

THE DEFENDANT'S RIGHT TO REMAIN SILENT AND NOT INCRIMINATE HIMSELF ACCORDING TO THE CRIMINAL PROCEDURE CODE. THE RESPECT OF THE PROVISIONS OF ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS¹

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Abstract: A defendant's right to remain silent regarding the actions for which he is prosecuted and to not contribute to his own incrimination represent essential aspects of an equitable criminal procedure law. The article aims to discuss the extent to which the provisions of the Criminal Procedure Code are violated, as well as the provisions of the European Convention on Human Rights in this matter. Based on the right to remain silent and not incriminate oneself as regulated in article 6, the criminal investigators are prevented from obtaining evidence by defying the will of the culprit and not to testify against him. Each accused individual has the right to remain silent and not incriminate himself, although the provisions of article 6 of the European Convention on Human Rights does not expressly mention this right, it is acknowledged by international legal regulations which are found at the center of the concept of equitable trial. The Romanian legislator should take a closer look at the provisions of the Romanian procedural code that currently establish these procedural measures and corroborate them with those of the Romanian Constitution and those of the ECHR.

Key words: Public Law, Criminal Law, Defendant's right to remain silent, Criminal Procedure Code, European Convention of Human Rights.

Introductory notes

Across time, almost all European procedural laws acknowledged the defendant's right to not incriminate himself, by remaining silent and ensuring access to legal assistance from the early stages of an investigation.

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The system of the European Convention on Human Rights regulates the right to an equitable trial in two regards: a wide meaning, stating that it entails all guarantees regulated by article 6 first paragraph, namely any person's right to equitable trial by an independent and impartial court, publicly and within a reasonable term, in regard to civil rights and obligations or any criminal charge; article 6 second paragraph states any individual who is accused of committing a crime has the right to be presumed not guilty until his guilt is legally established, by definitive court decision; article 6 third paragraph regulates some special guarantees in criminal matter, namely: any accused has the right to be informed of the nature and cause of his accusation in a language he understands, he must be ensured the time and necessary means to prepare his defense; he must be assisted by a chosen defender or assisted by a public defender free of charge, he must be able to question de prosecutor's witnesses and has the right to the hearing of his witnesses in the same conditions; he can be assisted by a translator without pay, if he does not understand the language of the court hearings³.

In national law, along with the suspect or defendant's right to remain silent (article 78 Criminal Procedure Code and article 83 first alignment letter a of the Criminal Procedure Code), the lawmaker has acknowledged, on a declarative level, the witness's right to not incriminate himself (article 118 of the Criminal Procedure Code).

On a simple reading of article 118 of the Criminal Procedure Code regarding the witness's right not to incriminate himself, we note that this procedural regulation conflicts with the right to an equitable trial, in which the presumption of innocence needs to be effectively respected with all its components and the right to a defense must benefit from all its values, according to the provisions of article 21 of the Romanian Constitution corroborated with those of article 6 of the European Convention on Human Rights.

The right to not self incriminate oneself and to refuse incriminating statements results from the very acknowledgement of the principle according to which the accused is not held to prove his innocence, as it is the duty of investigators to prove the deed without any help from the accused party. Beyond the specific manifestation and the meaning of the right to not self incriminate, of the same importance is the correlative obligation of the judicial investigators to ensure the defendant with the complete exercise of this right.

In national law, the obligation to warn the suspect or defendant on the right to remain silent is found in the provisions which regulate the right to a defense, in article 10 fourth alignment of the Criminal Procedure Code, thus the criminal investigators are held to inform the defendant of his right to remain silent, before the hearing of the suspect or defendant.

³ C. Birsan, *European Convention on Human Rights, Comments by articles*, Second edition, C.H.Beck Publishing House, 2010, page 359

The defendant's right to remain silent is a right which results from the provisions of article 6 of the European Convention on Human Rights; in national law, similar regulations are found in the Criminal Procedure Code, as it is an essentially procedural guarantee which exists and causes consequences only in the context of a criminal trial.⁴ A suspect's right to remain silent in regard to the deeds he is accused of and to not contribute to his own incrimination are essential aspects of an equitable procedure in the criminal trial. The European Court has constantly ruled that, even if article 6 of the Convention does not expressly regulate these rights, they are generally acknowledged regulations, which are the center of the notion of an equitable trial, as regulated in this text.

The reason for their acknowledgement is the need to protect the accused person of committing a crime from pressure from the criminal investigators, in order to avoid any judicial error in criminal trials and to allow the fulfillment of the purposes regulated in article 6 of the Convention.

The European Convention has shown that, on one hand, it is obviously incompatible with the demands of the Convention for a conviction to be exclusively or essentially based on the silence of the defendant, his refusal to answer questions or to testify in court; on the other hand, it is similarly obvious that these interdictions might prevent the court from considering the silence of the interested party in situations which require an explanation in order to appreciate the force of persuasion of the elements of the accused file⁵. There is no clear distinction between these two situations, thus "the right to remain silent" must not be seen as an absolute right.

Preliminary aspects

First, we must discuss the extent to which the right to remain silent must be respected and the right not to incriminate oneself in the time previous to the criminal court, namely before the criminal investigation. The philosophy of the Romanian lawmaker was that of acknowledging the right to remain silent only for the suspect or the defendant, thus, in order to discuss the existence and exercise of such a right, we must get past the time of the *in personam* criminal investigation, according to article 305 third alignment⁶ of the Criminal Procedure Code.⁷

⁴ F. Sudre, *European and International law of human rights*, Polirom Publishing House, Iasi, 2006, page 297

⁵ C. Birsan, *op. cit.*, page 515

⁶ Also see *Decision no 111 of February 28th, 2019*, regarding the non-constitutionality exception of the provisions of article 10 first and fifth alignments, articles 33 and 88 first alignment, article 305 third alignment and article 309 first alignment of the Criminal Procedure Code.

⁷ Article 105 third alignment of the Criminal Procedure Code states that: „ *when there is evidence to prove reasonable doubt that a certain person committed the crime for which he is investigated and none of the cases regulated in article 16 first alignment apply, the criminal investigator continues the inquiry, thus the*

What is relevant in this matter is knowing to what extent the criminal investigators would be obliged to respect a *de facto* but not *de jure* suspect's right to remain silent, by considering the fact that the lack of the official quality of suspect is the result of the lack of manifestation of will of the same criminal investigators, by failing to issue the ordinance mentioned in article 305 of the Criminal Procedure Code. If they were to disregard this interdiction of hearing witnesses of those who is the *de facto* suspect, the criminal investigators are in the situation of irrevocably affecting the right to an equitable trial, even in case those statements are not used as evidence.

Although internal law regulates, in article 118 of the Criminal Procedure Code⁸ the „witness's right to not incriminate himself“, it expressly mentions the impossibility to use the statement of a witness who subsequently became a suspect or defendant, as things are not so simple as the text would let us believe. This is because the legal solution of article 118 of the Criminal Procedure Code does not regulate the right of the witness to not give a statement which would incriminate him and to benefit from the assistance of a lawyer; at the same time, the criminal investigator's obligation to warn the individual of this is missing and the sanction of such statements is deceptive, thus allowing the use, in a criminal trial, of illegally obtained evidence. Criminal procedural law offers a remedy in the provisions of article 118 and 109 third alignment, according to which the witness's statement given in the course of a *in rem* criminal investigation by a person who, within the same investigation has subsequently become a suspect as a result of that statement can't be used against him and, in the course of the hearing, namely after the criminal investigation begins *in personam*, the suspect can exercise his right to remain silent in regard to any of the facts and circumstance about which he is questioned. As a result, the lawmaker has regulated the suspect's right to not contribute to its own accusation, a fact which represents an essential element of the right to an equitable trial.

Maybe the best example in this matter is the case Brusco vs. France⁹. Although a statement from the injured party exists which implicates Brusco in committing the crime of attempted murder, as well as the statement of a co accused which indicated that he had hired Brusco to commit the crime, the criminal investigators had heard the defendant as a witness and subsequently used his statements against him, including in order to indict him and subsequently convict him. Under these circumstances, the Court appreciated that, when the defendant was detained

person becomes a suspect. The measure undertaken by the criminal investigator is subject to confirmation by the district attorney within 3 days, as the investigator is held to present the file of the cause to the district attorney."

⁸ Article 118 of the Criminal Procedure Code: "A witness statement given by a person, who had the capacity of suspect or defendant before such testimony or subsequently acquired the capacity of suspect or defendant in the same case, may not be used against them. At the moment when they record the statement, judicial bodies are under an obligation to mention their previous capacity."

⁹ V. Pușcasu, *The right to remain silent and not incriminate oneself*, A collection initiated and coordinated by Sergiu Bogdan, Universul Juridic Publishing House, Bucharest, 2010, page 147

and had to be sworn in, he was under criminal investigation and benefited from the right to remain silent and not contribute to his own incrimination, as regulated by article 6 first and third paragraphs of the Convention.

Sanctions for violating the right to remain silent and to not self-incriminate

In order for the right to remain silent and not self-incriminate oneself to not remain unachievable and doubtful, but to manifest as an effective and specific guarantee, the procedural provisions are not enough, as certain legal tools are required which are meant to ensure efficiency, namely the Romanian lawmaker should study the international regulations in this matter, by identifying the inconsistencies which occur in practice; at the same time, the lawmaker should regulate sanctions in order to remove the consequences of this legal guarantee. We can distinguish between two categories of regulations: those of substantial law, which attract responsibility from the person who violated the right to remain silent and not incriminate, as well as essentially procedural provisions whose effect is that of sanctioning the validity of evidence and procedural acts which impair on the previously mentioned right¹⁰. The criminal law regulations send us to the provisions of the special part of the Criminal Code, namely those in the category of "Crimes against performing justice". The judicial object of the crimes against performing justice is the ensemble of social relations which are performed in regard to ensuring justice, independence, impartiality and efficiency in the process of enforcing laws, by criminally sanctioning the deeds which are likely to seriously influence, ignore or undermine the authority of justice. The crime of abusive investigation, stated in article 280 of the Criminal Code¹¹ has, as a judicial special object, the social relations regarding the activity of performing justice, an activity whose normal performance is incompatible with the use of illegal means against the individuals who are investigated or tried in a criminal case.

The crime of abusive investigation can only be committed by a public servant who, according to the law and his duties, performs activities of criminal investigation or criminal trial. The criminal investigators are divided in: criminal investigators of judicial police and special criminal investigators (for example, specialized workers of the Internal Affairs Minister specifically appointed by the

¹⁰ For a similar classification, see G. Theodoru, *Criminal Procedure Treaty*, Hamangiu Publishing House, Bucharest, 2007, page 495

¹¹ Article 280 of the Criminal Procedure Code states in the first alignment that : (1) The use of promises, threats or violence against a criminally investigated person by an investigator, prosecutor or judge, in order to force a statement or confession, a false statement or retraction of a statement, is punishable by incarceration from 2 to 7 years and the interdiction of holding a public office. (2) The same sanction is applied to the fabrication, falsification or creating false evidence by a criminal investigator, a prosecutor or a judge.

General Prosecutor or the case prosecutor, the preliminary chamber judge or the rights and liberties judge).

The typical version of this crime entails the existence of an essential condition regarding the time when the deed was committed. This results from the quality of the secondary passive subject, who can only be a criminally prosecuted or tried person; thus, it results that the criminal investigation had already began at the time the crime was committed and the deed was committed until there is a definitive court decision in the case, ruling in any of the solutions stated in article 396 of the Criminal Procedure Code¹². A deed which was committed before the beginning of the criminal investigation will be the one regulated by article 272 of the Criminal Code – influencing the statements, if all other elements of the crimes are present.

Conclusions

For a long time, the Romanian criminal procedure law contained no regulation of the right to remain silent and not incriminate oneself, thus lacking any historical tradition of this procedural guarantee in the internal system of law, built on an inquisitorial procedural model, in which the suspect or the prosecuted individual would talk to the judicial investigators¹³. Despite the obvious evolution of laws, the new regulation does not bring any light to this subject, as the lawmakers provided no explanation for the numerous legal regulations of the right to remain silent and not incriminate oneself in all aspects and phases of the criminal investigation.¹⁴

Based on the right to remain silent and not incriminate oneself as regulated in article 6, the criminal investigators are prevented from obtaining evidence by defying the will of the culprit and not to testify against him. Each accused individual has the right to remain silent and not incriminate himself, although the provisions of article 6 of the European Convention on Human Rights does not expressly mention this right, it is acknowledged by international legal regulations which are found at the center of the concept of equitable trial. By protecting the defendant against abusive constraint from the authorities, these immunities help avoid judicial errors and guarantee the desired outcome. This applies to all crimes, regardless of their degree of severity and complexity, from the early stage of the questioning by the police. It entails the fact that in a criminal investigation, the prosecutors are allowed to build their prosecution without proof which was

¹² Article 396 of the Criminal Procedure Code states in the first alignment: (1) The court rules on the guilt of the defendant, by ruling for conviction, renouncing the punishment, postponing the punishment or acquittal and end of criminal trial.

¹³ D. Ionescu *The warning procedure. Consequences in the matter of the validity of the accused's statements in the criminal trial*, in "Notes on Criminal Law" Magazine, no. 2/2006.

¹⁴ V. Puscasu, *The right to remain silent and not self-incriminate, Ratio essendi*, West University Magazine, Law series, Timisoara, page 95

obtained by constraint or pressure or against the will of the defendant. These rights serve to protect a suspect's right to choose whether to talk or remain silent when he is questioned by the police.

This freedom of choice is compromised in case the suspect chooses to remain silent during questioning, but the authorities use a legal subterfuge in order to force a confession or incriminatory statements which they was unable to obtain during questioning, thus exercising their coercion powers. In order to establish the fact of whether choosing to remain silent can lead to conclusions unfavorable to the defendant thus violating article 6 of the Convention, several elements must be considered such as the existing proof and the degree of constraint¹⁵. This right is destined to protect the individual against the coercing force of the competent authorities during questioning. In ECHR jurisprudence, it is considered that this right, which is not formally guaranteed by the constitution, is a guarantee given to the defendants in the name of the right to an equitable trial, the right to freedom and human dignity¹⁶.

¹⁵ V. Pușcasu, *The right to remain silent and not incriminate oneself*, A collection initiated and coordinated by Sergiu Bogdan, Universul Juridic Publishing House, Bucharest, 2015, page 315

¹⁶ N. A. Odina, *The right to remain silent. The role of silence in the protection and guarantee of natural subjective rights*, Eftimie Murgu University, Resita, page 73