

# THE RIGHT OF THE WITNESS TO REMAIN SILENT – A PROCEDURAL GUARANTEE AGAINST SELF-INCRIMINATION

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**ABSTRACT:** *The testimony of the witness is among the most common pieces of evidence in criminal proceedings. Although scientific evolution has considerably expanded the field of evidence, the deposition is and will remain essential to justice, as the direct human perception of the events contributes to the reconstruction of the fact, and during the hearings decisive and even previously unknown information or details can be discovered. Due to the frequency with which this evidence is used, the institution of the witness must enjoy a comprehensive regulation that gives it adequate protection. As a rule, the witness is called before the judicial bodies to give statements, which is why in the past it was not admissible a refusal on his part to report on the facts in connection with which he was summoned. If the witness had some information that could have prejudiced him in the sense of self-incrimination, he was put in front of an impossible situation to tell the truth thus contributing to his own incrimination, or to commit the crime of perjury. Of course, this situation goes against some basic principles in criminal procedural matters, an aspect that led to a regulation of the witness's right to remain silent and not self-incriminate, which was enshrined in most legal systems.*

**KEYWORDS:** *evidence; witness; deposition; right to remain silent; self-incrimination*

**JEL Code:** *K14*

## 1. INTRODUCTION

Since ancient times, the main pillars in the discovery and proof of the facts incriminated by the criminal law have been people, more specifically their statements about the events directly perceived by their own senses. Although, nowadays, the scientific investigation gives a certainty of the revealed facts, the witnesses remain indispensable in the process of administration of justice.

The witness's statement is a genuine means of evidence in the Romanian criminal process, being one of the oldest means of evidence that has retained its usefulness to this day. The deposition as a whole, reveals to the judicial bodies information that contributes to the discovery of some crimes, to the identification of the perpetrator, including the

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establishment of his guilt, the witness being thus a key participant in finding out the truth and in the just resolution of the case.

Being one of the most common means of evidence in the criminal process, it is fundamental to precisely regulate the status of the witness, respectively his rights and obligations within the judicial proceedings. However, the Romanian criminal procedural legislation does not enshrine an actual right of the witness to remain silent, this was recognized following a decision of the Constitutional Court of Romania.

Although the right to remain silent was originally a right that the suspect or defendant could claim, nowadays judicial practice demonstrates the need to guarantee this right to the witness, given that the perpetrator was often heard as a witness, then indicted on the basis of those declared. Precisely to combat and prevent such situations that would contravene the fairness of judicial procedures, the need to expand the category of persons who can invoke the right to remain silent was also imposed on witnesses.

## 2. THE RIGHT OF WITNESSES TO REMAIN SILENT IN ROMANIAN CRIMINAL PROCEEDINGS

The right to remain silent as a procedural right has been fully enshrined and recognized following a long jurisprudential evolution in most legal systems. Since the invocation of the Latin adage ``*nemo tenetur prodere seipsum*`` (no person can be forced to incriminate himself), today this right is enshrined in the legislation of most European countries, being affirmed including by the decisions of the European Court of Human Rights (Adrian Sandru, 2018 ).

According to the doctrine, the right to remain silent is a consequence of the presumption of innocence, which implies, in addition to the right not to testify against himself, the right of any person not to contribute to his own accusation (Gheorghiu Mateuț, 2019).

Even if nowadays it has become a right closely related to the right to a fair trial, but also to the presumption of innocence, in the past the right to remain silent has been criticized in the sense that it benefits only the guilty, because as a rule the innocent want to speak as well therefore to prove his innocence (R. Leng, 1993). Contrary to these statements, another theory perpetuated the idea that in the matter of obligations silence does not count as consent, therefore silence cannot be considered as a confession of guilt even in criminal law (A.J.Bullier, F.J. Pansier, 1997).

The right to remain silent originally appeared in England in the 1600s, then in the 19th century it gradually perpetuated itself in most legal systems. It was recognized in the charge of suspects or defendants, but contemporary judicial practice has proven the need to extend the category of persons who can invoke the benefit of this right to other participants in the criminal process, such as witnesses.

Like all participants in the criminal process, witnesses benefit from correlative rights and obligations, established with a protective but also preventive purpose to prevent unjustified refusal to testify. The judicial body has the obligation to communicate to the witness the capacity in which he is heard and the facts for the proof of which he was proposed as a witness, respectively the rights he benefits from and the obligations that fall to him in this capacity.

The new Code of Criminal Procedure introduced through the provisions of *art. 118* a guarantee in the matter of the right to non-self-incrimination in the sense of the impossibility of using the witness's statement against him in the same case. However, the situation of the interviewed witness is more difficult, in relation to procedural rights and obligations, than that of the suspect or defendant, which is why the protection offered by *art. 118* was insufficient.

The witness, as a rule, has a non-contradictory position in criminal judicial proceedings, he does not know the accusations made in the case, he does not have access to the file and is not assisted by a lawyer, he still has the obligation to tell the truth under the penalty of committing the crime of perjury (M. Udroi, A. Andone Bontaș, G. Bodoroncea, 2020). In the absence of the guarantee of the right to remain silent, the perpetrator could first be heard as a witness, being obliged to give statements and tell the truth, being later charged precisely on the basis of what was reported as a witness.

The Brusco case was among the first cases in which the European Court of Human Rights found a violation of the privilege against self-incrimination by conviction based on the sworn statement of the witness in police custody, in the absence of legal assistance and in the absence of a warning of the right to keep silent. The Court found that the plaintiff was not informed of procedural rights and obligations, moreover, he was heard as a simple witness, although there was enough data to charge him with attempted murder. The conviction based on the statement given as a witness violated the right not to contribute to self-incrimination and the right to remain silent, the Court finding that there is a violation of *art. 6 par. 1 and 3* of the Convention (Lucian Criste, 2010).

Concretely, the right of the witness not to accuse himself gains meaning when an interviewed witness becomes a defendant in the same case. A person who participates in the commission of the crime and who is called by the judicial body to give statements as a witness is compelled either not to tell the truth in order to excuse himself, thus committing the crime of perjury, or to tell the truth thereby contributing to own accusation (Ximena Moldovan, Lucian Chiriac, 2017). Therefore, the hearing of a person accused of committing a crime, as a witness, may result in the violation of the right not to contribute to self-incrimination, enshrined in *art. 6 of the European Convention on Human Rights*. This violation of the right of the witness not to incriminate himself manifests itself in three aspects: when the person who had the capacity to be accused was heard as a witness, when the two qualities are successive (the person is heard as a witness and later acquires the quality accused, or after being held criminally liable is heard as a witness in the case regarding the other participants tried separately) and the last hypothesis when through the witness statement the person in question commits the crime of perjury being accused of this crime (Bălan Iulian, 2019). However, *art. 118* of Romanian Criminal Procedure Code only partially covers these situations "*the witness statement given by a person who, in the same case, before the statement had or, subsequently, acquired the status of suspect or defendant cannot be used against him*", which is why the Romanian Constitutional Court found the unconstitutionality of this article, which does not specifically regulate the right of the witness to remain silent and not to incriminate himself, by *Decision no. 236 of June 2, 2020*.

Thus, in its decision, the Court noted that the person who participated in the commission of the crime, cited as a witness, can incriminate himself if he tells the truth. In the absence of the express regulation of the witness' right to silence and non-self-

incrimination, the criminal investigation bodies have no obligation to give effect to this right. More precisely, *art. 118 of Romanian Criminal Procedure Code* only assumes that the witness' statement cannot be used against him, therefore it can be used to obtain other derivative evidence that could incriminate him. In addition, the witness has the obligation to tell the truth, without being able to invoke the right to remain silent, even with the consequence of self-incrimination. Thus, the Court noted that these provisions "*do not establish an effective protection of the witness, because they do not regulate adequate procedural guarantees and do not prohibit the use of incriminating evidence obtained indirectly based on the witness's statement*". Consequently, the criticized legal provision was declared unconstitutional, being contrary to the provisions of *art. 21 para. 3, art. 23 para. 11, art. 24 para. 1* of the Fundamental Law, and the provisions of *art. 6 par. 1 and 2 of the European Convention on Human Rights*<sup>1</sup>.

The need to guarantee the right to remain silent in the case of witnesses was also highlighted by a decision of the High Court of Cassation and Justice, which considered a violation of the right to a fair trial the situation in which the prosecution has reasonable suspicions that a person is involved in a criminal activity and does not proceed when bringing these aspects to the person's attention. In this situation, the prosecution chooses to hear the witness in order to later consider the deposition as evidence and proceed to use it against the same person. It is practically beyond doubt that questioning a person as a witness, knowing that he is involved in a criminal activity in relation to which he is being questioned, is against the law. Such a statement cannot be used against him, under any circumstances, after the conversion of the quality of witness to that of defendant. Therefore, it is unfair that an interviewed witness is subsequently indicted precisely on the basis of his statement, being in these circumstances a serious violation of the right not to incriminate himself<sup>2</sup>.

In the light of the above, the implicit recognition of the right of the witness not to accuse himself is a necessity in order to be able to guarantee the effective defense of his rights as a participant in the criminal process. The right of the witness to remain silent should be provided in the sense of a procedural guarantee against self-incrimination, so that he can refuse to give statements, when he could accuse himself (Scarlat Corina, 2018).

Related to this right, the judicial bodies have a positive procedural obligation to inform the witness of the right to remain silent if they find that during the hearing he makes statements likely to incriminate him. If the judicial body does not fulfill this obligation, i.e. it does not proceed to interrupt the hearing as soon as the witness has given self-incriminating statements, it violates the provisions of *art. 118* of Romanian Criminal Procedure Code, a fact that will attract the exclusion of illegally administered evidence.

The current criminal procedural regulation is, therefore, deficient in the sense that it does not provide an effective right of the witness not to incriminate himself, but regulates a right circumscribed to the institution of the exclusion of evidence (T.V. Gheorghe, 2015).

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<sup>1</sup>Decision of the Constitutional Court of Romania no. 236 of June 2, 2020 regarding the exception of unconstitutionality of the provisions of art. 246 and art. 248 of the Criminal Code from 1969, of art. 297 para. (1) of the Criminal Code, of art. 114 para. (2) and of art. 118 of the Code of Criminal Procedure, as well as of art. 132 of Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption, published in the Official Gazette no. 597/8 July 2020.

<sup>2</sup>Decision of the High Court of Cassation and Justice no. 42/A of February 3, 2016, not published in the Official Gazette.

The only guarantee offered by the legislator is the impossibility of using the statement against him, proceeding to its exclusion from the evidentiary material.

I believe that in such conditions, the judicial body must intervene as soon as the witness begins to expose details that could incriminate him, in order not to contravene the principle of loyalty to the administration of evidence, and the obligation to give statements will stop where the person can incriminate himself.

Related to this issue, there are opinions contrary to those previously stated, which claim that the witness does not have the right not to give a statement, since in the hypothesis in which he retains the right to remain silent, the judicial body cannot know whether the reason for exercising this right is not to self-incrimination or to protect the suspect or defendant, invoking in the latter situation a false right to remain silent (Cristina Moisă, 2019).

### 3. CONCLUSIONS

Despite the controversies in the specialized literature, I believe that the witness has the prerogative to invoke the right to silence and non-self-incrimination during the hearing, but the legislator omits to clarify a particularly important aspect, how the judicial body can be certain that the witness justly invokes the right to silence, since under the conditions in which he would give details he would automatically incriminate himself? Without a complete regulation in this regard, the witness can invoke a false right to remain silent, the judicial body not being entitled to request additional clarifications.

Therefore, the plausibility of invoking the right to remain silent by the interviewed witness is put under the sign of uncertainty, since there are no legal mechanisms to verify the conformity with reality of what the witness claims in his defense.

However, giving the witness the right to remain silent is an absolute necessity in order to provide effective procedural guarantees against self-incrimination, in the absence of such a right of the witness, the statement by which he is accused could be used against him, being a situation that would violate the provisions of *art. 6 of the European Convention on Human Rights*.

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