Presumption of innocence within the right to a fair trial: implementation and contradiction to pre-trial detention

BACHELOR THESIS

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DECLARATION OF HONOUR:
I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

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ABSTRACT

Being an integral part of the right to a fair trial, the principle of the presumption of innocence not only ensures that every suspect is considered innocent until proven guilty, but also regulates the way how public authorities approach the conduct of the criminal trial. Sometimes, however, there may be a need to place the suspected under pre-trial detention, which, contrary to the presumption of innocence, requires a high degree of suspicion of guilt. The lack of court practice on compatibility of pre-trial detention with the presumption of innocence puts in question if the two can coexist in criminal proceedings.

This research, therefore, aims to examine both the presumption of innocence and pre-trial detention within the scope of the European Convention on Human Rights and determine if a contradiction between the two exists. By contrasting a theoretical study of the ECHR legislation and the court practice, the research will establish in which way the presumption of innocence can regulate or have a limiting effect on pre-trial detention, this way also figuring if a gap exists in the regulation of pre-trial detention by the ECHR.

Key words: right to a fair trial, presumption of innocence, criminal proceeding, pre-trial detention, Article 6, European Convention on Human Rights

SUMMARY

The following thesis “Presumption of innocence within the right to a fair trial: implementation and contradiction to pre-trial detention” is devoted to establishing which safeguards the principle of the presumption of innocence ensures within the scope of Article 6 of the European Convention on Human Rights, and to determining how the essence of the presumption is compatible with pre-trial detention, thus questioning how these two components of a criminal trial coexist during criminal trials. This research follows the objectives to examine the right to a fair trial in general, considering a high number of violations detected in the ECHR case-law; to study the presumption of innocence both as an independent principle and as a fair trial guarantee under Article 6; and, lastly, to determine the conditions that are necessary to issue a pre-trial detention order, and contrast them to the presumption of innocence. This topic is particularly topical both for national jurisdictions and the Convention law due to repeated violations of Article 6 by states, and due to the issue of overpopulated prisons, where a high number of suspected persons are awaiting their trial.

This research therefore aims to answer two questions: first, does the pre-trial detention contradict the principle of the presumption of innocence? The hypothesis that answers this question is that the contradiction between the two exists, as these are two integral parts of a criminal trial, and yet their essence does not to go hand to hand. To help to assess how exactly this contradiction is evident in practice, an additional descriptive research question of how is the presumption of innocence implemented within the framework of the right to a fair trial under the ECHR aims to analyse what the presumption implies and, with this, approach the way how it contrasts to pre-trial detention.

Doctrinal legal research method is used with the purpose to interpret the right to a fair trial and, further, the presumption of innocence that is guaranteed by Article 6 of the ECHR. Non-doctrinal legal research method is applied for determining if there is a contradiction between pre-trial detention and the presumption of innocence. The analysis is based on the ECHR case-law and scholarly works which help to determine in which way the contradiction is expressed. This thesis also includes an interdisciplinary element which aims to highlight that there is a challenge among the EU member states to implement the right to a fair trial by a standard approach, which leads to frequent violations due to differences in national legislative acts.

In order to compare the presumption of innocence to pre-trial detention and reveal whether there is the contradiction between the two, the research begins from introducing the right to a fair trial under Article 6 of the ECHR, including not only what this right consists of but also stressing that the EU member states’ courts lack a unified approach in its implementation – for both legal and political reasons. The first chapter thus looks at Article 6 under the criminal limb, considering the minimal rights the individual is entitled to be protected under during a criminal trial. What does the ‘criminal trial’ entail and which safeguards must be ensured to defendants while they undergo their trial? And how has the EU been trying to approach the regulation of the right’s implementation in the EU member states? The answers provided to these questions help to emphasize the challenge that revolves around a high number of cases of states violating the right to a fair trial and around the overpopulation of prisons in Europe by addressing it from the perspective of the regulation of the right to a fair trial by the EU. The ECHR, on the one hand, and additional EU Directives, on the other hand, attempt to establish the manner and specific guidelines for how national courts shall be conducting fair

trials in practice. State jurisdictions form an integral part of the conduct of criminal trials, but the fact that they differ with some of their requirements and court practices does not allow states' absolute obedience to the regional and international laws.

The second chapter focuses on the principle of the presumption of innocence, establishing not only what it implies when it operates as a procedural guarantee within the right to a fair trial under the ECHR, but also when it is applied as an independent substantial right. Within the ECHR practice, the presumption of innocence is not an unconditional right and hence, under specific circumstances, it can be a subject to limitations. The chapter begins from examining how the presumption has evolved over decades, stating that this is the principle that has been the core of the criminal trial even before it was legally named this way. The study continues with viewing the presumption from the perspective of the ECHR framework, in this way establishing which procedural safeguards it provides to accused persons, how it regulates the behaviour of public authorities, and which conditions can limit its implementation.

The third and last chapter looks closely at the tension between the presumption and pre-trial detention. The criteria for assessing whether it is necessary to apply pre-trial detention are provided with the use of the ECHR case-law and the relevant scholarly works, in order to understand in which cases it is reasonable and in which not. Further, the case-law and surveys are used as a source for establishing how members of courts approach the implementation of the presumption of innocence, this way figuring out that the principle does not play any role whatsoever in imposing limitations on pre-trial detention or restricting it. The chapter ends with concluding remarks that when there is a need to apply pre-trial detention, in the ECHR court practice, the presumption of innocent becomes absent, since it neither precludes it nor limits.

The conclusion made from this research thus supports the hypothesis that pre-trial detention contradicts the presumption of innocence. The scholarly works and the ECHR case-law demonstrate that when the conditions of the case require to place the defendant under detention, the presumption of innocence is simply abrogated. This means that when pre-trial detention takes place, despite its contradiction to the presumption of innocence, it is in no way regulated by the principle. In order for the right to be presumed innocent not to be violated, the defendant shall remain innocent until the court judgment, which is by nature impossible when he is being detained, since the detention requires a high degree of suspicion of guilt.

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INTRODUCTION

During criminal proceedings, the principle of the presumption of innocence is fundamental in ensuring a fair trial. However, when it comes to pre-trial detention, the question arises if it does not go against the essence of this principle. When a suspected person is being held in detention, the implication of the potential guilt occurs, making the probability of him eventually being found guilty considerably higher. The crucial issue is, therefore, to determine if the right to be presumed innocent is compatible with pre-trial detention in a way that it remains an effective remedy for ensuring a fair trial.

When it comes to European prisons and the people who are being held in detention, around 22% of them have not been convicted yet, awaiting their trial.[1] Applying detention that when there is no evidence of the suspect's guilt or that considerably exceed their reasonable length is a regularity that can be seen both in the practice of domestic courts and regional ones. Until the official court judgment is pronounced, the right to be presumed innocent shall allow the defendant to be considered innocent and not a "criminal" or a "threat" to public security. But how is it possible to maintain it when pre-trial detention, in its essence, requires a particular degree of suspicion of guilt?

The *aim* of this thesis is, therefore, to determine which guarantees the presumption of innocence provides under Article 6 of the European Convention on Human Rights (hereinafter 'ECHR' or 'the Convention'), and whether they can be effectively ensured when a decision to apply pre-trial detention is taken. The *objectives* to fulfil this aim are, first of all, to examine the scope of the right to a fair trial in order to understand in which context the presumption is being used in the ECHR practice. Second, to analyse the presumption of innocence and the obligations it imposes, also establishing the circumstances when it can be limited legitimately. And third, to be able to contrast the principle to pre-trial detention, the objective is to identify the conditions when pre-trial detention is a necessary measure in criminal proceedings and whether it can be restricted by the functions the presumption of innocence has.

The main *research question* of this research is **does the pre-trial detention contradict the principle of the presumption of innocence**? The *hypothesis* that answers this question is that the contradiction between the presumption of innocence and pre-trial detention *does* exist which, in turn, does not allow to absolutely safeguard the defendant's right to be considered innocent during the course of his detention. Since one of the necessary steps to answer this question is to determine how the presumption of innocence is, in fact, implemented within the criminal trial, the additional descriptive research question is **how is the presumption of innocence implemented within the framework of the right to a fair trial under Article 6 of the ECHR**?

The research will start by introducing the right to a fair trial, its guarantees, and its importance to the judicial system. It will further cover both the theoretical aspects of the essence of the right to be presumed innocent and the way how it should be operating in practice. The focus will shift to the application of pre-trial detention and the potential contradiction it has with the presumption of innocence. Both the interpretation of the right to a fair trial and the further analysis of the presumption of innocence and pre-trial detention will be based on the standards of the ECHR, more specifically on Articles 5 and 6. The case-law of the European

[1] Fair Trials, *Efficiency Over Justice: Insights into Trial Waiver Systems in Europe* (December 2021), p. 22, available on: https://www.fairtrials.org/articles/publications/efficiency-over-justice/. Accessed April 13, 2023.

Court of Human Rights (hereinafter 'ECtHR' or 'the Court') will be used as a part of the analysis in order to establish how judges approach the practical implementation of the integral components of a fair trial.

For that purpose, first, the *doctrinal legal research method* – analytical approach – will be applied in order to interpret the right to a fair trial guaranteed by Article 6 of the ECHR, later particularly focusing on the principle of the presumption of innocence: mainly what the scope of this right and guarantee is in the criminal proceedings, which obligations and limitations they impose, which obligations they impose on state authorities, and which factors usually lead to an establishment of their violation. A more detailed interpretation of the presumption of innocence will be provided in order to demonstrate how it has evolved over time and what differences exist in its application. Further, the *non-doctrinal legal research method* – analytical approach – will be used to determine if there is a contradiction between pre-trial detention and the presumption of innocence, and establish in which forms such contradiction is being expressed. The research will, therefore, include the analysis of the approach of the ECtHR in dealing with the presumption of innocence, this way aiming to illustrate how during criminal proceedings it regulates the behaviour of public authorities and provides protection against the misuse of their power. For that purpose, case-law and secondary sources will be used in order to provide practical examples of implementation of law.

Then, lastly, since the necessity of implementing the right to a fair trial is not only a matter important on the domestic level but also undoubtedly on the international one, this research will incorporate an *interdisciplinary element* which, in this case, is politics. For this purpose, the challenges of the implementation of the right to a fair trial will be examined at the level of the EU. First, the research will describe how the right is perceived on a more global perspective, and, second, determine how the EU is coping with the states' incompliance with legal norms, considering the difference of their national jurisdictions; this way also demonstrating the difference between the legal realm and reality.

This thesis consists of three chapters. The first chapter is devoted to introducing the concept of the right to a fair trial under Article 6 of the ECHR. Whereas Article 6 is applicable in both civil and criminal cases, this thesis will focus on the case of criminal proceedings; for this reason, apart from providing the main guarantees that must be ensured under this provision, the notion of a 'criminal offence' under the ECHR is being considered, too. Furthermore, this chapter will address the challenge to implement Article 6 in European countries; more specifically, the role of states' domestic laws that do not let them blindly follow the standard approach of the EU in enforcing fair trial safeguards.

The second chapter will closely examine the principle of the presumption of innocence. Starting generally from its evolution, the chapter will narrow to the framework of the ECHR, turning to the standard approach of the principle's implementation within Article 6 and, this way, looking at its guarantees and the circumstances in which they may be limited. This will be an essential step for the further analysis of its potential contradiction to pre-trial detention, since it will allow to identify what it implies to be protected under the presumption of innocence.

And finally, the third chapter will focus on pre-trial detention. Which conditions require the issuing of the pre-trial detention order, what they imply with respect to the defendant, and how it is perceived from the perspective of the right to be presumed innocent – these are some of the main issues this chapter will cover. And lastly, with the method of collecting and analysing the relevant scholarly works and the ECHR case-law, the chapter

will establish how the Court approaches the implementation of the presumption of innocence simultaneously with issuing a pre-trial detention order; this way also establishing whether the presumption of innocence, in fact, has a limiting capacity in relation to persons' deprivation of liberty prior the court trial.

1. THE RIGHT TO A FAIR TRIAL UNDER ARTICLE 6 OF THE ECHR

The right to a fair trial has been a fundamental human right since 1948.[2] It was set forth in Article 10 of the Universal Declaration of Human Rights, and later ensured by a variety of legal provisions, starting from universal ones like the International Covenant on Civil and Political Rights (Article 14) and continuing with regional ones like the ECHR (Article 6), the American Convention on Human Rights (Article 8), and the African Charter on Human and Peoples' Rights (Article 7).[3]

In the context of the ECHR, there have been thousands of cases brought to the ECtHR concerning violations of the right to a fair trial; whether resulting in the unreasonable time of the trial, biased judicial decision, or even the deprivation of liberty of innocent individuals[4] (which leads to a violation of the right to liberty under Article 5 of the ECHR), the infringement of the fair trial has been a major "miscarriage of justice"[5]. While the law sets specific safeguards to ensure that criminal trials are fair and in accordance with the legislation, domestic courts often tend to disregard this human right, leading to excessive law enforcement practices and misuse of state authority.[6] As a consequence, disproportionately long trials, overpopulated prisons due to a large number of suspects being held in pre-trial detention, and the assumption of guilt based on lack of impartiality of judges are only some of the problems unfair trials can lead to.

Indeed, disobedience to the law that regulates criminal proceedings and influences the outcome of the trial is a topical issue in legal realm. Whereas the states are the primary actors in ensuring that individuals' rights are respected and protected accordingly, they are also the ones holding a primary responsibility when these rights are disregarded and violated. This can be underpinned by the principle of subsidiarity that constitutes the foundation of the Convention.[7] It ensures that the protection of citizens' human rights must, first of all, be ensured by the state parties to the Convention; the Court, for its part, might intervene only after the state actors fail to do so.[8] Thus, despite the fact that states are subjected to international obligations, as in this case, states are the parties to the Council of Europe and shall therefore comply with the rights imposed by the ECHR,[9] domestic jurisdictions still play a vital role when it comes to interpreting law and regulating the court proceedings.

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[2] David Harris, "The Right to a Fair Trial in Criminal Proceedings as a Human Right," *The International and Comparative Law Quarterly* Vol. 16, No. 2 (1967), p. 352, available on: https://www.jstor.org/stable/757381. Accessed March 2, 2023.

[3] United Nations, "Chapter 6: The Right to a Fair Trial: Part I – From Investigation to Trial," *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003), p. 216, available on: https://www.ohchr.org/sites/default/files/Documents/Publications/training9chapter6en.pdf. Accessed April 19, 2023.

[4] Council of Europe Portal. Right to a Fair Trial. Available on: https://www.coe.int/en/web/impact-convention-human-rights/right-to-a-fair-trial. Accessed May 6, 2023.

[5] *Ibid.*

[6] Fair Trials. The Right to a Fair Trial. Available on: https://www.fairtrials.org/the-right-to-a-fair-trial/. Accessed May 11, 2023.

[7] Council of Europe/European Court of Human Rights, *Practical Guide on Admissibility Criteria* (March 2011), p. 69, available on: https://www.refworld.org/pdfid/4f16c1482.pdf. Accessed May 11, 2023.

[8] *Ibid.*

[9] Council of Europe Portal. The European Convention on Human Rights – How Does It Work? Available on: https://www.coe.int/en/web/impact-convention-human-rights/how-it-works#:~:text=The%20Convention%20protects%20the%20rights,human%20rights%20and%20basic%20freedoms. Accessed May 6, 2023.

In order to approach the analysis of the presumption of innocence (hereinafter 'PoI') – one of the fundamental safeguards ensuring the fairness of criminal trials – this research begins with introducing the concept of the right to a fair trial during criminal proceedings, i.e. the requirements it sets out, and the limitations it imposes on the behaviour of the members of the court. The interpretation of this right is based on the requirements of Article 6 of the ECHR, therefore providing the relevant definitions such as of a 'criminal offence' in accordance with the framework of the ECHR as well. It shall be noted, however, that

> the Convention is a *living* instrument which must be interpreted in the light of changing, present day conditions. This is particularly relevant to fair trial rights, as the requirements of fairness have evolved over time […]. European case law […] requires that Convention rights should be interpreted using a purposive rather than a purely literal approach.[10]

This means that even though the right to a fair trial and the guarantees that are granted with respect to it have been universally defined by Article 6, their practical implementation varies from one case to another. Where in some instances, the older case-law of the ECHR can provide guidance for how courts should approach a particular proceeding, in others, the same case law can be irrelevant as it is simply outdated.[11]

1.1. Criminal charge and a fair trial

1.1.1. Determination of the criminal offence

An individual whose human rights have been violated by a national court has the right to bring a claim against that state to the ECtHR if that state is a member of the Council of Europe and hence is subjected to the ECHR legislation.[12] When the right to a fair trial is being applied in the context of criminal proceedings, on a domestic level there usually are two stages when Article 6 might be enforced. First, over the course of the judicial process which encompasses the determination of the conduct of the trial and the examination of evidence, and the court hearing itself.[13] And second, it can be implemented after the announcement of the court judgment, that is during the appeal.[14] It should be emphasized therefore that since Article 6 does not guarantee protection at the stage when the charge had not been issued yet, the main requirement for implementing the provision is the initiation of the criminal prosecution, i.e. *criminal charge*.[15]

Within the meaning of the ECHR, the 'criminal charge' has been characterized as an official notification issued to the person who is suspected of committing a crime.[16] Such notification has the capacity to create restrictions over the rights of the suspected like the right

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[10] CPS. Human Rights and Criminal Prosecutions: General Principles. Available on: https://www.cps.gov.uk/legal-guidance/human-rights-and-criminal-prosecutions-general-principles. Accessed May 6, 2023.
[11] *Ibid.*
[12] The European Convention on Human Rights, *supra* note 9.
[13] Paul Mahoney, "Right to a Fair Trial in Criminal Matters Under Article 6 E.C.H.R.," *Judicial Studies Institute Journal* Vol. 4, No. 2 (2004), p. 108, available on: https://ijsj.ie/assets/uploads/documents/pdfs/2004-Edition-02/article/right-to-a-fair-trial-in-criminal-matters-under-article-6-e.c.h.r..pdf. Accessed April 22, 2023.
[14] *Ibid*.
[15] *Ibid*., p. 109.
[16] George Octavian Nicolae and Sebastian Bogdan Gavrila, "The Criminal Charge," *Lex ET Scientia International Journal* Vol. 24, No. 1 (2017), p. 109, available on: HeinOnline database. Accessed March 2, 2023.

to respect for private life and correspondence or the right to liberty,[17] and yet, at the same time, in no way it can comprise the presumption of guilt.[18]

While the nature of the offence might seem like the most obvious indicator, there is a number of other aspects that influence whether, in the end, the offence is to be considered a criminal one. The court decision in the case of *Engel* v. *the Netherlands* has become essential with regard to establishing the notion of the criminal charge, since it provides specific criteria for its interpretation;[19] this is an example of when the decision in an older case has been used extensively as a source for the subsequent ones. According to the so-called "*Engel* criteria"[20], first of all, the offence shall be classified in accordance with the domestic law: it shall be determined

> whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently.[21]

The protection under Article 6 of the ECHR is applicable in cases when the domestic law characterizes the offence as criminal, since, in most cases, the Court does not object to the state's classification.[22] The application of Article 6 within the criminal limb, however, is *limited* in the cases concerning taxes and is *not applicable* at all in politically related cases like electoral sanctions or conflict of interests within the office, and cases of expulsion.[23]

The second criterion, which might be more important in this context, concerns the nature of the offence, which implies that when "the offence with which the applicant was charged in disciplinary proceedings has an inherently criminal character,"[24] it can be considered that there is enough evidence for the ECHR to be applicable.[25] How severe the offence is might not require a vast consideration if the case concerns, for example, a murder – the deprivation of other human's life obviously falls under the category of a criminal offence; but in some cases, it might be less evident, comparing how the particular offence has been classified in other states' jurisdictions thus is one of the methods to establish the general perception.[26]

Lastly, there must be an examination of the defendant's potential penalty and the assessment of its gravity in accordance with the nature of the offence.[27] A more serious punishment can be an indication that the committed offence has been serious, too, and, therefore, might be regarded as criminal. The cases when the defendant's punishment would consist of long-term imprisonment or when he loses the right to have his prison sentence reduced (a so-called loss of remission for a prisoner) are some of the most common instances when Article 6 might be evoked under the criminal limb.[28]

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[17] CPS, *supra* note 10.
[18] Criminal Charge, *supra* note 16.
[19] C. J. F. Kidd, "Disciplinary Proceedings and the Right to a Fair Criminal Trial under the European Convention on Human Rights," *The International and Comparative Law Quarterly* Vol. 36, No. 4 (1987), p. 857, available on: https://www.jstor.org/stable/760357. Accessed March 2, 2023.
[20] *Ibid.*
[21] *Engel and Others v. The Netherlands*, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, § 82, ECHR 1976.
[22] Kidd, *supra* note 19, p. 858.
[23] Council of Europe: European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights – Right to a Fair Trial (Criminal Limb)* (31 December 2020), pp. 13-15, available on: https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf. Accessed May 2, 2023.
[24] *Engel v. The Netherlands, supra* note 21.
[25] *Ibid*.
[26] Kidd, *supra* note 19, p. 859.
[27] Mahoney, *supra* note 13, p. 109.
[28] *Ibid*., p. 110.

1.1.2. Guarantees of Article 6

The right to a fair trial under Article 6 of the ECHR provides both institutional and procedural guarantees;[29] it is a particular safeguard for the assurance of legitimate and fair court proceedings. Article 6 consists of three paragraphs, each establishing the minimal rights a person is entitled to enjoy according to the law.

Article 6 para. 1 focuses on providing the basic right of a fair trial during both civil and criminal proceedings. This implies "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law",[30] which requires the public announcement of the court judgment and, at the same time, does not allow the public or media to influence the course of the trial.[31] The provision requires that the trial is held *publicly*, where the public provides the visibility and transparency of the court procedure[32] and, this way, excludes the risk of an unlawful exercise of authority and, consequently, unjust trial. Only due to specific circumstances the trial can turn into a private one whereas such exceptions must fall under the interests of the public or the accused himself.[33] The list of these specific grounds consists of:

(1) the interests of "morals, public order, or national security in a democratic society"[34];
(2) the interests of juveniles;[35]
(3) the interests of the private life of the parties concerned;[36] and
(4) the interests of the court.[37]

In these cases, upon consideration of the court the trial can be held outside the public eye. The requirement of the publicity of the trial must also be balanced, for example, with the presumption of innocence: public statements are allowed in order to make the hearing transparent, and yet in case if there is has been no judgment announced yet, such statements must not suggest that the defendant is guilty (as ensured by Article 6 para 2.).[38]

With respect to the "tribunal", Article 6 requires it to be independent, impartial, and established by law. These requirements secure that the judicial body which assesses the case and establishes the existence of the guilt of a defendant is not only competent to execute a fair judgment but is also not being influenced by other authorities or any kind of outside factors.[39] First and foremost, the tribunal must be *established by law* which means that it shall be official and lawful.[40] The *independence* of the court, in turn, is determined by the way the judges are being assigned, considering their tenure and, securing that they are not in any way influenced

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[29] Guide on Article 6, *supra* note 23, p. 3.
[30] Council of Europe, *European Convention of the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11, 14, and 15 (4 November 1950), ETS 5, Article 6(1). Available on: https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[31] *Ibid*.
[32] Guide on Article 6, *supra* note 23, p. 56.
[33] Harris, *supra* note 2, p. 358.
[34] ECHR, *supra* note 30.
[35] *Ibid*.
[36] *Ibid*.
[37] *Ibid*.
[38] *Ibid*., Article 6(2).
[39] Guide on Article 6, *supra* note 23, p. 20.
[40] Dovydas Vitkauskas and Grogoriy Dikov, *Protecting the Right to a Fair Trial Under the European Convention on Human Rights: A Handbook for Legal Practitioners*, 2nd edition (Council of Europe, 2017), p. 46. Accessed February 24, 2023. https://www.echr.coe.int/LibraryDocs/VITKAUSKAS-Protecting_right_to_a_fair_trial-2017.pdf.

by external factors.[41] The separation of powers plays a primary role in ensuring the independence of courts, since it implies that neither the legislative nor executive branch have any control over the judiciary one.[42] Lastly, *impartiality* concerns the members of the court that are present during the trial who shall approach the matter with no prejudice or bias.[43]

The determination of the proportionate length of trial proceedings is another essential component in ensuring their fairness, the *reasonable time* thus being assessed with regard to the complexity of the case, the period from its beginning until the end, and the behaviour of the applicant.[44] Setting a reasonable time for the length of the trial has been one of the most common challenges in ensuring a fair trial since it is being determined by assessing each case individually. Instances of lengthy or delayed trials do not necessarily result in the breach of Article 6,[45] and yet there is still a high number of detained waiting for their trial which, in the result, becomes a concern for prisons due to the overpopulation.

The PoI is one of the most fundamental principles that guarantees a fair trial during criminal proceedings. Article 6 para. 2 specifies that a person who is being a suspect in a criminal offence cannot be held criminally liable when the guilt had not been proven, which in other words also means that the accused shall be considered innocent until the announcement of the court verdict which provides a sufficient evidence of the guilt.[46] This principle serves as a procedural safeguard for the way the trial shall be conducted, particularly referring to the prohibition of stating the guilt of the accused by the court tribunal, public authorities, and press.[47] A more detailed interpretation of the PoI is provided in the second chapter of this thesis, which is fully devoted to providing both literal and contextual explanations of how it operates in court practice.

Para. 3 of Article 6, in turn, provides a list of specific minimum rights which must be ensured for a person charged with a criminal offence. First, it includes the right to proper information, which implies that the information provided with regard to the charge and the trial shall be available in the language understood by the defendant, and shall include the details of the case in a detailed and understandable manner.[48] Second, there shall be an appropriate time allocated and tools offered in order to prepare for the defence adequately.[49] Third, the criminally offended person is entitled either to defend himself or receive the services of a lawyer of his choice.[50] In case if it is in the interests of justice for the accused to have a legal representative but the accused does not have the appropriate budget to hire it, it shall be provided for free.[51] Fourth, the evidence shall be collected and examined, including the interrogation of witnesses on both sides.[52] And finally, the right to have an interpreter shall be guaranteed in instances when the criminally offended person does not speak the language used in the court.[53]

[41] Mahoney, *supra* note 13, p. 117.
[42] Harris, *supra* note 2, p. 354.
[43] Vitkauskas, *supra* note 40, p. 52.
[44] *Šulcas v. Lithuania*, no. 35624/04, § 68, ECHR 2010.
[45] Bettina Weisser, "The European Convention on Human Rights and the European Court of Human Rights as Guardians of Fair Criminal Proceedings in Europe," *The Oxford Handbook of Criminal Process* (2019), available on: Oxford Handbooks Online. Accessed March 15, 2023.
[46] ECHR, *supra* note 30, Article 6(2).
[47] Mahoney, *supra* note 13, p. 120.
[48] ECHR, *supra* note 30, Article 6(3)(a).
[49] *Ibid*., Article 6(3)(b).
[50] *Ibid*., Article 6(3)(c).
[51] Mahoney, *supra* note 13, p. 126.
[52] ECHR, *supra* note 30, Article 6(3)(d).
[53] *Ibid*., Article 6(3)(e).

This way, the right to a fair trial is a legal remedy that provides a considerable amount of protection to the parties concerned in a trial by ensuring

> the principles of fairness, transparency, independence, timeliness, objectiveness, and legitimacy of court; publicity of the court judgment, the presumption of innocence, and other guarantees.[54]

It does not only secure the individuals' human rights but also regulates and systemizes the way in which the court shall conduct the trial, so that it would be objective, reasonable, and in accordance with the law.

1.2. A unified approach to the implementation of a fair trial: an issue within the EU

The right to a fair trial guarantees a certain balance between individuals' human rights and the legal system. Where there are procedural safeguards being ensured to an individual during his trial, there is a guarantee that there will be the standard of proof applied and the trial will be held impartially.

> Fair trial rights are of fundamental importance to democratic societies: they underpin the rule of law, protecting the individual against arbitrary rule even in the most exigent of circumstances.[55]

One of the issues related to the assurance of the right to a fair trial is that it is not absolute and thus, in specific circumstances, can be subjected to limitations. But the main challenge, however, is that even though legal texts do provide the standards of a fair trial, the criminal procedure systems within the European states vary significantly.

The fact that states have different jurisdictions is not a discovery – it is a natural occurrence; the case of Europe is not an exception. The states that belong to the European Union are all the parties to the ECHR and, therefore, must comply with the rights protected by the Convention.[56]

> Article 52(3) of the [EU Charter of Fundamental Rights] confirms that the EU may raise standards beyond those of the ECHR but it cannot permit States to fall *below* them. […] [Consequently,] if an action by an EU institution (or a Member State implementing EU law) breaches the ECHR, it will also breach the Charter.[57]

With regard to state sovereignty, states are free to act in accordance with their national legislations but they must nevertheless ensure that it is not below the obligations set by the ECHR; that is in theory.

What we see in reality, however, is a completely different story. Despite the fact that the ECHR binds its State Parties to act in compliance with all its provisions,[58] the domestic

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[54] Latvijas Republikas Tiesībsargs. More about the Right to a Fair Trial. Available on: https://www.tiesibsargs.lv/en/areas-of-practice/more-about-the-right-to-fair-trial/. Accessed March 19, 2023.

[55] Debbie Sayers, "Protecting Fair Trial Rights in Criminal Cases in the European Union: Where does the Roadmap Take Us?" *Human Rights Law Review* Vol. 14, Issue 4 (2014), p. 733, available on: Oxford Academic database. Accessed March 2, 2023.

[56] *Ibid*., p. 734.

[57] *Ibid*.

[58] JJ. Fawcett, "The Impact of Article 6(1) of the ECHR on Private International Law," *International and Comparative Law Quarterly* (2007), p. 3, available on: https://www.corteidh.or.cr/tablas/R06755.pdf. Accessed March 2, 2023.

laws have a considerable impact on how the national courts approach their implementation, which, in fact, can be contrary and thus violate the EU law.

> Broadly we can identify 10 factors […] that have an effect on whether Member States implement EU law correctly. These factors are: institutional decision-making capacity; goodness of fit; preference fit; administrative efficiency; low complexity of EU law; favourable culture (toward rule of law and conflict management); few inter-ministerial coordination problems; national enforcement and monitoring; EU monitoring and enforcement; learning. Furthermore, only 'goodness of fit' and the 'institutional decision-making capacity' are factors that are robustly substantiated across multiple case studies.[59]

Thus, different states might have different patterns of behaviour when it comes to implementing the standard regulations of the EU and international treaties which they have ratified.[60] In our case, on the domestic level, courts shall respect the right to have a fair trial under Article 6, and yet, if examining the number of cases that have been brought to the ECtHR after states breach this right, it can be noted that with their different national legislations, states cannot always manage to act in accordance with their external obligations. In 2021, for instance, 20% of all cases brought to the ECtHR concerned the violation of the right to a fair trial, the two most common grounds being the unfairness of the trial and the unreasonableness of its length.[61]

The establishment of concrete generally accepted guarantees (like the ones listed in Article 6 paras. 2 and 3) has been one of the key measures to securing the minimum rights under the ECHR legislation which must be taken into account during the national courts' practice.[62] The number of violations of Article 6 demonstrates that such a step has been essential for creating the EU standards, and yet not sufficient enough domestically. Due to that, the EU laid down the "Stockholm Roadmap" programme consisting of EU directives that concern fair trial rights such as being presumed innocent, receiving information, right to interpretation, etc.[63] The aim of this project has been to, first of all, instead of imposing one unified standard approach to how the court trials shall be conducted, create distinct regulations which would address each fair trial guarantee separately and, this way, enhance their significance.[64] And, second, not only to create other binding regulations but also to encourage states to use them as a source for guidance whenever there is a criminal proceeding taking place:

> [t]he Directives will harmonise these procedural standards throughout the EU, sketching out more precisely certain aspects of Article 6 of the ECHR, which is replicated in Article 48 of the Charter.[65]

Such a measure seemed like a step forward since previous attempts to regulate the procedural matters related to a fair trial were not supported unanimously by all states, resulting in their abandonment due to the "dispute over competence and the possible duplication of

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[59] European Parliament, Briefing requested by the JURI committee on the challenges in the implementation of EU Law at national level (2018), p. 8, available on: https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608841/IPOL_BRI(2018)608841_EN.pdf. Accessed May 11, 2023.
[60] *Ibid*., p. 6.
[61] European Court of Human Right, *The ECHR in Facts & Figures 2021* (Council of Europe, February 2022), p. 7, available on: https://www.echr.coe.int/Documents/Facts_Figures_2021_ENG.pdf. Accessed March 2, 2023.
[62] Sayers, *supra* note 49, p. 735.
[63] Fair Trials, *Practitioners' Tools On EU Law: Right to Information Directive* (August 2020), p. 5, available on: https://www.fairtrials.org/app/uploads/2020/08/FT-Toolkit-on-Right-to-Info-Directive.pdf. Accessed March 2, 2023.
[64] Sayers, *supra* note 55, p. 736.
[65] *Ibid*.

existing standards under the ECHR".[66] But for the two following reasons, the "Roadmap", too, could not be called entirely successful. The first problem with this programme is related to the fact that sometimes the directives tend to "undermine the protection offered by the ECHR and consequently potentially conflict with the Charter";[67] this puts into question whether the functions of the fair trial safeguards ensured by Article 6 would not be weakened and remain in favour of the defendant. The second issue revolves around the differences in states' criminal systems. The "Roadmap" directives are binding and therefore imply that states must adjust their law in case they cannot perform in accordance with them.[68] But what the directives do not take into consideration is that it is simply impossible to ensure that states do not violate human rights without knowing what causes these violations in each state. This requires a thorough analysis of the practical implementation of the law in each EU member state, which, in turn, demands a high degree of awareness and commitment.[69]

> The operational impact of domestic occupational cultures within criminal justice systems demonstrates that, when we create new standards, we must be aware of the context of their implementation […]. This requires an emphasis on preventative practice to avert violations. Prevention requires empirical study, understanding, training, planning, the application of resources and political commitment to address the causes of violations. Standard setting should not just address hypothetical disparity between systems; it must deal with the reality of criminal justice practice and the reasons why existing protections fail.[70]

Neither the already existing EU law nor the establishment of new EU directives is capable of "fixing" the long-standing global problem of states acting contrary to their international obligations. This is an issue that must involve not only the legal sphere but also economic and political ones, and unless there is states' consensus to be subjected to the study of their criminal systems and, later, to *commit* to the relevant changes in these systems, frequent violations of human rights will continue and remain a paradigm.

Forming a unanimous European system of fair trial procedures within the European states therefore is a very sophisticated, time-consuming and binding process both in terms of national legislation policies and states' political guidelines. It is a "sovereignty sensitive and politically controversial"[71] issue, since states might not be able to interpret and comply with the EU law in a standard way and, at the same time, not to undermine their internal arrangements.

> [There is] the lack of equivalence in fair trial rights within the EU [which, in turn,] has the potential to undermine the EU criminal cooperation project. However, achieving consensus on the development of procedural safeguards is a complex political undertaking.[72]

There have been efforts put into establishing mutual trust among the EU states by addressing the issue of national courts' different approaches to the conduct of criminal trials with the help of the EU regulations and its "backup" in the form of Directives. But seeing the current reality – the statistics that show that the existence of these safeguards does not assure states' compliance with them – only explains the number of cases with violation of Article 6. The EU must consider that its law cannot be applied to all states' jurisdictions in the same way, at least

[66] *Ibid*., p. 735.
[67] *Ibid*., p. 736.
[68] *Ibid*.
[69] *Ibid*., p. 759.
[70] *Ibid*.
[71] *Ibid*., p. 735.
[72] *Ibid*.

simply because of different "practice and culture of domestic judicial systems"[73], meaning that there should be a change in the way how this issue is approached: instead of creating new regulations, the core issue of human rights violations on a domestic level ought to be analysed.

[73] *Ibid*., p. 759.

2. PRINCIPLE OF THE PRESUMPTION OF INNOCENCE

The presumption of innocence is undoubtedly one of the key components of a fair, impartial trial; while it can be considered as a procedural safeguard of a fair criminal proceeding, it can as well stand as an independent principle.[74] In both cases, the principle is considered to be a fundamental human right and a one of the essential elements necessary for the effectiveness of the criminal justice system.

Even though, in this thesis, the PoI is introduced both as a guarantee within the framework of the right to a fair trial under the ECHR and as a separate substantial right, the main focus is set on the first perspective. While it is para. 2 of Article 6 that is devoted specifically to the PoI, it should be noted that all three Article 6 paragraphs are interconnected and, therefore, may be relevant to the PoI in varying degrees. After introducing the evolution of the PoI and different perspectives from which it can be viewed, this chapter proceeds with interpreting the presumption within the scope of ECHR's right to a fair trial: what it guarantees to the persons who have been suspected in criminal offence, which obligations it imposes on the public authorities, and the conditions under which it can be imposed to limitations.

2.1. Evolution of the presumption of innocence

Recognized as a customary international law rule and codified in national legal systems, the presumption plays the role of the core tenet of criminal law.[75] The traces of this principle can already be found in the ancient times, since the idea of being presumed innocent until proven guilty is one of the earliest principles that exist in law:[76]

> [i]f you allege that someone has done something wrong, the [burden of] proof is on you to demonstrate that what you say is true. […] That's a first principle of law that everybody knows.[77]

The existence of the burden of proof supported the idea that any accusations needed to be underpinned by the relevant evidence; it was, therefore, a grave misconduct to accuse somebody without acquiring the proof of that.[78] Even though it was only the 13th century that marked beginning of the period when the debates about how such idea should be named in legal terms,[79] the very notion of the PoI has been a vital part of criminal proceedings long before it was officially formulated as a principle and a fundamental human right. With the official establishment of the PoI as a legal principle, scholars came to the conclusion that it illustrates

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[74] Richard L. Lippke, *Taming the Presumption of Innocence* (Oxford University Press, March 2016), p. 34, available on: Oxford Academic database. Accessed May 3, 2023.
[75] Fair Trials, *Innocent Until Proven Guilty Report* (June 2019), p. 4, available on: https://www.fairtrials.org/articles/publications/innocent-until-proven-guilty-report/. Accessed April 2, 2023.
[76] Anthony Davidson Gray, "The Presumption of Innocence Under Attack," *New Criminal Law Review: An International and Interdisciplinary Journal* Vol. 20, No. 4 (2017), p. 596, available on: https://www.jstor.org/stable/26417679. Accessed March 29, 2023.
[77] Time. The Meaning of 'Presumed Innocent' Has Evolved. Here's How the Kavanaugh Hearings Fit Into That History (2018). Available on: https://time.com/5417005/presumption-of-innocence-history/. Accessed April 21, 2023.
[78] Gray, *supra* note 76, p. 597.
[79] *Ibid*.

two main values: first, the provision of maximum protection against wrongful conviction, and, second, the respect for the rule of law.[80]

In international law, the PoI was first integrated into Article 11 para. 1 of the Universal Declaration of Human Rights in 1948, stating that it is the right that shall guarantee that "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law"[81]. Five years later, in 1953, it was codified within the framework of the ECHR and later – within the International Covenant on Civil and Political Rights. It, therefore, became a *minimal* condition that shall be tolerable in relation to people, on the one hand, and a *fundamental* aspect in a sense that it ensures the protection of human dignity, on the other hand.[82]

The concept of the PoI is best applied within the criminal trial context.[83] It implies 'innocence' and, whereas its definition may vary from one legal system to another, its main meaning within the criminal context remains one – the PoI shall be viewed from the perspective of *legal innocence*, and not, for instance, moral.[84] To put it in simple terms, the suspected person is considered innocent when he has not committed the criminal offence and, therefore, shall not undergo to the consequent penalties. In cases when there has been an infringement of the law detected and proved, the legal innocence stops functioning.

The principle of the PoI can be viewed from two main perspectives: as a *procedural* right, on one hand, and as a *substantial* right, on the other.[85] Firstly, the idea of the PoI constitutes the regulation of the behaviour of the court members during the criminal trial, which must be impartial and unprejudiced; it, therefore, overlaps with other rights such as the right to an impartial tribunal.[86] From this perspective, this principle is considered as a procedural guarantee that establishes the standard of proof, this way complementing and strengthening the criminal trial system, and the justice system as such. It is being enforced, once the criminal charge has been officially filed,[87] thereby becoming the suspected person's guarantee of protection against the imposition of guilt based on bias or any other preconceived idea and not on a legitimate and reasonable ground.

As was stated by Amnesty International, the PoI is a fundamental right that shall be observed at all times, this way acknowledging it as non-derogable.[88]

> The Human Rights Committee held in General Comment 29 to Art. 4 of the ICCPR (derogation in a general emergency situation) that as fair trial rights are explicitly

[80] David Hamer, "A Dynamic Reconstruction of the Presumption of Innocence," *Oxford Journal of Legal Studies* Vol. 31, No. 2 (2011), p. 420, available on: https://www.jstor.org/stable/23014694. Accessed April 2, 2023.
[81] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 11(1), available on: https://www.refworld.org/docid/3ae6b3712c.html. Accessed April 19, 2023.
[82] Ho Hock Lai, "The Presumption of Innocence as a Human Right," *Criminal Law and Criminology* (2015), available on: https://lawexplores.com/the-presumption-of-innocence-as-a-human-right/. Accessed April 22, 2023.
[83] Lippke, *supra* note 74, p. 16.
[84] *Ibid*., p. 14.
[85] Liz Campbell, "Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence," *The Modern Law Review* Vol. 76, No. 4 (2013), p. 684, available on: https://www.jstor.org/stable/24029836. Accessed April 24, 2023.
[86] Paul Roberts and Jill Hunter, *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Bloomsbury Publishing, 2012), p. 269, available on: Google Books. Accessed November 27, 2022.
[87] Guide on Article 6, *supra* note 23, p. 10.
[88] Elies Van Sliedregt, "A Contemporary Reflection on the Presumption of Innocence," *International Review of Penal Law: A Historical Record of the Association (1926-2014)* Vol. 80 (2009), available on: https://www.cairn.info/revue-internationale-de-droit-penal-2009-1-page-247.htm. Accessed April 27, 2023.

> guaranteed in the laws of war, and therefore apply in situations of armed conflict, there is no justification for derogation from these rights in emergency situations.[89]

The principle of the PoI falls within the category of fair trial rights – this is generally accepted and is not a subject to dispute. But, as it was stated before, the presumption is universal and has been insured by a variety of legal instruments. This means that even though, most of the times, it *is* considered as the right that is not only relevant and applicable during the court trial but also beyond it, and the right that shall be respected absolutely, under some conventions, the PoI might be also viewed as a derogable right.[90] One such example is the ECHR. (*See further* Chapter 2.3.).

But not only that, the PoI, apart from being an integral element of the criminal trial, can also be viewed separately from it. The PoI, as was noted by Stefan Trechsel, can be considered as having a "reputation-related aspect".[91] This way, above anything else, it is a human right that protects the criminally charged person's reputation and ensures that there is no presumption of guilt unless proven and, consequently, no wrongful conviction and punishment. This way, the PoI can be considered more as a substantive right which is functioning beyond the criminal procedure; it influences the way in which the court tribunal, public authorities, and other members of society "view and treat persons as 'above reproach' simply insofar as they are persons"[92]. This means that the existence of a criminal charge should not be the requirement for the enforcement of the PoI,[93] since all civilians shall fall under the protection of public authorities and have their reputation respected – not only during the criminal trial but also outside of it.

To conclude, the PoI aims to ensure that any restriction of a person's rights, including the possible deprivation of his liberty, is justified: it is established by the impartial tribunal and is in accordance with the provided evidence. The presumption obliges authorities to act in a way to provide fair court proceedings and a reasonable judgment,[94] this way securing the accused persons' innocence and reputation. Depending on the legal instrument that ensures the presumption, it can be either absolute and applicable at all times (including war time) or be subjected to specific limitations. As there is a well-known fact of the extensive practice of authorities misusing their state power, in both cases the PoI can be interpreted as one of those safeguards that prevent misuse of state power and the harmful influence it can have on criminal proceedings, a defendant, and the justice system in general.[95]

2.2. Presumption of innocence within the ECHR framework

Within the scope of the ECHR, the PoI plays a role of a procedural guarantee – it is a "part of the proof structure of [a] criminal trial"[96] and, therefore, complements the process of a fair hearing. Within the framework of the ECHR, Article 6 para. 2 is the one dealing with the principle of the PoI. Considering this principle as a right, it thereby states that every person who has been charged with a criminal offence must be considered innocent until proven guilty

[89] *Ibid*.
[90] *Ibid*.
[91] Lai, *supra* note 82.
[92] Lippke, *supra* note 74, p. 34.
[93] *Ibid*.
[94] *Ibid*., p. 36.
[95] *Ibid*.
[96] *Ibid*., p. 20.

according to law.[97] Neither a preconceived opinion nor any kind of bias shall, therefore, influence the way judges and other members of the court examine a case and approach a person who had been criminally charged.[98]

The existence of the criminal charge is a necessary condition for the person to fall under the protection of this provision: that would mean that if there has not been an official accusation put forward yet, Article 6 para. 2 cannot be used as a safeguard. However, there have been various concerns with regard to this requirement – if the criminally charged persons fall under the protection of the PoI, what about those persons who had not officially become defendants yet?[99]

The case of *Karaman* v. *Germany* is an example when the applicant's presumption of innocence was violated at the moment when there had been *no* formal criminal charge issued against him. The Regional Court in Germany issued the statement that the applicant, who at that moment was a co-suspect in a fraud of donated money and not criminally charged yet, was indeed involved in committing the offence.[100] The German government did not find a violation of the applicant's PoI, since he was not the accused but the third party and "had not exhausted domestic remedies in that respect".[101] The Court, however, noted that even though the applicant was not the accused, he had a link to the offence, and the criminal charge therefore was not a necessary precondition for his presumption of innocence to be violated.[102] The comments made by the Regional Court presumed the applicant's guilt when it had not been proven yet and, even though he had not been criminally charged when these comments were made, the Court found violation of his right under Article 6 para. 2.[103] This way, the Court's decision highlighted that the right to be presumed innocent can indeed be also infringed *before* the moment when the official charge is filed, whereas the person concerned can be related to the offence and not be criminally charged with it.

The ECtHR therefore reacted to the concerns by widening the meaning of being charged with a criminal offence. The Court established that the enforcement of the presumption under Article 6 para. 2 might not necessarily demand the issuing of the charges; instead, it can be applicable the moment the person receives an official notification that he is suspected of committing a crime.[104]

Whereas para 2. of Article 6 requires *proof* which is according to law in order to presume the guilt, para. 3 might provide a more concrete conception of how this proof shall be determined. First of all, as stated in para. 2, the process of the examination of evidence shall be in accordance with the law which implies compliance with legal norms, on the one hand, and the existence of an impartial tribunal, on the other hand.[105] After that comes para. 3 with its minimum rights which shall be guaranteed to the suspected person in order to ensure a legitimate process of

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[97] ECHR, *supra* note 30, Article 6 (2).
[98] Guide on Article 6, *supra* note 23, p. 71.
[99] Thomas Weigend, "There is Only One Presumption of Innocence," *Netherlands Journal of Legal Philosophy* Vol. 42, No. 3 (2013), p. 198, available on: https://www.elevenjournals.com/tijdschrift/rechtsfilosofieentheorie/2013/3/NJLP_2213-0713_2013_042_003_003.pdf. Accessed April 25, 2023.
[100] *Karaman v. Germany*, no. 17103/10, § 7-8, ECHR 2014.
[101] *Ibid*., § 37-38.
[102] *Ibid*., § 63-71.
[103] *Ibid*.
[104] Weigend, *supra* note 99.
[105] Lai, *supra* note 82.

collecting evidence and, consequently, the proof of guilt or innocence.[106] The proof can be viewed as the "production of evidence"[107] which is being introduced to the court whether confirming the statement of the suspect or denying it; and it can also be viewed as a mean to establish a link between the facts of the case and the statements of proof in order to reach and put forward the final verdict.[108]

The PoI sets particular requirements for the behaviour of public authorities during criminal trials. One of the requirements is related to the members of the court – they shall deliver a ruling on the presumption of guilt based on the proven violation of the law by the suspected person, i.e. based on their illegal activities which could have been controllable by the suspected person. Other grounds like gender, race, religion, age, and reputation, also so-called "status characteristics"[109], shall not be taken into account when determining the suspected person's guilt, since, most of the time, they cannot be changed or controlled by a person.[110]

Another important requirement set by the PoI is that there shall not be any public announcements of the guilt made by public authorities, whether by court members, government officials, police officers, or the press.

> All parties involved in criminal proceedings should […] avoid giving any indication or impression that an opinion on the guilt of the defendant has been reached before the verdict is final and binding. Particular attention must be given to the vocabulary that judges and prosecutors employ […].[111]

Even when there is a strong suspicion that the person is responsible for committing the crime, there can be no declarations of guilt made prior to the official judgment of the court that proves so whatsoever. It shall be noted, however, that usually there *is* a certain degree of belief that the criminally charged person is guilty. Otherwise, there would not be any ground to put forward the charge:

> [t]he accused would not be where they are if police, prosecutors, a grand jury, or a judge at a preliminary hearing did not believe there was evidence indicating that they had committed one or more crimes.[112]

The presumption, in turn, establishes a particular "mindset" – an approach for how judges and other public authorities need to act in relation to the criminally charged persons during trial – they can suspect but cannot make hasty conclusions about their guilt and, especially, publicly announce it. Moreover, it sets certain limitations, so-called boundaries, for the activities of the authorities: police officers shall discover the crime and collect the evidence, prosecutors shall investigate the case and cooperate with the persons concerned, and the press can publish the information about the trial (except the cases when trials are held *in camera*), but it is not in their competence to determine and pronounce the guilt.[113]

In cases when there is doubt, it shall benefit the accused person; the *in dubio pro reo* principle, therefore, constitutes part of the PoI, too.[114] When it comes to the burden of proof,

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[106] *Ibid*.
[107] *Ibid*.
[108] *Ibid*.
[109] Lippke, *supra* note 74, p. 38.
[110] *Ibid*.
[111] OSCE Mission to Bosnia and Herzegovina, *The Presumption of Innocence: Instances of Violations of Internationally Recognized Human Rights Standards by Courts of Bosnia and Herzegovina* (2007), p. 7, available on: https://www.osce.org/bih/110246. Accessed April 15, 2023.
[112] Lippke, *supra* note 74, p. 83.
[113] *Ibid*., p. 45.
[114] Guide on Article 6, *supra* note 23, p. 74.

within the terms of the PoI it shall be on the prosecution, meaning that the state is the responsible body for notifying the suspected person of the charge:[115]

> [t]he placing of the onus on the state is underpinned by the imbalance of resources and power between the parties in the criminal process, and acknowledges the liberal conception of limited state intervention and individual autonomy.[116]

Since one of the aims of the PoI is to decrease the risk of wrongful convictions during criminal trials, it is important for the burden to be on the state in order to support the issuing of the judgment with a particular standard of proof.[117] A wrongful suspicion does not only make a person particularly vulnerable but also implies the undeserved punishment and might have a negative impact on a person's mental health:

> [t]he very existence of an individualized suspicion of criminal wrongdoing has serious social-psychological consequences: it tends to stigmatize the suspect and to jeopardize his acceptance as a trustworthy citizen.[118]

During the trial, the violation of para. 2 of Article 6 is detected in cases when the opinion of the judicial authorities implies that the defendant is guilty when it had not been officially affirmed yet. Such reasoning presumes that the conviction, very likely with criminal liability, will follow, thus establishing guilt and penalties before the final court verdict. This is wrongful and against the law, and neglects not only the right to the PoI but also the right to a fair trial as such.

The PoI can also be violated if statements that presume guilt are made by state officials. An example of when national authorities infringe the right to be presumed innocent can be the famous case of *Allenet de Ribemont* v. *France*, where the Minister of the Interior and later high-ranking police officers stated that the defendant is a "murderer", even though the trial has not even begun yet.[119] The Court established that there has been a violation of the defendant's right under Article 6 para. 2, also mentioning the consequences that followed from such statement: it "encouraged the public to believe him guilty and […] prejudged the assessment of the facts by the competent judicial authority"[120].

A high public interest in a case is another common reason why public authorities, especially the press and mass media, have the temptation to make public statements where they presume the guilt of the defendant. With respect to the general interest, according to the ECHR case-law, the PoI is usually being violated due to the brutality of the committed crime, the public reputation of the defendant, or in cases when the matter is of public concern.[121] This is the aspect of publicity where a contradiction can be found: Article 6 para. 1 states that, except in particular conditions, a hearing shall be public, meaning that the press has the right to disclose the facts of the case, and yet a lot depends on the wording which shall neither state the guilt nor suggest it.

It is apparent that the statement on a suspected person's guilt made by judiciary or state authorities can have a considerable impact on how the press and public perceive it, and *vice versa*. From such interconnection follows that no matter *who* states the presumption of guilt, it

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[115] *Ibid*.
[116] Campbell, *supra* note 85, p. 683.
[117] *Ibid*., p. 684.
[118] Weigend, *supra* note 99, p. 196.
[119] *Allenet de Ribemont v. France*, no. 15175/89, § 39-41, ECHR 1995.
[120] *Ibid*.
[121] Fair Trials report, *supra* note 75, p. 14.

results in changes in attitudes and hence affects the defendant's reputation and the impartiality of the criminal trial.

2.3. Presumption of innocence: limitations

Especially lately, there have been numerous instances of the PoI being limited or abolished. Legitimate or not, it brings attention to what this principle stands for and to the circumstances that influence such a pessimistic tendency. The ECHR is an example when the PoI might be subjected to limitations; there are specific circumstances in which the persons' enjoyment of their rights under Article 6 para. 2 may be restricted and, at the same time, not violated.[122] Even though a violation of Article 6 para. 2 is usually found in cases when the PoI requirements are not being met by judges or other public authorities, this chapter also establishes some of the most common circumstances when a presumption of guilt *can* be considered legitimate.

In its rulings, the ECtHR mentions several cases when judges or other authorities can (or are required to) announce statements which presume the guilt of the defendants before the final judgment,[123] this way not absolutely following the PoI and yet, at the same time, not violating individual's human rights. Whether as a preventive mechanism or with the purpose of public safety, the restriction of the right to be presumed innocent can be justifiable, as these are considered necessary and reasonable conditions.

Probably one of the most common cases is when the PoI is supposed to be restricted due to the necessity of *pre-trial detention*. While there is a need to ensure the implementation of suspected individuals' human rights, there can, at the same time, also arise the need to act in the interests of public safety. This means that even though, during the criminal trial, individuals shall enjoy their fundamental rights, special circumstances might necessitate a restriction of some of those rights.[124] This brings us to the challenge to ensure the defendant's PoI during his pre-trial detention, which is addressed in a greater detail in Chapter 3 of this thesis.

Apart from that, the PoI needs to be competently combined with other human rights and fair trial requirements like the right to freedom of expression or the standard of having a public hearing.[125] On the domestic level, states view this challenge differently, since determining in which cases information about the criminal case and its parties can be publicly disclosed and when it cannot is a complicated task by its nature and requires establishing a balance.[126] For instance, there is a contradiction between the right of the media and other authorities to publicise the facts of the case in order to make the trial public, as the right to a fair trial requires. But, at the same time, it is a thin line that divides the statements that are appropriate and the ones that violate the defendants' presumption of innocence. From one perspective, the press has gained protection from international human rights law and, in this case, it is an important aspect of a fair trial that enlightens the public about ongoing criminal proceedings, making them transparent.[127] Contrary to that, however, the information released publicly may affect the

[122] Sliedregt, *supra* note 88.
[123] Lippke, *supra* note 74, p. 42.
[124] Ana Aguilar-Garcia, "Presumption of Innocence and Public Safety: A Possible Dialogue," *Stability: International Journal of Security & Development* Vol. 3, Issue 1 (2014), available on: https://www.researchgate.net/publication/285173438_Presumption_of_Innocence_and_Public_Safety_A_Possible_Dialogue. Accessed March 29, 2023.
[125] Fair Trials report, *supra* note 75.
[126] *Ibid*., p. 19.
[127] *Ibid*.

impartiality of the judges and the reputation of the suspected individual[128] – especially recently, the press and media have become powerful actors in influencing public opinion; it can, therefore, play a negative role in how the defendant is perceived both by the judges and society.

The application of the PoI is therefore not unconditional and, within the framework of the ECHR, it can be limited. The implementation of the PoI requires a balance with other fair trial guarantees and with other rights. With the fact that the hearing shall be held public, the statements made by public authorities thus must be assessed with regard to their context in order to detect the PoI violation and not, for example, be forbidden completely.

[128] *Ibid*.

3. PRESUMPTION OF INNOCENCE AND PRE-TRIAL DETENTION: APPROACH OF THE ECHR

3.1. Presumption of innocence vs. pre-trial detention

The fact that pre-trial detention and the presumption of innocence both are realms that exist within the criminal proceedings demonstrates that there indeed is one more perspective in which the PoI can be viewed. It is a principle that should, in one way or another, impose certain limitations on pre-trial detention. The PoI safeguards the right to be considered innocent which, in turn, implies that there can be no punishment imposed on the accused person when there had been no final court sentence based on sufficient proof.[129] This means that even when detention is applied, the defendant still must be treated as if he *is* innocent and not as a person who has committed the crime.[130]

According to the ECHR framework, pre-trial detention is viewed as a last resort measure.[131] The right to liberty and security is regulated by Article 5 of the ECHR and protects individuals from unlawful and arbitrary detention.[132] The Convention, however, does not set up what the specific length of pre-trial detention should be, meaning that it is up to national courts to assess each case and determine how long the period of detention will last.

> [P]re-trial detention practice has been the concern of criminal defence lawyers and scholars for many years: they believe grounds for pre-trial detention are too easily accepted and the use of pre-trial detention is ever increasing.[133]

Since, as was just mentioned, the application of pre-trial detention is the responsibility of courts, there are diverse systems of establishing if it is reasonable. Domestic courts of different states can evaluate one and the same case in different ways and thus have opposing views with regard to the necessity of detention. What is common in determining if pre-trial detention is legitimate is a thorough implementation of the principle of proportionality, because depriving individuals of their liberty and, this way, restricting one of their most fundamental human rights requires a serious ground.[134] Usually, in these cases, two aspects are essential when assessing proportionality: the *seriousness of the committed crime* and the *level of suspicion*.[135]

First, in order to issue a pre-trial detention order, the crime committed must be of a particular degree of seriousness. There are no universally accepted criteria as to which crimes are considered serious, but the ECtHR has been using a standard approach where it assesses the gravity of the offence following the above-mentioned two aspects of proportionality.[136] Serious crimes usually entail "violence or an attempt at violence against individuals",[137] where pre-trial

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[129] Sliedregt, *supra* note 88.
[130] *Ibid.*
[131] Council of Europe, *Pre-trial Detention Assessment Tool*, p. 3, available on: https://rm.coe.int/pre-trial-detention-assessment-tool/168075ae06#:~:text=Pre%2Dtrial%20detention%20(PTD)%3A,and%2For%20prevent%20unlawful%20interference. Accessed April 16, 2023.
[132] ECHR, *supra* note 30, Article 5.
[133] Lonneke Stevens, "The Meaning of the Presumption of Innocence for Pre-trial Detention: An Empirical Approach," *Netherlands Journal of Legal Philosophy* Vol. 42, No. 3 (2013), p. 241, available on: HeinOnline database. Accessed May 5, 2023.
[134] Weigend, *supra* note 99, p. 199.
[135] *Ibid.*
[136] Stevens, *supra* note 133, p. 242.
[137] *Ibid.*

detention of the suspected persons plays one of the primary roles of preventing the possibility of their further criminal activities, therefore also preventing a so-called risk of repetition and ensuring public safety.[138] The reason behind it is the idea that if the committed crime, in its nature, is serious then it is also dangerous, and the defendant is dangerous too; this requires stricter measures with respect to the defendant's liberty to ensure that no other person would become a victim of such crime.[139] Since there appears a certain threat to public safety, the authorities issue the detention order with the aim to "eliminate [the] danger by incapacitating the suspect"[140].

Second, there must be strong, clear evidence that the crime has been committed exactly by the person who is the suspect.[141] This means that the amount of evidence can be smaller when it comes to simply suspecting a person in the criminal offence, and shall be more significant and not just a "probable cause"[142] when it comes to issuing the order of pre-trial detention. In order to justify a detention, there must, therefore, be a higher degree of suspicion that the defendant indeed can be responsible for having committed a crime.[143]

For the purpose of this research, it is essential to determine which role the PoI plays with respect to pre-trial detention; and establish whether, when it comes to deciding whether to detain a person or protect his right of the presumption of innocence, the circumstances when pre-trial detention is necessary influence the restriction of the principle of the PoI.

The PoI guarantees a level of protection to everyone who undergoes a trial, and yet, as it can be seen, it conflicts with pre-trial detention.

> The relationship between the presumption of innocence and pre-trial detention (and coercive measures in general) is not self-evident. What's more, it proves to be a highly uncomfortable relationship. As De Pinto wrote in 1852, it is "a great injustice, because a person is imprisoned on the basis of bare, more or less serious suspicions before he has been proved guilty".[144]

Being detained means a particular level of presumption of guilt because there must be serious ground in the form of convincing evidence for the issuing of a detention order.[145] If the defendant is being detained in accordance with the two above-mentioned aspects of the principle of proportionality, pre-trial detention is a necessary measure by which the authorities protect society both from the risk of the repetition of the commitment of serious crimes and from persons who have been suspected of committing them. Especially once serious evidence has been provided against the defendant, exactly as pre-trial detention requires, guilt is coming along, and the PoI thus has truly small chances of keeping the reputation of the detained person as innocent.[146] In this case, even being a fundamental principle of fair trial, the PoI neither prevents the defendant from being subjected to pre-trial detention nor it imposes limitations on it; it only "protect[s] the integrity of the criminal process"[147].

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[138] *Ibid.*
[139] *Ibid.*
[140] *Ibid.*, p. 243.
[141] Weigend, *supra* note 99, p. 199.
[142] Lippke, *supra* note 74, p. 163.
[143] *Ibid.*
[144] Sliedregt, *supra* note 88.
[145] *Ibid.*
[146] Stevens, *supra* note 133, p. 243.
[147] Weigend, *supra* note 99, p. 197.

The main issue, again, is with the fact pre-trial detention is being commonly overused, and this as well implies that the abolishment of the PoI is unjustified too. This seems like a closed circle: while there is a disproportionate use of detention, there is an unreasonable restriction of a person's right to be presumed innocent. This is a court system that is hard to change, which only illustrates that whether the PoI is in place or not, pre-trial detention was and will remain an inevitable part of the criminal proceedings.[148]

If looking at the case law of the ECtHR, it can be noted that pre-trial detention has been used too extensively, public authorities thus overuse the legitimate grounds of pre-trial detention and this leads to violations of defendants' other human rights like

> inhuman or degrading prison conditions caused by prison overcrowding, violations of the principle of presumption of innocence and even fair trial violations with respect to the manner evidence is obtained from a person deprived of his/her liberty at the initial stages of proceedings.[149]

From this follow some of the most common concerns related to pre-trial detention from the perspective of the PoI: when defendants are being detained, they endure the same – if not worse – imprisonment conditions as those who *have already* been convicted of a crime.[150] Moreover, the detainees are viewed as a threat to society, this way justifying pre-trial detention as a measure to defend the public against the dangerous persons. The PoI can oppose such occurrence by asking why should the suspect undergo the conditions as if he had committed the crime and be considered a "threat" to public security[151] when the trial has not taken place and the judicial decision has not been made yet. And, in addition, how can the authorities establish and predict whether there actually is a risk related to the suspect not being detained before the trial without any court verdicts supporting the presumption of guilt.[152]

These are some of the main reasons why scholars like Antony Duff consider pre-trial detention a violation of the PoI, as it is an "infringement of the civic trust"[153] where a suspected person is viewed as a person who cannot be trusted,[154] and as a person who needs to be detained while not being convicted of a crime. Deprivation of liberty is the experience that is often faced by those who, in reality, do not pose any threats to the safety of society.

3.2. How does the ECHR regulate pre-trial detention by the presumption of innocence?

According to the ECHR practice, imposing limitations on a person's right to liberty is viewed and regulated by Article 5 para. 3, and not from the point of the PoI.[155] When detention is unjustified or unreasonably long, it is not Article 6 para. 2 being violated but the right to liberty under Article 5. In the case of use of *pre-trial* detention which is used extensively in court practice, however, neither the context of Article 5 nor Article 6 para. 2 include specific guidelines on how to limit it.[156] According to the EU Directive 2016/343 on the strengthening

[148] Stevens, *supra* note 133, p. 248.
[149] Detention Assessment, *supra* note 131.
[150] Lippke, *supra* note 74, p. 155.
[151] *Ibid*.
[152] *Ibid*.
[153] Stevens, *supra* note 133, p. 240.
[154] *Ibid*.
[155] Sliedregt, *supra* note 88.
[156] *Ibid*.

of certain aspects of the presumption of innocence, on the other hand, the principle of the PoI ensures that the defendant shall not be considered guilty not only during the court trial but also during his pre-trial detention;[157] this is the only guideline of the Directive with respect to the relationship between pre-trial detention and the PoI. That means that even with the fact that the ECHR views pre-trial detention as a measure of the last resort whereas making a decision in its favour requires particularly serious grounds, the EU rules do not provide its firm regulation.

Such an example can be found in the case of *Peers* v. *Greece*. Previously undergoing treatment for his heroin addiction and later being arrested in the airport for drug offences, the applicant was put in pre-trial detention.[158] The applicant claimed that his right to be presumed innocent was violated because the prison authorities did not consider that he has not been formally accused of the offence yet, and was therefore "subjected to the same regime as convicts".[159] Such "regime" implied dirty and overcrowded sells, cold temperature in the cells during winter time due to broken windows and the fact that heating was getting turned on just for two hours per day and, no control over the light switches and ventilation whatsoever.[160] The applicant thus was placed in the same imprisonment conditions as those detainees who had been convicted in crime, but since the PoI does not include the rules concerning the limitations on pre-trial detention, there was no ground both for the government and the Court to establish the infringement of the right to be presumed innocent under Article 6 para. 2.

> [The applicant] argued that the failure of the Koridallos Prison authorities to provide for a special regime for remand prisoners amounts to a violation of the presumption of innocence. […] The Government submitted that Article 6 § 2 could not be interpreted in this manner. The Court recalls that the Convention contains no Article providing for separate treatment for convicted and accused persons in prisons. It cannot be said that Article 6 § 2 has been violated on the grounds adduced by the applicant.[161]

This is an illustration of the lack of pre-trial regulation by the right to a fair trial.

In this context, impactful research done by Lonneke Stevens can be mentioned as well. She conducted interviews with 28 Dutch judges in order to determine how pre-trial detention is being approached in court practice.[162] The results of her research included not only judges' arguments for justifying the use of detention but also a more general view of how it impacts the practise of a fair trial and the PoI, in particular. Even though the responses of the interviewed judges must be interpreted by taking into account the context of the Dutch jurisdiction, in their practise, pre-trial detention requires the crime to be serious and the evidence to be convincing,[163] which is similar to the practice of the ECHR.

Judges also commented on the problem of pre-trial detention misuse in European courts, stating that national legislations do not prohibit issuing detention orders, since they are considered as a preventive step in the interests of public security.[164] While there are also no strict limitations of pre-trial detention, there is a propensity to its excessive use:

[157] 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, *OJ L* 65/1, 11.3.2016, § 16, available on: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0343. Accessed May 2, 2023.
[158] *Peers* v. *Greece*, no. 28524/95, § 8, ECHR 2001.
[159] *Ibid.*
[160] *Ibid.*, § 24-27.
[161] *Ibid.*, § 76-78.
[162] Stevens, *supra* note 133, p. 241.
[163] *Ibid.*, p. 242.
[164] *Ibid.*, p. 245.

> [a] country may have an inadequate legal framework in which, for example, alternatives to pre-trial detention or limits on its duration are absent. Pre-trial detention might also be routinely prolonged, or could be abused to obtain confessions.[165]

As case-law has shown, such instances are not restricted by the PoI. In her conclusion, Stevens, first of all, states that when the case concerns a serious crime, pre-trial detention becomes inevitable – the court system requires so; it is, therefore, impossible to reject it despite the controversy surrounding its contradiction to the PoI.[166] Furthermore, she notes that there is simply not enough court practice when it comes to establishing whether pre-trial detention violates the presumption of innocence; the PoI does not provide guidelines as to how to deal with this issue.[167]

3.3. Concluding remarks

Since this analysis is focused on the case law of the ECHR, and due to diverse ways of how the principle of the PoI can be interpreted, in this research, it is viewed as a procedural guarantee within the ECHR. The ECtHR, in turn, considers the PoI not only as a guarantee of the suspected person's innocence but also as a reputational aspect that "aims to protect the image of the person but also to defend him against the power of the state"[168]. The ECHR also views the presumption of innocence as a "starting point for pre-trial detention decisions",[169] and yet it is not common for the Court to consider pre-trial detention as a violation of the PoI. Taking the severity of the committed crime and the provision of convincing proof of guilt as a reasonable ground for ordering detention prior to the trial, the Court thus uses a cursory examination based on the little amount of evidence to restrict the suspect's right not to be presumed guilty.[170]

Moreover, when the conditions of pre-trial detention are not adequate for a person who has not been convicted of an offence, like in the *Peers* v. *Greece* case, the right to be presumed innocent is not breached. The PoI, therefore, neither restricts nor regulates pre-trial detention.

> [C]ertain kinds of liberty-limiting requirements can legitimately be placed on those awaiting trial […]. Pre-trial detention, however, cannot be justified in those terms, and is (except in a very few types of case) inconsistent with the Presumption of Innocence and with proper respect for the defendant's civic status.[171]

Thus, pre-trial detention can be whether considered unreasonable of be justified, whereas, in the case of the latter, there must be a serious crime committed and a piece of a strong evidence provided in order to deprive a suspected person of their liberty legitimately.

> In some European systems pre-trial detention is even set by a constitutional norm revealing a bias in favour of liberty in line with the presumption of innocence. This limits the circumstances under which pre-trial detention is authorised […] it should only

[165] *Ibid*.
[166] *Ibid*., p. 241.
[167] *Ibid*.
[168] Campbell, *supra* note 85, p. 684.
[169] Stevens, *supra* note 133, p. 240.
[170] The Square One Project, *The "Radical" Notion of the Presumption of Innocence* (2020), p. 19, available on: https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf. Accessed May 2, 2023.
[171] Robin Antony Duff, "Pre-Trial Detention and the Presumption of Innocence," *Prevention and the Limits of the Criminal Law* (2013), available on: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103303. Accessed May 2, 2023.

> apply after the court determines that defendants pose a substantial risk of flight, a threat to the safety of the community, victims or witnesses, or a risk of hindering investigations.[172]

In practice, in connection to pre-trial detention, the PoI is nevertheless simply not applicable. The Court aims to limit the suspect's right to the PoI as a preventive measure, but what can often be seen is the cases of pre-trial detentions that are based on minimal proof of guilt.[173] Apart from that, the PoI does not guarantee protection against an excessive length of detention and unfairly harsh imprisonment conditions.

As the research also demonstrates, when it comes to balancing the PoI and pre-trial detention there can certainly be found a gap in the court practise. The ECtHR case-law does not provide a full picture of how suspected persons may be detained, while maintaining their innocence at the same time. Even though pre-trial detention has both an aspect of reasonableness and legitimacy, it still means that the defendant needs to prove he is not guilty before the definitive sentence, and that is contrary to what the PoI stands for. In the best scenario, pre-trial detention does not affect the course of the trial and the final judgment; but more often, however, it affects both the reputation of the suspected person and the way he is perceived by authorities at the trial stage.

Ordering detention by itself is a serious ground to believe in the defendant's guilt and presume he has committed the crime. In addition to that, when there is detention, there is a presumption of guilt, and that automatically requires the defendant to prove he is not guilty during his trial. This as well is contrary to the essence of the PoI because if the defendant is considered innocent, the question is why he has to to prove that he is not guilty in order to get released from his detention.

The tendency of issuing pre-trial detention orders that are not reasonable or that end up excessively lengthy is, therefore, not encouraging at all. The frequent failure of both national courts and the ECtHR to weigh up the evidence and issue a justified claim illustrates that the challenge of balancing the PoI and other fair trial aspects is not dealt with successfully. The lack of court practice and case-law, respectively, also does not give a cause for optimism, since it only indicates that the contradiction between the PoI and pre-trial detention is not considered serious enough from the perspective of their practical implementation.

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[172] European Commission, /* COM/2011/0327 final */ Green Paper Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, 14/06/2011, available on: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52011DC0327. Accessed May 4, 2023.

[173] Stevens, *supra* note 133, p. 247.

CONCLUSION

The first research question of this thesis aimed to determine if pre-trial detention contradicts the principle of the presumption of innocence. The hypothesis was that a contradiction between pre-trial detention and the presumption does exist, which can be proved by the following conclusions from this research.

First, relevant is the answer to the additional research question which was devoted to examining the presumption of innocence in order to demonstrate how exactly its objectives and functions can be contrasted with pre-trial detention. The answer to the question of how the presumption of innocence is implemented within the framework of the right to a fair trial under Article 6 of the ECHR can be answered in the following way: universally, the presumption of innocence can be considered both as a procedural rule within the context of the right to a fair trial, thus being relevant for the entire duration of criminal proceedings, and as an independent right that protects the reputation of persons and ensures a particular degree of civic trust also beyond the scope of a criminal trial. In the ECtHR practice, the presumption of innocence operates as a procedural safeguard that secures the fairness of suspected individuals' fair criminal trial by considering them innocent until proven otherwise. The presumption does not only provide protection to everyone who has been suspected of committing a criminal offence, but also imposes obligations on the behaviour of the members of the court and other public authorities. The principle is thus particularly relevant while approaching the examination of evidence and statements made by the suspected person. The presumption is the right that protects the defendant from the unreasonable implication of guilt prior to the final judicial decision. Judicial authorities, the government, or the press are all prohibited from approaching the case and examining the defendant with prejudice and bias the same way as from making public statements that presume guilt. Not only ensuring the impartial tribunal and the burden of proof on the prosecution, the presumption of innocence also safeguards the suspect's reputation and trustworthiness, where any criminal conviction is based on sufficient proof and the following penalty is justified.

By determining what constitutes the presumption of innocence, namely its nature and the meaning in criminal proceedings, requirements under Article 6 para. 2 of the ECHR as well as the circumstances in which it can be limited legitimately, it can also be concluded that the presumption requires a balance with other rights and fair trial guarantees in order to function properly. Article 6 para. 1 emphasizes that the hearing must be public, meaning that the public authorities have the right to make public statements with regard to the court procedures. Yet, their statements shall be carefully formed as to neither suggest nor presume guilt.

This leads us to the answer to the first question. Whereas pre-trial detention, in its essence, requires that a serious offence ought to have been committed and particularly strong evidence, it presumes a high degree of suspicion and thus, to a certain extent, also the presumption of the defendant's guilt. Consequently, there is a contradiction between the principle of presumption of innocence, on the one hand, and the need for detention, on the other. Simply put, the natures of the principle and pre-trial detention are contrary to each other, this way creating a conflict that also signifies the challenge in the court practice. Where there is the use of pre-trial detention, the presumption cannot fulfil its practical functions, which also illustrates that where there is pre-trial detention, the presumption, most probably, is simply absent.

According to the ECHR case-law and the existing study of this topic, the only way how the presumption of innocence regulates pre-trial detention is by stating that during the trial the suspect shall be considered innocent. There are no other limiting effects the presumption has over detention. In cases when pre-trial detention is unreasonably long, or implies harsh conditions, there is no sufficient ground to establish a violation of Article 6 para. 2 simply because the presumption of innocence does not have any regulations with this regard. The detainees who are awaiting their trial can be unfairly undergoing the same imprisonment conditions as the ones who have been convicted, and the presumption of innocence has no role whatsoever in providing protection in such a case.

The research also concludes that the inability of the EU to create a standard approach for implementing guarantees of the right to a fair trial is due to the difference in national jurisdictions. The EU directives that aimed to provide more concrete regulations for states to follow while approaching the criminal trial appeared to be not the most effective tool in dealing with the problem of severe human rights violations. The statistics show that there is a significant number of cases that concern only the violation of the right to be presumed innocent, thus supporting the fact that there is a lack of a standard approach and guidelines in how to effectively ensure it in practice. What might look like a more relevant and substantial method of improving the court trial system in states is a more thorough approach that focuses on each state's criminal justice system separately and determines what are the main factors that affect each state's inability to ensure an effective protection to its citizens.

This research, therefore, can be continued by narrowing the analysis to how the courts of different EU countries are dealing with the cases concerning the principle of the presumption of innocence. Instead of analysing the approach of the ECHR in general, the implementation of the presumption of innocence can be viewed from the perspective of states' domestic legislations. As it was mentioned in this research, the differences in states' national jurisdictions and the sovereignty and political controversies do not allow to create a unanimous approach in dealing with the fair trial proceedings within Europe. Scrutinising what are the major differences that exist in domestic laws with respect to a fair trial and that, at the same time, preclude the absolute enforcement of the EU regulations would give a chance to correlate them and, possibly, establish a pattern of the most common reasons why violation of persons' right to a fair trial is a regular occurrence. This as well would allow to think about possible solutions that could improve the level of fair proceedings domestically and, later, also in the EU.

Apart from that, if talking about pre-trial detention, there seems to be a need for stricter criteria and, perhaps, more concrete guidelines on how judicial authorities should approach the process of deciding if a suspect may be detained. A cursory assessment of the evidence has been leading to a common overuse of this legal remedy, resulting in detention of persons who have not in fact committed any crime. The process of examination of the evidence shall, therefore, be subjected to specification in order to avoid legal uncertainty and disproportionate use of detention. Moreover, it seems necessary to regulate how pre-trial detention is conducted, for example, by creating more specific instructions concerning a reasonable length of pre-trial detention and ensuring adequate prison conditions.

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