Short essay on Presumption of innocence.ECHR precedent.

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Abstract: The presumption of innocence represents a fundamental principle that has to regulate any criminal trial, being regarded as a juridical and social safeguard awarded to the defendant supposed to have committed a crime. It is strictly linked to finding the truth and the right proof of facts and causality.

Key-words: presumption, innocence, guilt, criminal trial, ECHR, principle, defendants, prosecutors, violation

1 Introduction

The presumption of innocence is the basis to the right to a defense and implicitly all the procedural rights awarded to the defendants. Nicolae Purdă, concurring to the opinions of the doctrine [1], defines the presumption of innocence as being a constitutional principle according to which a person is considered not guilty as long as there is no final sentencing, alongside being one of the most powerful safeguards of human liberty and dignity.

The juridical literature has recently mentioned [2] that „even if the principle does not meet the requirements of doctrine of being present throughout the whole criminal trial to be in the fundamental right category, because it cannot function during the phase of carrying out the sentence, it can remain in this category, regarding it's dimension and overwhelming importance it has for the ensurance of a fair trial." Grigore Theodoru mentions that the presumption of innocence emanates from the requirement that no innocent person can be held accountable, safeguarding that anyone, in lack of proof cannot be trialed and judged, judicial authorities being obligated on the basis of this principle to administer necessary proof for proving guilt, and , in lack of such proof, to conclude upon the innocence of the defendant [3].The presumption is perceived as a benefit, a legal protection that accompanies the defendant, with the purpose of balancing the forces in a criminal trial [4]. Even though the applicability of the presumption of innocence is criminal law, all of the situations in which an action of a person has criminal conotations, as of late, more and more often, are appreciated with the applicability of the presumption. Thus it does not regard only the criminal trial stricto sensu. Respecting the presumption means that any representative of the state must abstain from publicly declaring that the defendant is guilty, appearing in a court of trial for having presumably committed a crime, before his guilt has been proven with a final judgement. Ion Neagu, remembering Caesare Lombrosso, mentions that making provisions about the presumption of innocence in the legal systems of the states represents a victory against the misconceptions of the anthropological and positivistic schools, according to which there are born criminals, with a pathological predilection towards committing crimes.[5]

2 Short history, national and international provisions

The presumption of innocence is mentioned in article 23 paragraph 11 of the Romanian Constitution, revised and republished, and it is a constitutional principle according to which a person is considered innocent as long as there is no final judgement proving him or her guilty. This principle is one of the most powerful safeguards of human dignity and liberty and all judicial activity has to obey it.[6] The romanian constitutions of 1866, 1923, 1938 do not expressedly regulate the presumption of innocence, this fundamental laws creating other safeguards for the protection of individual freedom and other fundamental rights and liberties. In the Constitution of 1948 it is mentioned in article 30 that only with a legally observed judgement can a person be convicted or determined to serve a sentence. This constitutional provision represent a incipent form of the presumption of innocence, as long as it requires the existence of a

sentence and the serving of it. The constitutions of 1952 and 1965 do not contain provisions regarding the presumption of innocence. In the Romanian Constitution of 1991, article 23 paragraph 8 states that „Untill a sentence is final, the person is considered not guilty." The text is fully copied in the revised Constitution. By mentioning it in the Constitution, the presumption of innocence becomes a fundamental right of the citizen, that in a case is accused of having committed a crime.[7]

In many systems of law the presumption of innocence is expressedly mentioned or in constitutional texts, or in the criminal procedure laws or statutes. Thus, the Constitution of Italy mentions the presumption of innocence in article 27 paragraph 2, which states that „The accused is not considered guilty until final sentencing". In the french constitutional system, the presumption of innocence is mentioned in article 9 of the French Declaration of human and citizen rights of 1789 [8], which is part to the Preamble to the French Constitution of 1958 according to the principle of the french block of constitutionality. The portuguese Constitution mentions the presumption of innocence in article 32 (marginal text „Safeguards of the criminal trial"), where paragraph 2 states that any person accused of having committed a crime is presumed innocent until his or hers sentencing is final, as soon as possible, with respect to the right to defense.The german Constitution does not mention in it's whole the principle of presumption of innocence, but alltogether the provisions, especially article 103 and 104, create the ideea that the german constitution maker envisions the legal protection of all fundamental rights awarded at an international level, the presumption of innocence being expressedly mentioned in many legal international documents. In the constitutional provisions of the United Kingdom of Great Britain and Northern Ireland the presumption of innocence, even if not in this words, can be found in the Habeas Corpus Act and the Human Rights Act.

The principle of presumption of innocence is also mentioned by international provisions. The Universal Declaration of Human Rights states in article 11 paragraph 1 that „Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence"Also the rule can be found in the International pact on civil and political rights in article 14 paragraph 2: „Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.", and also article 40 paragraph 2 letter b, point 1 of the Convention on child rights, as a guarantee for the legal protection of a child suspected to have committed a criminal offence.[9]The European Convention on Human Rights states in article 6 paragraph 2, the principle of presumption of innocence „Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Throughout the provisions of article 6, and the rich precedents of the European Court on the subject matter of article 6, the presumption of innocence is an element of the right to a fair trial, and the interpretation and applicability of conventional provisions of article 6 paragraph 2 being subsumed to the fair trial in it's dimensions awarded by the european regulations.

The European Charta of Human Rights also states, amongst it's base principles, in article 48 paragraph 1, the presumption of innocence „Any accused person is presumed innocent until it's guilt will be proven according to law".The presumption of innocence has an esential role in the guarantee of individual freedom. Until recently, the presumption of innocence had not found it's place in a complete and adequate regulation of the criminal trial per se, being only mentioned in article 23 of the Constitution. This until the enactment of Law no.281 of 2003 [10], our system of criminal laws made an indirect mention to this principle by the provision of article 66 of the Criminal Procedure Code, according to which „the defendant is not obligated to prove his innocence".The importance of the presumption of innocence, that outgrows the subject matter of proof, imposed the reevaluation and the consacration of it as a base rule of the entire criminal trial. Thus, by Law no.281/2003 article 5^2 was introduced in the Criminal Procedure Code, entitled „presumption of innocence" that mentions at a principial level „any person is considered innocent until proven guilty by a final sentence". The existence of such a provision in the Criminal Procedure Code was also due to the fact that by it's functionality and meaning, the presumption of innocence is applicable to the entire criminal trial. The same law modified the provision of article 66 paragraph 1 of the Criminal Procedure Code, making it workable with the new provision. According to it „the defendant is awarded the presumption of innocence and is not obligated to prove it's innocence". In the light of article 66 paragraph 2, when there is proof of guilt, the defendant has the

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right to prove they are sound. In the situation in which, after having administered all the proof, there is a doubt regarding innocence, and this doubt is persistent even after the administration of other pieces of proof, the presumption of innocence is not overturned, according to the principle of in dubio pro reo, any doubt must be interpreted in the favor of the defendant. In such a manner the courts decided, that for sentencing, the guilt of the defendant must be proven beyond any reasonable doubt, because any doubt is interpreted in favor of the defendant. „Starting with the hyphothesis that the criminal trial has to ensure the finding out of the truth regarding the facts of the case, and the person of the defendant, any person is considered innocent until his or hers guilt is proven through a final civil sentence, the presumption of innocence, a relative presumption, being able to be overturned, but only with certain proof of guilt"[11]

The presumption of innocence does not mean we have to adopt a passive attitude towards criminals. We could never be against a fair and rigorous repression, in accordance with legal provisions, but it cannot be mantained against situations not fully proven. Having a relative character which we mentioned, it can be overturned only by a final sentence, that has to be based on the certainty of the administered proof, overcoming any posibility of sentencing based on probability, apperances and ensuring the finding out of the truth regarding the case. [12]

3 Issues mentioned by scholars

In doctrine it is shown that by the form given to the presumption of innocence in article 23 of the Constitution and the similar provisions in article 6 paragraph 2 of the European Convention and article 5^2 of the Criminal Procedure Code there is at least one contradiction regarding the moment up until to which the presumption functions. Thus, on the one hand according to article 23 of the Constitution, the person is considered innocent until the sentence is final, and on the other the two aforementioned provisions state that the presumption operates until the guilt will be legally proven. The correct applicability of this principle in the author's opinion requires that regarding the powers awarded by the law, the judiciary must not begin with the misconception that the person being inquired or on trial is guilty. The same authors shows that the presumption of innocence is the pillar on which the right to defense stands and implicitly that of procedural rights award to the defendants. Both Anastasiu Crişu and other authors agree that the presumption of innocence is the base of the rule in dubio pro reo – doubt favors the accused, and also that the presumption includes the necessitz of a fair trial. The defendant must be on the same level as the accusation in front of the judge, fact which ensure his or hers protection against a verdict of guilt which was not legally established.[14]

The doctrine is unanimous in the sense that the presumption has a relative character being able to be overturned prin proving guilt with certain proof.[15] There has been a problem regarding the legitimacy of freedom restraining on a person – by awarding preventive measures against him or her – in relation to the presumption of innocence. In legal literature it has been proven that the recognition of the presumption of innocence does not exclude the awarding of preventive measure, not even those regarding personal freedoms, but it guarantess (or it should guarantee) that these will not be taken outside the rigorous conditions and framework of constitutional and criminal procedure provisions, thus in the situations in which guilt is presented with certain proof.[16] Even if the presumption of innocence is not overturned, the judiciary can award procedural measures, that represent restrains on fundamental rights, only if legal conditions are respected. Gheorghe Radu feels that in practice there has to be a reconciliation of the existence and awarding of freedom restraining preventive measures and the acknowledgement of the perpetual presence of the presumption of innocence throughout the criminal trial. This has to be done by observing the dynamics of the latter, the mode in which from an abstract notion with safeguard qualities of the fundamental individual rights it is awarded substance during the criminal trial. The same author mentions that during the criminal trial, the force of the presumption of innocence increases or decreases, according to the proof being administered, finally reaching a state of certainty of innocence or guilt.

Preventive incarceration is contrary to the presumption of innocence, even when it is first awarded, or it is prolonged or mantained, this constitutes a method of punishment, when it becomes a sanction before a sentence. Corneliu Bârsan shows that in argumenting a decision, the presumption of innocence can be indirectly tresspassed; it is suffice to say that the decision might contain an argument understandable that the judge may consider the

defendant guilty "without the legal proof of guilt, a judicial decision sees him guilty in a sentimental way".

Commenting on precedents of the European Court, Vasile Pătulea notices that the interpretative role of the Court is especially orientated towards signaling out the general procedural rules that contain obligations for the judiciary in the criminal subject matter, the methods thru which these principles are applied in practice, and the explanation of the text "legally proven guilt" of article 6 paragraph 2 of the European Convenion.[17] Mihail Ordoiu and Ovidiu Predescu, while examining the provisions of article 6 paragraph 2 of the European Convention, showed that the presumption of innocence is guaranteed to all persons against which a criminal action has been started in the sense provided by article 6 paragraph 1 of the European Convention, being one of the elements of a fair trial and the establishing of guilt only during the criminal procedures done in the competent courts. [18] Examining the above mentioned opinions we appreciate that the recognition of the presumption of innocence does not exclude the awarding of preventive measure of freedom restrictions, but it obligates us that these measures be taken in strict conformity with the requirements and procedures set by the law, until the definitive sentence the presumtion having a peramanent and intact character.

In the present procedural provisions, mainly article 48 of the Criminal Procedure Code, the judge is incomptaible regarding his own decisions as judge of the case, only in the situation when he solved the proposal of preventive incarceration or prolonging of preventive incarceration during criminal discovery (the situation mentioned by the provisions of article 48 paragraph 1 letter a), not for the situation in which the judge prolonged or maintained the incarceration during the trial. We consider that the legal status of the incarcerated defendant must not be subject to the easily envisioned subjectivism of the judge in such a situation. The lawmaker must introduce this case of incompatibility, that of a judge that prolonged or maintained the arrest of the defendant, iregardless of the phase of trial, so he may not be able to judge in the case on it's background or in other hierarchical different courts. These opinions are also expressed in foreign doctrine. Frederic Sudre [19] has shown that the right of a person of being considered innocent even if he or she is believed to have committed a crime – or a criminal action is brought forward, in the words of the Convetion – until the final sentence, constitutes one of the fundamental principles of modern penal law.

Jean Fracois Renucci, while examining the guarantees set forth by article 6 of the European Convention, shows that the presumption of innocence is an esential safeguard and represents a principle of fundamental value, one of the esential principles of modern criminal law. It's limitations cannot put into balance it's traditional legal strength. It is a principle that consists in the hypothesis that any person accused of committing a crime is presumed guilty until his or hers guilt will be legally established. [20] The author mentions that the natural functioning of the presumption of innocence principally requires that it is a rule regarding proof, in such a manner that the burden of proof is on the prosecution and doubt favores the accused, which in any hypothesis must have the ability to explain himself or offer a counter-evidence. Also, the author adds, the presumption of innocence is, as established by ECHR precedent [21] a rule regarding background because it represent a real subjective right of any person. The author analyses the subjects of the obligation to respect it. They have to abstain from anything that might trespass this fundamental right with principle value. Thus, starting with ECHR precedent (Worm v. Austria 29th of august 1997), the author shows that for a long time it was believed that the representative of the state must abide to a neutrality regarding the legal status of a suspect. It might be required of other persons too, especially journalistis, regarding the importance of mass media and the relative sensability of the presumption, and the necessity to be cautious [22].

4 ECHR precedent

The principle of presumption of innocence is complex and represents a constant preoccupation of the court at Strassbourg, which underlined that this presumption of article 6 paragraph 2 of ECHR is one of the elements of a fair trial. According to ECHR precedent, this principle requires that in the exercise of their office, the members of the court must have no preconceptions regarding the committing of the crime by the accused.[23] According to constant precedent of the ECHR, the convention must be interpreted in such a way that it safeguards concrete and efective right, nu theoretical and ilusive ones, this way of interpretation of the convention being also applicable to the presumption.[24] Regarding the subject matter,

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ECHR decided that the presumption does not regard only the criminal trial stricto sensu, but it is applicable every time the action could have a criminal, sanctionable character, like fiscal fraud or in the subject matter of administrative sanctions.[25] Regarding another aspect of interpreating the presumption, by precedent the Court acknowledged that in it's applicability we find the obligation of the representatives of the state (especially the judiciary) to abstain from public statements through which they assert that the accused or the defendant is guilty of having committed the crime it is presumed to have committed, before his guilt was established thru a final sentence.[26]

Article 6 of ECHR mentions that up until sentencing the suspect must be presumed innocent, and the goal of paragraph 3 of this articol is esential in determining the moment in which to free the person when his arrest has stopped being reasonable. [27] In the case of Miailhe v. France, ECHR mentioned the violation of article 6 of the Convention when a "violation against the right, to any accused, in the sense […] to not say anything and not contribute to it's own incrimination".

In the case Minelli v. Switzerland, the Court mentioned "the presumption of innocence is not respected if, without anterior legal establishing of guilt of the defendant […] a judicial decision regarding him or her reflects the feeling that he may be guilty". In the case Duriez-Costes v.France of the year 2000, the Court in Strassbourg reminded the precedent (Decision X v.Holland 1978), in which it was established that the obligation of an automobile driver to take some blood tests while suspected of being inebriated is not contrary to the presumption of innocence. Also, it was mentioned that this presumtion is violated through statements made by public officials about pending investigations, that encourages the public to believe in the guilt of the suspect before a sentence has been issued by a competent authority (the case of Allenet of Ribemont v. France 1995). Also, the right of not incriminating oneself is strongly linked with the presumption of innocence (Saunders v. Great Britain,1996). The ECHR established that the presumption is not intended only for the judge, but other authorities of the state, regarding public statements which can be made about the accused which is not yet sentenced, thus imposing caution.[28] In the case of Samoilă and Cionca v. Romania of the 4th March 2008, the ECHR considered that the statements of the prosecutor [29] which clearly indicated that the defendants are guilty of the crime of trying to determine perjury, encouraged the public to believe in their guilt, anticipating the value given to the facts by the competent judge. For this arguments, and the fact that the defendants were brought to court, during the trial, in prison uniforms, ECHR considered that the romanian authorities violated the presumption of innocence guaranteed by article 6 paragraph 2 of the Convention. Similarly in the case of Vitan v.Romania it was noted that throught the statements of the investigating prosecutor made during a press conference in the sense that the defendant is guilty of having committed the crime of influence peddling, without the court having given a sentence, violated the presumption. In another case the ECHR noted that the presumption had been violated by the austrian authorities who sentenced the accused of having committed a trafic accident, based on a police report coroborated with the lack of explanations from the accused which refused to declare anything. The Court considered the presumption was violated because the national courts, in lack of sufficient proof, interpreted the silence of the accused in an unfavorable way to him. [30]

We have to mention that the ECHR precedent has been very clear regarding the extent of the presumption, mentioning that it guarantees to any individual that the representatives of the state will not be able to consider him or her guilty for a crime before a competent court will establish this according to law. [31] From ECHR precedent and as well from doctrine we can conclude that the presumption of innocence is the beneficiary of sufficient legal safeguards to ensure the procedural mechanisms for its abidement during the criminal law.

5 Conclusion

The presumption of innocence is a constitutional principle according to which a person is regarded not guilty as long as there is no final decision otherwise.It is also one of the most powerfull safeguards of human dignity and freedom. From ECHR precedent and doctrine we can acknowledge the fact that the presumption has sufficient safeguards in place to ensure the procedural mechanisms necessary in a criminal trial.

This principle imposes to the members of a court not to start with a preconception that the suspect or the accused committed the offence, the accusation

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having the duty to prove anything, and the accused benefiting from the doubt. In essence, the presumption of innocence tends to protect the person suspected to have committed a crime against a verdict that has not been reached legally yet.

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