years ago", then writes "Higgins was able to speak out about the violent crime committed at her workplace". Both of these statements convey the alleged offence as fact, which can lead readers to believe that the alleged offence did unequivocally occur prior to any guilty verdict being found. Due to the confronting subject matter of the article, there also seems to be an element of shame if the word "alleged" is used. The reader is guilted into believing that if they do not make a judgment like the article has done, they support those who have been founded to have committed sexual assault crimes whilst silencing and degrading victims of such horrific, disgusting crimes. Under the presumption of innocence, if an individual is found guilty, they are likely inextricably guilty. By the media actively guilting those who wish for the presumption of innocence to be applied, the media undermines a human right seeking to protect the individual from arbitrary state power, whilst compromising due process. Further, the media warps what the presumption of innocence means; according to Tom Bathurst, "When the phrase is carelessly or incorrectly bandied…this undermines the reputation and mandate of rule of law processes".[39] By converting the events of a trial into articles merely containing several paragraphs of information and discussion, the media's narrative imposes guilt or non-guilt upon the accused and consequently can skew the reader's interpretation of the proceedings.[40] The media alienates details from their context, allowing them to be repackaged to support the motivations of the writer or organisation, even if such repackaging is unintentional.[41] This is not to say that the media doesn't have a legitimately important role in pursuing justice; according to Nicholas Cowdery, the New South Wales Director of Public Prosecutions from 1994 to 2011:

> "There should be a fostering of enlightened public opinion, especially by free and independent public media, to assist all that to occur, to examine what happens and to complain or comment if it goes wrong".[42]

Conclusion

The job of the Australian government is to protect the Australian people. We deserve to be protected, and our protective rights should be improving and increasing, rather than diminished under the justification of an emergency, whatever the emergency may be. Because the presumption of innocence has been under legislative, public and media attack, the presumption must be upheld to protect every individual from arbitrary state power.[43]

END NOTES

[1] Brittany Higgins (Speech, Canberra, October 27 2022) <https://www.smh.com.au/politics/federal/brittany-higgins-full-media-statement-20221027-p5btjm.html>.
[2] 'Young Lawyers on the Rule of Law' ed. Nick Clark, Louisa Spiteri, chapter: 'How the International Criminal Court Upholds the Rule of Law', 84.
[3] Tom Bathurst, 'Challenges to the Rule of Law in Modern Society' (Speech, District Court of NSW Annual Conference, May 2021) 26.
[4] Nicholas Cowdery, 'Australian avoidance of the rule of law' (2006) 63 Law Society Journal, 63.
[5] Ibid 64.
[6] Bathurst (n 3).
[7] Woolmington v Director of Public Prosecutions [1935] UKHL 1, quoted in Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31(1) University of Tasmania Law Review 132, 132.
[8] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(2).
[9] Prajesh Shrestha, "Two Steps Back: The Presumption of Innocence and Changes to the Bail Act 2013 (NSW)" (2015) 37(1) Sydney Law Review 147.
[10] European Convention for the Protection of Human Rights and Fundamental Freedoms Art 6(2) cited in Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31(1) University of Tasmania Law Review 132, 134.
[11] Universal Declaration of Human Rights Art 11 cited in Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31(1) University of Tasmania Law Review 132, 134.
[12] Momcilovic v The Queen, referenced in Shrestha (n 9).
[13] Shahram Dana and Ben White, 'Terrorising innocence: Australia's counter-terrorism laws trump freedom of liberty' (2022) 27(2) Australian Journal of Human Rights 352, 355.
[14] Bathurst (n 3) 26.
[15] Anthony Gray, 'The rule of law and reasonable suspicion' (2011) 16(2) Australian Journal of Human Rights 53, 54.
[16] Dana and White (n 13).
[17] Tanya Mitchell, 'The Presumption of Innocence: Evidential and Human Rights Perspectives, Andrew Stumer' (2011) 22(3) Current Issues in Criminal Justice 505, 505.
[18] Shrestha (n 9), 149.
[19] Tracey Booth and Lesley Townsley, 'The Process is the Punishment: The Case of Bail in New South Wales' 21(1) Current Issues in Criminal Justice 41, 41-42.
[20] Shrestha (n 9), 148.
[21] Terry Connolly, 'Golden Thread or Tattered Fabric: Bail and the Presumption of Innocence' (Conference Paper, Law Council of Australia National Access to Justice and Pro Bono Conference, 11-12 August 2006), 1-2.
[22] Dana and White (n 13).
[23] Crimes Act 1914 (Cth) s 15AA s (1).
[24] Lachlan Auld and Julia Quilter, 'Changing the rules on bail: An analysis of recent legislative reforms in three Australian jurisdictions' (2020) 43(2) University of New South Wales Law Journal 642, 644.
[25] Ibid 648.
[26] Ibid.
[27] Anthony Gray, 'Presumption of innocence in peril' (2017) 42(2) Alternative Law Journal 87.
[28] Australian Law Reform Commission, Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Report No 129) chapter 11, 318-319.
[29] Gray, 'Presumption of innocence in peril' (n 27).

[30] Ariana Tanoos, 'Shielding the Presumption of Innocence from Pretrial Media Coverage' (2016-2017) 50 Indiana Law Review 997, 998.

[31] Ibid 997-998.

[32] Jessica Kidd, 'Hazen El Masri charged over alleged domestic violence assault', ABC News (online at 20 October 2015) <https://www.abc.net.au/news/2015-10-20/hazem-el-masri-charged-over-alleged-domestic-assault/6868686>.

[33] Ibid.

[34] News.com.au, 'Hazen El Masri opens up on domestic violence saga', News.com.au (online at 11 April 2017) <https://www.news.com.au/sport/sports-life/hazem-el-masri-opens-up-on-domestic-violence-saga/news-story/bc6a7adb7f2d6b42063a877681aa044c>.

[35] Michelle Brown, 'Former Canterbury Bulldogs player Hazem El Masri's domestic violence charges to be dropped by police', ABC News (online at 10 March 2016) <https://www.abc.net.au/news/2016-03-10/hazem-el-masri-domestic-violence-charges-dropped/7236008>.

[36] George Williams, 'Hazen El Masri case shows Australia has a problem with innocent until proven guilty', The Sydney Morning Herald (online at 15 March 2016) <https://www.smh.com.au/opinion/hazem-el-masri-case-shows-australia-has-a-problem-with-innocent-until-proven-guilty-20160315-gnjf4r.html>.

[37] Sarah Hathway, 'Gendered violence 'a disease in our workplaces'' Green Left (online at 1 March 2021) https://www.greenleft.org.au/content/gendered-violence-disease-our-workplaces.

[38] Ibid.

[39] Bathurst (n 3) 26.

[40] Deb Waterhouse-Watson, 'News media on trial: towards a feminist ethics of reporting footballer sexual assault trials' (2016) 16(6) Feminist Media Studies 952, 956.

[41] Ibid.

[42] Cowdery (n 4), 63-64

[43] Bathurst (n 3).