

# THE PRESUMPTION OF INNOCENCE – EUROPEAN LAW PRINCIPLE

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## *Abstract*

*Regulated in article 6 paragraph 2 of the European Convention on Human Rights, the presumption of innocence is an essential principle in criminal proceedings and it is also a principle of European law. This latter feature was fully highlighted by the rich jurisprudence of the European Court of Human Rights.*

*The presumption of innocence principle is also included in the constitutions of some countries, such as Italy, Spain, Portugal and Canada. The Amendments of the US Constitution do not explicitly devote this principle, but they simply assume it if the provisions protecting the individual in terms of proof and procedure are taken into account. In France, this principle is set out in the Declaration of the Rights of Man and of the Citizen of 1789, as well in the French Procedure Code.*

*In the Romanian Criminal Procedure Code, the presumption of innocence is included among the basic rules of the criminal proceedings. By adopting the presumption of innocence as a basic principle, distinct from the other rights that also guarantee individual freedom – the right to defence, respect for human dignity – there has been series of restructuring of the Romanian criminal trial.*

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The presumption of innocence is an important principle in the criminal proceedings, as well as a principle that ensures the respect for the human rights in the criminal proceedings.

According to the presumption of innocence, the suspect or the defendant is not obliged to prove his/her innocence. As a rule of law, this principle gained its independence only in the eighteenth century, being proclaimed for the first time in the United States' legislation.

The need to establish it in international documents prompted its entry in article 1 paragraph 1 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948. It was also recommended that the national laws insert the rules on the presumption of innocence.

The International Covenant on Civil and Political Rights, adopted on 16 December 1966 by the UN General Assembly governs the presumption of innocence in article 14 paragraph 2: "Anyone charged with a criminal offense is presumed to be innocent as long as his/her guilt has not been legally established."

In the Statute of the International Criminal Court in article 66, the presumption of innocence states that: "Anyone shall be presumed innocent until proved guilty before the Court shall be established in accordance with the applicable law."

The European Union Charter of Fundamental Rights, proclaimed in Nice on 7 December 2000, stipulates the presumption of innocence in article 48, paragraph 1: "Any person accused is presumed innocent until his/her guilt shall be proved in accordance with the law."

In the Romanian legislation, until 2003 the presumption of innocence was stated under Title III of the Code of Criminal Procedure (evidence and means of evidence) in article 66. By Law 281/2003, article 5 ind. 2 was introduced, through which it was explicitly stated that any person is presumed innocent until establishing his/her innocence through a final criminal judgment. The title of article 66 was changed to the right to test the

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lack of rationality of the evidence, stating in its content that “the accused or the defendant is presumed innocent and is not obliged to prove his/her innocence.”

Romania’s Constitution, through article 23 point 8, establishes that “until a final judgment of conviction, a person is presumed innocent.”

In the text of the Constitution the focus is on the existence of a final judgment of conviction and, in article 5 ind. 2 the phrase “final criminal ruling” is used, referring to those criminal judgments that are not of conviction, but that can determine a person’s guilt in committing a criminal offense. In case there has been a question of removing the criminal liability or of defence of punishment, the decision of the court is to cease the trial, although by court judgment, the defendant’s guilt was initially found (Theodoru, 2010).

The presumption of innocence principle is inserted in the constitutions of other countries, such as Italy, Spain, Portugal, Canada (article 11 d of the Canadian Charter of Rights and Freedoms). Without explicitly proclaiming this principle, the amendments of the U.S. Constitution assume it, if taken into account the provisions that protect the individual in terms of evidence and procedure. In France, the principle is contained in the Declaration of the Rights of Man and of the Citizen of 1789, which according to the Constitutional Council is part of the “block of constitutionality” (all the rules with constitutional value), as well as in the preliminary article (III paragraph 1) of the Code of Criminal Procedure. Article 21 of the Constitution of the Moldavian Republic provides that “any person charged with a crime is presumed innocent until proved guilty legally during a public trial at which he/she has all the guarantees necessary for his/her defence,” the principle being also resumed in article 8 of the Code of Criminal Procedure (Țăndăreanu, 2010).

Romania’s Constitutional Court defines this principle and tries to explain the guarantees offered by the presumption of innocence. The Constitutional Court, through decision no. 815/2006 regarding the exception of unconstitutionality of article 500 of the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, no. 39 of 18 January 2007 states that: “(...) the presumption of innocence is the right of a person to whom a criminal charge is brought to be presumed innocent until his/her conviction by a final judgment. This principle imposes on the members of a court not to start with the preconceived idea that the accused committed the offense he/she is charged with, the burden of proof belongs to the prosecution, and the accused takes advantage of the doubt. In essence, the presumption of innocence tends to protect the person under investigation for a criminal offense against a verdict of guilt that was not legally established.”

The presumption of innocence is a relative presumption, with a special legal regime, which, although can be proven by any evidence, can only be rebutted by a criminal judgment of conviction, which became final (Chiriță, 2008). Thus, through a judgment (the Case Phillips vs. United Kingdom, 2001), the European Court of Human Rights held that “besides being explicitly mentioned in article 6 § 2, the right of a person, criminally prosecuted, to be presumed innocent and to compel the prosecution to bear the burden of proving the allegations against him/her falls under the general concept of a fair trial according to article 6 § 1. This right is not absolute, however, since any legal system operates with presumptions of fact or of law to which the Convention does not oppose, in principle, as long as the contracting states do not violate certain limits taking into account the seriousness of the cause and respecting the right to defence.”

The European Convention stipulates in article 6 paragraph 2 that “Anyone charged with a crime is presumed innocent until his/her guilt will be legally proved.” Whenever the prosecutor or the court will establish, as a result of the evidence, the defendant’s guilt, the presumption of innocence will cease to operate and it will be removed by a final

proceedings judgment. According to the same article, it is stated that when there is evidence of guilt, the accused or defendant has the right to prove their lack of rationality.

The first judgment, which focused on the regulations of article 6 paragraph 2 of the European Convention on Human Rights, was the cause Minelli against Switzerland, where it was held that the presumption of innocence is violated if “the accused without being previously found guilty, in compliance with the law, and especially without having had the opportunity to exercise the right to defence, a judicial decision reflects the opinion that he/she would be guilty” (Van Dijk, Van Hoof, 1998).

The European Convention on Human Rights expressly states the right of the accused “to be informed promptly, in a language which he/she understands, and in detail, of the nature and cause of the accusation brought against him/her.”

Any person has the right to his/her trial fairly, publicly and within a reasonable period of time for his/her case, by an independent and impartial tribunal, established by law, which will decide on the solidity of any criminal charges against him/her.

The right to a fair trial should not be considered a guiding principle of the criminal trial, it must be found in the content of any procedure, throughout the course of the criminal proceedings, as a sum of procedural safeguards provided to the person involved (the defendant or the accused) (Mateuț 2007 ).

The text of article 6 of the European Convention on Human Rights stipulates in paragraph 1 that “Any person has the right to a fair trial, publicly and within a reasonable period of time for his/her case, by a tribunal which is independent and impartial to his/her civil rights and obligations or on the solidity of any criminal charge against him/her. The judgment shall be pronounced publicly, but the access in the meeting room may be forbidden for the press and the public throughout the trial or for part of it in the interests of morality, public order or national security in a democratic society, when the interests of juveniles or the protection of private life of the parties involved in the trial so require, or to the extent strictly required by the court when, in special circumstances, publicity would prejudice the interests of justice.” It can be noted that the text refers to the trial of the accused, which brings to mind only the trial stage, without considering the other stages, the prosecution and the enforcement of the criminal judgments.

But, the text of the law continues with the principles of the right to a fair trial in paragraphs 2 and 3, thus: “2. Any person charged with a crime is presumed innocent until his her guilt is legally proved.

3. Any accused has, particularly, the right to:

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

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

c) to defend himself/herself or to be represented by a lawyer of his/her choice and if he/she does not have the means to pay for legal assistance, to have the free assistance of a public defender, when the interests of justice so require;

d) to ask or require the examination of the witnesses of the prosecution and to obtain the summoning and the examination of the defence witnesses under the same conditions as prosecution witnesses;

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

The right to a fair trial established by the text of the European Convention on Human Rights text is found in other legislations, under other aspects. Thus, in the United States’ Constitution, Amendment VI states the right of the accused to benefit from the confrontation with the prosecution witnesses, the so-called right to counter-interrogation, which is an indispensable element in guaranteeing the right to a fair trial (Kadar, 2012).

Similar provisions of this right are set out in article 6 paragraph 3 letter d) of the European Convention on Human Rights.

The term “accusation” found in the text of article 6 of the European Convention on Human Rights is very broad, covering both criminal charges brought to someone, and his/her indictment, which are usually made in the prosecution stage. The prosecution is not done directly in front of the court, but for exceptional cases, if the prosecution stage is missing (Neagu, 2008).

Article 6 of the European Convention on Human Rights gives a broad sense to the term of indictment, which thus includes both the criminal charges and the indictment, also relying on the 11 classical principles. In all three paragraphs of article 6 there are expressions such as: criminal charge (paragraph 1), accused of committing a crime (paragraph 2) and accused (paragraph 3). This principle must also be based on the equality of the arms of the prosecution and those of the defence, combined with the impartiality of the prosecutor (Neagu, 2008).

The Court’s jurisprudence has mentioned that article 6 of the European Convention on Human Rights makes no distinction between “acts punishable by criminal law” and “acts which, given their lack of social danger, are not punishable under criminal law,” the provisions of the text being applicable to “any criminal charge” (Bîrsan, 2006).

The text does not impose a specific form of how the accused must be informed of the nature and cause of the accusation brought against him/her.

In clarifying the content of the concept of “information”, ECHR ruled that this means the bringing to the attention of the accused of the material facts that are alleged and the legal characterization.

The European Convention on Human Rights guarantees for any “accused” the opportunity to defend the charges brought in three ways:

- the accused can defend himself/herself;
- he/she may be assisted by a counsel of his/her choice;
- he/she may have the free assistance of a public defender.

Regarding the guarantees established, the doctrine revealed that some of them are borrowed from the legislation of article 6 paragraph 1 of the European Convention on Human Rights (Bîrsan, 2005):

- the burden of proof in criminal matters lies with the prosecution;
- the application of the “in dubio pro reo” principle;
- the requirement that the judges have of not having preconceived ideas;
- the prosecution is required to state the facts on which the accused is charged and to bring sufficient evidence to prove his/her guilt.

Further to these guarantees, article 6 paragraph 2 of the European Convention on Human Rights also provides its own guarantees, such as (Chiriță, 2008):

- the obligation of the states to refrain from imposing sanctions without a conviction decision;
- guaranteeing the right to silence;
- the prohibition of having a trial twice for the same offense and the same perpetrator, with the opinion that this prohibition also influences his/her prosecution.

The presumption of innocence applies both in the prosecution and the trial stages.

The applicability of article 6 paragraph 2 during the prosecution stage is possible when we can talk about a criminal charge. At this stage, the criminal procedural guarantee is that the accused person should not be treated as if guilty. Moreover, it was established that during the prosecution, the institution of preventive custody is exempted from article 6 paragraph 2. This exemption extends throughout the prosecution stage, excluding the

situation in which the preventive custody is punitive and represents an anticipated punishment (Bogdan, Selegean, 2008).

During the trial, the presumption of innocence works starting with the moment of referring a case until the final decision, no matter how many degrees of jurisdiction it would go through, both in the court of first instance and in appeal or cassation.

According to Article 6 paragraph 3, letter d of the European Convention, any accused is entitled to “ask or require the examination of the prosecution witnesses and to obtain the examination of the defence witnesses under the same conditions as the prosecution witnesses” and in accordance with the provisions of letter e “to have free assistance of an interpreter if he/she cannot understand or speak the language used in court.”

In conjunction with the principle of the right to silence of the suspect or defendant, the European principle of presumption of innocence establishes the following rules (Mateuț, 2007):

- the burden of proof lies with the pursuer;
- the accused benefit of the doubt;
- the right of the accused to adopt a passive attitude;
- the interdiction to use preventive detention to exert immediate repression;
- the observance of the presumption of innocence in the communications with the media;
- prohibition for a court to disclose, during a trial, its opinion or belief about the facts alleged against the accused;
- the principle of good faith in civil law is found in the presumption of innocence in the criminal proceedings, creating an inextricable link between the two branches of law (civil law and criminal procedure law).

The doctrine has debated enough cases before the Court, leading to a thorough understanding of the scope of the presumption of innocence.

To highlight this principle, the European Court of Human Rights underlined that (the case Viorel Burzo against Romania, 2009), if the presumption of innocence established in article 6 paragraph 2 is included among the items of the fair criminal trial requested by article 6 paragraph 1, it is not limited to a procedural guarantee in criminal matters: its scope is wider and requires that no representative of the state declare that a person is guilty of any offense before his/her guilt has been established by a court. However, article 6 paragraph 2 cannot impede the authorities regarding article 10 of the Convention to inform the public about the criminal investigations in progress, but it requires that they do so with all the discretion imposed by the presumption of innocence. Moreover, a virulent press campaign can, in some cases, harm the equity of the trial, influencing the public opinion and, by doing so, the judges who were to rule on the defendant's guilt.

According to its constant jurisprudence, the European Court of Human Rights decided on 4 March 2008 in the Case Samoilă and Cionca against Romania that public statements, through the printed press, made after the beginning of the criminal investigation, but before its solving, which leaves the distinct impression of guilt, violates the presumption of innocence.

In fact, C. Samoilă and D. Cionca, police officers, have been charged with committing an act of abuse of office. Police have ordered an inquiry, and the press was informed that the two were disciplinarily moved to another police unit and that they had committed “with certainty” the deeds of which they were accused.

The Court, considering that the state officials have given the Romanian public the distinct impression of guilt of the plaintiffs, which infringed their presumption of

innocence, established the violation of article 5 paragraphs 3 and 4 and article 6 paragraph 2 of the European Convention of Human Rights and Fundamental Freedoms.

In a recent case (the Case Viorel Burzo against Romania, 2009), the Court reiterates that if the principle of presumption of innocence established in article 6 paragraph 2 is included among the items of the fair criminal trial requested by article 6 paragraph 1, it is not limited to a procedural guarantee in criminal matters: its scope is wider and requires that no representative of the state declare that a person is guilty of any offense before his/her guilt has been established by a court. An undermining of the presumption of innocence can be generated not only by a judge or court, but also by other public authorities.

The Court also notes that the articles appeared in the press, which also concerned the plaintiff, appeared at the time of the arrest and beginning of his case, and not in the moment of convicting, while there was a certain period of time between the events on which the plaintiff grounded its allegations in the perspective of article 6 paragraph 2 of the Convention and the moment of his conviction, considerations that lead to the conclusion that article 6 paragraph 2 was not violated.

In the Case Păvălache against Romania (Case Păvălache against Romania, 2011), regarding the comments of various politicians, the Court considers it necessary that they be located in the context of the fight against corruption, a topic of concern for the entire Romanian society.

Referring to the echo that the case had in the press, the Court considers that in a democratic society comments are inevitable, sometimes severe, from the media on a sensitive case, such as that of the plaintiff, it challenges the morality of certain senior officials.

Although the national authorities cannot be held liable for the actions of the press, the importance of the choice of words used by the state agencies is underlined, and in particular, by the judicial authorities who control the investigation.

The Court finds that, by informing the journalists about the plaintiff's preventive detention, the prosecutor H.M. said that all the evidence converge towards establishing with certainty the plaintiff's guilt and that his conviction could not have been avoided, given that "nobody and nothing can help him escape criminal liability." Considering the content and the context of these comments, the Court concludes that they clearly stated that the plaintiff had been guilty of corruption, encouraging the public to believe his guilt and they prejudged the assessment of the facts by the competent courts. Consequently, article 6 paragraph 2 was violated and the presumption of innocence was undermined.

Wearing handcuffs before the jury does not violate article 6 unless corroborated by other deeds that cause damage in the realm of the presumption of innocence (Clayton, 2000).

In the case Englert against Germany, the Court held that a decision, after the cessation of the prosecution, the refusal for an accused of the reimbursement of the costs and fees and reparation made for the provisional detention, may raise an issue from the perspective of article 6 paragraph 2 if the reasons inseparable of the device are the equivalent in substance to a finding of guilt, without the latter being previously legally established and without the person concerned having the opportunity to exert his/her rights of defence (Filimon, 2003).

The doctrine, extracting from the reasoning of the Court, stated that the authorities cannot, in the public statements, use any type of vocabulary, the choice of the terms is essential for the protection of the safeguards in criminal matters. The only representative that can, in certain circumstances, use broader language to highlight the existence of

sufficient evidence in the case file is the prosecutor, the other officials do not benefit from such freedom of expression (Bîrsan, 2005).

In the case of Vitan against Romania (judgment of 25 March 2008), the Court emphasizes the importance of choosing by the officials of the terms for the statements which they make before a person was considered or recognized as guilty of an offense. In this case, the prosecutor assigned to the investigation proceedings against the plaintiff stated on 19 December 2000, during a press conference, that the plaintiff was guilty of traffic of influence, given that his guilt was not legally established until 15 May 2002, the date of the final judgment in question.

In these circumstances, the Court considers that this statement made by the prosecutor could be perceived as an official statement to the effect that the plaintiff was guilty given that his guilt had not been legally established, resulting in the violation of the presumption of innocence.

During the period in which this principle was not expressly stipulated in the Code of Criminal Procedure, the courts of Romania took into account the specific establishment of the presumption of innocence in the Constitution of 1991 and its regulation in article 66 of the Criminal Procedure Code.

The judicial practice (HCCJ Decision no. 3465 of 27 June 2007) held that in case the evidence relating to guilt are not certain, secure, complete, but there is doubt about the defendant's guilt, the rule in dubio pro reo is applied, according to which any doubt operates in favour of the defendant, and on its basis, the solution that emerges is acquitting the defendant by the court.

In the current Criminal Procedure Code, the presumption of innocence is regulated in article 4 paragraph 1 having the same content as the one in the old regulation. In paragraph 2 it is mentioned that: "Following the administration of the entire evidence, any doubt in forming the belief of the judicial bodies shall be construed in favour of the suspect or defendant." The new paragraph was added to emphasize the establishment with certainty the guilt of the suspect (not the accused) or defendant, any doubt taking advantage of the latter.

In the Romanian Criminal Procedure Code, the presumption of innocence is entered between the basic rules of the criminal proceedings. By adopting the presumption of innocence as a basic principle, distinct from the other rights that also guarantee the personal freedom – the right to defence, respect for the human dignity – there have been series of restructuring of the criminal trial and the concept of the judicial bodies which should answer the following requirements:

- guilt is established within a trial, observing the procedural safeguards, because the mere accusation does not mean establishing guilt;
- the burden of proof lies with the judicial bodies, which is why the interpretation of the evidence is done at each stage of the criminal proceedings, the findings of a judicial body not being binding and final for the next stage of the trial;
- upon the adoption of a judgment of conviction, until the final decision, the defendant has the status of innocent person, upon adopting a decision of final sentence the presumption of innocence is reversed with "erga omnes" effects;
- the sentence must be based on clear evidence of guilt, and in case of doubt, that cannot be rebutted by evidence, there must be decided a solution of acquittal.

All these requirements are arguments for turning the concept on the presumption of innocence from a simple rule, guarantee of certain fundamental rights, to a distinct right of every person to be treated as innocent until proven guilty by a final criminal judgment. Furthermore, in the jurisprudence of the ECHR, in the case Constantin and Stoian against Romania published in the Official Gazette, Part I, no. 169 of 16.03.2010, it was held that

article 6 of the Convention was violated (fairness of the criminal proceedings and the presumption of innocence).

The presumption of innocence obliges that court vested with the proceedings not to start from the preconceived idea that the person prosecuted is guilty in the sense of the criminal law, requiring that this principle does not remain theoretical, but to be guaranteed specifically by certain rules of legislation to allow the accused person to prove his/her innocence, at least in the same way in which the prosecution tries to prove the allegations (Oncescu, 2012).

### **Conclusions**

The presumption of innocence is not the passive attitude towards the offenders, but the fact that the body conducting the criminal proceedings against a person has to prove his/her guilt so that there is no doubt about it or the court does not declare the person's guilt until the culpability is not certainly apparent. The stipulation of this principle, both worldwide and specifically in the countries where there is a strong democracy, it is a guarantee for respecting the human rights, especially when it comes to the criminal trial, because here the person's freedom is firstly questioned.

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