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IN DUBIO PRO REO - MYTH OR REALITY

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Abstract

The current code of criminal procedure brings important changes to some institutions from the old code of criminal procedure, but it also establishes a number of new institutions that did not exist in our criminal procedural law. All these changes are reflected first and foremost in Title I of the General Part of the Code, which regulates the principles of criminal procedural law. The presumption of innocence is closely related to the notion of impartiality of the court, in order to guarantee the presumption of innocence is also art. 6 para. 2 of the ECHR, according to which the state representatives refrain from making public statements in the sense that the accused is guilty of committing a certain crime.

Keywords: *in dubio pro reo, principle, equity*

The principle of the presumption of innocence is the constitutional principle according to which, until the final stay of the judgments of conviction, the person is considered innocent.[1]

It is enshrined as a defining element in dubio pro reo, which is also reinforced by art. 103 paragraph 2 C.C.P. that, "*the conviction is ordered only when the court is convinced that the accusation has been proven beyond any reasonable doubt*."

The presumption of innocence is closely related to the notion of impartiality of the court, in order to guarantee the presumption of innocence is also art. 6 para. 2 of the ECHR, according to which the state representatives refrain from making public statements in the sense that the accused is guilty of committing a certain crime and therefore, they refer to the accused as suspect or defendant, in according to the processual stage of the criminal trial.

The presumption of innocence has the character of a procedural guarantee granted to the persons prosecuted or prosecuted.[2] However, the presumption of innocence goes beyond a fundamental principle, at the same time being a fundamental human right. There are several opinions regarding the consecration of the presumption of innocence as a right, thus, in one of the opinions it is considered that it would represent a material human right, because it concerns

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[1] D. Pavel, „Considerații asupra prezumției de nevinovăție", in *Revista Română de Drept,* no. 10/1978, p. 10.

[2] N. Volonciu, coord., *Codul de procedura penala comentat*, Hamangiu Publishing House, 2017, p.11.

everyone, being opposable *erga omnes*, and in another (art. 23 of the Constitution, article 4 of the CCP), it is considered that it operates only in the case of a person accused of committing an offence. [3] Therefore, until a final decision of the court regarding the guild, that statues that a person has committed a crime, no one should have a different attitude or refer to a person as being a criminal, otherwise, he would be himself violate the rights of a human being.

The field of the presumption of innocence is different depending on the emphasis placed on protecting the values of the company or on protecting the rights of the individual in the criminal process. It is possible to establish the right to enter the territory of the territory of the country and to have the right to do so, and to do so, if it is not possible to do so. First, there is a possibility that the facts to be discovered and sanctioned more efficiently, as, secondly there is a possibility of avoiding judicial errors.

Although art. 6 para. 2 of the ECHR stipulates "*any accused person*", art. 4 paragraph 1 of C.C.P. the "*any person*", thus extending the scope of action and action on witnesses, expressly providing for art. 118 C.C.P. the witness's right to a naked charge.

In judicial practice it has been stated[4] that the presumption of innocence is not defeated as long as there is no evidence to prove with certainty that the defendant committed the facts for which he was sent to trial. Even if the defendant's statements in the course of criminal prosecution do not corroborate with other means of proof, they cannot constitute grounds for his conviction. The certainty can be evinced by any reasonable doubt, even if there are some means of proof that indicate that a person has committed the crime he is accused of, therefore, once the doubt is installed, it has to be in the favour of the defendant.

The rule *in dubio pro reo* constitutes a complement to the presumption of innocence, so the decisions that the court pronounces must be based on the **certainty acquired on the basis of decisive, complete, reliable evidence**, as it reflects the objective reality, and **not on probability**.

Other consequences of the presumption of innocence result from different provisions of the code of criminal procedure, such as: incompatibility of the judge who took part previously in the trial of the case (art. 64 para. 3 CCP), the rule that the burden of proof belongs to the prosecutor or the civil party (art. 99 paragraph 2 thesis II), the general conditions provided in art. 202 CCP regarding the application of preventive measures, the obligation to motivate the criminal decisions (art. 403 C.C.P.), etc. We can easily conclude that the presumption of innocence and the rule *in dubio pro reo* are constant in all criminal legislation, with a

[3] S.M. Teodoroiu, I. Teodoroiu, „Prezumția de nevinovăție şi neconstituționalitatea unor norme procesuale", in *Dreptul* no. 5/1995, p.4; V. Puşcaşu, *Prezumția de nevinovăție*, Universul Juridic Publishing House, Bucharest, 2010, p. 35.

[4] ICCJ, s. pen. Dec. no. 1508 from March 8, 2006, in B.J. Baza de date, apud N. Volonciu, *op.cit.*, p. 19.

lot of references in the criminal code and criminal procedure, therefore the legislature was constant in assigning this human right to any prosecuted person.

The standard of proof beyond any reasonable doubt was also imposed, making a passage in the current code from the principle of the judge's intimate conviction to the standard of proof beyond any reasonable doubt[5], thus "the conviction is ordered only when the court is convinced that the accusation has been proven beyond any reasonable doubt "(art. 103, para. 2, thesis second of the CCP). From this it follows the conclusion that, although evidence has been administered in support of the accusation, but the doubt persists regarding the guilt, the doubt "equates to a positive proof of innocence" and therefore the defendant must be acquitted.[6]

The presumption of innocence is not an absolute presumption, but a relative presumption, which can be overturned by clear evidence of guilt. The standard of proof able to overturn the presumption of innocence is evaluated by elements indicated precisely by the code, as being decisive, complete and reliable. The standard is considered as being achieved only when all these elements are present, the lack of any of them is able to fault the standard.

The legal consecration is the date of art. 4 C.C.P., art. 23 of the Constitution, art. 6 para. 2 of the ECHR, art. 48 of the Charter of Fundamental Rights of the European Union.

The presumption of innocence is also a substantive rule which represents a true right of the suspect or the defendant to be respected and protected in all stages of a criminal trial, up until a final decision of the court.[7]

Violation of the presumption of innocence as a subjective law does not lead to the nullity of the acts that infringed this right, but may lead to the criminal liability of the guilty person or the authority (art. 1349 C.C. and 1357 C.C.)

The recommendation of the Committee of Ministers (2003) 13E / 10.07.2013 regarding the dissemination of information through the media in relation to criminal proceedings stipulates that the right to free expression of journalists should be exercised without prejudice to the presumption of innocence, mainly because the impact that media has on social image of a person can prejudice that person in all aspect of her life, from personal to professional, with implication both regarding the reputation and the financial state, in other words, journalists may distroy a person in the social environment and his family along with him only by prejudiciating the presumption of innocence.

The incrimination of misleading the judicial bodies (art. 268 C.C.P.) is also regulated to protect the presumption of innocence as a subjective right.

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[5] N. Volonciu, s.a., *op. cit.*, p. 13.

[6] ICCJ, s.pen., decizia nr. 3465/2007, accesed www.legis.ro.

[7] M. Udroiu, *Procedura penala*, C.H.Beck Publishing House, Bucharest, 2017, p. 19.

The presumption of innocence is perhaps one of the oldest procedural safeguards in criminal matters, being the constitutional principle, according to which, until the definitive stay of the judgments of conviction, the person is considered innocent.

From a legal point of view, the presumption of innocence raises a number of problems. One of these problems is whether one can discuss a relative or an absolute presumption, although it is obvious that the presumption of a person's innocence can only be a relative one. However, the relative character of this presumption is somewhat mitigated by the fact that the reversal of the presumption can only be made by a sentence of criminal conviction, even if it can be proved by any means of proof. No other legal act, regardless of which organ it comes from, cannot lead to establishing a person's guilt. Therefore, it is necessary to have a definitive sentence of criminal conviction in order to be able to call a person guilty, neither the arrest, which is a preventive measure, decided on a determined period of time, nor the sentence of the court in first instance that is not definitive yet can stand for the guilt of a prosecuted.

There are a few situations when the restriction of rights of the suspect or prosecuted can lead us to the conclusion that the presumption of innocence is affected during the criminal trial. For example the preventive measures, such as the preventive arrest must be considered as a supposition of guilt, reasonable enough to restrict the rights of liberty of a person, but it can not be an equivalent of certain guilt, needed for a conviction. Therefore, the authorities have the role of decision regarding the degree of danger that a person presents and only on the basis of the proofs can restrict, for a determined period of time, the rights of the suspect or prosecuted.

On the other hand, the separation of the judicial function and the incompatibilities established by the criminal code and criminal procedure come to guarantee that a person`s innocence presumption is not affected during the trial, therefore, a judge of rights and freedoms can not be a judge in the preliminary chamber, because he can not analyse the legality of the measures disposed by himself. In principle, a magistrate that pronounced himself regarding a suspect or an prosecuted cannot judge the same case, because it is supposed that his impartiality if affected, mostly concerning the presumption of innocence.

Another problem is raised by the knowledge of the sanction of non-observance of the presumption of innocence, due to its legal nature. Due to the multitude of acts that can be harmed, the answer is different depending on the act by which the presumption of the person's innocence was violated, aspects that we will deal with in part.

The presumption of innocence is closely related to the notion of impartiality of the court, in order to guarantee the presumption of innocence being also art. 6 para. 2 of the ECHR, according to which the state representatives refrain from

making public statements in the sense that the accused is guilty of committing a certain crime.

However, this obligation does not imply that the authorities refrain from informing the public about the ongoing investigations, but must use formulations that do not result in the guilty persons being investigated, using terms such as "suspect", "there is a suspicion that", etc. The need to ensure the reliability of the evidence implies that the state authorities exercise their powers in compliance with the fundamental principles of the fairness of the procedure. Or, in our case, the court corroborates only indirect evidence of prosecution, without correctly appraising the entire probative material.

Conclusions

Romania is among the few countries that enumerate the principles of the criminal process, the extremely broad ECHR jurisprudence, as well as the European Union legislation forcing a permanent change, to new rules that in our opinion can lead to uncertainties in practice, due to the difficult assimilation.

We have observed through the analysis made that the principle of finding the truth may contradict the principle of legality or that of respecting human dignity, but the present code apparently solves this problem by introducing the procedural sanction in the matter of probation, namely the exclusion of the evidence obtained by breaking the law. We consider that this solution is not even a simple one, being full of nuances, which must be solved by judicial practice.

We consider that it is preferable to strike a balance between the principle of legality and that of finding out the truth, otherwise one may encourage the violation of the law to obtain evidence by the judicial bodies or to harm the social values protected by the impossibility of finding the truth.

The arguments supported in this paper lead to the conclusion that the principles of our code of criminal procedure should not be too different from those of the laws of other EU countries, and the solutions in the judicial practice that are based on the principles of the criminal process should be similar.

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