

# REQUIREMENTS OF THE EUROPEAN UNION IN THE MATTER OF PRESUMPTION OF INNOCENCE. ROMANIAN STANDARDS

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## Abstract

*In the present study, we take into account the analysis of the presumption of innocence, a fundamental principle of enforcement of the criminal procedural law, from the perspective of the regulations of the European Union and of the national regulations. It was examined the domestic legal framework, respectively Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.*

**Keywords:** *presumption of innocence, right to be present at the trial, right to a fair criminal trial, European Union, Romanian Code of Criminal Procedure.*

## 1. Introduction

In recent years, the European Union's concern has become obvious for strengthening the legal framework of the Members States with a view to regulate certain minimum standards the purpose of which is the fair conduct of criminal trials. In this context, according to the existing provisions of the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, taking into account the proposals of the European Commission, certain directives were adopted with reference to the maintenance and development of an area of freedom, Security

and justice, as follows: Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings<sup>1</sup>, Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime<sup>2</sup>, Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty<sup>3</sup>, respectively Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings<sup>4</sup>.

This is the context in which on 9 March 2016 it was adopted the Directive (EU) 2016/343 on the strengthening of

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<sup>1</sup> Published in the Official Journal of the European Union L 142/1 of 1 June 2012.

<sup>2</sup> Published in the Official Journal of the European Union L 315/57 of 14 November 2012.

<sup>3</sup> Published in the Official Journal of the European Union L 294/1 of 6 November 2013.

<sup>4</sup> Published in the Official Journal of the European Union L 132/1 of 21 May 2016.

certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (hereinafter referred to as Directive)<sup>5</sup>, with the aim of “strengthening the right to fair trial in criminal proceedings by establishing minimum common rules with regard to certain aspects of the presumption of innocence and of the right to be present at the trial”. In compliance with Article 14 of the Directive, the Member States are required to fully transpose the European provisions in the domestic laws by 1 April 2018, and they shall immediately notify the European Commission to this end.

Under such circumstances, on 30 October 2020, the European Commission requested several Member States (Bulgaria, Croatia, Cyprus and Romania), by certain reasoned opinions, to fully enforce the EU rules regarding the strengthening of the presumption of innocence and of the right to be present to trial, considering that the concerned States proceeded to the partial transposition of the provisions of the Directive<sup>6</sup>. Effectively, certain deficiencies were identified with regard to the public references to guilt, the manner in which the suspected or accused persons are presented before the criminal judicial authorities, respectively the right to be present at the trial. The concerned States were given a two-

month deadline to answer the findings of the European Commission, and they may be sued in the Court of Justice of the European Union, in the absence of such an answer.

## 2. The presumption of innocence - general aspects.

Even if there have been manifestations specific to this principle since Antiquity<sup>7</sup>, the presumption of innocence had an express regulation only in the 18th century, in the French Declaration of the Rights of Man and of the Citizen of 1789, and Article 7 set forth that any person is presumed innocent until he or she is declared guilty („*tout homme étant présumé innocent jusqu’à ce qu’il ait été déclaré coupable*”).

At present, the presumption of innocence is enshrined in the most important international documents, such as the Universal Declaration of Human Rights of 1948 (Article 11), the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 [Article 6 para. (2)]<sup>8</sup>, the International Covenant on Civil and Political Rights of 1966<sup>9</sup>, the Charter of Fundamental Rights of the European Union of 2007<sup>10</sup>.

As regards domestic laws, it is required to mention, first, the provisions of Article 23 para. (11) of the Constitution of Romania<sup>11</sup>,

<sup>5</sup> Published in the Official Journal of the European Union L 65/1 of 11 March 2016.

<sup>6</sup> For details, see [https://ec.europa.eu/romania/news/20201030\\_infringements\\_justitie\\_ro](https://ec.europa.eu/romania/news/20201030_infringements_justitie_ro) (accessed on 14 November 2020, at 17.00).

<sup>7</sup> Justinian’s Digest of the year 533 contained the rule of law “*ei incumbit probatio qui dicit, non qui negat*” – the burden of the proof lies upon him who affirms not he who denies (for details, I. Neagu, M. Damaschin, *Treaty on criminal procedure. General part*, the 3rd edition, Universul Juridic Publishing House, Bucharest, 2020, p. 95-101; Gh. Mateuț, *Criminal Procedure. General part*, Universul Juridic Publishing House, Bucharest, 2020, p. 70-74).

<sup>8</sup> Romania adhered to the Convention by Law no. 30/1994 (published in the Official Journal no. 135 of 31 May 1994).

<sup>9</sup> Romania ratified the International Covenant on Civil and Political Rights by Decree no. 212/1974 (published in the Official Journal no. 146 of 20 November 1974).

<sup>10</sup> The decision of the preparation of this document was made by the European Council at Köln (3-4 June 1999). Therefore, the Charter of Fundamental Rights of the European Union was adopted at Nice, on 7 December 2000. The last version in Romanian was published in the Official Journal of the European Union no. C 202 of 7 June 2016.

<sup>11</sup> The Constitution of Romania was republished in the Official Journal no. 767 of 31 October 2003, following the amendment and supplement by Law no. 429/2003, published in the Official Journal no. 758 of 29 October 2003.

according to which “until the judgment of conviction remains final, the person is considered innocent”. As regards the criminal procedural laws, until 2003, the legal basis of the presumption of innocence resided in Article 66 para. (1) of the Code of Criminal Procedure adopted in 1968, in compliance with which the suspected or accused person was not required to prove his or her innocence.

The enshrining of the presumption of innocence as a fundamental principle of the enforcement of the criminal procedural law was made by Law no. 281/2003, a regulation by which the previous Code of Criminal Procedure was supplemented by the introduction of Article 52, having the following content: “Everyone is considered innocent until proven guilty under a final criminal judgment”. In the present Code of Criminal Procedure (hereinafter referred to as, Code of Criminal Procedure), which became effective on 1 February 2014, the principle of the presumption of innocence is found in Article 4. We shall further examine, by using the comparative method, the provisions of the Code of Criminal Procedure in the matter of the presumption of innocence and the provisions of the Directive, in order to determine the degree of compliance of the domestic laws with the requirements of the EU document.

### **3. A comparative analysis of the regulation of the presumption of innocence in the Romanian criminal procedural law, respectively of the provisions of the Directive**

According to Article 2 of the Directive, the rules shall be applicable to natural persons being suspected or accused within criminal procedures, in all stages of the criminal procedures, from the time when a person is suspected or accused of committing an offence or an alleged offence

until the time when the judgment establishing that the respective person has committed the offence under consideration remains final. The text under consideration includes a series of remarks, taking into account the provisions of the Code of criminal procedure, as will be specified below.

Thus, first of all, by “suspected person”, within the meaning of the Directive, we shall understand the suspect in the criminal proceedings, the person in relation to whom it was ordered to further conduct the criminal prosecution, subsequently to the initiation of the criminal prosecution *in rem*. As such, the right to be presumed innocent shall actually arise upon ordering the further conduct of the criminal prosecution against a certain person, in compliance with Article 305 para. (3) of the Code of criminal procedure. “Accused person” shall mean the defendant, against whom a charge in criminal matter may be filed by initiating the criminal proceedings.

Secondly, considering the holders of the presumption of innocence, the phrase “in all stages of criminal proceedings” means the period of time elapsed from the further conduct of the criminal prosecution against a certain person and the moment when the judgment according to which the defendant’s guilt was established, has remained final. Therefore, the scope of this principle shall not interfere with the entire duration of the criminal proceeding, as during a possible stage of enforcement of the criminal judgment of conviction (or waiver of the punishment application or deferral of the punishment application) the presumption of innocence cannot be relied on anymore, as it is rebutted by the effect of finding the defendant’s guilt.

As regards Article 4 of the Directive, which also determined the formulation of the opinion dated 30 October 2020, we consider that its transposition in the domestic laws

shall not be made by amending the Code of criminal procedure, as the most part of the obligations aim at the public authorities in general, since their activity cannot be regulated under the criminal procedural rules. Hence, according to para. (1), Member States are required to take the necessary steps in order to warrant that, since the guilt of a suspected or accused person has not been proven according to law, the public declarations given by the public authorities and the judicial decisions other than those relating to guilt, shall not refer to the respective person as being guilty. In this respect, we indicate the constant manner of the criminal prosecution bodies of informing the public about the initiation or conduct of certain criminal files by press releases containing express references to the presumption of innocence (“We indicate that the further conduct of the criminal prosecution is a stage of the criminal proceedings regulated by the Code of criminal procedure, the purpose of which is to establish the procedural background of producing evidence, an activity which cannot, in any event, defeat the principle of the presumption of innocence”)<sup>12</sup>. Otherwise, the interest in informing the public about the conduct of certain criminal cases (especially, in the stage of criminal prosecution) is recognized by para. (3) of Article 4 of the Directive, according to which “the obligation laid down in paragraph (1), not to refer to the suspected or accused persons as if they were guilty, shall not prevent the public authorities from

providing any information publicly regarding the criminal procedures when this is strictly necessary for any reasons related to the criminal investigation or in the public interest”.

As regards the measures which are required in the case of breach of the obligation of not referring to a person suspected of having committed an offence as being already guilty, these cannot be established under the Code of Criminal Procedure but, eventually, by Law no. 304/2004 on the judicial organization or other normative acts under which the activity of other public judicial or non-judicial authorities or of the press institutions is organized<sup>13</sup>.

The same solution is required, in our view, as regards the transposition at the domestic level of the provisions of Article 5 of the Directive, according to which adequate measures are necessary to guarantee that the suspect or defendant shall not be presented as if they were guilty, either before the courts of law, or in other public circumstances, by using certain measures of physical constraint. Thus, for example, the obligation not to present to the public the image of a person immobilized by enchainment, under the circumstances in which he or she benefits from the right to be presumed innocent, rests not only with the criminal prosecution bodies, but with the police bodies within the centres of custody and provisional detention, in the custody of which the suspect or defendant deprived of liberty is, respectively, of the servants of the

<sup>12</sup> See the website of the National Anticorruption Directorate (<https://www.pna.ro>), of the Directorate for Investigating Organized Crime and Terrorism (<https://www.diicot.ro>), of the Public Prosecutor's Office attached to the High Court of Cassation and Justice (<https://www.mpublic.ro>), accessed on 15 November 2020.

<sup>13</sup> As an example, we consider Law no. 218/2002 on the organization and functioning of the Romanian Police (republished in the Official Journal no. 170 of 2 March 2020), Law no. 254/2013 on the execution of custodial sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal trial (published in the Official Journal no. 514 of 14 August 2013), the Regulation on the organization and functioning of the centers of custody and provisional detention, as well as the measures needed for their safety, approved by the Order of the Minister of Internal Affairs no. 14/2018 (Official Journal no. 212 bis of 8 March 2018) etc.

National Administration of Penitentiaries (insofar as the deprivation of liberty takes place during the trial stage in penitentiaries). It is interesting to indicate the fact that in the literature<sup>14</sup>, the “immobilization” is defined as a binding police measure, undertaken for the purpose of making impossible for a person to run or have an aggressive behaviour towards the policeman or other persons, to start or continue a violent action. In this context, there is a possibility that the suspect or defendant should be immobilized, either in order to be presented before the criminal judicial authorities, or to be transported, in order to avoid a possible attempt to run or to behave violently towards other persons. However, in this context as well, it is necessary to avoid the exposure of the suspect or defendant before the public in any circumstances of immobilization, most of the times by using handcuffs. Moreover, para. (2) of Article 5 of the Directive consecrates the right of the States to apply measures of physical constraint, if required by any circumstances specific to the case.

In compliance with Article 6 para. (1) of the Directive, the burden of proof for establishing the guilt of the suspect or defendant shall rest with the criminal prosecution bodies. The requirement is fully met through the agency of the provisions of Article 99 para. (1) of the Code of Criminal Procedure, according to which “in the criminal proceedings, the burden of proof mainly belongs to the prosecutor”, respectively to the criminal investigation body. Additionally, according to para. (2), “the suspect or defendant benefits from the presumption of innocence, and he is not required to prove his innocence (...)”. Moreover, the requirement for the regulation

of the rule *in dubio pro reo*, resulting from Article 6 para. (2) of the Convention, (“Member States ensure that any doubt relating to guilty is in favour of the suspected or accused person, including when the court assesses the possibility of the respective person’s acquittal”), is met, first of all, as a result of the regulation with the principle laid down in Article 4 para. (2) of the Code of criminal procedure (“After taking of the entire evidence, any doubt regarding the conviction of the judicial bodies shall be interpreted in favour of the suspect or defendant”). Thus, the rebuttal of the presumption of innocence may only be made by certain guilty evidence, as the national case-law firmly found that “the doubt is equivalent to some positive evidence of innocence”<sup>15</sup>. The provisions relating to the *in dubio pro reo* rule are also acknowledged by other criminal procedural rules. In this respect, we consider Article 103 para. (2) the final sentence of the Code of criminal procedure (“the sentence is only ordered when the court is convinced that the accusation was proven beyond any reasonable doubt”) or of Article 396 para. (2)-(4) of the Code of Criminal Procedure (“The sentence is passed if the court finds, beyond any reasonable doubt, that the act exists, it constitutes an offence and was committed by the defendant. (3) The waiver of the application of the penalty shall be passed if the court finds, beyond any reasonable doubt, that the act exists, it constitutes an offence and was committed by the defendant, according to Articles 80-82 of the Criminal Code. (4) The deferral of the application of the penalty shall be passed if the court finds, beyond any reasonable doubt, that the act exists, it constitutes an

<sup>14</sup> E. Neață, M. Pruteanu, *Elements of police strategy and operational procedures regarding the intervention of the public order and safety structures (Elemente de tactică polițienească și proceduri operaționale privind intervenția structurilor de ordine și siguranță publică)*, Hamangiu Publishing House, Bucharest, 2013, p. 98.

<sup>15</sup> The High Court of Cassation and Justice, Criminal Chamber, decision no. 3465/2007, in I. Neagu, M. Damaschin, *op. cit.*, p. 99.

offence and was committed by the defendant, according to Articles 83-90 of the Criminal Code”).

As regards the regulation of the right to silence and of the right not to incriminate oneself, as provided for in Article 7 of the Directive, the national legal framework is fully adapted to the European requirements. It is firstly noticed the enshrinement of two distinct rights, namely the right to silence, respectively the right of the suspected or accused persons not to incriminate oneself. As regards the right to silence, the present Code of criminal procedure contains numerous provisions to this end. We consider Article 10 para. (4) of the Code of criminal procedure (“Before they are heard, the suspect and the defendant should be instructed that they have the right not to give any statement”), Article 83 letter a) the first sentence of the Code of criminal procedure („During the criminal proceedings, the defendant is entitled not to give any statement, his attention being drawn that he refuses to give any statements, he shall not suffer any unfavourable consequence”) or Article 374 para. (2) of the Code of Criminal Procedure (“The president of the panel of judges shall notify the defendant in relation to the right not to give any statement”). Furthermore, the right to non self-incrimination is consistently regulated in the Romanian criminal procedural law. Hence, according to Article 83 letter a) the 2nd sentence of the Code of Criminal Procedure, the defendant has the right to be informed that in the event that he gave statements, they could be used as means of evidence against him. In other words, the exercise of the right to silence also involves the possibility to avoid self-incrimination. According to Article 78 of the Code of Criminal Procedure, in conjunction with Article 83, the right to silence and to non self-

incrimination is also recognized to the suspect.

In this matter, it is also relevant the assumption in which the procedural regime of a person is modified during a criminal trial, in the sense that the concerned person is initially heard as witness and subsequently he or she becomes suspect or defendant. In this case, according to Article 118 of the Code of Criminal Procedure, the witness statement cannot be used against him. The rule shall also be applicable to the situation in which the person is initially heard as suspect or defendant and subsequently, it is required his or her hearing as witness (for example, when the splitting is ordered, and the defendant who recognized his or her guilt in the file in which the splitting has been ordered, is heard as witness in the casefile made up as a result if that splitting). With reference to this legal text, it is necessary to mention as well, the Decision of the Constitutional Court no. 236/2000, under which the privilege of the right to silence and to non self-incrimination has been extended and as regards the witness, in the event that any accusations in criminal matter in the respective casefile may be filed against him<sup>16</sup>.

We also mention the provisions of Article 7 para. (4) of the Directive, according to which Member States may allow to their judicial authorities that, upon passing judgments, they should take into account as well, the cooperative behaviour of the suspected and accused persons, any rules existing in the domestic laws either in the form of judicial circumstances, or as component elements of the procedure of the agreement of recognition of the guilt or of the abbreviated procedure of recognition of the guilt.

<sup>16</sup> The Constitutional Court of Romania, decision no. 236/2020, published in the Official Journal no. 597 of 8 July 2020.

#### 4. Right to be present at trial. Right to a new trial

Other procedural rights were also approached in the Directive, which are not in a necessary interdependence relationship with the presumption of innocence. We consider the right to be present at trial (Article 8), respectively the right to a new trial (Article 9). Actually, the non-observance of these rights implicitly determines the impossibility of exercising all the other rights of procedure, among which the right to be presumed innocent until establishing the guilt under a final criminal judgment.

The existence of a set of criminal procedural rules meeting the European requirements is noticed in this matter. Recently, we mention the provisions of Law no. 228/2020<sup>17</sup> by which the Code of Criminal Procedure was supplemented for ensuring the exercise of the right to be present at trial and of the right to a new trial. Hence, the institution of the criminal trial suspension (both of the criminal prosecution, and of the judgment of the case) was supplemented by the establishment of the obligation of the judicial body to verify whether the hearing of the suspect or of the defendant being seriously ill cannot be made at the place where he or she is, or by videoconference. Moreover, with reference to the right of the defendant convicted to a new trial, according to law, Article 557 was supplemented with para. (1<sup>2</sup>), according to which at the same time as the handing over of the writ of execution, the convicted person is notified, under signature, in writing, about the right to request the reopening of the criminal trial, in the case of judgment by default.

#### 5. Conclusions

The analysis of the text of the Directive and of the domestic laws in the matter of ensuring the presumption of innocence shall determine the finding, in principle, of the fulfilment of the minimum standards enshrined in the document of the European Union within the Romanian criminal procedural laws. In this respect, we consider the regulation under the Constitution of the presumption of innocence, its enshrinement with a status of fundamental principle of the criminal proceedings according to the provisions of the Code of Criminal Procedure (to which a set of relevant rules are added in the matter of evidentiary hearing, respectively of the method of settlement of the criminal action), respectively of Law no. 304/2004 on the judicial organization. Furthermore, it is noticed the relevant application of the presumption of innocence in the practice of the Romanian courts of law, especially as regards the *in dubio pro reo* rule.

Under such circumstances, the deficiencies found by the European Commission in the matter of presumption of innocence (public references to guilt, the manner in which the suspected or accused persons are presented before the criminal judicial authorities), may be remedied by regulating certain obligations of the judicial or non-judicial authorities or institutions (administrative police, penitentiary authorities, mass-media, etc.). In other words, in this respect, it is not required to amend the criminal procedural laws, as the organization of the activity of the judicial or non-judicial authorities or institutions is ensured by any distinct normative acts, upon which the Romanian legislator should

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<sup>17</sup> Law no. 228/2020 for the amendment and supplement of certain normative acts in the criminal matter for the purpose of transposing certain directives of the European Union, published in the Official Journal no. 1019 of 2 November 2020.

intervene, in order to transpose the minimum requirements of the examined Directive.

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