

## The Presumption of Innocence in the legal framework of Germany

### *Abstract*

*This paper presents the different sources of the presumption of innocence in the German legal framework: the principle of the rule of law rooted in the German constitution, the European Convention on Human Rights, and the Charter of Fundamental Rights of the European Union. After that, the constitutional and European remedies for violation of the presumption of innocence are discussed.*

### I. Legal bases

#### 1. German constitution (Basic Law)

**a) Entrenchment:** To start with, there is an astonishing finding: The German constitution called ‘Basic Law’ (*Grundgesetz*) fails to explicitly deliver a written regulation providing for the presumption of innocence. This does not mean, however, that it is unfamiliar to the Basic Law: According to the established case law esp. of the German Federal Constitutional Court (*Bundesverfassungsgericht*), the presumption of innocence is a special manifestation of the overarching principle of the rule of law, provided for mainly in Article 20(3) of the Basic Law. Thus the presumption of innocence has constitutional rank even without being explicitly mentioned within the constitutional text.<sup>1</sup>

**b) Scope of protection:** The presumption of innocence prohibits, on the one hand, the imposition of any measures on the culprit having the effect of a sentence or treating him as guilty without evidence of his guilt in accordance with the procedural regulations. On the other hand, the presumption of innocence requires a conviction in a fair trial before a person can generally be treated as criminal in legal relations.<sup>2</sup> As a manifestation of the principle of the rule of law, the presumption of innocence does not contain *specific* requirements and prohibitions; instead, its implications for procedural law require shaping depending on the circumstances of the respective case. This task primarily pertains to the legislature.<sup>3</sup>

**c) Additional sources in German law:** In addition to its implicit constitutional status, the presumption of innocence in the German legal framework results from Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights – ECHR)<sup>4</sup> and from Article 48(1) of the Charter of Fundamental Rights of the European Union (EU Charter). Like many other European states, Germany finds itself in the specific situation that its genuine national law is directly supplemented with the provisions of these two sources.

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<sup>1</sup> Federal Constitutional Court’s Report (BVerfGE) 133, 168 (202); 133, 1 (31); 110, 1 (22 f.); 82, 106 (114); 74, 358 (370).

<sup>2</sup> BVerfGE 133, 168 (202); 74, 358 (371); to a certain extent already BVerfGE 82, 106 (114 f.).

<sup>3</sup> BVerfGE 133, 168 (202); 74, 358 (371 f.).

<sup>4</sup> BVerfGE 133, 168 (202); 133, 1 (31); 110, 1 (22 f.); 82, 106 (114); 74, 358 (370).

## 2. European Convention on Human Rights

**a) International Treaty.** Germany is a signatory state to the European Convention on Human Rights (ECHR) of November 11, 1950. It entered into force in Germany on September 3, 1953. The ECHR is an international (intergovernmental) treaty applying to 47, i.e. almost all European states (with the exception of Belarus). By ratifying the ECHR, it became an integral part of the German legal framework having the rank of a Federal law. Article 6(2) of the ECHR explicitly provides for the presumption of innocence. It reads as follows:

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

**b) European Court of Human Rights.** The ECHR has set up a specific court: the European Court of Human Rights (ECtHR) in Strasbourg. The Court considers the presumption of innocence as a part of the right to a fair criminal trial as provided in the afore-going paragraph.<sup>5</sup> According to its case law, the presumption of innocence guarantees everyone the right not to be designated or treated as guilty of a criminal offence before his guilt has been established by a court.<sup>6</sup> This guarantee includes, inter alia, that judges, in the exercise of their functions, do not take as a basis the preconceived opinion that the accused has committed the offence of which he is accused.<sup>7</sup> The presumption of innocence is violated by statements or decisions which give the impression that the person concerned is guilty, lead the public to believe that he is guilty or anticipate the assessment of the facts by the competent judge.<sup>8</sup>

## 3. Charter of Fundamental Rights of the European Union

Besides the German Basic Law and the ECHR, the third source of the presumption of innocence in Germany is Article 48(1) of the EU Charter of Fundamental Rights (EU Charter). It has almost the same wording as the corresponding provision in the ECHR:

Everyone who has been charged shall be presumed innocent until proved guilty according to law.

The EU Charter was proclaimed in 2000 and declared legally binding by the Treaty of Lisbon by elevating it to the status of primary Union law as supranational law.<sup>9</sup> It entered into force on December 1, 2009. However, the scope of application of the EU Charter is different to the national constitution and the ECHR: Under its Article 51(1), the provisions of the EU Charter are addressed to the institutions, bodies, offices and agencies of the European Union and to the Member States *only when they are implementing Union law*. Thus, the EU Charter does not protect the individual outside the scope of application of EU law.

Substantially, Article 48 of the EU Charter is meant to be ‘the same as Article 6(2) and (3) of the ECHR’ according to the commentary provided in the Official Journal of the European Union.<sup>10</sup>

<sup>5</sup> ECtHR, Feb 27, 1980, 6903/75 – Deweer v. Belgium; ECtHR, March 25, 1983, 8660/79 – Minelli v. Switzerland; ECtHR, April 23, 1998, 159/1996/778/979 – Bernard v. France.

<sup>6</sup> ECtHR, March 30, 2010, 44418/07 – Poncelet v. Belgium.

<sup>7</sup> ECtHR, December 6, 1988, 10690/83 – Barberà, Messegué and Jabardo v. Spain.

<sup>8</sup> ECtHR, October 28, 2004, 48173/99 – Y.B. and others v. Turkey.

<sup>9</sup> One of the main features is the ‘direct domestic effect’ of EU law within the EU member states, cf. the key decision ECJ of Feb 5, 1963, C-26/62, ECLI:EU:C:1963:1 – van Gend en Loos.

<sup>10</sup> Official Journal of the European Union 2007, C 303/30.

Therefore it has ‘the same meaning and scope as the right guaranteed by the ECHR’. This is why reference can be made to the above explanations.

## II. Legal remedies against infringements of the presumption of innocence

Having direct effect in favour of the individual, any accused person can invoke the presumption of innocence before any German prosecution service, court or other administrative authority. However, this paper is limited to considerations of constitutional reliefs and remedies under European law.

### 1. Constitutional complaint under German law

Article 93(1)(4a) of the German Basic Law provides for the legal remedy of constitutional complaint (*Verfassungsbeschwerde*) to the German Federal Constitutional Court in Karlsruhe. It may be invoked by any person alleging that one of their fundamental rights has been violated by any public authority. The problem is that the presumption of innocence is derived from the rule of law (vide supra I 1) and that this principle is no fundamental right but merely features objective character, i.e. it binds all state authorities but does not entitle individuals. A constitutional complaint based on violation of the rule of law would not be admissible, let alone founded. Under German legal doctrine, the ‘vehicle’ to get the constitutional complaint nonetheless going is to combine the rule of law with a fundamental right: This ‘agent’ is the catch-all provision of Article 2(1) of the Basic Law ensuring the general freedom of action. In conjunction with the principle of the rule of law, it puts the constitutional complaint into operation in favour of any individual for an alleged violation of the presumption of innocence.<sup>11</sup>

### 2. Remedies based on violation of the ECHR and the EU Charter

**a) European courts.** As a matter of course, a violation of the presumption of innocence can be invoked before the European Court of Human Rights in Strasbourg under Article 6(2) of the ECHR as well as before the Court of Justice of the European Union (CJEU) in Luxembourg under Article 48(1) of the EU Charter.

- However, the individual complaint to the ECtHR under Article 34 of the ECHR requires the exhaustion of all national legal remedies (Article 35(1) of the ECHR).
- And the jurisdiction of the CJEU is restricted to EU law and its implementation where criminal law is not yet a big issue.<sup>12</sup>

This begs the question of whether an infringement of the ECHR or the EU Charter can be invoked before the German Federal Constitutional Court in Karlsruhe.

**b) The ECHR before the Federal Constitutional Court.** As outlined above, as an international treaty the ECHR is restricted to the rank of an ordinary federal law in Germany. Therefore, it is as such no valid standard of review of the Federal Constitutional Court.<sup>13</sup> Nevertheless, the Court considers the ECHR to play a specific part among international treaties, since the protection of human rights is the core feature of the German constitution (vide Article 1(2) of the Basic Law).

<sup>11</sup> BVerfGE 78, 358 (370); 82, 106 (114).

<sup>12</sup> An important exception is the ‘European warrant of arrest’, cf. BVerfGE 140, 317 ff.

<sup>13</sup> BVerfGE 111, 307 (317).

As a consequence, Article 6(2) of the ECHR is deemed an ‘interpretative aid’ for the interpretation and application of domestic German law and esp. German fundamental rights.<sup>14</sup>

**c) The EU Charter before the Federal Constitutional Court.** During the past 40 years, the Federal Constitutional Court was not considering itself competent to review actions of the European Union. All the more, a constitutional complaint could not be based on an alleged violation of fundamental Union rights.<sup>15</sup> However, the First Senate of the Court has very recently changed its case law on this subject and used the Union’s fundamental rights as a standard for examination – provided that a specific branch of law is entirely harmonised (like e.g. data protection law).<sup>16</sup> When it comes to criminal law and the presumption of innocence, such a harmonisation will take time. For the time being, Article 48(1) of the EU Charter is not likely to play an important part in German law.

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<sup>14</sup> BVerfGE 111, 307 (328 f.); 128, 326 (367 ff.).

<sup>15</sup> BVerfGE 110, 141 (154 f.).

<sup>16</sup> BVerfG, decision of June 11, 2019, 1 BvR 276/17, NJW 2020, 314 (not yet published in BVerfGE).