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The Right to Remain Silent in Criminal Trial

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Abstract: A person's right not to incriminate oneself or to remain silent and not contribute to their own incrimination is a basic requirement of due process, although the right not to testify against oneself is not expressly guaranteed. This legal right is intended to protect the accused/ the defendant against the authorities' abusive coercion. The scope of the right not to incriminate oneself is related to criminal matter under the Convention, and thus susceptible or applicable to criminal proceedings concerning all types of crimes as a guarantee to a fair trial. The European Court of Justice ruled that despite the fact that art. 6 paragraph 2 of the Convention does not expressly mention the right not to incriminate oneself and the right not to contribute to their own incrimination (*nemo tenetur are ipsum accusare*) these are generally recognized international rules that are in consistence with the notion of "fair trial" stipulated in art. 6. By virtue of the right to silence, the person charged with a crime is free to answer the questions or not, as he/she believes it is in his/her interest. Therefore, the right to silence involves not only the right not to testify against oneself, but also the right of the accused/ defendant not to incriminate oneself. Thus, the accused/defendant cannot be compelled to assist in the production of evidence and cannot be sanctioned for failing to provide certain documents or other evidence. Obligation to testify against personal will, under the constraint of a fine or any other form of coercion constitutes an interference with the negative aspect of the right to freedom of expression which must be necessary in a democratic society. It is essential to clarify certain issues as far as this right is concerned. First of all, the statutory provision in question is specific to *adversarial systems*, which are found mainly in Anglo-Saxon countries and are totally different from that underlying the current Romanian Criminal Procedure Code, which observes the tradition of *continental trial systems*. This type of system was traditionally adopted in our country and it underlies the entire judicial doctrine and practice endorsed by our scholars and practitioners from the foundation of the modern state to date.

Keywords: self-incrimination; silence; right; accusation; testimony

A person's right not to incriminate oneself or to remain silent and not contribute to their own incrimination is a basic requirement of due process, although the right not to testify against oneself is not expressly guaranteed. This legal right is intended to protect the accused/ the defendant against the authorities' abusive coercion. The scope of the right not to incriminate oneself is related to criminal matter under the Convention, and thus susceptible or applicable to criminal proceedings concerning all types of crimes as a guarantee to a fair trial. The European Court of Justice ruled that despite the fact that art. 6 paragraph 2 of the Convention does not expressly mention the right not to incriminate oneself and the right not to contribute to their own incrimination (*nemo tenetur are ipsum accusare*) these are generally recognized international rules that are in consistence with the notion of "fair trial" stipulated in art. 6. By virtue of the right to silence, the person charged with a crime is free to answer the questions or not, as he/she believes it is in his/her interest. Therefore, the right to silence involves not only the right not to testify against oneself, but also the right of the accused/ defendant not to incriminate oneself. Thus, the accused/defendant cannot be compelled to assist in the production of evidence and cannot be sanctioned for failing to provide certain documents or other evidence.

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Obligation to testify against personal will, under the constraint of a fine or any other form of coercion constitutes an interference with the negative aspect of the right to freedom of expression which must be necessary in a democratic society.

Starting with 2003 this right has been stipulated in our legislation when the legislature amended the content of art. 70 of the Code of Criminal Procedure with the provision in paragraph 2 that the accused or defendant shall be informed, among other things, on "the right not to make any statement, and the caution that anything he says may be used against him". It is essential to clarify certain issues as far as this right is concerned. First of all, the statutory provision in question is specific to *adversarial systems*, which are found mainly in Anglo-Saxon countries and are totally different from that underlying the current Romanian Criminal Procedure Code, which observes the tradition of *continental trial systems*. This type of system was traditionally adopted in our country and it underlies the entire judicial doctrine and practice endorsed by our scholars and practitioners from the foundation of the modern state to date.

There is a great difference between adversarial and continental systems given the fact that the two systems have different approaches to the very core issue of judicial activity, which is *judicial truth* (Ionescu, 2006, p. 28). In continental system judicial truth must be identical to the objective, real truth, which means the courts cannot record something other than what actually happened. The Romanian Criminal Procedure Code *finding out the truth* is a basic rule stipulated in art. 3, which provides that "criminal proceedings must ensure the truth of the facts and circumstances of the case and also the truth about the offender". Hence, the principle of the active role of the judiciary (art. 4 of the Criminal Procedure Code), which is an absolutely necessary tool to ensure the observance of the principle of judicial truth.

The adversarial system states that the aim of continental systems to find the *objective truth* in a criminal trial is a utopia and that judicial truth which is reconstructed after the collection of evidence in a criminal trial may be different from the objective truth. In an adversarial trial system each party facing a criminal trial is the holder of one's own truth, which is trying to impose after a fair confrontation. Hence, the great importance that the adversarial system attaches to *procedure*, which has to be perfectly fair in order to reach a just solution. In a continental trial system all parties are compelled to work in order to find out the objective truth in criminal trials. For this reason, such a system does not stipulate the defendant's right not to give a statement at the trial, because it does not fit the purpose of the criminal proceedings which is *"to find out the facts of crime in due time and completely"* (art. 1 paragraph 1 of the Criminal Procedure Code). Therefore, even art. 70 paragraph 2 of the Criminal Procedure Code stipulated, upon being adopted, that the accused or defendant *"... is warned to declare everything he/ she knows about the offence and the charge that is brought against him/her in connection with it". Of course in this trial system "for the accused or defendant, giving a statement is not an obligation, but failure to do so creates an inevitable suspicion against him*" (Dongoroz, 2003, p. 190).

In contrast, the adversarial system cannot draw any conclusions from the defendant's use of his/ her right not to give any statement. It should be noted also that the legislature in the continental system had compassion for human weaknesses, because out of self-preservation mankind tends to hide the truth to avoid the evil that is associated with the punishment, for which reason the act of the offender who distorts the truth is left unpunished when failing to recount the objective truth to the judiciary. In the adversarial system, given the existence of the right of the accused not to make statements, it was possible to incriminate the offense of perjury in all cases, even if it is committed by the accused who wanted to give a statement in court. This is due to the defendant's obligation to observe the justness of

the procedure, while having both the right to a "fair trial" and the obligation to behave "fairly" in the proceedings.

Moreover, taking the provision of article 70 paragraph 2 of the Criminal Procedure Code of the adversarial system has no effect without taking penalties in this specific trial system. According to the Criminal Procedure Code failure to comply with such a rule could attract the sanctioning of relative nullity (the only sanctions provided by our code as far as criminal procedural acts and proceedings are concerned), which should be invoked even *"in carrying out the act when the party is present"* (art. 197 paragraph 4 of Criminal Procedure Code), which seems to be nonsensical, because the defendants are always there when their statements are taken. There are authors who argue that in this case a sanction specific to the burden of proof arises, namely the sanction of exclusion of evidence illegally taken, but what would be the legal basis for the application of this measure in our procedural system? How to reconcile this rule with the free evaluation of evidence (art. 63 of C.P. Code), which implies the freedom to convince the judicial body that a certain piece of evidence has probative value? For such a system the application of nullity seems more appropriate (art. 197 of C.P. Code) even in matters related to the burden of proof than the application of a sanctioning regime as strict as the exclusion of evidence. This is why practitioners are reluctant to sanction the exclusion of evidence, even after the introduction of the Law no. 281/2003 of art. 64 paragraph 2 of C.P. Code that *"evidence obtained illegally cannot be used in criminal proceeding"*. Some time will have passed until such a sanctioning system will have been assimilated from the burden of proof and adjusted to the entire Romanian procedural system.

On the other hand, what sanction should be imposed when the defendant agrees to give a statement, but is not telling the truth? Obviously, none. In this case, what is the importance of the defendant's right to not make any statement stipulated in art. 70 paragraph 2 of the Criminal Procedure Code? The defendant was still able not to tell the truth, without suffering any penalty, an option which is even "better" than the right not to make any statement. Is it really beneficial to borrow from the adversarial system the defendant's right to not make any statement, leaving aside the sanction for breaching the obligation to observe the fairness of the procedure itself and not to mislead the court?

If we think in terms of the European Convention on Human Rights to see if it necessarily requires the existence of a similar provision to that in art. 70 paragraph 2 of the Criminal Procedure Code referring to the warning of the defendant about the right not to make any statement, it appears that this right of the accused is not explicitly stipulated in the Convention and the case law of the Court does not impose such an obligation of the judicial bodies to warn the defendant about the right not to make any statement. Even though it was provided in the case law of the Court, the defendant's right to remain silent and not to incriminate oneself is not similar to that of the adversarial systems. The Court imposes minimum rules on the protection of human rights, which should be observed by every trial system of the Convention signatory states, but does not suggest the adoption of a solution from any trial systems.

Obviously, if the solutions provided by the Court are closer to an adversarial procedure, being in fact inspired by it, it is difficult to implement them in a continental procedure, but this can be done while preserving the main characteristics of the borrowing system. For instance, the European Court noted that it was incompatible with the requirements of the Convention that a conviction be based *solely or substantially* on the silence of the accused, on his refusal to answer questions or testify in court, but these restrictions could not mean the failure to take into account the defendant's silence in situations that demand his/her explanation *in order to evaluate the persuasive power of the incriminating evidence.* It was pointed out that there is a clear separation line between these two situations, so that

the "right to remain silent" should not be regarded as *absolute* (Bârsan, 2005, p. 528). Thus, although the European Court provides this right of the accused, it appears that it does not compel the contracting states to borrow the adversarial system solution referring to the defendant's warning procedure and, moreover, it does not require the adoption of the sanction of excluding the statement taken without prior warning of the accused stipulated by the famous U.S. Supreme Court decision in the case of Miranda v. Arizona.

Another question that arises is about the exception to the restriction to use the defendant's silence against him. Claus Roxin - one of the most appreciated German legal science theorists - noted that the defendant's silence cannot become incriminating evidence against him (Roxin, 1997, p. 74) with only one exception, namely, when the accused agrees to make a statement and on such occasion he withholds certain information he is asked about, which is likely to produce legal effects. The argument is that when the defendant agrees to give evidence (by making a statement), he implicitly accepts his statement to be evaluated. Therefore, if the statement must be offered a conclusion, the author considers that the conclusions should be made based on the defendant's entire behavior. In other words, important is not only what was said, but also what was omitted when a question was asked about a particular issue.

Accepting such an exception would truncate the right against self-incrimination in that this principle would be valid only in case of total non-involvement of the accused in offering assistance to judicial bodies against themselves. However, the accused may only be required to offer such assistance at a certain point of the statement, when the right against self-incrimination is likely to produce legal effects. If the accused agrees to give a statement to the judicial bodies does not imply giving up his right against self-incrimination. Therefore, it should be acknowledged that the defendant's strategy may consist in misleading the judiciary, while trying to keep the appearance of collaboration with the judicial authorities. When such collaboration – initially beneficial to the defendant - puts him in a position of self-incrimination, silence cannot and should not have any legal effect. Both the author and practical solutions cited refer only to accused' silence during a general statement. Thus, the obvious question that arises is why, when the defendant creates more obstacles to authorities by misleading them instead of remaining silent, he is protected by the right against self-incrimination, whereas keeping silence at the time of making the statement is likely to turn against him?

It has been argued that in the Romanian legislation the right to remain silent does neither overlap with denying the deed, nor with admitting it, since it does not disprove the prosecution, would mean it admits it, and a mere unproved accusation has no value as compared to the presumption of innocence, which justifies the silence, no one being forced to prove their innocence, especially when the accusation is unconfirmed or unreliable. Judicial practice has constantly proven that the accused or the defendant should not be in any way coerced or sanctioned for his silence or refusal to answer, which is his right, and the law should allow any defendant to speak or not and, moreover, the defendant may remain silent not necessarily to withhold evidence or avoid judgment. There is no statutory provision to state that the right to remain silent can be an aggravating circumstance for the defendant and, moreover, it cannot be argued that if the accused or defendant refrains from giving statements thus making use of his right to silence, this attitude can be a disadvantageous circumstance for him. The judicial practice has upheld this point of view, arguing that the defendants' failure to show up in court for hearing and the subsequent submission of evidence cannot be considered a definite proof of their guilt[1].

[1] Criminal decision no. 347/June, 14th, 2007, made by Olt Tribunal.

Another issue that arose in connection with the right to silence was to determine whether circumstantial evidence obtained as a result of an inadmissible statement given by the accused is itself inadmissible or can be used in criminal proceedings. The solution derived from the German judicial practice was that indirect evidence obtained in this way is admissible. In a case, an informant infiltrated into the defendant's cell while the latter was being held on remand. The informant persuaded the defendant to confide in connection with the offence the latter was charged with and every piece of information was subsequently transmitted to the judicial bodies. The court held that the statements given by the defendant are basically inadmissible as evidence in the criminal trial. However, it argued that the information referring to the accused having an accessory while committing the offence is circumstantial evidence that can be used in the criminal proceedings. As a result, the accomplice was heard as a witness, whose testimony led to the defendant's conviction.

The Court's reasoning was that the police could also identify the witness by other means and the use of circumstantial evidence is needed to effectively combat crime. Yet, Roxin rejects this point of view arguing that by using this mechanism the privilege against self-incrimination is devoid of content - the judiciary could easily evade its scope (Roxin, 1997, p. 81). Moreover, the argument that this mechanism can fight crime more effectively is rejected by the author, who rightly argues that the public interest would consequently attract the inapplicability *in abstracto* of the privilege under discussion. Finally, it was argued that the possibility of obtaining such evidence by other means is not likely to be invoked as an argument for the admissibility of circumstantial evidence. Eventually, says the author, in most cases there is such a theoretical likeliness.

As far as we are concerned, we can only concur with the arguments offered by Roxin and the conclusion he draws. However, we note that the opposite argument is also upheld in the local doctrine (Chiriță, 2008, p. 310). Thus, starting from a common law case[1], it has been argued that a statement taken in violation of the privilege against self-incrimination can reveal the existence of a weapon without any risk of being deemed inadmissible as evidence when it is found by authorities. It is obvious that in this case there is still a theoretical likeliness that the weapon shall be discovered by other means. However, this cannot by itself attract the admissibility of evidence obtained in breach of the privilege against self-incrimination. Yet, it is debatable if this admissibility should be rejected *de plano.* In so far as the authorities had evidently other means at hand that would most likely have led to such circumstantial evidence without making extensive efforts to that end, we could accept the likeliness that such evidence can be deemed admissible.

Another issue from the American doctrine this time has been raised in connection with a potential conflict between the privilege against self-incrimination and the psychiatric tests the accused can be compelled to take in criminal proceedings. The hypothesis was that the accused claims lack of discernment when committing the crime, referring to a psychiatric examination conducted by a private expert. Will he be allowed to invoke the privilege against self-incrimination when the state itself requires a psychiatric examination?

The discussion is of interest because the only effective means to rebut the defense evidence (psychiatric examination conducted by a private expert) is to conduct another psychiatric test. But, in order to do this, the state needs the same legal framework that was available for the defense. This means that the state should have access to the defendant by a forensic expert. However, the interaction between the accused and the expert cannot be limited to mere preliminary observation or physical examination of the defendant. In this context it is considered that the expert has to interact with the

[1] Privy Council, dec. Lam Chi-Ming c. R. 1991 in R. Chiriţă, p. 310.

accused at least by interviewing him (Krash, 1961, p. 918)[1]. Yet, in order to draw appropriate conclusions, it is argued that the expert has to examine or consider several times the personal circumstances of the accused from the commission of the offence on. This approach, however, cannot occur without the cooperation of the accused. The defendant's uncooperative behavior may result in an inability to offer a conclusion about the existence of discernment at the time of the offence.

Therefore, it was considered that the silence of the examined defendant becomes useless when it comes to drawing an expert opinion. Thus, the lack of cooperation cannot lead to the conclusion that the defendant is irresponsible, the only remaining possibility being to identify a mental dysfunction that is also physically visible (Marcus, 1968-1969, p. 740). Without highlighting the shortcomings of the studies focusing on the privilege against self-incrimination, it is necessary to provide the framework in which it finds its applicability in both European law and common law. Thus, it is accepted that the privilege under discussion protects the accused against making self-incriminating statements.

Therefore, a distinction should be made - at least at first glance - between the obligation of the defendant to give statements (in a broad sense that would also include documents) and the constraint of the accused to become a source of real or physical evidence.[2] This latter form of constraint can refer to the collection of fingerprints, pictures of facial features, measurements of the accused, handwriting or voice samples of the accused in order to make comparisons, biological samples etc. In all these cases, there may be a form of coercion imposed by the state (it remains to be seen how this constraint may result in violation of other rights of the individual) without breaching the right to remain silent or the privilege against self-incrimination. This is because we are not discussing about a testimonial sample. In an attempt to resolve the issues under discussion, an analogy has been made between the collection and interpretation of biological samples and the coercion of the defendant to cooperate with the forensic expert to conduct an interview. In this context it was considered that both types of evidence obtained are admissible in court because they do not reflect upon any statement given by the accused (Marcus, 1968-1969, p. 741). At first glance the analogy seems faulty. This is because the interview/discussion between the forensic expert and the defendant implies the latter's giving a statement about the circumstances in which the offence was committed and other aspects that may reveal the existence or lack of discernment at the time of the offence.

Moreover, it was argued that the expert is not interested in the content of the defendant's responses, these being used only to establish the existence or lack of discernment at the time of the offence which the defendant is accused of. Therefore, it was concluded that the psychiatric interview conducted by a forensic expert can assess the mental health of the defendant similarly to the way a chemist analyzes the biological samples collected from him (Marcus, 1968-1969, p. 742). However, we believe that the nature of the information provided by the defendant during psychiatric examination depends on how that information is used. Thus, we accept that as long as the information obtained is used as evidence only in determining responsibility/ irresponsibility of the defendant, it is admissible in court.

In conclusion, we concur with the thesis that the mental state of the accused is real evidence that can be obtained only through the already discussed procedures, for which reason it is not in the scope of the privilege against self-incrimination. This is because, in order to establish discernment, the state can appeal only to the accused by obtaining his cooperation (Marcus, 1968-1969, p. 743).

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[1] Krash, A. (1961). The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia. *Yale Law Journal, Vol. 70*, p. 918.

[2] See also relevant case law of The European Court of Human Rights – for instance, *Saunders v. United Kingdom.*

Nevertheless, in as much as the information obtained from the defendant is used to determine his guilt or degree of guilt, the privilege against self-incrimination should be applicable. This conclusion was pointed out in the common law jurisprudence.[1] There is still a debatable issue referring to the circumstantial evidence obtained against the defendant as a result of the information he gives during the interview. As far as we are concerned, the privilege against self-incrimination should be applicable. Yet, this issue needs further analysis.

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[1] See also *The State v. Obstein*, cited by J. Marcus, p. 743.