[ж] A FEMINIST RESPONSE AGAINST IMPUNITY IN GENDER BASED VIOLENCE: WHOM THE PRESUMPTION OF INNOCENCE PROTECTS?

*(*TOPLUMSAL CİNSİYET TEMELLİ ŞİDDET VAKALARINDA CEZASIZLIĞA FEMİNİST BİR KARŞI ÇIKIŞ : MASUMİYET KARİNESİ KİMİ KORUYOR?*)*

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ÖZ

Toplumsal cinsiyete dayalı şiddet vakalarında kadınların yaşadığı en büyük sorun cezasızlıktır. İstatistikler, Türkiye'de her 100 toplumsal cinsiyete dayalı şiddet vakasında mahkumiyet kararı oranının sadece %0,7 olduğunu kanıtlamaktadır. Türkiyeli feministler, özellikle 2000'li yılların başlarında yoğunlaşan tartışmalar sonucu cinsel şiddet yargılamalarındaki sistematik cezasızlık kültürüne ve yargılamalarda yaşanan ikincil mağduriyetlere bir tepki olarak seslerini yükseltmiş ve cinsiyetçi kalıp yargılardan azade etkili bir soruşturma talebiyle cinsel şiddet vakalarında "kadının beyanı esastır" ilkesini ortaya koymuştur. Ne var ki "kadının beyanı esastır" ilkesi hem doktrinde hem de yargı pratiğinde özellikle ispat yükünün yer değiştirmesine neden olduğu ve masumiyet karinesini ihlal ettiği gerekçesiyle itirazlarla karşılaşmaktadır. Bu çalışma, "kadının beyanı esastır" ilkesine getirilen itirazları özellikle Robert Alexy'nin hukuk teorisi ve Catharine MacKinnon'un feminist hukuk teorisi çerçevesinde incelemektedir. Bu bağlamda çalışmada ilk olarak "kadının beyanı esastır" ilkesinin ve masumiyet karinesinin gerçekte ne olduğu, bu ilkelerin ortaya çıkışında etkili olan tarihsel kökenler de dahil olmak üzere analiz edilmektedir. Daha sonra, masumiyet karinesinin hukuki niteliği çoğunlukla Alexy'nin hukuk teorisi bağlamında teorik yönleri ile incelenmekte ve pratikte de ilkenin karşılaştırmalı hukuktaki yorumları ele alınmaktadır. Çalışmada son olarak, masumiyet karinesinin, Alexy'nin anayasal haklar teorisi ve Mackinnon'un feminist teorisi ışığında sınırsız bir hak olmadığı ve bu nedenle bir dengelemeye (balancing) tabi tutulması görüşü ortaya

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konmakta, bu dengelemenin ise fiili eşitlik lehine gerçekleştirilmesi gerektiği savunulmaktadır.

Anahtar kelimeler: *Cinsel şiddet, masumiyet karinesi, "kadının beyanı esastır" ilkesi, hukuk teorisi.*

ABSTRACT

The biggest problem that women experienced in gender based violence cases is systematic impunity. Statistics proves that the ratio of decision of conviction in every 1000 gender based violence incidents is only 0.7% in Turkey. As a reaction to impunity and re-victimization of woman during legal proceeding, feminists started to raise their voice and tried to find possible ways of feminist interventions in the field of procedural law of sexual offences. Accordingly, in the early 2000s, feminists in Turkey who demand an effective investigation free from sexist bias, have been united around the principle named "woman's account is essential" by saying that woman's statement should be taken as the basis during the whole stages of criminal trial in sexual offences. However, the principle of "women's account is essential" is constantly objected both in doctrine as well as judiciary on the grounds that it breaches the presumption of innocence, mainly on the grounds that it reverses the burden of proof. In this study, it is presented that such objection is delusive in many aspects by mainly using the Robert Alexy's legal theory and Catharine MacKinnon's feminist legal theory. In this light, it is analysed what those two principles really are, including the motives and historical origins behind them. Then, the legal character of the presumption of innocence is discussed under mostly Alexy's legal theory with its theoretical aspects as well as legal interpretations in comparative law. Lastly, it is argued that the presumption of innocence actually has to be balanced in favour of factual equality, under the Alexy's theory of constitutional rights and Mackinnon's feminist theory.

Keywords: *Sexual violence, impunity, presumption of innocence, the principle of "women's account is essential", legal theory.*

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Introduction

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence ("the Istanbul Convention"), as a breakthrough legal step on struggling against gender-based violence, defines gender-based violence and violence against women

as a *gendered act*[1] which is a violation of human rights and 'a form of discrimination against women'. Under the Istanbul Convention, acts of gender based violence are emphasised as resulting in or likely to result in physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. According to the Convention, gender based violence against women is directed against a woman *because she is a woman* or that *affects women disproportionately*.

Such definition of the Istanbul Convention reflects the idea that 'sexuality is social and relational, constructing and constructed of power'[2]. Feminist theory of sexuality locates sexuality within a theory of gender inequality, meaning the social hierarchy of men over women. Feminist work, both interpretive and empirical, on rape, battery, sexual harassment, sexual abuse of children and pornography, support this idea. These practices, taken together, express and actualize the distinctive power of men over women in society; their effective permissibility confirms and extends it. Indeed, this idea could be disregarded if the fact that 1 in 3 women has experienced physical and/or sexual violence in their lifetimes is not considered as ignorable[3]; if such prevalence of sexual violence against women is not denied, minimized, or excepted as deviant or episodic and if one believes women's accounts of sexual use and abuse by men.[4] However, this is not the case.

The biggest problem that women experienced in gender based violence cases is impunity. Statistics proves that the ratio of decision of conviction in every 1000 gender based violence incidents is only 0.7% in Turkey. As a reaction to impunity and re-victimization of woman during legal proceeding, feminists started to raise their voice and tried to find possible ways of feminist interventions in the field of procedural law of sexual offences. Accordingly, in the early 2000s, feminists in Turkey who demand an effective investigation free from sexist bias, have been united around the principle named "woman's account is essential" by saying that woman's

[1] All emphasizes in the text are added by the author.
[2] MacKinnon, A., Catherine, "Toward to A Feminist Theory of State", Harvard University Press, 1991, 176.
[3] Pallitto, C. C., Garcia-Moreno, C., Jansen, Ellsberg, M., Heise, L., Watts, C., "Intimate partner violence, abortion, and unintended pregnancy: Results from the WHO multi-country study on women's health and domestic violence", International Journal of Gynecology & Obstetrics, 2013, 120(1), 3.
[4] MacKinnon, 150-151.

statement should be taken as the basis during the whole stages of criminal trial in sexual offences. However, the principle of "women's account is essential" is constantly objected both in doctrine as well as judiciary on the grounds that it breaches the presumption of innocence, mainly on the grounds that it reverses the burden of proof.

In this study, it is presented that such objection is delusive in many aspects by mainly using the Robert Alexy's legal theory and Catharine MacKinnon's feminist legal theory. In this light, it is analysed what those two principles really are, including the motives and historical origins behind them. Then, the legal character of the presumption of innocence is discussed under mostly Alexy's legal theory with its theoretical aspects as well as legal interpretations in comparative law. Lastly, it is argued that the presumption of innocence actually has to be balanced in favour of factual equality, under the Alexy's theory of constitutional rights and Mackinnon's feminist theory.

I. Offences against sexual inviolability through the statistics

As one of the most obvious form of gender based violence, sexual violence may be defined as any act targeting a person's sexuality or gender identity[5] whether the act is physical or psychological in nature, that is committed, threatened or attempted against a person without the person's consent. It is an umbrella term covering all forms of non-consensual acts including but not limited to sexual assault, sexual harassment, stalking, victim blaming, gaslighting, stealthing and sexual exploitation. According to the FRA survey conducted across the 28 member states of the European Union, one in three women has experienced physical and/or sexual violence since she was 15 years old. One in 10 women has experienced some form of sexual violence since the age of 15, one in 20 has been raped.[6] While the

[5] Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modifications of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism. International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, available at: https://yogyakartaprinciples.org/ [accessed 17 February 2020].

[6] European Union Agency for Fundamental Rights, "Violence against women: an EU-wide survey – Results at a glance", Eurostat, 2014, available at https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf [accessed 17 February 2020].

survey shows that gender based violence disproportionately affects women, it also dramatically presents that violence against women is systematically under-reported to the authorities. According to the survey, only 14% of women reported their most serious incident of intimate partner violence to the police, and 13% reported their most serious incident of non-partner violence to the police.[7]

In Turkey, the numbers are much worse than in Europe. Throughout Turkey, 38% of ever-married women have been subjected to lifetime physical and/or sexual violence. In other words, approximately 4 out of every 10 women have been subjected to physical and/or sexual violence.[8] However, while gender based violence is so prevalent in Turkey, vast majority (89%) of women who have been subjected to physical and/or sexual violence did not apply to official institutions or non-governmental organizations. In other words, only 11% of women, or one in ten women have been subjected to physical and/or sexual violence, have applied to institutions or organisations. Among these 11%, the percentage of women who applied to police is 7%. Moreover, in 29% of the applications made to the police, women were reconciled with their husbands, 23% of the applications resulted in giving cautionary decisions, 41% of them resulted in referral of the police to other institutions like women's shelters and in 13% of the applications nothing was done. Due to lack of judicial data, the percentage of applications referred to the public prosecutor is not known. However, when the percentages above are taken into account, it is certain that at least in 42% of the applications made to the police, the police had not referred the application to the prosecution office. In other words, the public prosecutor had involved only in 4 out of 100 cases which women have been subjected to physical and/or sexual violence, at the utmost.

When these 4 out of 100 cases are examined, the picture gets even more dramatic. According to the Judicial Statistics in Turkey in 2019, in 46,9% of the complaints on offenses against sexual inviolability[9], the public prosecutor has made the decision of non-prosecution, and only in 34,7% of

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[7] Ibid.

[8] Hacettepe University Institute of Population Studies, "Research on Domestic Violence against Women in Turkey", 2015, available at http://www.hips.hacettepe.edu.tr/eng/english_main_report.pdf [accessed 17 February 2020].

[9] Under the Turkish Penal Code, offenses against sexual inviolability are sexual assault (Art. 102), child molestation (Art. 103), sexual intercourse between/with persons not attained the lawful age (Art. 104) and sexual harassment (Art. 105).

the complaints, the public prosecutor has filed a public prosecution.[10] This means only in 1.4% of cases (34.7% of 4%) which women have been subjected to physical or sexual violence, a public prosecution have been initiated. In the cases which a public prosecution has been initiated, the percentage of verdict of conviction is% 49.[11] In other words, only in almost in half of the cases (0,7%) in which a public prosecution has been conducted, the perpetrator has been punished. In the end, it shows that only in 0,7% of cases where women have been subjected to physical or sexual violence, the perpetrator has been sentenced. More clearly, in every 1000 cases where men committed sexual offences against women, only 7 persons get conviction, while 993 of perpetrators keep on their life somehow freely in society.

II. What the statistics say: impunity

When all these statistics are taken into consideration, nothing more but the fact that the perpetrator gets sentence only in 0,7 out of 100 cases itself makes it unavoidable to study on impunity for violence against women.

One of the important factors for the sexual violence to remain unpunished is not to report the violence. As the statistics proved that, 89% of women who are subjected to sexual violence do not report it to police or judiciary. According to the studies, the primary reason for not reporting is a sense of guilt and embracement that women experienced.[12] Women think that they will be subjected to victim-blaming[13] and will have to tell what happened in detail over and over again in to the police. Thus, sexist

[10] Türkiye Cumhuriyeti Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü, Adli İstatistikler 2019, available in Turkish at https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/1062020170359HizmeteOzel-2019-bask%C4%B1-%C4%B0SA.pdf [accessed 17 February 2020].

[11] Ibid

[12] Binder, Renee L., "Why women don't report sexual assault", The Journal of Clinical Psychiatry, 42(11), 1981. Available at https://www.ncbi.nlm.nih.gov/pubmed/7298584 [accessed 17 February 2020].

[13] Victim blaming is holding the victim responsible for what has happened to them. Victim blaming is mostly perpetuated through rape myths. The most obvious manifestations of victim blaming appear in sexual assault cases. Adult female victims of sexual assault are often blamed for being provocative, seductive, suggestive, teasing, or "asking for it". In contrast, male perpetrators are seen as helpless, sexually-frustrated beings, responding to sexually-provocative women. See more, Canadian Resource Centre for Victims of Crime, "Victim Blaming", 2009, available at https://crcvc.ca/docs/victim_blaming.pdf [accessed 17 February 2020].

prejudices cause many events to remain unrequited before being brought to justice.[14]

On the other hand, it is true that offences against sexual inviolability remain unpunished even when women report it, as seen in the abovementioned statistics. The biggest reason that leads to impunity in proceedings of offenses against sexual inviolability is throwing out the case due to lack of evidence, by not believing in women's account on how women define what did happen. Indeed, crimes against sexual integrity are the crimes in which there is little or no witnesses or physical evidence, because they are mostly committed when the perpetrator and the victims are alone. Therefore, when the victims subjected to sexual offences, -mostly women, according to the statistics[15]- are applied to the judiciary, the cases are decided to non-prosecute or dismissed on the grounds that the offence is not proved beyond reasonable doubt due to lack of evidence. Consequently, such difficulty in proof in sexual offences helps the perpetrators to get away with sexual offences.

Moreover, difficulties in proof is accompanied by sexist bias and myths about sexual violence. Indeed, in sexual offences, police, prosecutors and judges acting with sexist bias can feel free to make assessments in favour of the perpetrator instead of women's account, for instance when women wear tight jeans[16] or low-cut[17], when women do not go and report the offence to

[14] Canikoglu, Seher Kırbaş, "Kadının Beyanı Esastır: Çok Bilinmeyenli Denklem", Ankara Bar Review, Vol.4, 2015, 240.

[15] According to the judicial statistics in Turkey in 2019, male perpetrators of sexual offences are 50 times more than female perpetrators of the same category. See more, Türkiye Cumhuriyeti Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü, Adli İstatistikler 2019, available in Turkish at https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/1062020170359HizmeteOzel-2019-bask%C4%B1-%C4%B0SA.pdf [accessed 17 February 2020].

[16] In it's "well-known" decision, the Italy's Supreme Court ruled that there is "consensual sex" but not rape on the grounds "it is impossible to slip off tight jean without the collaboration of the woman who is wearing it". See, Faedi Duramy, Benedetta, "Rape, Blue Jeans, And Judicial Developments In Italy", Columbian Journal of European Law Online, 2009, available at https://digitalcommons.law.ggu.edu/pubs/104 [accessed 17 February 2020].

[17] In a divorce case, the Kayseri 1st Family Court has decided to deem women wearing low-cut dress is equally responsible for the divorce when compare to her husband who systematically beat her. See more, in Turkish, at https://www.ntv.com.tr/turkiye/yargitay-dekolte-ile-siddet-esit-olamaz,liG5qlZHNUGKJDDxJqUOpg [accessed 17 February 2020].

the police immediately[18], when a woman is polyamorous[19] or when a woman consumes gets alcohol during New Year's Eve[20]. Examples can be varied by many different aspects. Behind these practice of the judiciary, mostly sexist bias and myths about sexual violence lay out. In such a picture, women who decided to report the violence they were subjected to, have to struggle with these sexist biases which exist in all levels of the judiciary. Even if they feel quite positive on what happened and how to define what they are subjected to, they do not report or hesitate to report the offence, because they feel ashamed and guilty, and scared to be blamed by the police, prosecutor and judges.[21] Although there are some cases that courts decided conviction without seeking other evidences rather than women's account,[22] the overall picture in proceedings of offences against sexual inviolability is impunity in favour of men, as proved by judicial statistics abovementioned.

As is seen, there is an undeniable link between the ratio of women who do not report the violence and the ratio of verdict of conviction. Pursuant to the surveys, most women do not report violence and do not feel encouraged to do so because they think that police and judicial systems are

[18] In a case where the victim woman is pregnant for 22 weeks, the Turkish Supreme Court ruled that the account of woman who did not make a complaint for these time period cannot be true. See more, in Turkish, The 14th Penal Chamber of the Supreme Court, 6645/7000, 20.06.2012, 6645/7000, available at www.sinerjimevzuat.com.tr [accessed 17 February 2020].

[19] From a Turkish Supreme Court case where the victim woman is allegedly polyamorous: "… when the fact that the victim has not *a proper life-style* (mazbut yaşam) because she is in relationship with more than one man is taken into consideration…". See more, in Turkish, The 5th Penal Chamber of the Supreme Court, 7018/1510, 24.02.2010, available at www.kazanci.com [accessed 17 February 2020].

[20] In a case that I personally observed, the Court was not 'convinced' whether it was a consensual sex or a rape, since the victim had alcohol in the New Year's Eve when the rape occurred. Istanbul 2nd Heavy Penal Court, 2019/154 E., 2019/622 K., 20.11.2019.

[21] European Union Agency for Fundamental Rights, "Violence against women: an EU-wide survey – Results at a glance", 2014, available at https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf [accessed 17 February 2020].

[22] According to the Turkish Supreme Court, rape is directly related with women's honor, especially if the woman is a "virgin". When a woman declares that she was subjected to rape, it will affect her life at every stage. No woman does not take such a big risk, if it is grounded on unreal event. See more in, Bacaksız, Pınar and Bayzit, Tuğba, "Yargıtay'ın Cinsel Dokunulmazlığa Karşı Suçlarda İspata Yaklaşımı", Dokuz Eylül University Faculty of Law Review, Essays in Honour of Prof. Dr. Durmus Tezcan, Vol. 21, 2019, 379-414.

unsupportive.[23] They think that the systems are unsupportive because their need of justice is not satisfied as is proved by the dramatically low percentage of verdict of conviction. When the systems are deemed unsupportive by women due to impunity, gender based violence against women becomes more un-talkable, and women experience self-blame and a sense of shame, and vice-versa. Besides its negative effects on women individually, impunity increases gender based violence and reinforces gender inequality in society. This is because when the State fails to hold perpetrators accountable, it sends a message to society that male violence against women is both acceptable and inevitable, as the United Nations former Secretary General Ban Ki-moon rightly stated.[24]

III. A feminist response to impunity: the principle of "women's account is essential"

Women who charge rape say they were raped twice, the second time in court.[25] In other words, in sexual crimes, we are faced with not only the problem of impunity, but also the problem of re-victimization. Both impunity and re-victimization of women which become systematic in sexual offences led feminists to re-think and develop suggestion for a solution.[26]

As a reaction to impunity and re-victimization of woman during legal proceeding, feminists started to raise their voice and tried to find possible ways of feminist interventions in the field of procedural law of sexual offences. Accordingly, in the early 2000s, feminists in Turkey who demand an effective investigation free from sexist bias, have been united around the principle named "woman's account is essential" by saying that woman's statement should be taken as the basis during the whole stages of criminal trial in sexual offences. The principle is significant for feminists in Turkey especially for two reasons: first, it played out -and still plays out- an essential role in feminist policy and advocacy in struggle against gender based violence in Turkey, including drafting the new Penal Code in 2005

[23] European Union Agency for Fundamental Rights, "Violence against women: an EU-wide survey – Results at a glance", Eurostat, 2014, available at https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf [accessed 17 February 2020].

[24] The Office of the High Commissioner for Human Rights (OHCHR), "Impunity for violence against women is a global concern", 14 August 2012, available at https://www.ohchr.org/EN/NewsEvents/Pages/ImpunityForVAWGlobalConcern.aspx [accessed 17 February 2020].

[25] MacKinnon, 178.

[26] Canikoglu, 232.

and signing the Istanbul Convention, the Council of Europe Convention on preventing and combating violence against women and domestic violence in 2011. Second, it is a unique concept which has been shaped by political struggle of many years of feminists from Turkey. Thus, although it is been partly echoed as sort of reversal of burden of proof in sexual crimes in other languages, there is no exact equivalent in the comparative jurisprudence or literature.[27]

Although there are different approaches on what "women's account is essential" means among women, the common aim is to overcome difficulty in proof and to ensure access to justice. In this light, "women's account is essential" should be understood as a principle which urges prosecutors to conduct an efficient investigation based on women's account and enables judges to give a verdict of conviction in cases where any evidence rather than women's account was not found despite it was fully investigated, by taking into account the all special conditions of the event and observing that right of defence is fully satisfied.

Under the principle of "women's account is essential", what women demand is that police should take women's complaints and collect all necessary evidence without undue delay and refer the complaint to the prosecutor by ensuring adequate and immediate protection to women. When it is referred to the prosecutor, they should conduct an effective investigation without undue delay and consider whether the women's account is enough to prosecute, even if there is no other evidence. In a similar vein, judges should ensure that proceedings are carried out without undue delay while taking into consideration fundamental human rights of the woman during all stages of the criminal proceedings. Judges should abstain from asking questions that can cause re-victimisation of women and limit possible approaches of the defence, if necessary. Judges should ensure that culture, custom, religion, tradition or so-called "honour" cannot be considered as justification for gender based violence. Most importantly, while taking into consideration difficulty in proof in sexual offences, judges should take the women's account as a basis and should ask to the perpetrator to prove their innocence if they consider that women's account is consisted, truthful and coherent in the natural flow of life, when there is no other evidence and witness rather than women's account. For example, the Court

[27] For a historical analysis of the principle in the feminist movement in Turkey, see, Baytok, Cemre, "Political Vigilance in Court Rooms: Feminist Interventions in the Field of Law", master's thesis, Boğaziçi University, 2012.

should be able to ask the perpetrator to prove, where he was at the time the crime was allegedly committed.

However, it does not necessarily mean that it is a total reversal of the burden of proof. As rightly stated, the principle of "women's account is essential" is just an interpretation of the concept of natural flow of life within the framework of patriarchal inequality between women and men, but not a request to punish the perpetrator without evidence.[28] In this context, the principle must be understood as a "trigger" for an effective investigation in prosecution and a "base line" for assessing evidence in proceedings grounds on what women say and how they define what happened. In fact, it is nothing more than a reminder of the obligation of effective investigation and prosecution free from discriminatory and sexist approaches to police and judiciary by taking into consideration gender inequality. Such a comprehensive perspective reasonably requires that judges should, who are obliged to reach the material fact, be able to ask for some questions or clarifications to the defence, if the fact that 993 of perpetrators in every 1000 gender based violence cases continue to live freely in the society, sounds even if just a bit, unfair.

IV. The biggest challenge to the "women's account is essential": the presumption of innocence

The principle of "women's account is essential" is objected both in doctrine as well as judiciary on the grounds that it breaches one of the fundamental principles in criminal law, namely presumption of innocence, mainly on the grounds that it reverses the burden of proof. Before discussing whether this argument is sound or not, the origin of the presumption of innocence, values behind it and the way it is reflected by main international human rights law instruments must be examined in detail first.

While the idea that the prosecution must prove its case may have originated with the Code of Hammurabi[29] and Talmudical law;[30] it is

[28] Canikoglu, 240.

[29] "If anyone ensnare another, putting a ban upon him, but he cannot prove it, then he that ensnared him shall be put to death." The Code of Hammurabi, translated by L.W. King, The Avalon Project, Yale University, available at https://avalon.law.yale.edu/ancient/hamframe.asp [Accessed 24 February 2020]
Also see, Sassoon, John, "Ancient Laws and Modern Problems: The Balance between Justice and a Legal System", Third Millenium, 2001, 42.

[30] Kirschenbaum, Aaron, "Double Jeopardy and Entrapment in Jewish Law", Israel Yearbook on Human Rights, Vol. 3, 1973, 211.

acknowledged that its roots in modern manner is going back to Roman times.[31] Indeed, the Code of Justinian puts that "let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day."[32] Especially since the fifteenth century, lawyers echoed the Digest of Justinian by stating that it was better to acquit the guilty persons escape than that one innocent suffer. This argument was crystallized by Blackstone's famous maxim, "it is better that ten guilty men should escape than that one innocent man should suffer."[33]

Without doubt, the Woolmington v. DPP case has a significant importance in the history of presumption of innocence. In this case, the defendant Mr. Woolmington was charged with the murder of his wife, Violet. In his testimony, Woolmington stated that he brought a gun with him and went to Violet's mother's house to convince her to go back home with him. He said that when his wife refused to return, he threatened to kill himself by drawing the gun from his waist. However, the gun was fired by an accident and Violet was shot through her heart. In the trial, the judge directed the jury that malice had to be presumed because Violet had died through the act of the defendant, therefore the burden of proof laid on the defendant. Consequently, Woolmington was convicted of murder.[34]

When he appealed on the ground of a material misdirection, however, the House of Lords upset the conviction by stating that "throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt. … No matter what the charge is, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."[35] The principle that the prosecution should bear the burden of proof which was deemed as the "golden thread" by virtue of

[31] See more in, Volokh, Alexender, "n Guilty Men", University of Pennsylvania Law Review, Vol.146, No:2, 1997, available at https://www2.law.ucla.edu/volokh/guilty.htm [Accessed 24 February 2020]

[32] Stumer, Andrew, "The Presumption of Innocence : Evidential and Human Rights Perspectives", Oxford: Hart Publishing, 2010, 1.

[33] Ibid, 3.

[34] Cane, Peter and Conaghan Joanne, "The New Oxford Companion to Law", Oxford University Press, 2008. Available at https://0-www-oxfordreference-com.libunix.ku.edu.tr/view/10.1093/acref/9780199290543.001.0001/acref-9780199290543 [Accessed 24 February 2020]

[35] Stumer, 7-8.

the Woolmington decision, became consequently one of the core principles of criminal law not only in the Anglo-Saxon legal system but in international law.

Indeed, provisions protecting presumption of innocence are included in international human rights law instruments including the Universal Declaration on Human Rights', International Covenant on Civil and Political Rights, European Convention on Human Rights, American Convention on Human Rights, African Charter on Human and People's Rights. Although not specifically stated in the US Constitution, the presumption of innocence has been held to be implied by the 5th, 6th and 14th amendments.[36] Alongside Western constitutions, it is also included in the Brazilian, Colombian, Iranian, South African, Russian and Turkish constitutions.

For sure, wide literature on the importance of the presumption of innocence plays a significant role on perception of the principle. Indeed, when the literature on presumption of innocence has been reviewed, it is seen that the presumption of innocence is potently defended by several reasons. The most obvious reason for insisting upon the presumption of innocence is that it is instrumental in protecting the innocent from wrongful conviction.[37] Further, it is argued that (a) given the possible sanction of removing someone's liberty, it is right that a high threshold is needed for that to happen; (b) there is always a risk of error in fact-finding in trials, and it is better that the prosecutor bear this risk; (c) police have far-reaching powers to conduct investigations and that these powers must be exercised in a way that properly respects human rights and freedoms; (d) typically the state's resources far exceed that of any individual; and (e) the presumption of innocence is logically coherent with the principle of proof of a criminal charge beyond reasonable doubt.[38]

While the main emphasis is given to the presumption's instrumental value, that is, to its role in securing the 'right result' by protecting against wrongful conviction, there is, however, little articulation of how it does

[36] Ferguson, Pamela R., "The Presumption of Innocence and Its Role in the Criminal Process", Criminal Law Forum, 27/2, 2016. Available at https://link.springer.com/content/pdf/10.1007/s10609-016-9281-8.pdf [Accessed 24 February 2020]

[37] Stumer, 28.

[38] Gray, Anthony, "Constitutionality Protecting the Presumption of Innocence", University of Tasmania Law Review, 31/1, 2012. Available at http://classic.austlii.edu.au/au/journals/UTasLawRw/2012/5.html#fn1 [Accessed 24 February 2020]

this.[39] Although Woolmington is often treated as being a resounding endorsement of the presumption, it actually focused more on the burden of proof, and the two have often been treated as synonymous.[40] Indeed, like the interpretation of the United States and United Kingdom Supreme Courts, presumption of innocence is understood merely as a matter of burden of proof under the Turkish Constitution. According to the Article 38/6 named 'Principles relating to offences and penalties' of the Turkish Constitution, "No one shall be considered guilty until proven guilty in a court of law". The commentary of Article 38/6 clearly observes that what constitution-makers mean by the presumption of innocence is merely that the defendant is not obliged to prove their guilt and the "burden of proof" belongs to the prosecution.[41]

Consequently, treating the presumption of innocence as just another way of articulating the burden of proof, led to question on whether reversal of burden of proof provisions, which require the accused to prove a defence, breach the presumption of innocence. Put another way, any reversal of burden of proof is discussed in terms of the presumption of innocence, since the presumption of innocence is understood as equated to burden of proof. However, this is not an adequate inference. The presumption of innocence is not equated to the burden of proof, merely. In other words, it is not a true argumentation that "it is better than ten guilty men should escape than that one innocent man should suffer" *ipso facto* requires that "that the defendant is not obliged to prove their guilt and the "burden of proof" belongs to the prosecution". Indeed, they are not synonyms of[42], or, equated to each other. The link between them is not an ipso facto, but an ipso jure, which historically originated to some sort of religious and moral beliefs.[43]

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[39] Ferguson, 133.

[40] See, for example, "In truth then, the presumption of innocence has no independent significance. The rule that the accused is presumed to be innocent is synonymous with the rule that the prosecution has the burden of proof." (Cited as Ferguson, 134) Rea, B., "The Presumption of Innocence in Criminal Cases", 3 Washington & Lee Law Review, 1941-1942, 82, 84.

[41] Constitution of the Republic of Turkey, Article 38, available at https://global.tbmm.gov.tr/docs/constitution_en.pdf See also, Commentary of the Turkish Constitution, in Turkish, available at https://www.anayasa.gov.tr/tr/yayinlar/gerekceli-anayasa/ [Accessed 24 February 2020]

[42] Ferguson, 135.

[43] See on the history of the presumption of innocence is originated to Babylonians and Jewish law, footnote 28 and 29 above.

In this light, a reductive argument like that the principle of 'women's account is essential' breaches the presumption of innocence on the grounds that it reverses the burden of proof falls short of analysing the question in a proper way of legal argumentation, when it is taken into consideration that the presumption of innocence is not merely equated to the burden of proof. Thus, a deeper analysis on the legal structure of the principle of presumption of innocence under legal theory is required first. Consequently, the question of whether the presumption of innocence can be subjected to limitation has to be handled.

V. Can the presumption of innocence be limited?

Unlike the wide international recognition of the presumption of innocence, understandings regarding its meaning, scope or structure differ from each other. Indeed, while it is recognized as a "right" or "human right" by some[44], it is also recognized as "a fundamental principle"[45], or "a presumption" by others[46]. For the hard positivists, the effort to analyse the legal structure of the presumption of innocence may be seem as an unnecessary theoretical roundabout (though, mostly these two are equated each other for them), but it does *matter* in fact, since it is strictly related to the question of whether or to what extent the presumption of innocence can be subjected to limitation.

V.I. Theory on structure of constitutional rights norms

German legal theorist Robert Alexy establishes his theory of constitutional rights on the distinction between rules and principles. According to him, this distinction is the basis for a theory of constitutional justification and a key to the solution of central problems of constitutional rights doctrine.[47] Although it is not a new distinction under the constitutional rights doctrine, the distinctive feature of his theory is that Alexy acknowledges the distinction between rules and principle is *qualitative*. According to him, principles are norms which require that

[44] Ho, Hock L. "The Presumption of Innocence as a Human Right" in P. Roberts and J. Hunter, 'Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions', Hart Publishing, 2012, 259.

[45] Ashworth A. and Horder J., "Principles of Criminal Law", Oxford University Press, 2013, 71.

[46] Centel N. and Zafer H., "Ceza Muhakemesi Hukuku", Beta Publishing, 2005, 138.

[47] Alexy, Robert, "A Theory of Constitutional Rights", translated by Julian Rivers, Oxford University Press, 2010, 44.

something be realized to *the greatest extent possible* given the legal and factual possibilities. Principles, thus, are *optimization requirements*, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends on what is factually and legally possible. In this light, the scope of what is legally possible is determined by opposing principles and rules. By contrast, rules are norms which are either fulfilled or not. The requirement is to do exactly what it says, neither more nor less. In this way, rules contain *fixed points* in the field of the factually and legally possible.[48] Moreover, for Alexy, a norm is only qualified on the basis that what it requires is either satisfied or not, regardless how a norm is often called a principle or rule in ordinary linguistic usage.[49]

Such distinction is significant when it comes to conflict of rules and competing principles. Since rules are the fixed point which must be satisfied or not, a conflict of rules can only be resolved in that either an appropriate exception is read into one of the rules or at least one the rules is declared invalid[50] such as "lex specialis derogat legi generali" or "lex posterior derogate legi priori." However, competing principles are to be resolved in a different way. According to Alexy's theory, when two principles compete, one of the principles must be outweighed. Put another way, this is what is meant when it is said that principles have different weights in different cases and the more important principle on the facts of the case takes precedence.[51] In this context, Alexy's approach on dimension of weight shows similarity with Dworkin's. According to Dworkin, principles have a dimension of weight or importance. When principles intersect, one must resolve the conflict by taking into account the relative weight of each.[52] Consequently, as is framed in the well-known Lebach Judgement of the German Federal Constitutional Court, the conflict of principles is not resolved by declaring one of the principles is invalid, but by *balancing* constitutional values, since neither takes absolute precedence.[53]

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[48] Ibid, 47-48.
[49] Ibid, 61.
[50] Ibid, 49.
[51] Ibid, 50.
[52] Dworkin, Ronald, "Taking Rights Seriously", Harvard University Press, 1977, 26-27.
[53] "The opposing protected legal interests must be balanced against each other in each individual case in the light of general and specific considerations." Bundesverfassungsgericht 5 June 197 BVerfGE 35, 202. Translated by F H Lawson and B S Markesinis. Available at https://germanlawarchive.iuscomp.org/?p=62 [Accessed 25 February 2020]

This is a reasonable result of Alexy's comprehensive legal theory, which comprehends the different prima facie character of rules and principles. According to Alexy, principles require that something be realized to the greatest extent legally and factually possible. Thus, they are not definitive but only *prima facie* requirements.[54] Indeed, principles represent reasons which can be displayed by other reasons, unlike rules which have definitive character. Consequently, they can only create *prima facie rights*.[55]

In this light, the prima facie nature of principles reasonably leads to the principle of proportionality in Alexy's legal theory. As the German Federal Constitutional Court stated, the principle of proportionality emerges basically from the nature of constitutional rights themselves.[56] Put another way, if a constitutional rights norm which is a principle competes with another principle, then the legal possibilities for realising that norm depend on the competing principle. To reach such decision, one needs to engage in a *balancing* exercise. [57]

As Turkish constitutional lawyer Soysal puts it, constitutions are not colourless, empty boxes. Constitutions, of course, have a colour, and this colour reflects the ideological perspectives in the society.[58] Indeed, constitutions are not "value-free" texts. For example, Turkish Constitution declares that "The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble." Moreover, the Constitution itself prohibits to amend or even propose to amend such characteristics mentioned under Article 4.[59] Similar approach was taken by the Federal Constitutional Court as recognized in the Lüth Judgement as follows:

"It is true that the Basic Law, which does not consider itself a value-neutral system, …, has established an objective order of values in its

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[54] Alexy, 57.

[55] Ibid, 60.

[56] Bundesverfassungsgericht 15 December 1965. BVerfGE 19, 342 (348–49). Available at https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=15.12.1965&Aktenzeichen=1%20BvR%20513/65 [Accessed 25 February 2020]

[57] Ibid, 67.

[58] Soysal, Mümtaz, "Dinamik Anayasa Anlayışı : Anayasa Dialektiği Üzerine Bir Deneme", Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları, No:272, 1969, 71.

[59] See the Constitution of the Republic of Turkey, in English, at http://www.judiciaryofturkey.gov.tr/Current-version-of--Constitution-of-the-Republic-of-Turkey--including-latest--amendments [Accessed 25 February 2020]

constitutional rights catalogue. … This order of values, which is centred on the dignity of the freely developing person within society, must be seen as a fundamental constitutional decision for all areas of law."[60]

Although it is true that the weight of principles can never be determined independently or absolutely[61], there are some values which have a higher level of generality. Indeed, a few ideas such as dignity, liberty or equality cover just about everything needed when balancing constitutional principles. Those who try to establish a ranked order of values at this sort of level have few problems identifying the elements to be ranked.[62] For example, for a democratic, secular and social state governed by rule of law, and respecting human rights, principle of equality is supposed to be the centre value, without doubt.

V.II. The presumption of innocence as a *principle*

The presumption of innocence, as is recognized in the European Convention on Human Rights ("the Convention"), is an element of right to fair trial under Article 6 of the Convention. Article 6 of the Convention is as follows:

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed. innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

[60] Bundesverfassungsgericht 15 January 1958. BVerfGE 7, 198. Translated by Tony Weir. Available at https://germanlawarchive.iuscomp.org/?p=51 [Accessed 25 February 2020]
[61] Barry, Brian, "Political Argument", Routledge & Kegan Paul, 1965, 7.
[62] Alexy, 96-97.

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

As is seen by the formulation of Article 6, the key concern behind it is to ensure fairness of the criminal proceedings. However, right to a fair trial is not absolute under the Convention system. Indeed, when determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration.[63]

Paragraph 2 of Article 6 reflects the principle of the presumption of innocence. By the virtue of the Court's case law, it can be said that it requires, (1) when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; (2) the burden of proof is on the prosecution, and (3) any doubt should benefit the accused.[64] Thus, unlike the perspective equates the presumption of innocence merely to the burden of proof, the presumption of innocence is more than that the burden of proof is on the prosecution under the Convention.

One of the main aims under Article 6/2 is preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. Consequently, the presumption of innocence is violated when judicial authorities or public officials reflect an opinion that he is guilty before he has been proved guilty according to law. This guarantee includes not only judges but for example police officials, President of the

[63] Council of Europe, European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights, 2020 (last updated 31 December 2019). Available at https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf [Accessed 28 February 2020]

[64] European Court of Human Rights, Barberà, Messegué and Jabardo v. Spain, Application no. 10590/83, 6 December 1988, para.77. Available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57429%22]} [Accessed 28 February 2020]

Republic, Ministers, prosecutor and other prosecution officials such as an investigator.[65]

Another aspect of the presumption of innocence is that the burden of proof is on the prosecutor. It provides that it is for the prosecution to inform the accused of the case that will be made against him or her, so that he or she may prepare and present his or her defence accordingly, and to adduce evidence sufficient to convict him or her.[66] According to the Court, however, the defence may be required to provide an explanation after the prosecution has made a prima facie case against an accused.[67]

The Court also considers that the "in dubio pro reo principle" (doubts should benefit the accused) is a specific expression of the presumption of innocence. An issue from the perspective of this principle may arise if the domestic courts' decisions finding an applicant guilty are not sufficiently, or if an extreme and unattainable burden of proof was placed on the applicant so that his or her defence does not have even the slightest prospect of success.[68] In other words, reverse of burden of proof will be deemed as a violation of the presumption of innocence when it is extreme and unattainable so that his or her defence does not have even the slightest prospect of success.

According to the Court, the presumption of innocence is not an absolute right. In fact, the Court states that there are presumptions of fact or of law in every criminal system and this is not prohibited in principle by the Convention. In particular, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.[69] However, the presumption of innocence has to be limited within reasonable limits which

[65] Guide on Article 6 of the European Convention on Human Rights, para.328 – 338.
[66] European Court of Human Rights, Barberà, Messegué and Jabardo v. Spain, Application no. 10590/83, 6 December 1988, para.77. Available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57429%22]} [Accessed 28 February 2020]
[67] European Court of Human Rights, Poletan and Azirovik v. the former Yugoslav Republic of Macedonia, Applications nos. 26711/07, 32786/10 and 34278/10, para.63-67. Available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-162704%22]} [Accessed 28 February 2020]
[68] Guide on Article 6 of the European Convention on Human Rights, para.353.
[69] European Court of Human Rights, Salabiaku v. France, Application no. 10519/83, 7 October 1988, para. 27. Available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57570%22]} [Accessed 28 February 2020]

take into account the importance of what is at stake and maintain the rights of the defence.[70] In other words, as a result of general perspective of the Court on balancing, the contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved.[71]

The European Court of Human Rights is not the only body which acknowledges that the presumption of innocence is not absolute, thus can be subject to some limitations. For example, the Canadian Supreme Court held multiple decisions on the grounds that the presumption of innocence is subject to reasonable limits.[72] The reasoning of the Court mainly focused on these decisions that there was no possibility that the accused could be found guilty of a crime, despite the existence of a reasonable doubt. Such reveals were often thought necessary because, otherwise, it might be extremely difficult for the prosecutor to meet the required burden.[73] Similarly, the U.S. Supreme Court had also acknowledged some exceptions to the burden of proof. According to the U.S. Supreme Court, "the ordinary default rule, of course, admits of exceptions.[74] For example, the burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defences or exemptions. Under some circumstances this Court has even placed the burden of persuasion over an entire claim on the defendant."

Another important example can be found under the Turkish Labour Law. Although it cannot be analysed within the realm of criminal principles, still it is significant to underline the perspective behind it in order to understand how to justify possible limitations to presumption of innocence. Under the Article 5 of the Labour Law named the Principle of Equal Treatment, no discrimination based on language, race, sex, political opinion, philosophical belief, religion and sex or similar reasons is permissible in the employment relationship. Although the burden of proof in regard to discrimination

[70] Ibid, para.28.
[71] Guide on Article 6 of the European Convention on Human Rights, para.357.
[72] See for example, Momcilovic v. The Queen, HCA 34, 8 September 2011. Available at http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2011/34.html or, R. v. Schwartz, 2 SCR 443, 8 December 1988. Available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/376/index.do [Accessed 28 February 2020]
[73] Ibid.
[74] The Supreme Court of the United States, SCHAFFER V. WEAST (04-698) 546 U.S. 49 (2005), available at https://www.law.cornell.edu/supct/html/04-698.ZO.html [Accessed 28 February 2020]

claims by the employer rests on the employee, if the employee shows a strong possibility of such a violation, the burden of proof rests on the employer.[75]

Similar approach has been adopted by the Swiss Federal Act on Gender Equality as well. According to the Section 2 named Equality at Work of the Gender Equality Act of Switzerland, in relation to the allocation of duties, setting of working conditions, pay, basic and continuing education and training, promotion and dismissal, discrimination is presumed if the person concerned can substantiate the same by prima facie evidence.[76] Indeed, examples regarding the reveal of the burden of proof in comparative law are multiple to beyond the scope of this work.

This is a reasonable result of the qualitative structure of presumption of innocence. The presumption of innocence is a legal *principle* in terms of legal theory. In other words, it is not a rule, or a fixed point which must be either satisfied or not, but a principle which is an *optimization requirement.* It is not a rule because it is not possible to argue that the presumption of innocence must be either satisfied or not. The defendant is not neither "guilty" whom guilt has been proved by a final decision, nor "innocent" who has not been charged ever. The defendant is in between them.[77] As Bentham put it forward, the defendant is not in fact treated as if he were innocent, it would be absurd and inconsistent to deal by him as if he were. The state he is in is a dubious one, between non-delinquency and delinquency.[78] Thus, "being presumed innocent" is not a fixed point, because otherwise measures like detention or arrestment would have no legal justification.

Presumption of innocence is a legal principle which requires to be realized to *the greatest extent possible* given the legal and factual possibilities. Thus, as a principle, the presumption of innocence is not a definitive but only *prima facie* requirement, it is only a *prima facie right.*

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[75] Turkish Labour Law, No.4857, 22.05.2003. Available at in Turkish https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4857.pdf [Accessed 28 February 2020]

[76] Federal Act on Gender Equality, GEA, 24 March 1995. Available at https://www.admin.ch/opc/en/classified-compilation/19950082/index.html [Accessed 28 February 2020]

[77] Şık, Hüseyin, "Suçsuzluk Karinesi", Uyuşmazlık Mahkemesi Dergisi, Vol.1, 2012. Available at https://dergipark.org.tr/tr/download/article-file/159949 [Accessed 28 February 2020]

[78] Bentham, Jeremy, "The Works of Jeremy Bentham", edited by John Bowring, William Tait, 1843. Available at https://oll.libertyfund.org/titles/bentham-the-works-of-jeremy-bentham-vol-2/simple [Accessed 28 February 2020]

Thus, since it does not have absolute precedence, legal possibility of its realisation depends on the competing principle when it competes with another principle. In order to resolve such a competition, balancing exercise must be applied. As acknowledged by Walter Gropp, the presumption of innocence is a principle, so an optimization requirement, which is in a conflict to be solved by balancing with competing principles.[79] Likewise, the presumption of innocence has been interpreted as a derogable principle which is subject to reasonable limitations by the European Court of Human Rights as well as various national judicial bodies as mentioned above in detail. In sum, the presumption of innocence cannot be deemed as a rule or a sacred untouchable value in terms of legal theory, therefore can be subjected to limitations.

VI. Does the principle of "women's account is essential" breach the presumption of innocence?

As mentioned above, the maxim of "women's account is essential" is objected on the grounds that it breaches the presumption of innocence, because it reverses the burden of proof. However, this objection is fallacious on several counts. First of all, the principle of 'women's account is essential' does not merely offer a total reveal of the burden of proof. The main aim of it is to ensure an effective investigation which is free from bias in gender based violence cases.[80] Second, presumption of innocence is not only equated to the burden of proof. As an important aspect of right to fair trial, it has a wider scope including but not limited to the burden of proof.[81] Third, the presumption of innocence has not a definitive character in regard to legal theory. It is a legal principle which can be subjected to reasonable limitations.[82] And four, it has to be limited, indeed, when it competes with one of the founding principles of constitutional theory, namely the principle of equality. In order to evaluate the latter argument, now it must be analysed what the principle of equality is.

[79] Gropp, Walter, "Masumiyet Karinesinin Ceza Muhakemesini Sınırlayıcı Etkisi – Zum verfahrenslimitierenden Wirkungsgehalt der Unschuldsvermutung", translated by Osman İsfen, in Adil Yargılanma Hakkı ve Ceza Hukuku, Prof. Dr. Nurullah Kunter'e Armağan, Seçkin, 2004, 332.

[80] See the Chapter 3 above.

[81] See the Chapter 4 and partly 5.2 above.

[82] See the Chapter 5 above.

VI.I. Legal and factual equality

Equality before the law is undoubtedly the vital principle lies at the heart of the idea of law. As affirmed by the all liberal legal constitutions as well as human rights law instruments, all people are equal before the law and are entitled without any discrimination to equal protection of the law.[83] Under the equality before the law, everyone must be treated equally under the law regardless of race, gender, national origin, color, ethnicity, religion, political opinion, philosophical belief, disability, or other characteristics, without privilege, discrimination or bias.

The question on what the equality is discussed over centuries by numerous philosophers and lawyers. The classic formula defines it as "to treat the same similarly and differences differently."[84] Thus, the idea of equality does not mean that the legislature should put everyone in the same legal position or that it has the responsibility to ensure that everyone has the same personal characteristics or lives under the same material circumstances.[85] It would be, in fact, inappropriate and unjust. In this context, what is forbidden is not every differential treatment but only arbitrary differential treatment. According to the German Federal Constitutional Court, "arbitrary differentiation is to be found whenever a persuasive and reasonable ground, arising from the nature of the subject-matter or some other material circumstance, cannot be given for the legal differentiation".[86] Put another way, a differentiation will be arbitrary if an adequate reason which is sufficient to justify it is missing. Consequently, if there is no adequate reason for permitting different treatment, then similar treatment is needed. Then, it can be summarised as Alexy argued rightly, the general principle of equality is indeed a principle of equality, which prima facie requires similar treatment and only permits differential treatment if this can be justified by competing reasons.[87]

However, equal treatment does not always necessarily bring equal consequences. For example, an early decision of the Federal German Constitutional Court was about whether the refusal of legal aid for a certain legal procedure in spite of a requirement for legal representation breached

[83] Universal Declaration of Human Rights, available at https://www.un.org/en/universal-declaration-human-rights/ [Accessed 28 February 2020]

[84] The origin of such formula can be traced by Plato's "Laws" and Aristotle's "Nichomachean Ethics".

[85] Alexy, 262.

[86] Ibid, 267.

[87] Ibid, 273.

the general principle of equality or not.[88] In the case, both the poor and the well-off were treated similarly, because the advantages of legal aid were denied to both. In this light, they were both legally treated equally. However, in the consequence, the poor and the well-off were not treated equally because non-granting of legal aid prevented the poor but not the well-of, from pursuing their legal remedies, merely because they cannot afford to do so. Thus, although they were legally treated equally, *in fact*, they were unequally. Similarly, the German Federal Constitutional Court held that the requirement to 'treat the same similarly' had been breached, by holding that there was no adequate reason justified the factually differential treatment.[89]

The perspective which approaches the principle of equality as a fundamental constitutional value beyond the legal equality is embedded in modern liberal constitutions. For example, under the Turkish constitution it is stated that the State has the obligation to ensure that the equality between men and women exists in practice. Thus, measures taken for this purpose shall not be interpreted as contrary to the principle of equality.[90] In other words, in modern liberal constitutions, the idea of that legal and factual equality competes with each other and contains an equality paradox[91] has been abandoned. Indeed, it can be said that this is a reflection of the Dworkinian way of thinking, which recognizes "the law as an integrity". According to Dworkin's thesis, the duty of the judge is not to fulfil the gap or invent the law, but just to discover what is already embedded in it, since there is no gap in the law.[92] Under such a comprehensive perception, legal equality and formal equality cannot be defined as two different principles in terms of 'negative' and 'positive' obligation of states in ensuring the constitutional rights, since they are just two sides of the same coin, the law.

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[88] Bundesverfassungsgericht, BVerfGE 2, 336, 17 June 1953. Available at http://www.servat.unibe.ch/dfr/bv002336.html [Accessed 28 February 2020]

[89] Ibid, para.340.

[90] See the Constitution of the Republic of Turkey, in English, at http://www.judiciaryofturkey.gov.tr/Current-version-of--Constitution-of-the-Republic-of-Turkey--including-latest--amendments [Accessed 25 February 2020]

[91] According to Alexy, "if one combines both principles (legal and factual) into a super-principles of equality, this wide principle contains an equality paradox. Such paradox could be resolved by dispensing one of them." See, Alexy, 277.

[92] Dworkin, Ronald, "Law's Empire", Chapter 7 'Integrity in Law', Harvard University Press, 1986.

VI.II. Balancing the presumption of innocence with gender equality

The objections towards the principle of "women's account is essential" is not a coincidence. Just like the fact that gender based violence disproportionately affects women and male perpetrators of sexual offences are 50 times more than female perpetrators of the same category is not a coincidence. In a sociological reality which reflects that the perpetrator has been sentenced only in 0,7% of cases where women have been subjected to physical or sexual violence, it is possible to say that a formalist interpretation of the presumption of innocence leads unequal consequences, *in fact*. Moreover, it is not only about formalist interpretation of the presumption of innocence. If there is still objections towards the maxim of "the women's account is essential" where 993 of perpetrators are free in every 1000 sexual violence incidences, it is merely because of sexist bias and discrimination against women, which is exactly what the principle of "the women's account is essential" struggles on.

Still, it is not a coincidence. Because the state is male in the feminist sense: the law sees and treats women the way men see and treat women. The state is male because of its objectivity. Objectivity is liberal legalism's conception of itself. The foundation for its neutrality is the pervasive assumption that conditions that pertain among men on the basis of gender apply to women as well; that is, the assumption that gender inequality does not really exist in society.[93] In other words, judicial neutrality assumes that the conditions which pertain among men on the basis of sex, for example consent to sex, equally apply to women. Thus, it considers that gender inequality in society is not real.

Law assumes that consent to sex is as real for women as it is for men, women in private have the same privacy men do, women have the access to speech men have. It assumes that women are already equal to men.[94] The law divides women into spheres of consent according to indices of relationship to men. Which category of presumed consent a woman is in depends upon who she is relative to a man who wants her, not what she says or does. One can be acquainted with an accused by friendship or by meeting him for the first time at a bar or a party or by hitchhiking. In marital rape cases, courts look for even greater atrocities than usual to undermine their assumption that "if sex happened, she wanted it."[95]

[93] MacKinnon, 161-163.
[94] Ibid, 169.
[95] Ibid, 175-176.

As MacKinnon rightly puts it, most women get the message that the law against rape is virtually unenforceable. Women, distinguish between rape and sexual violation by concluding that they have not "really" been raped if they have ever seen or dated or slept with or been married to the man, if they were fashionably dressed or not provably virgin, if they are prostitutes, if they put up with it or tried to get it over with, if they were raped for years. The implicit social standard becomes: if a woman probably could not prove it in court, *it was not rape*.[96] This for sure re-traumatise women, and the worse is that when a rape prosecution is lost because a woman fails to prove that she did not consent, she is not considered to have been injured at all.

Ones who object to the principle of "the women's account is essential" argues that allegations are false because, to them, the facts describe consensual sex. However statistics prove that only around 5% of the rape accusations in judicial cases are false.[97] Similarly, the anxiety that rape is easy to charge and difficult to disprove, despite the overwhelming evidence to the contrary, arises because of sexist bias and discrimination. As a result, when complex and theological doctrines such as presumption of innocence becomes an ideology, it would be possible for a perpetrator to make a defence of 'not-guilty'. Because, the law is designed as to conclude that the rape did not occur. While it causes a great inequality for women, any attempt to solve this problem by without asking what the presumption of innocence covers in fact, is male-sided and patriarchal.

Within the context of the presumption of innocence, "the differences are treated similarly", because of gendered interpretation of such principle by the judiciary. As already explained, the differentiation is arbitrary, when a persuasive and reasonable ground, arising from the nature of the subject-matter or some other material circumstance is missing. In sexual violence cases, mostly there is no evidence rather than what women say. Applying the presumption of innocence in sexual violence cases without observing the patriarchal inequalities between the women, the victim and the perpetrator, the man, breaches women's right to be equal before the law. The statistics that 993 of perpetrators are free in every 1000 sexual violence incidences is enough itself to indicate such breach clearly.

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[96] Ibid, 179.

[97] Lisak, David; Gardinier, Lori; Nicksa, Sarah C.; Cote, Ashley M., "False Allegations of Sexual Assualt: An Analysis of Ten Years of Reported Cases", Violence Against Women, 16/12, 2010, 1318 - 1334. Available at https://cdn.atixa.org/website-media/atixa.org/wp-content/uploads/2016/03/12193336/Lisak-False-Allegations-16-VAW-1318-2010.pdf [Accessed 29 February 2020]

Consequently, it is true that there is a competition between the principle of presumption of innocence and women's right of equality and non-discrimination. Since principle do not have absolute precedence, a balancing exercise is needed. It must be emphasized that, however, this is not just an ethical or moral effort, or a feminist agenda, to ensure gender equality. Because as Alexy stated, just because a norm is valid sociologically or ethically does not mean that it is a valid constitutional rights norm. Instead, a norm is valid and is a constitutional rights norm when it is possible to provide correct *constitutional justification* for it.[98]

Indeed, balancing idea under Alexy's legal theory, is not a decision-taking model which the one doing the balancing follows their own personal presuppositions, but a justification model. Because while the determination of the statement of preference is the outcome of a rationally uncontrollable mental process in the decision-taking model, by contrast, the justification model distinguishes between the mental process which leads to the determination of the statement of preference and its justification.[99] So in balancing the presumption of innocence and right to equality, the preferential statement to which it leads must be justified on the grounds that state's obligation to ensure factual equality derives from the perspective perceives the law as an integrity.

Conclusion : Is it still better that 993 guilty men escape than 1 innocent man suffers?

The presumption of innocence, which is a universally recognised core principle in the administration of criminal justice, tilts the scales of justice in favour of a defendant by requiring the prosecution to establish guilt to a high standard of certainty. As a result, it causes that convictions are made more difficult and there is an increased likelihood that the guilty will escape punishment.[100]

Behind the presumption of innocence, there is a (somehow theological) value which bases on the belief that "it is better that 10 guilty men escape than that 1 innocent man suffers". This is an idea which cannot be justified rationally, since it does not elaborate *how it exactly is better* that 10 guilty men escape than that 1 innocent man suffers. Indeed, to what extent it is better to escape than to suffer, what is the exact limit on it? 15 or 50 guilty

[98] Alexy, 36.
[99] Ibid, 100-101.
[100] Stumer, xxxvii.

men?[101] What if 993 guilty men? Is it still better that 993 guilty "men" escape than 1 innocent man suffers?

According to the statistics, 38% of ever-married women have been subjected to lifetime physical and/or sexual violence in Turkey. However, 89% of these women who have been subjected to physical and/or sexual violence do not report the violence. Because of not believing women's account, in 29% of the applications made to the police, women were reconciled with their husbands and in 13% of the applications nothing was done. Only 4 out of 100 cases which women have been subjected to physical and/or sexual violence referred to the public prosecutor. When the decision to non-prosecute and acquittals is deducted, it is seen that only in 0,7% of cases where women have been subjected to physical or sexual violence, the perpetrator has been sentenced. More clearly, in every 1000 cases where men committed sexual offences against women, only 7 persons get conviction, while 993 of perpetrators keep on their life somehow freely in society.

Beyond any political and sociological arguments, such a big impunity on gender based violence explicitly refers to a huge inequality that women suffer from. Arguing that principles and practices aiming to deduce such impunity and ensure equality breach the presumption of innocence is not only sexually biased but also legally false. Indeed, presumption of innocence is a legal principle and thus, is an optimization requirement which is subject to balancing when it competes with other principles. When it is taken into consideration that it competes with women's right to equality since it prevents women from access to justice as proved by the statistics, such balancing exercise becomes easier. Indeed, the argument that "it is better that 993 men escape than 1 innocent man suffer" would not be proportionate in a democratic state governed by rule of law, in which equality and non-discrimination are indeed centre values lies at the heart of it.

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[101] See Volokh, "n Guilty Men", the footnote 30 above.

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