THE PRESUMPTION OF INNOCENCE WITH GENERAL PRINCIPLES: A REVIEW CONSIDERING THE COUNCIL OF STATE'S DECISIONS

(Genel Prensiplerle Masumiyet Karinesi: Danıştay Kararları Açısından Bir Değerlendirme)

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ABSTRACT

The presumption of innocence is accepted by its position in all international and regional human rights treaties as a standard of fair trials, which similar to that Continental Law System. According to Anglo-Saxsons Law System, the presumption is described in principle of burden and standard of proof. Whereas; the presumption of innocence in every legal system may not be understood as an accepted by Anglo-Saxons and Continental Law Systems. A level of abstraction is necessary, for accepted to common principle, a search for the minimum standard that universally hold. According to this minimum standard level; the presumption has long been regarded as fundamental to protecting accused persons from wrongful conviction; and the basic principle is that the accused is to be considered innocent until proven guilty of a criminal offer. Understanding the presumption of innocence is possible with determining the nature of the right. In this article, the presumption of innocence considering the Council of State decision is examined. There are general principles in first part, the purposes of the presumption of innocence in second part, presumption in administrative law jurisdiction in third part and the Council of State decisions in fourth part.

Keywords: The presumption of innocence, the purposes of the presumption of innocence, presumption of innocence in administrative law jurisdiction, presumption of innocence in Council of State decisions, philosophy of the presumption of innocence, doctrine of the presumption of innocence, burden of proof, standard of proof.

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ÖZ

Masumiyet karinesi, tüm uluslararası ve bölgesel insan hakları sözleşmeleri tarafından, Kıt'a Avrupası Hukuk Sistemiyle benzer bir biçimde, adil yargılanma hakkının unsuru olarak tanınmaktadır. Anglo-Sakson Hukuk Sisteminde ise karine, ispat yükünü ve standardını belirleyen bir ilke olarak kabul edilmiştir. Buna karşılık her hukuk sisteminde masumiyet karinesi, Anglo-Sakson ve Kıt'a Avrupası Hukuk Sistemlerinin öngördüğü şekilde kabul edilmeyebilir. Karinenin ortak bir değer olarak kabul edilebilmesi, belirli bir düzeyde asgari mutabakat seviyesinin belirlenmesiyle mümkündür. Bu asgari mutabakat seviyesine göre karine, suç ile itham edilenleri, yanlış mahkûmiyetten koruma amacına hizmet eder ve kişinin, suçlu olduğu kanıtlanıncaya kadar masum sayılmasını sağlar. Masumiyet karinesinin anlaşılabilmesi, ilkenin doğasının tespit edilmesiyle mümkündür. Bu makalede, Danıştay içtihatları ışığında masumiyet karinesi inceleme konusu yapılmıştır. Makalenin birinci kısmında genel prensipler, ikinci kısmında masumiyet karinesinin amaçları, üçüncü kısmında idari yargıda masumiyet karinesi ve dördüncü kısmında Danıştay kararları yer almaktadır.

Anahtar Kelimeler: Masumiyet karinesi, masumiyet karinesinin amaçları, idari yargıda masumiyet karinesi, Danıştay kararlarında masumiyet karinesi, masumiyet karinesinin felsefesi, masumiyet karinesinin doktrini, ispat yükü, delil standardı.

INTRODUCTIOAN

Different meanings are attributed to the presumption of innocence in doctrine. It is not possible to give an alliance description on the point of definition, purpose, aim and nature of the presumption [2]. In the most general sense, the presumption of innocence expresses that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law [3].

In the 9th paragraph of the Declaration of the Rights of Man and of the Citizen, published as a result of the French Revolution, which started

2 Laudan, Laudan, **Truth, Error and Criminal Law: An Essay in Legal Epistemology**, Cambridge University Press 2006, p.92.

3 Jackson, D. John, Summers J. Sarah, **The Internationalisation of Criminal Evidence Beyond the Common Law and Civil Law Traditions,** Cambridge University Press 2012, p. 200; Lippke, Richard L., The Presumption of Innocence in The Trial Setting, **Tatio Juris Review** 2015, 28/2, p. 160; Campbell, Liz, Criminal Labes, the European Convention on Human Rights and Presumption of Innocence, **The Modern Law Review**, 76/4, p. 682.

with the motto "Equality, Freedom and Brotherhood", it was declared that everyone charged with a criminal offence would be presumed innocent until proved guilty according to law. The Declaration, seen as the most important contribution of Continental European Legal System to the presumption of innocence, also accelerated the announcement of another international manifesto[4].

In the first paragraph of Article 11 of the Universal Declaration of Human Rights, which was prepared by the United Nations and adopted at session held by the United Nations General Assembly on 10 December 1948, is deemed innocent unless found guilty by law.

In order to compensate for destruction caused by Second World War and to prevent such a devastation from happening again, some states signed the Council of Europe Statute in 1949 with the aim of establishing an organization. In the same year, it was decided to prepare a contract on human rights and founding states opened European Convention on Human Rights, where fundamental rights and freedoms were issued, on 4 November 1950, and the Convention entered into force on 3 September 1953. Including Turkey, it has signed a contract that also found all framer members. In the second paragraph of Article 6 of Convention (Article 6 § 2) ruled, everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

4 De Jong, F., Van Lent L., The Presumption of Innocence as a Counter Futual Principles, *Ultrecht Law Review*,V. 0/2, 2016, p. 36.
Summary of Historical Perspective: The first point of origin of the presumption of innocence, which is a long history and an ancient legal doctrine, is based on Hammurabi Laws. Anglo-Saxon Legal System has an important place in the development of the presumption, which was also found in Greek City States and Roman times (Gray, A. (2017), s. 1-2.). In Islamic Legal System, the presumption of innocence has found steady application ((Eş- Şeybani, M., (Translated by Mehmet Boynu Kalın), **Beyrut, Dar İbn Hazm**, V. X., p. 477-478; ŞEBBE Ö., (Translated by Mehmet Boynukalın), **Tarihü'l-Medine Daru'l-Uleyeyani**, V. II, p. 345-346; Erturhan, S. (2002), İslam Hukukunda Şüpheden Sanığın Yararlanması İlkesi (In Dubio Pre Reo), **Cumhuriyet University Review**, V. 6/2, p. 185; ARI, A. (2003), Hz. Ömer'in Ebu Musa El Eş'ariye Gönderdiği Mektubun Yargılama Hukuku Açısından Analizi, **Islamic Law Review**, V. 0/2, p. 94-96; ÇAYAN, G. (2016), **Adil Yargılanma Hakkı,** Istanbul, Legal Law Press, p. 16.). On the other hand, it is possible to say that Continental European Legal System has helped the development and expansion of the doctrine.In the 9th paragraph of the Declaration of the Rights of Man and of the Citizen, published as a result of the French Revolution, which started with the motto "Equality, Freedom and Brotherhood", it was declared that everyone charged with a criminal offence would be presumed innocent until proved guilty according to law. The Declaration, seen as the most important contribution of Continental European Legal System to the presumption of innocence, also accelerated the announcement of another international manifesto. In the first paragraph of Article 11 of the Universal Declaration of Human Rights, which was prepared by the United Nations and adopted at session held by the United Nations General Assembly on 10 December 1948, is deemed innocent unless found guilty by law.

The presumption of innocence is ruled as a fundamental right in Turkish Constitution 1982, in the fourth paragraph of Article 38. According to this article "No one shall be considered guilty until proven guilty in a court of law".

In the continuation of examination, the presumption of innocence in administrative jurisdiction will be made within the context of the Constitution and the European Convention on Human Rights. The general principles in first part; the purposes of the presumption of innocence in second part; the application of the presumption of innocence in administrative judgment in third part; the Council of State's Decision in fourth part are examined.

I. GENERAL PRINCIPLES

The presumption of innocence, with different meanings over time, can not be defined today simply by saying "no one is considered guilty until proven guilty in a court of law". First problem that arises when explaining meaning of presumption stems from its paradoxical nature. According to Weingend, its paradoxical nature is to protect the person accused of a crime against experiences and intuition [5]. On the other hand, Ferzan and Campbell argues that the presumption of innocence is a criminal law principle, which is used to balance the power of State to use force, to provide evidence, to access confidential information, to accuse, to apply protection measures, to find guilty and to punish.

While Constitution 1982 accepts the presumption of innocence as "No one shall be considered guilty until proven guilty in a court of law"; The European Convention on Human Rights regulates that " Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.".

If we act in the light of positive regulations, the Constitution and the Convention, within Weingend, Ferzan and Campbell's expressions, there must be a criminal charge for application of the presumption of innocence. As a rule, it is impossible to say that the presumption of innocence will find application if there is no criminal charge or accusation.

As it is seen, there is no hesitation in point where the presumption of innocence protects person suspected of committing a crime. The guarded person continues to be a reasonable suspect of the crime allegedly committed, while assuming that she or he is innocent. At this point, its paradoxical contradiction emerges. This contradiction can theoretically

5 De Jong, p. 37.

be explained by the hypothetical and non-cognitive normative character of the presumption of innocence[6].

There are different opinions about the presumption of innocence's normative character in legal systems. Continental European Legal System accepts it as a hypothetical starting point for a fair trial[7], whereas Anglo-Saxon Legal System recognizes it as a procedural protection[8]. European Court of Human Rights accepts like Continental European Legal System[9].

European Court of Human Rights has adopted various to define the content of the presumption of innocence. It discusses that three ways in which the content of the right has been defined: Firstly, a principle prohibiting official decisions reflecting guilt in the absence of a prior judicial determination; secondly, a principle placing the burden of proof on the prosecution and giving the defendant the benefit of any doubt; and lastly, a principle requiring presumptions of fact or law to be confined within reasonable limits. The second of these formulations, concerning the burden of proof, is more in line with the common law understanding of the presumption of innocence. However, it is the third formulation, concerning "presumptions", that has become the standard means in ECtHR cases for describing the content of the right protected by Article 6 § 2[10].

Leaving aside whether it is a procedural principle or a hypothetical starting point, the presumption of innocence is a principle to protect suspect's reputation[11]. As Weingend puts it, suspect is protected against experiences and intuition, thanks to it[12].

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6 De Jong, p. 37.

7 Jackson, p. 212.

8 De Jong, p. 37; Çayan, Gökhan, **Adil Yargılanma Hakkı, Legal Law Press** *2016, p.* 189; Sherman, J. Clarck, The Juror, The Citizen, and The Human Being: The Presumption of Innocence and the Burden of Judgement, **Cirim Law and Philos Review**, V. 0/ 8, 2014, p. 423.

9 Phillips/United Kingdom, A. N: 41087/97, 12/12/2001, § § 39- 40; Grayson and Barnham/ United Kingdom, A.N: 19955/05 and 15085/06, 23/12/2008, § § 37- 39; Poncelet/Belgium, A.N. 44418/07, 04/10/2010, § 50; Garycki/Poland, A.N.: 14348/02, 06/05/2007, § 68.

10 Stummer, Anrew, **The Presumption of Innocence Avidental and Human Rights Perspective**, Oxford and Portland, Oregon Press 2010, p. 89- 90.

11 Trachsel, Stefan, **Human Rights in Criminal Procedure,** Oxford University Press 2005, p. 164; Campbell, p. 684. Trachsel, S. (2005), *Human Rights in Criminal Procedure*, Oxford University Press, p. 164; Campbell, L. (2013), p. 684. In my opinion protecting the presumption of innocence involves taking steps to secure the liberty and reputation of the suspect. These measures can be both criminal and civil. On the criminal front, the protection of the freedom of the presumed innocent supposes the determination of the consequent offences. On the civil side, the protection of the presumption of innocence consists in the insertion of a repairing press release and the award of damages. These are additional measures to the main sentences.

12 De Jong, F, p. 7, 35. For Weigend, the fact that the presumption of innocence is a rule of

II. PURPOSES of the PRESUMPTION of INNOCENCE

The most generally recognized qualification of the presumption of innocence is that it serves as a safeguard against wrongful convictions. This conception focuses on the dangers inherent in conviction as such. It is the nature of consequences being found guilty of a criminal offence that is believed to necessitate the safeguarding of defendant from wrongful convictions by, firstly, adhering to the in *dubio pro reo* principle and, secondly, by burdening the prosecution with proving guilt and thereby defeating the presumption of innocence. Ashworth takes this rationale to be the first and foremost reason for recognizing the principle. To Van Sliedregt, the prohibition of wrongful convictions constitutes core of the presumption of innocence; the rule of in *dubio pro reo* is a direct deduction of this. Keijzer speaks of the right to be acquitted if the charge has not been legally and convincingly proved[13].

In Anglo-Saxon Legal System, the most obvious aim of the presumption of innocence is to protect an innocent from wrongful conviction [14]. This aim is also adopted to Continental European Legal System. Because the formal or informal registration of conviction may also result in plumbs such as censorship, social exclusion, stigmatization or disqualification from some forms of employment[15]. There must be strong reason for these results to be imposed on person. For this, the principle of proving guilt with precise and clear evidence has been accepted [16]. Trachsel acknowledges that the presumption of innocence is derived from the principle of protecting personal honor [17].

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procedure means that it applies 'from the initiation of a criminal process to its final conclusion'. According to him, the very aim of the presumption of innocence is to protect the suspect from overbearing situations as a consequence of state actions. Therefore, it prohibits state agents from taking action that necessarily presupposes that the suspect is in fact guilty. In this context Weigend defines the presumption of innocence as a 'counterweight' against all the real risks involved in an individualized suspicion (it puts his social status in jeopardy, it submits him to the State's vast powers, and it sets in motion processes possibly leading to conviction and detention).

13 De Jong, p. 34- 35.

14 Stummer, p. 29.

15 Asworth, Andrew, **Four Threats to the Presumption of Innocence,** Sweet and Maxwell Press 2006, p. 247; DE JONG, p. 36. Ashworth concludes that the application of the presumption of innocence to the pre-trial phase is dictated by the same aim that also underlies the interpretation of the presumption of innocence as a rule of evidence, that is: following up on the State's duty to recognize the defendant's legal status of innocence prior to conviction. (Asworth, A. (2006), p. 244). This is so because subjecting the individual to the vast state powers that are part and parcel of the criminal procedure seems to contradict the notion that only the court's decision occasions the consequences of the status of a guilty person (De Jong, F. (2016), p. 36).

16 Sherman, p. 434.

17 Trachsel, p. 164

Article 6 § 2 of European Convention on Human Rights (ECHR) safeguards the right to be "presumed innocent until proved guilty according to law"[18]. European Court of Human Rights (ECtHR) has accepted that the presumption of innocence has two aspects. According to first aspect, viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of the burden of proof; legal presumptions of fact and law; the privilege against self-incrimination; pre-trial publicity; and premature expressions, by the trial court or by other public officials, of a defendant's guilt. The second aspect of the protection afforded by Article requires that a person must be treated in a manner that is consistent with his or her innocence after the conclusion of criminal proceedings which have terminated in an acquittal or discontinuation. The extension of the protection of Article to subsequent non-criminal proceedings constitutes an important safeguard for the person's established innocence in relation to any charge not proven. In order for the second aspect of Article to be applicable to subsequent proceedings, the Court requires an applicant to demonstrate the existence of a link between concluded proceedings and subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyses the criminal judgment, to engage in a review or evaluation of the evidence in the criminal file, to assess the applicant's participation in some or all of the events leading to the criminal charge, or to comment on the subsisting indications of the applicant's possible guilt[19].

III. IMPLEMENTATION of the PRESUMPTION of INNOCENCE in ADMINISTRATIVE JURISDICTION

When a crime is mentioned, first thing that comes to mind as a charge in the Criminal Code. However, the area of punishment and crime is not limited to the Criminal Code regulations. In countries such Turkey, Germany, France, Britain and Spain punishment area is divided into three parts. These are classical punishment under criminal law, simple crimes or misdemeanors punishment under specific law,

18 Matijasevic/Serbia, A.N: 23037/04, ECHR 2006 A- X, § 49; Mokhov/Russia, A.N: 28245/04, 04/03/2010, § 32.

19 Tsvetkova and Others/Russia, A.N: 54381/08, 10/04/2018, § 192; Allen/United Kingdom (GC), A.N: 25424/09, § § 93 94; Kemal Coşkun/Turkey, A. N: 45028/07, 28/03/2017, § 41.

and administration punishment under administrative legislation[20]. It is necessary to determine whether the presumption of innocence will be applied in actions included in the administrative punishment area although an action is not regulated under the Criminal Code as a crime[21].

To brighten this issue, the concept of criminal charge, in other words definition of crime, must be determined. ECtHR explains incrimination in its autonomous interpretation principle. According to autonomous interpretation principle, the matter in dispute is evaluated free from national qualifications in a separate manner for each concrete event. The court explains the notion of incrimination essentially and establishes the notion of incrimination by going beyond is visible[22].

In order for an action to be considered as a criminal charge and the 6th article to be applied to case, one of three criteria needs to take place. These criteria do not have to take place in a cumulative way. Existence of a single criterion is enough for ECtHR to accept action as a criminal charge[23]. These criteria are classification of the offense in the law of the respondent state, the nature of the offense and the severity level of possible punishment[24].

20 Çayan, Gökhan, The Right to a Fair Trial, the Coverage of the Right and Application in the Tax Cases, Law and Justice Review, V. 0/12, 2016, p. 445-446.

21 Çayan, Tax Cases, p. 445 and Çayan, Gökhan, The Right to a Fair Trial in the Discrepancies Originating from Public Officials' Status Human Rights Review, V. 0/11, 2016.

22 Deweer/Belgium, A.N: 6903/75, 27/02/1980, § § § *k.b.a.*

23 Çayan, (Public Officials'), p.191; Çayan G., (Tax Cases), p. 453.

24 Çayan, (Public Officials'), p.192-193; Çayan, (Tax Cases), p.455. According to this; Firstly, Classification of the offence in the law of the respondent state; in this particular case, if the offence is classified as a crime in the law of the respondent state, it is sufficient to consider the act as a crime. There is no need for a further condition to take place. If an act is really classified as a crime by the law of the national legal system, the principles of criminal court will step in with the claim that particular offence took place and the investigation period about the person will begin. In a system where the right to a fair trial is granted to people from the point of the starting of the criminal investigation, the classification of the act as a crime in the national legislation is enough to apply the 6th article to the case. Likewise, the classification of the act that the person is claimed to commit as a crime in the national legislation generally causes the person to be exposed to criminal investigation and prosecution. If an act is not classified as a crime in the national legislation; then the attribution of the act needs to be determined by evaluating the act with regard to secondary and tertiary criteria. There are such cases that there may be doubt about if the act is classified as a crime in the national legislation or not. In such a case, an evaluation with regards to secondary or tertiary criteria will be inevitable(Çayan G. (2016), Public Officials', p.191; Çayan G. (2016), Tax Cases, p. 455.) Secondly, The Nature of the Offence; by taking into account the essentials such as the resemblance of the act to the acts that are classified as crime in the national law, how this act is tackled with in other conventional governments, what should be the response to such an act in a democratic nation, whether or not the act is a qualification that affects everyone in the society; the criteria used in determining the qualifications of the act is called nature of the

If an administrative offence contains one of the three criteria which determined by ECtHR, it should be accepted as a criminal charge and benefit from the presumption of innocence's guarantee. As a matter of

act criteria. In this scale, whether or not by taking the nature of the act into account the act should be considered a crime is emphasized. If the act resembles that are considered crimes in the national legislation or if there is a resemblance between the procedure that will be applied to the relevant act and the procedures that will be applied in case of punishments; the act is considered as a crime by its nature. (If there is no resemblance between the relevant act and the acts that are considered crimes in the national legislation, whether or not the act is considered in conventional governments or what should be the procedure for this kind of act in a democratic state of law should be considered and be determined if the act is a crime or not. Another essential that must be tackled here is that; moving from the fact that if the act has a qualification that will affect everyone, what should be understood from the notion of determining the qualification of the act. If the punishment given to this particular act can only be applied to a certain part of a society the discipline aspect of the act is considered dominant; and if the punishment given to this particular act can be applied to all people in the society, the crime aspect of the becomes dominant. However, particular crimes that the legislation assumes that they can only be committed by a certain type of people should not be considered in this scope. In the cases where these particular crimes are present, according to the dependence rule, other people can be punished too; because of this, all the society potentially becomes the object of this crime. For instance, because the punishment precluding lawyers from doing their duty only interest the lawyers, it is possible to say that this act's discipline aspect is dominant as it is not possible to punish people with this punishment who are not lawyers. On the other hand, the act of embezzlement is a deliberate crime. The perpetrator of this crime is the public official by law. However, if another person who is not a public official participates in the crime, he or she will too suffer the consequences that are pre-determined for this kind of an act according to the dependence rule (Çayan G. (2016), Public Officials', p.191-192; Çayan G. (2016), Tax Cases, p. 455).) And lastly, the type and the severity level of the possible punishment; the determination of the qualifications of the act by emphasizing the issues of the purpose of punishment and whether or not the punishment limits the freedom of the person is called the type and severity scale of the punishment. In this scale, the offence being charged is determined by taking the type and the severity of the punishment that will be given to the alleged crimes. ECtHR almost accepts all the acts that require punishments limiting the freedom of the person as criminal charges. However, it is not possible to say in advance that all the punishments limiting freedom originate from criminal charges; and for this reason, the 6th article of ECHR can be applied. For ECtHR determines the accusation's qualification by taking the severity and the longevity of the freedom limiting punishment. For instance, in an application, two days of freedom limiting punishment was not seen enough to incriminate the person; while in another application, 3 months long of a punishment was seen enough to be considered a crime. While the time period of the freedom limiting punishment is determined in terms of criminal charges, not the duration of the final punishment that is given should be taken into consideration, but the minimum punishment duration that can be given to the act in question according to the national legislation should be considered. For instance, if a person is given two days of imprisonment as a punishment as consequence of an act, does not allow the acceptance of the act in question to be considered as a criminal charge just because of the severity of the punishment. Only if three months of imprisonment can be given as the punishment for that person as the consequence of his act then should the act need to be evaluated as a criminal charge. In other respects, the basic qualification of the punishment is not enough to push the alleged offence out of the coverage of the 6th article. Likewise, the dire situation of the punishment that will be given as a consequence of an act is not mandatory for the 6th article to be applied to the case (Çayan G. (2016), Public Officials', p.192-193; Çayan G. (2016), Tax Cases, p.455).

fact, in the Jussila/ Finland case, ECtHR, accepted administrative fines as criminal charges according to these criteria[25].

In order to ensure the protection afforded by the presumption of innocence, a suspicion should not be considered guilty by criminal and public authorities and should not be treated as a convict until the guilt is fixed[26]. Because if judicial and public authorities are prejudicial, the protection afforded by the presumption can not go beyond theory [27].

It is not possible to say that the presumption of innocence will be applied in all administrative cases. In order for the presumption of innocence is applied in subsequent cases, there must be a reasonable link between the criminal case. Whenever the question of the applicability of Article 6 § 2 arises in the context of subsequent proceedings, victim must demonstrate the existence of a link, as referred to above, between the concluded criminal proceedings and the subsequent proceedings[28].

IV. The PRESUMPTION of INNOCENCE in the COUNCIL of STATE DECISIONS

A. Discussion of Acquittal

The main purpose of the presumption of innocence is to protect innocents from wrongful conviction. If a suspicious is found guilty in criminal proceeding, there is no doubt about an administrative case. Because protection afforded by the presumption of innocence is now disabled[29].

25 Jussila/Finland, A.N: 73053/01, 23/11/2006, § 38.

26 Allen/United Kingdom, § 94. The presumption of innocence also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been continued, from being treated by public officials and authorities as though they are in fact guilty of the offence with which they have been charged. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public.

27 Kürşat Eyol, A.N: 2012/665, 13/06/2012, § 29

28 Allen/United Kingdom, § 104. Whenever the question of the applicability of Article 6 § 2 arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require an examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyses the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt.

29 Atli Ali, A.N: 2013/500, 20/03/2014, § 35.

However, if a criminal case has ended with a result other than a conviction, the role of the presumption of innocence becomes more important in a subsequent administrative case. Here, it should be determined how the presumption of innocence should be applied in the administrative case.

Indeed, it is necessary to accept that the presumption of innocence continues in the cases where a crime is not fixed as a result of a criminal case or it is not possible to be certain that the crime was committed. This should be respected in the subsequent administrative cases, and the decisions other than convictions should not be discussed[30]. Turkish Constitutional Court ("Constitutional Court") also steadily emphasizes that a non-conviction decision from the criminal case will not prevent the imprisonment of administrative punishment, but the acquittal decision should not be discussed[31].

ECtHR has acknowledged in its case-law the existence of two aspects to protection afforded by the presumption of innocence: a procedural aspect relating to the conduct of criminal trial, and a second aspect, which aims to ensure respect for a finding of innocence in the context of subsequent proceedings, where there is a link with criminal proceedings which have ended with a result other than a conviction. Under its first aspect, the principle of the presumption of innocence prohibits public officials from making premature statements about defendant's guilt and the acts as a procedural guarantee to ensure the fairness of criminal trial itself. However, it is not limited to a procedural safeguard in the criminal matters: its scope is broader and requires that no representative of the state should say that a person is guilty of an offence before his guilt has been established by the court[32]. In that respect the presumption of innocence may be infringed not only in the context of the criminal trial, but also in separate the civil, disciplinary or other proceedings that are conducted simultaneously with the criminal cases. While the scope of first aspect under Article 6 § 2 of the Convention covers period in which a person has been charged with a criminal offence until the criminal proceedings are final, second aspect of the protection of the presumption of innocence comes into play when the criminal proceedings end with a result other

30 Ayyıldız Uğur, A.N: 2012/574, 06/02/2014, § 76.

31 Ayyıldız Uğur, § 79; Mustafa Akın, A.N: 2013/2696, 09/09/2015, § 41.

32 Konstas/ Greece, A.N: 53466/07, 24/04/2011, § 32: The presumption of innocence does not cease to apply solely because the first-instance proceedings resulted in the defendant's conviction when the proceedings are continuing on appeal.

than a conviction, and requires that the person's innocence *vis-à-vis* the criminal offence is not called into doubt in subsequent proceedings[33].

In the case of *Mr. Ahmet V. / Governorship of Şırnak*, the plaintiff's house in Şırnak was destroyed on the grounds that it was used as a shelter by members of the PKK terrorist organization. He applied to the Governorship of Şırnak with the request to compensate his damage caused by the demolition process under the provisions of the Law on Compensation of the Losses resulting from Terrorism and the Measures Taken against Terrorism (Law no. 5233 of 27 July 2004). Upon the rejection of the application, he filed a lawsuit at the Mardin Administrative Court.

Due to the same action, a criminal investigation was launched against him on the grounds that he committed the crime of helping the terrorist organization. The Diyarbakır First State Security Court stated that, 17/03/1999 and numbered 1998/304 M, 1999/44 D., the acquittal of the defendant (plaintiff) on the grounds that he committed the crime under the pressure of the PKK terrorist organization and there was no intention, and the acquittal decision was finalized without any appeal.

The Mardin Administrative Court, which resolved the claim for compensation from the merits, stated that *"In the subparagraph (e) of Article 2 of the Law No. 5233, it is regulated that damages which occur as a result of the people's own intention can not be compensated. The plaintiff condoned use of his house by members of the terrorist organization, and the damages caused*

33 Sekania/Austria, 25/08/1993, S. 266-A, § 30. In case of Seven/Turkey, ECtHR has been decided that both aspects also violated. The applicant applied to European Court of Human Rights, argued that the presumption of innocence was violated. ECtHR decided that, *"Regard being had to the disciplinary context of case, in which one of the legal grounds for the applicant's dismissal was "rape or sexual assault" under the disciplinary regulations, and the way in which the administrative court summarized the events of 12 April 2002, the statement that the applicant had intercourse with S.K. without her consent can not but convey to a reader of the judgment the impression that the applicant was guilty of raping S.K. There has been a violation of Article 6 § 2 of the Convention as regards its first aspect."* Having found that the first aspect was violated, the Court has also examined whether the second aspect has been violated by national court. ECtHR, in terms of the second aspect, decided that: *"The applicant explicitly argued before Supreme Administrative Court that he had been acquitted of all charges in criminal proceedings and that therefore the grounds of his dismissal under disciplinary regulations could no longer be considered compatible with the law. Against that background, the Court considers that Supreme Administrative Court needed to explain why it regarded that reasoning employed by disciplinary authorities and the first-instance court could continue to be in accordance with the law, although the applicant had been acquitted in the meantime in criminal proceedings. That was the only way it could have avoided situation complained of by the applicant, namely that he was left with two contradictory judgments. By keeping silent on that point, it missed opportunity to rectify previous reasoning, which the Court has already found incompatible with the presumption of innocence by virtue of the first aspect of Article 6 § 2 of the Convention, and therefore cast doubt on the applicant's innocence, which had already been established. The foregoing considerations are sufficient to enable the Court to conclude that there has also been a violation in respect of the second aspect of Article 6 § 2 of the Convention."*

by intentional behavior. For this reason, the procedure did not violate, and the case should be rejected.". In addition, the Administrative Court considered the State Security Court's decision, and stated that: "*Although the acquittal was decided due to the same action, it is clear that there was no complaint by the plaintiff that his house was used by members of the terrorist organization. It is therefore clear that the present damage occurred from own intent."*.

An appeal was filed by the plaintiff. The 15th Chamber of the Council of State, appealed that,12/09/2012 and numbered "2011/9635 M., 2012/5277 D.", the action was carried out with the pressure and the fear of the terrorist organization, which there was no intent and this matter was acquitted by the Diyarbakır State Security Court's decision, for these reason it decided that the Mardin Administrative Court's decision was unlawful. The Mardin Administrative Court, which did not comply with the Council of State decision, decided to reject the case like its first decision, 19/07/2013 "2013/851 M., 2013/1325 D.". The decision was appealed again by the plaintiff.

The Council of State Plenary Session of the Administrative Law Chamber, which examined the dispute from the merit and, has decided that: "*The discussing of acquittal in an administrative case linked to a criminal case is incompatible with the presumption of innocence and, it is not possible for an action that has been decided not to be intention as a result of the criminal proceedings. That the intentional element regulated in Law No. 5233 is not realized for the present case. Considering that the intentional element regulated in Law No. 5233 does not occur in terms of the plaintiff and that his acquittal was decided due to the same action, the damage must be compensated. For these reasons, it should be decided that the administrative court's decision is unlawful.*"

When determining whether the presumption of innocence has been violated, it is necessary to evaluate whether the court has charged with a crime and whether it questioned the acquittal decision[34]. There is no hesitation that the Mardin Administrative Court questions the acquittal and charges a crime in the case of *Mr. Ahmet V. / Governorship of Şırnak*.

Rules regarding the presumption of innocence in administrative jurisdiction clearly discussed in the case of *Mr. Seyit D. / Coordination Directorate of Gendarmerie*. The lawsuit was filed by the plaintiff, who served as a gendarmerie in İzmir, with the request for dissolution of the public service contract due to the negative results of archive

34 Altın Sebğatullah, A.N: 2013/1503, 02/12/2015, § 30.

research and security investigation at the İzmir Administrative Court. The reason for the negative evaluation of the archive research and the security investigation is that the criminal case ongoing against him on the allegation that the crime of "buying, accepting, possessing drugs and stimulants to use". The İzmir Administrative Court accepted the case on the grounds of although a public lawsuit- criminal case has been opened against him, the acquittal has been ruled as a result of the trial and there is no other criminal record, and the dissolution of the contract is contrary to the presumption of innocence.

The Izmir Administrative Court's decision was brought to appeal, and the Izmir Regional Administrative Court decided to reject the case on the grounds that although he was acquitted from the criminal cases, considering the nature of the public duty, the act of the dissolution of the public service contract is within the discretion of administration and there is no violation of the law. Although an appeal was filed against the decision by the plaintiff, the 12th Chamber of the Council of State decided to approve the İzmir Regional Administrative Court's decision and it was finalized.

It is possible to criticize the final decision under two headings in the case of *Mr. Seyit D. / Coordination Directorate of Gendarmerie*. Firstly, those who consider punishment as purpose and Retributivists say that main thing is the protection of the Act, and the State does not have a duty to protect the innocents. The common starting point of positioning is that wrongful conviction of innocents is unfair. If persecution increases in the State, or the State and legal system proves persecution, trust in justice is destroyed. Social crisis and turmoil arise where trust in justice is destroyed. When the social crisis can not be overcome with the shadow of justice, it turns into a swamp through the legal system. For this reason, the persecution should be rejected by justice. The state and Law can only be legitimate if they serve the purpose of glorifying human. Because the state and its laws gain meaning with the existence of the society formed by individual people. For this reason, it is not possible to say that the State has no purpose to protect the innocents[35]. In this case, despite the acquittal decision, a judgment was brought against the plaintiff in order to respect the discretionary power of the administration. Secondly, in the case of Seven/Turkey, the ECtHR ruled that the presumption of innocence was violated on the grounds that although clearing he/ she

35 Duff, R. Antony, **Punishment, Communication and Community**, Oxford Yayınları 2001, s. 510; Asworth, p. 50-52

was acquitted of all criminal charges during the appeal investigation, the applicant's innocence was suspicious and his/ her acquittal was questioned[36]. Likewise, the Constitutional Court made a similar decision in the application of Sebğatullah Altın[37].

The Constitutional Court, in application of Huseyin Sezer, has brought a different perspective to the old views. In the aforementioned application, the applicant alleged that the presumption of innocence was violated due to his conviction at the administrative court despite the acquittal decision of the criminal court. The Constitutional Court, which examined the application from the merits, decided as follows: *"When the statements in the Administrative Court are examined, it is seen that in addition to the discussion of the conclusion reached in the criminal court decision, caused the impression that the applicant committed the crime imposed on him. In this case, the acquittal decision became meaningless and the applicant's innocence was overshadowed; On the other hand, contradictory decisions between the two judicial branches as to whether the applicant committed the offense of violation of confidentiality was caused. Therefore, the second dimension of the presumption of innocence has been violated[38]."* However, in this decision, it is noteworthy that an evaluation was not made in terms of the standard of proof in the administrative courts and the criminal court[39].

36 Seven/Türkiye, 23/01/2018, A.N: 60392/08, § § 54-57.

37 Altın Sebğatullah, § 33.

38 Republic of Turkey Legal Gazette, Date: 23/10/2020, Numbered: 31280.

39 Assefa stated that presumption of innocence is a restatement of the rule that in criminal matters the public prosecutor has the burden of proving guilt of the accused for the accused to be convicted of the crime he is charged with. Burden of proof has two elements: the first element is evidentiary burden, i.e. producing evidence in support of one's allegation, while the second element relates to the burden of persuasion (also referred to as the legal burden), which is the obligation of the party to convince the court that the evidence tendered proves the party's assertion of facts. The allocation of burden of proof is complicated by factors, such as, affirmative defenses and presumptions which are exceptions thereby shifting the burden of proof to the defendant. Moreover, the determination of the elements of the crime is a formidable task because often, all the elements may not be found in a single provision that defines the crime. There is also lack of clarity regarding the rules and/or the practice relating to the standards of proof (ASSEFA S. K. (2012), The Principle of the Presumption of Innocence and Its Challenges in The Ethiopian Criminal Process, *Mirzan Law Review*, V. 6/2, p. 274). Burden of proof formulation originated in 1963 decision of the Commission in Pfunders Case. In that case, the Austrian Government alleged that the Italian courts had denied the presumption of innocence to six young men who had been convicted of the murder of an Italian customs officer. The Commission gave some general guidance on the meaning of Article 6 § 2: This text, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, requires firstly that court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged. In other words, the onus to prove guilt falls upon the prosecution, and any doubt is to the benefit of the accused. Moreover, the judges must permit the latter to produce evidence in rebuttal. In their judgement they can find him guilty only on basis of direct or indirect evidence sufficiently strongly in the eyes of the law to establish

Since I will examine this issue in the following sections, I do not give any further details here.

B. Standard and Burden of Proof in the Light of the Presumption of Innocence

According to the presumption of innocence, the burden of proof is in prosecution[40]. When the burden of proof [41] is removed from the prosecution to the defendant, the presumption of innocence is violated [42].

If the criminal trial is ended with a result other than a conviction, it is not for this reason that accused is convicted to pay compensation for the same events does not violate the Convention [43]. But even then, the burden of proof belongs to suspect is incompatible with the Convention [44].

Whenever the question of whether the presumption of innocence's effect on the burden of proof can be limited, various debates are raised in the doctrine. Because the burden of proof is removed from the prosecution to the defendant, it means that the presumption of innocence is limited.

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his guilt (Stummer A., (2010), p. 92). In Fameka İnş. Plastik San. ve Tic. Ltd. Application an administrative fine was imposed on the applicant in accordance with the Road Traffic Law, due to exceeding maximum permissible load weight. In lawsuit filed against this decision, first instance court decided to reject case on the grounds that there was no information and document to justify application and the decision was finalized. The applicant company filed an individual application to the Constitutional Court, claiming that it was the sender of cargo allegedly exceeding maximum limit, did not take any action on the carriage of cargo and the fines could not be imposed for this action that did not belong to its. The Constitutional Court ruled that the applicant's being the sender of item being transported was considered sufficient to impose the fines, in other words, the fact that being of a specific status (sender) was justified, in this case, it would not comply with the presumption of innocence (Fameka İnş. Plastik San. ve Tic. Ltd., A.N: 2014/3905, 19/04/2017, §§ 33, 34). Barbera, Messegue and Jabardo/Spain, A.N: 19590/83, 06/12/1988, § 77: The principle of the presumption of innocence requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defense accordingly, and to adduce evidence sufficient to convict him. Ringvold/Norway, § 38; Y./ Norway, § 41: Exoneration from criminal liability does not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof. Capeau/Belgium, A.N: 42914/98, 13/06/2005, § 25: The presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defense (Telfner v. Austria, § 15). The burden of proof can not be reversed in compensation proceedings brought following a final decision to discontinue proceedings.

40 Telfner/Austria, A.N: 33501/96, 20/06/2001, § 15.

41 Stummer, p. 92.

42 Barbera, Messegue and Jabardo/Spain, A.N: 19590/83, 06/12/1988, § 77.

43 Ringvold/Norway, § 38; Y./ Norway, § 41.

44 Capeau/Belgium, A.N: 42914/98, 13/06/2005, § 25.

According to Hart, society consists of one by one individuals. Onwards the restricted right belongs to individuals, the right of society will be limited. Since the limitation of the presumption of innocence also causes the rights restriction of the society and societies benefit does not justify the limitation of the presumption[45].

However, the dominant view in the doctrine admits that the presumption of innocence can be limited. In limitation of the presumption, "the theory of balancing" and "the competition of rights theory" or "optimisation requirements" have been introduced[46].

In my opinion, if there is a sentence of conviction thanks to criminal justice, a huge chaos occurs in the society. And this situation destroys the society and the State over time. For this reason, to apply the presumption of innocence broadly will increase their decisions with wrongful acquittal. Sometimes it can be said that it is better for ten criminals to be acquitted rather than being condemned to an innocent[47]. Sometimes there are thousands of criminals. Numbers are important. A system that allows thousands of criminals to be freed for fear of condemning an innocent may not be able to adequately protect the society. If the society is not sufficiently protected, social chaos becomes inevitable. For this reason, it is impossible to recognize the presumption of innocence as an unlimited right. If society requires benefit, the presumption of innocence can be limited and under certain circumstances, the burden of proof can be left to the defender.

Leaving aside the doctrinal debates, the ECtHR acknowledges that the presumption of innocence and the burden of proof can be limited by legal and actual (*de facto*) presumption. The ECtHR does not find it contrary to the Convention that person holding a certain amount of drugs would be punished for drug trafficking. In such cases, The Court decide that the burden of proof could be left to defender thanks to actual and legal presumption. Here, carrying a certain amount of drugs is the presumption of drug trafficking. Under normal circumstances, drug trafficking had to be proved separately. But thanks to a legal presumption, it was considered sufficient to carry a certain amount of drugs for crime[48].

45 Stummer, p. 38; Asworth, p. 107, 209.

46 Ibid.

47 Gray, A. (2017), p. 19.

48 As a known annulment actions concerning administrative acts that are brought by a person

The Council of State has ruled that the principle of innocence should also be applied in disciplinary penalties that are not linked to the criminal case. Accordingly, the disciplinary offence should be proved with certain, concrete, sufficient and convincing evidences which are beyond any doubt; otherwise, it is incompatible with the presumption of innocence[49].

In the case of *Mr Bayram Ç./ Governorship of Konya* it was opened by the plaintiff, who work as a police officer in Konya, with the request of cancellation of the disciplinary procedure regarding the punishment with a deferral of advancement to a higher rank for a period of ten months, as the disciplinary offence of causing a suspect to escape was committed.

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whose interests were violated, with the claim that act is illegal due to a mistake made in one of the elements of competence, form, reason, subject and aim. Administrative act takes advantage of the lawfulness presumption. The fact that the administrative acts takes advantage of the lawfulness cannot be interpreted as being obliged to prove plaintiff's justification under all circumstances. Because an administration authority, established an act, must demonstrate its compliance with the law. Especially in administrative disciplinary acts, the legality of sanction should be revealed. It is possible for administration rely on legal or actual (*de facto*) presumptions while demonstrating legality of act. In cases where legal and actual (*de facto*) presumptions are based, the burden of proof passes to plaintiff. While proving legality of administrative act by the administration, it is possible to rely on legal or actual (*de facto*) presumptions. In such cases, plaintiff has to prove that these presumptions are incompatible with truth and that the administrative act is unlawful. Here, it is necessary to evaluate whether the burden of proof is reversed, whether it complies with the presumption of innocence in terms of administrative offence or integrated administrative proceedings. In the Ahmet Altuntaş application, the Constitutional Court has accepted that the burden of proof can be reversed in administrative offence with legal and actual (*de facto*) presumptions. The Court also emphasized that plaintiff should be given opportunity to prove the opposite of the presumptions and not rely on they automatically. Otherwise, the presumption of innocence would be violated (Ahmet Altuntaş, A.N: 2015/19616, 17/05/2018, § § § 28, 29, 33). In the Application, the applicants who owned some agricultural land in Batman Province were punished with administrative fines on the grounds that stubble was burned in land. The applicants filed a case demanding the cancellation of the administrative fine in Batman Administrative Court. The Administrative Court, which decided the dispute in merit, decided to reject the case on the grounds of *"As a rule, only those who burn the stubble can be fined. It should be determined whether plaintiffs who are beneficial owner can be punished for this action. Following the action, crime scene was visited and those who burned the stubble could not be identified. It is clear that the stubble burner can be caught only in red-handed. It is understood that plaintiffs did not make any notice or complaint to the official authorities that the stubble was burned in lands. For this reason, it must be accepted that person who burns the stubble is the plaintiffs who are the beneficial owner (*Ahmet Altuntaş, § § 11-12.)*."*. The Constitutional Court, which found acceptable, decided that the presumption of innocence was violated by expressing: *"In the present case, Administrative Court found the applicants' ownership of the stubble-burned agricultural land sufficient to impose administrative fines. No evidence of perpetrator has been identified. The actual presumption that action was carried out by property owners was used by the court of instance. The court used actual presumption that the crime was committed by the property owners. With the actual presumption, the applicants were automatically convicted. This situation made the applicants disadvantaged against administration in terms of defense and actual presumption used in evidence violated the presumption of innocence"*.

49 5th Chamber of Council of State, 10/12/2018, 2016/15716 M, 2018/ 19173 D; 5th Chamber of Council of State, 14/12/2017, 2016/15214 M, 2017/24214 D.; 5th Chamber of Council of State, 09/01/2019, 2016/24288 M, 2019/188 D.

The Konya 2nd Administrative Court, 13/12/2011 and numbered 2011/1396 M., 2011/2077 K., decided to reject the case on the grounds of "After receiving the doctor's report of the suspect, he/ she was handed over to the plaintiff at the Public Security Bureau, and this action was attached to a report in which there were the signatures of two police officers and the plaintiff. Accordingly, it is clear that the captured person was delivered to the plaintiff and the suspect escaped after the delivery process took place. For these reasons, the present case is rejected.".

The 5th Chamber of the Council of State, which examined on appeal, reversed the Konya 2nd Administrative Court's decision, 10/12/2018 and numbered 2016/15716 M, 2018/18173 D. The Chamber ruled that: "Although it was stated that the two police officers handed over the suspect to the plaintiff, this was not clear and, the statements of both police officers' expressions about the present event contradict each other. Whereas the disciplinary offence should be proved with certain, concrete, sufficient and convincing evidences which are beyond any doubt; otherwise, it is incompatible with the presumption of innocence, it is not clear whether the suspect was actually delivered to the plaintiff in the present case. For these reasons that the Konya 2nd Administrative Court's decision, which is incompatible with the presumption of innocence, is unlawful.".

As a known if the criminal trial is ended with a result other than a conviction, it is not for this reason that accused is convicted to pay compensation for same actions does not violate the Convention[50]. But even then, the burden of proof belongs to suspect is incompatible with the Convention[51].

In the case of *Mr. Kadir O. Ö./ İstanbul University*, the plaintiff, who served as a computer operator within the defendant administration, was punished with public service dismissal on the grounds that he committed the crime of organizing a false diploma and military service document. Due to the same crime, a criminal investigation was started against the plaintiff and it was decided by the Istanbul Public Prosecutor's Office in 09/02/2009 that there was a decision not bring a prosecution bring the suspect as there was not enough evidence to file a criminal case.

The plaintiff filed a lawsuit at the Istanbul 4th Administrative Court for the cancellation of the punishment, which is public service dismissal

50 Ringvold/Norway, § 38; Y./ Norway, § 41.

51 Capeau/Belgium, A.N: 42914/98, 13/06/2005, § 25.

penalty. The case was rejected on the grounds that his fake diploma and military service documents were reflected in the television program, the notes containing the student's names and receivable and debt information were included in his special agenda, and that he committed a crime with these actions. The 8th Chamber of the Council of State, which examined the plaintiff's appeal, ruled that the first-instance court's decision to be reversed by stating that there was a decision not bring a prosecution bring the suspect before a criminal court proceeding and that the crime had not been committed with the decision of 22/06/2010, 2010/817 M., 2010/3680 D. The Administrative Court, which did not comply with the Council of State's decision, decided to reject the case like its first decision. This decision was appealed again by the plaintiff and, The Council of State Plenary Session of the Administrative Law Chamber approved to it, 09/06/2014, 2012/484 M., 2014/2554 D.

The Administrative Court and the Chamber found the images about the plaintiff and some notes in the special agenda sufficient for disciplinary action without implying that the crime was committed. Thus, the difference in the standard of proof between a criminal proceeding and an administrative proceeding has been clearly demonstrated.

In some disputes, the Council of State ruled that in an administrative case linked to a criminal case, the decisions made without examining the evidence contained in the criminal court's file are contrary to the presumption of innocence[52].

C. The Effect of Prejudicated Declarations on the Presumption of Innocence

The presumption of innocence prevents the use of prejudicated declarations relating to a criminal case. Apart from a criminal case, prejudicated declarations should also be avoided in context of subsequent administrative cases and offences[53].

In ECtHR, a common and influential formulation of the presumption of innocence states that an official decision should not reflect opinion that defendant is guilty, unless the guilt of defendant has previously been determined according to law[54].

52 For example: 8th Chamber of Council of State, 17/06/2016, 2015/10534 M., 2016/7018 D.; 8th Chamber of Council of State, 17/06/2016, 2015/14482 M., 2016/7019 D.

53 İsmoilov and Others/Russia, A.N: 62902/00, 27/11/2003, § 160.

54 Stummer, p. 90.

The presumption of innocence can be violated from not by court members and prosecutors but by other public officials prejudicated declarations[55]. According to the ECtHR, Article 6 of the Convention prohibits public officials from making prejudicated declarations regarding the ongoing trials[56]. For this reason, public officials must pay attention to words when making statements about ongoing trials[57].

Court members' statements should be examined more strictly than those of the prosecutors and other public officials. Indeed, the ECtHR stated that court members should be more careful and attentive than other public officials in interim decisions, hearing, press statements or in any form[58]. Interim decisions or hearing statements that action was carried out before decision was made do not comply with the presumption of innocence[59].

There are different details in the doctrine on this subject. Even though Weigend, like Keijzer, qualifies the presumption of innocence as a rule of procedure, he considers that this rule does not restrict anyone (e.g. the media) but the judicial authorities in expressing an opinion as to the guilt of the defendant. The fact that the presumption of innocence is a rule of procedure means that it applies 'from the initiation of a criminal process to its conclusion' and only addresses the judicial authorities in their dealings with the suspect/defendant. Likewise, Ashworth finds that the principle's aim – due respect for the legal status of innocence, necessitated by the harm done by a conviction and the proper relationship between State and individual– also prevents public officials from making statements on the guilt of the defendant[60].

In the case of *Mrs. D.A./ Governorship of İstanbul*, due to the press statement made by the Istanbul Governor about the plaintiff attending the meeting in Taksim Square, it was requested to decide to pay TL 100.000,00 for non-pecuniary damage suffered as a result of the violation of the presumption of innocence.

The Istanbul Governor made the following statement about the plaintiff: *"There is a girl whose name is D. K. Everyone writes a lot of columnists*

55 Daktaras/ Lithuania, § 42.
56 Butkevicius/Lithuania, A.N: 48297/99, 26/06/2002, § 53; Daktaras/ Lithuania, § 41.
57 Fatullayev/Azerbaijan, A.N: 40984/07, 22/04/2010, § 159.
58 Pandy/Belgium, A.N: 13588/02, 12/02/2007, p. 43 (Stummer, p. 67).
59 Nerattini/Greece, B.N: 43529/07, 18/12/2008, § 88.
60 De Jong, p. 37-38.

and stuff. They say that she was an innocent teenager who was injured while going to his aunt's house. Once you will learn the events well. I say clearly: I will say all the words clearly today. Everybody hears. No one should try to mislead the conscience of Turkish Nation with asparagas, fabricated, speculative words. Today I am telling the truth as the governor of this State. Share them honestly with our nation! Since you put the cameras in front of me. Get over my words to people. D.K. is a 19-year-old and a member of the terrorist organization. When I say a member of the terrorist organization, what I mean is this: is a marginal group member. She is in fighting. There are images of the Ihlas News Agency yesterday's recording that she clashed with the police. Therefore, she is not a girl who goes to her aunt with her mother. She is a radical member and has images that throw stones at our police. We wouldn't want such a problem to happen. A stone or something else thrown by her friends. We are trying to investigate but she is a member of radical terrorist organization.".

The 5th Istanbul Administrative Court, which examined the case of merit, ruled the following decision, 23/03/2015, 2014/1523 M., 2015/530 D. : *"The statement by Governor is that D.K. is a member of the terrorist organization, is far from reflecting the visible truth about D.K., whose discourse has no criminal record. According to International Human Rights Conventions, no one is considered guilty until proven guilty in a court of law. A criminal investigation against D.K. is still ongoing and, there is no previous conviction that the plaintiff was a member of the terrorist organization. Holds that the respondent administration is to pay the plaintiff, TL 10.000,00 in respect of non-pecuniary damage.".* Although an appeal was filed by the defendant administration against the decision, the 10th Chamber of the Council of State approved it.

CONCLUSION

The presumption of innocence, which is based on the suffering caused by injustice, the dignity of personal honor and biased jurisdiction, has been accepted in almost all modern legal systems.

There is no hesitation in point that the presumption of innocence will become effective with criminal charge. But here there is a contradiction in how crime charge should be interpreted. Is criminal charge limited only to Criminal Code?

The area of punishment and crime is not limited to Criminal Code regulations. In countries such Turkey, Germany, France, Britain and Spain punishment area is divided into three parts. These are the classical punishment under criminal law, the simple crimes or misdemeanors

punishment, and administration punishment under administrative legislation. Therefore, while evaluating criminal charge, not only Criminal Code should be limited, but also the presumption should be applied in other punishment areas.

Will the accusation of crime that will make the presumption of innocence change from day by day or from society to society? Here, let's move on the action of passing (continue driving) in red light. Let me assume that the penalty for the action of passing red light in country A is a fine, there is a three-day imprisonment in country B, and there is no penalty for this action in country C. In country C, there is no doubt that the presumption of innocence will not find application since action is not included in any punishment. On the other hand, it is easy to say that for country A, which regulates three-day imprisonment that deprives the human of liberty, this action is an accusation of crime and that the presumption of innocence will come into effect. So, what would be fact in country A, which regulates a fine for action?

Before moving on to country A, we have found that crime charges have changed from country to country. Because in example there is a criminal charge in country B and the presumption of innocence will find application area; in country C, since action is not included in any punishment area, it is not possible to say coming into effect the presumption of innocence. Let's assume that country C has made an amendment and has determined the equivalent of action as two months imprisonment. In this case, according to the severity of crime and punishment, action is now a criminal charge for country C and the presumption of innocence will find application. As can be seen, while the presumption of innocence for the same action previously did not work, it became operational with new regulation in country C. In this case, it is also possible to say that the applicability of the presumption of innocence varies from time to time.

So, will fines in country A be considered as criminal charges? In the Kangers v. Latvia application, the European Court of Human Rights accepted such a case as a criminal charge and decided that the presumption of innocence would be applied. I agree with the same view as the Court of Human Rights and that the presumption of innocence will find application in administrative fines.

Nowadays, presumption of innocence is applicable in many disputes within administrative jurisdiction. Administrative courts, which aim to

establish rule of Law, have to prevent administrative acts contrary to presumption of innocence, while controlling the legality of this acts.

So, does administrative court have to self-examine whether an administrative act is accordance with presumption of innocence, even if it has not been argued by plaintiff?

As it is known, self-examine procedure is valid in Turkish Administrative Jurisdiction. In this procedure, a judge examines whether procedure is lawful, regardless of parties' claims and arguments. While conducting a trial, it is necessary to evaluate whether important human rights have been violated by administrative act.

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