

THE PRESUMPTION OF INNOCENCE IN THE ROMANIAN LEGISLATION AND IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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The presumption of innocence is a fundamental principle of the Romanian legislation and a fundamental value of the European legal space, as provided by the European Convention on Human Rights.

Under this presumption, a person accused of committing a crime is considered innocent until the court decree of condemnation remains definitive.

Key words: the presumption of innocence, the European Convention on Human Rights, the fundamental principle, Romania's Constitution, criminal suit, proof.

The presumption of innocence has been established as rule of law in the XVIIIth century, for the first time proclaimed in the legislation of the United States and later in the Universal Declaration of Rights of Man and Citizen in 1789 [1]. According to the art. 9 of the Declaration "all persons are held innocent until they shall have been declared guilty."

Later, it entered in the art. 11 of the Universal Declaration of Human Rights [2], which stipulates that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty in a public trial where he has had all the guarantees necessary for his defense". In this document it was recommended to the states to regulate the legal provisions on the presumption of innocence.

The International Covenant on Civil and Political Rights [3], in art. 14 point 2 regulates that "any person accused of committing a penal offence is presumed to be innocent while culpability has not been established according to the law."

On the 4th of November 1950 the European Convention on Human Rights was officially signed, further on named the Convention, namely a document with binding legal nature that benefit from an autonomous mechanism of surveillance. According to the Preamble, the Convention is the first step "for the collective application of certain rights set out in the Universal Declaration" To this end, they laid the foundations of an interstate procedure for the submission of complaints to the European Commission of Human Rights in the case of allegations of human rights abuses by the state authorities of one of the contracting parties. All the cases appeared before the European Commission of Human Rights, which established the facts and decided whether complaints may be admitted by confidential procedures. If decided that a complaint could be sustained, the Commission tried to mediate between both sides to reach an amicable solution. If an amicable settlement could not be reached, the Commission would formulate an opinion regarding the substance of the case in a document named "report cf. art. 13 ". If the complaint had been instituted against a state that does not accept the jurisdiction of the European Court of Human Rights, the case was sent to the Committee of Ministers for settlement. If the complaint had been instituted against a state that accepts the jurisdiction of the European Court of Human Rights, the State or the Commission sent it for settlement to the Court. The Court verified whether the complaint was admissible, reviewed the essence of the case and reached a

decision following a public and legal procedure. Any decision of the Court was binding. The increasing interest for the activity of the Commission and of the Court led to a growth of the volume of work, so Protocol 11 was approved, which came into force on the 1st of November 1998, bringing profound changes in the system. The Commission and the Court have been replaced by a single independent Court. The individual right of petitioning as well as the jurisdiction of the Court have become mandatory, which means that individuals have direct access to the Court. The role of the Committee of Ministers has been limited to monitoring the execution of resolutions.

The presumption of innocence is regulated in art. 6, paragraph 2 of the Convention [4], which stipulates "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

In our country, the presumption of innocence is one of the fundamental principles of the criminal process and it also represents an essential value of European legal space. In the internal legislation, the presumption of innocence is regulated along with the fundamental rights and freedoms of the person, being raised at the level of fundamental principle and going beyond the strict limits of the judicial proceedings [5].

Romania's Constitution expressly provides in Article. 23 point 8 that "Any person shall be presumed innocent till found guilty by a final decision of the court." By comparing the legal provisions of the Constitution of Romania with the art. 6, paragraph 2 of the Convention we may see that it is nothing but a formulation in different terms of the same moment, respectively the moment when the decision of conviction of the court becomes final (according to the Constitution of Romania) and the establishment of legal culpability (in the Convention).

The presumption of innocence is a basic rule of the criminal suit and entered in the art. 5² of the Criminal Procedure Code (Chapter I of the report entitled "The aim and the basic rules of criminal proceedings"), which provides that "any person is considered innocent until its guilt is established by a final criminal decision." In our law the accused or the defendant must not prove their innocence, the burden for administration of evidence in criminal suits is incumbent on the body of prosecution and on the judicial instance (Article 65 Criminal Procedure Code). They must make clear all aspects of the case on the basis of evidence (Article 62 Criminal Procedure Code).

The presumption of innocence, as a relative presumption, can be shattered by contrary evidence, respectively the proof of guilt. According to art. 66 paragraph 2 of the Criminal Procedure Code when there is evidence of guilt, the accused or the defendant has the right to prove their lack of firmness. It was stressed in the specialized literature that "when a party has proposed a proof that was administered, the other side has always the right to counter-evidence, namely the right to produce evidence with which to fight what has been established by the given evidence " [6].

Only certain evidence of guilt can make the overturning of the presumption of innocence. If the evidence relating to guilt is not certain, secure, complete, but there are doubts as to guilt, the defendant shall be subject to the rule "in dubio pro reo", according to which any doubt operates in favor of the defendant. In this sense the judicial practice came out [7], and showed that the rule "in dubio pro reo" is a complement of the presumption of innocence, an institutional principle that reflects the way in which the principle of finding the truth, sanctioned in art. 3 of the Criminal Procedure Code is found in the material of the evidence. It is explained by that, as far as the evidence given to support the guilt of the accused contains doubtful information upon the guilt of the perpetrator in connection with the deed charged, the criminal court cannot form an opinion that is meant to be a certainty, and therefore, they should conclude within the meaning of innocence and to acquit him.

Before being a matter of law, the in dubio pro reo rule is a matter of fact. The administration of criminal justice requires that judges should not be based on probability in the decisions that they pronounce, but on the certainty gained on the basis of decisive, complete, reliable, evidence, able to reflect the objective reality (deed subject of the judgment).

This is the only way that belief is formed, coming from the evidence given in the cause, that objective reality (deed subject of the judgment) is, unequivocally, the one showing the reality ideologically reconstituted with evidence.

Even if in fact evidence was given to support the indictment and other evidence is not foreseen or it simply does not exist, and yet the doubt persists regarding the guilt, then the question is "equivalent to a positive proof of innocence" and so the defendant must be acquitted.

The legal literature [8] specifies that the functionality of the presumption of innocence is much broader than factual issues related to evidence, revealing itself in at least a few main directions:

- The presumption of innocence guarantees the protection of man in criminal suits against the arbitrariness in the establishment and in the process of holding him criminally responsible. The principle should not be considered as an evidence of the moral position of a person, whereas it would be devoid of reason and sometimes opposed to the reality as a legal norm to give someone blameless honesty. What law can provide is the legal guarantee to ensure that no one will be held criminally and discretionary punished, and when he is accused of committing a crime will follow a judicial procedure by which to establish his guilt.

- The presumption of innocence is the basis of all procedural guarantees relating to the protection of the person in the criminal suit. In the criminal procedural legal relationships should be given legal protection to the accused or defendant, so it should not be put into any inferiority to the judicial organs and to the parties. The concerned does not benefit from such platform only to the extent that he is considered innocent by the law until guilt determination.

- The presumption of innocence is closely related to finding the truth and proving the exact circumstances of fact of the case, so that guilt must be established with certainty. The issue is of particular theoretical importance and has many practical implications at least in relation to the management and appraisal of evidence.

Thus, both judicial practice and specialized literature recognize for the presumption of innocence the rank of fundamental principle in the criminal suit.

We believe that this principle should be respected at all stages of criminal suits, respectively in the phase of criminal proceeding and in the trial phase (first instance and remedies), so that no innocent person should be punished, but at the same time it should not be generalized, because a person that was proved guilty should be held liable to criminal sanction applied in relation to the seriousness of the crime committed.

The presumption of innocence is contained in art. 6, paragraph 2 of the Convention, and in accordance with Articles 11 and 20 of the Constitution of Romania, the European Convention on Human Rights and its additional protocols have become an integral part of the national law, taking precedence over it. Thus, the provisions of the art. 10 of the Convention after its ratification by Romania (the 18th of May 1994) and its publication in the Official Gazette (31 May 1994), became mandatory and prior source of law.

The Decisions of the European Court of Human Rights have defined standards in this field and have made the relations between the members of the Government, politicians and media, between the public authorities and free expression of the individual.

The legal instrument available for the application of the Convention is given by Article 11 paragraph 2 and art. 20 paragraph 1 and 2 of the Constitution of Romania, that formulated the principle of direct effect (through the inclusion in the national law of the treaties ratified by Romania) and the principle of primacy of international rules on human rights to the internal laws, in case of discrepancy.

By agreeing with the direct application of the Convention we believe that its rules require a transformation process through the interpretation given by the Court.

The direct application does not automatically result from the legal provisions, but it needs the support of a firm jurisprudence clarifying the concepts, the dissociation of the Convention text from the judicial practice developed by the Court being impossible, whose decisions are usually cited as legal basis by the European court.

Therefore, the Convention has obtained a direct applicability in the internal law and the knowledge of jurisprudence of the European Court of Human Rights becomes an obligation for theorists and practitioners of law. The participants in the judicial process, especially the criminal one, are mainly responsible for the application of the decisions of the European Court of Human Rights and judicial practice developed on the basis and for the application of the Convention.

The European Court of Human Rights, further on named the Court, is the first international jurisdiction and supreme interpreter of the Convention, which is applied in many countries, including ours. The decisions pronounced by the European Court of Human Rights led in many cases, to changes in legislation and jurisprudence.

The presumption of innocence as stipulated in art. 6, paragraph 2 of the Convention, first of all refers to the position of the judge who must decide on the offense. He must have an objective attitude, he must be partial and he must not be prejudiced in prosecuting the case. The judge should not start from a presumption or suspicion that the defendant is guilty [9].

The presumption of innocence also concerns the task of the proof, that is incumbent on the Public Ministry and the doubt is in the defendant's advantage [10]. As in the Romanian judicial practice, in the jurisprudence of the Court the presumption of innocence is a relative presumption, which can be shattered almost immediately by any contrary evidence. Thus, if the criminal suit does not end with a conviction, the Court does not allow the person to whom it has conducted research to have the costs reimbursed [11]. The Court has also decided that the provisions of art. 6, paragraph 2 of the Convention are violated if the court, noting that the prescription of the criminal responsibility has intervened, has obligated the defendant to pay two-thirds of the costs of the procedure performed in the case, thus believing that it is convinced of the guilt of the defendant and that, in the absence of prescription, it would have been condemned [12].

The Court has decided in the sense that, in the absence of convincing evidence of guilt, sentencing the defendant is likely to violate the art. 6, paragraph 2 of the Convention [13].

The presumption of innocence implies the right of the defendant's silence, he can declare nothing until the end of the trial. This right is also found in the Romanian legislation and it is provided for in art. 70 paragraph 2 of the Criminal Procedure Code, under which the accused or defendant is notified the right of not making any statement, drawing his attention that anything he says can be used against him. Such a provision is another step towards the harmonization of criminal law with the Convention. The use of the right of silence by the accused or the defendant is not to be confused with the denial of the crime, or with its recognition. A simple accusation without proof has no value against the presumption of innocence when the authority observes the law. We believe that the

presumption of innocence also justifies the silence, nobody being obliged to prove his/her innocence, especially when the accusation has not been proved or is improbable.

The right of the non-contribution to their own incrimination has been explicitly recognized by the Court [14], but this right does not oppose to the use in court of evidence obtained from the accused against his will, but that have an existence beyond his will, such as documents obtained as a result of searches, samples of blood, tissue for DNA test [15].

The presumption of innocence, according to the jurisprudence of the Court, shall apply in the prosecution phase, but it is not opposed to acts such as impressing a person, searches or obligation to carry out the breathalyzer test [16]. What is important at this judicial stage is that the defendant should not be treated as being guilty of committing the crime.

Preventive arrest is an exception to the presumption of innocence and cannot be interpreted as an application of early penalties, before that the defendant is convicted by a court decision. During the prosecution and the criminal suit until the legal establishment of the culpability, so also for the procedures for appeal and recourse, the presumption of innocence shall take effect [17].

The judge is the first that must respect the obligation to refrain from any statement, which refer to the defendant's guilt [18].

Not only the judge is held to respect the presumption of innocence, but also the state authorities, including the legislative ones [19]. Generally, art. 6, paragraph 2 of the Convention guarantees to every person the right not to be treated by any representative of the state as if it were guilty of committing a crime, before his legal culpability having been set by the competent court [20]. Thus, the police or the Prosecutor will not make public statements before the sentencing of the person suspected of committing a crime, statements that include a finding of his guilt [21].

In connection with the violation of the presumption of innocence, the Romanian state, in the case *Notary vs. Romania* [22] has avoided the pronouncement of a condemning decision, through the resolution of the case on amicable way. The complainant Notary Gheorghe informed the European Commission of Human Rights citing, among other provisions, the breach of art. 6, paragraph 2 of the Convention, which sanctions the right to presumption of innocence, since his identity was revealed in a television broadcast, being identified as the author of a crime, although his guilt had not been lawfully established. The broadcast was registered in the conference room of a police department, and during its transmission on television it revealed the identity of the person and stated that he committed the offense of robbery. The registration has been running in a thematic broadcast dedicated to juvenile delinquency. The Romanian Government has proposed to the plaintiff an amicable agreement, which in addition to the financial element included the assumption of certain obligations, including taking necessary measures for the purpose of informing the police regarding the proper conduct to be adopted to ensure compliance with the presumption of innocence, in the sense of art. 6, paragraph 2 of the Convention. We believe that by this amicable agreement was implicitly acknowledged breaching the presumption of innocence and by assuming the obligations, the Romanian state proved the compliance with the provisions of the Convention.

CONCLUSIONS

The state of law represents that democratic regime in which the state is the guarantor of the individual rights and freedoms.

The presumption of innocence is a fundamental right of the person, and it represents only the protection of a person accused of committing a criminal act against a verdict of guilt that was not legally established. Thus, any person is protected by the presumption of

innocence until a court determines definitively that it has committed the crime. The presumption of innocence is governed by the internal legislation and European Convention on Human Rights. It must be respected not only by judicial organs but also by the legislative authorities. In this sense, The European Court of Human Rights, which interprets the Convention, came to the conclusion in the sense of guaranteeing of concrete and effective, not theoretical rights. We cannot speak of a state of law if the human rights are not respected effectively but just formally.

We believe that the entry of presumption of innocence as a basic rule in the criminal suit involves the improvement of all the procedural institutions in which the need for evidence of the guilt proofs is evoked, and if necessary, new institutions will be introduced to contribute to amplify the resonance of this fundamental principle during the criminal suit.

Furthermore, we believe that it is necessary to adopt a specific legislation that expressly defines the obligations and prohibitions against individuals suspected of committing certain criminal acts, to explicitly regulate the behavior of the judicial and public authorities against the criminal suits in progress.

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