THE WITNESS'S RIGHT AGAINST SELF-INCRIMINATION. NATIONAL STANDARD

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Abstract

This study is meant to reveal the legal solution in the Romanian system regarding the witness's right not to contribute to self-incrimination. Thus, as a translation of the principle nemo testis idoneus in re sua, the Romanian legislator stipulated the witness's right against self-incrimination under the privilege of not using his statements, in consideration of his locus standi, against him, regardless of the fact that he later on was given the status of a defendant for the same offence or whether he is a defendant in a different case, which is connected to the one where he is a witness. Likewise, the privilege of not using his statements against him, stipulated under these conditions in the criminal procedure law, seems to respond to the three difficult choices that the witness has, a premises for the necessity to formulate, on a jurisprudential bases, the witness's right to remain silent and the right against self-incrimination.

Keywords: *right to remain silent, self-incrimination, nemo testis idoneus in re sua, national legal solution.*

1. Legal framework.

According to the Reasoning of the project for the Law regarding the Criminal Procedure Code, it was explicitly regulated according to the European Court of Human Rights (the case *Serves v. France*), *the privilege* against self-incrimination, also in respect to the hearing of the witness.

In its initial form, the proposed legislation, the privilege against self-incrimination was marginally defined, under Article 118 Criminal Procedure Code, *The right of the witnesses to avoid self-incrimination* that is *the witness's statement may not be used in a trial against him.* Later on, Article 102 point 75, Law no. 255/2013 for the implementation of the criminal procedure law, the content of Article 118 suffered a series of changes, practically lacking utility, the text thus became *the witness's statement given by a person who had the capacity as suspect or defendant before such testimony or subsequently acquired the capacity of suspect or defendant in the same case, may not be used against him. The legal authorities have the obligation to stipulate, when the declaration is written, the previous capacity of that person.*

For a better understanding of the law-maker and of the elements that accounted for its legal acknowledgement, for the patrimony of the witness's rights, of the privilege against self-incrimination, we consider it necessary to highlight the relevant circumstances that the European Court took into consideration in the above-mentioned reasoning, respectively *Serves v. France*[1].

As to the facts, it was maintained that the applicant Paul Serves, a regular officer in the French army, that held the rank of captain, was in command of the first company of the 2nd Foreign Parachute Regiment ("2nd Para") and was based in the Central African Republic. On 11 April the applicant, holding information on poaching activities, he ordered an "unofficial" investigation mission in order to find and catch the poachers. For this purpose, he ordered that any poachers encountered during the missions should be intercepted, and, if they fled, should if necessary be fired on after a warning had been given. During one mission, one poacher was wounded in the leg and later killed by one of the subordinates of the applicant.

Regarding this incident, several investigations were carried on under the supervision of a prosecutor at the Paris Military Court who, on 20 May 1988, had been notified and presented the names of the soldiers involved, and the applicant was amongst them.

Thus, following this notification, the prosecutor charged the applicant with manslaughter, later a murder charge was substituted, and the applicant was detained.

Notes that the investigation was commenced without the opinion of the Minister of Defense or of the authority referred to the Code of Military Criminal Procedure, the Paris Court of Appeal upheld the orders in issue, the only documents held were the messages with the names of the persons involved in the incident that had been sent to the prosecutor.

Restarting the investigation, and after receiving the opinion of the Minister of Defense, showing that the facts seemed to be severe crimes and that a criminal investigation had to be carried on, the prosecutor charged two of the applicant's subordinates, and the applicant was summoned to appear as a witness. The hearing of the witness failed as he refused to oath and give evidence on the facts. Each time he was ordered to pay fines.

The applicant appealed against those orders and his argument in his pleadings was that the preliminary inquiry and the messages of 18 and 20 May 1988 on

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[1] CEDO, Serves v. France, 20225/92, 20 Oct. 1997, [www.hudoc.echr.coe.int].

which his 1988 charge had been based remained effective, there was incriminating evidence against him such as enabled him to be charged, so that he could not be examined as a witness without his defense rights being infringed and a breach of Article 6 of the Convention and Article 105 of the Code of Criminal Procedure being committed.

The applicant was later charged for aiding and abetting murder and convicted to four years' imprisonment at first court.

For the reason that the applicant was summoned by the military authorities as a witness, regardless of the fact that there were evidence that he had been involved in the case, that he could have been considered as a defendant according to the autonomous sense of the convention, the European Court held that Article 6 paragraph 1 was applicable.

For these reasons, the European Court held that, the way he acted, the investigation judge placed the applicant in the position to choose either to refuse to take the oath and give evidence, thereby making himself liable to repeated fines, or should he convince the judge of the overwhelming nature of the case against him and thus, ultimately, admit guilt.

The Court reiterated that the right of any "person charged" to remain silent and the right against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6 of the Convention. Their rationale lies, *inter alia*, in protecting the "person charged" against improper compulsion by the authorities and thereby contributing to the avoidance of miscarriages of justice and to the fulfillment of the aims of Article 6. The right against self-incrimination, in particular, presupposes that the prosecution in a criminal case seeks to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the "person charged".

Resuming to national provisions, we also note the fact that according to Article 47 paragraph (5) of Law no. 24/2000 regarding the legislative technique norms for laws – wide-ranging laws, as it is the case of codes, the articles should have marginal definitions that express the synthetic object, but with no self-significance within the body of the provision.

Under these circumstances, we understand the witness's right against self-incrimination as the privilege stipulated by the law that no charge or unfavorable solution of the court should be based on the statements given as a witness before or after becoming an offender or defendant in the case.

2. The conventional standard.

Unlike other systems of fundamental rights protection[2], the European Convention does not explicitly provide the right to remain silent or the right not to contribute to self-incrimination. Nevertheless, jurisprudence, as a form of protection of the defendant against improper compulsion by the authorities, in order to avoid judicial errors and to the fulfillment of the objectives of Article 6[3], the European Court formulated the right of any "person charged" to remain silent and the right against self-incrimination[4]. The jurisprudential formulations were elaborated under the umbrella of the notion of the right to a fair trial under the Article 6 § 1, pointing, especially, the connection with the presumption of innocence stipulated by Article 6 § 2[5]. Though, the doctrine observed that recent jurisprudence seems to place the discussion towards the lack of equity of the procedure[6].

The concept of "criminal charge" or "the charge under the criminal law" has an autonomous meaning, according to the specific meaning of the European Convention, a solution which is imposed to ensure the object and the purpose of the convention[7], given the multitude of interpretations of these concepts under domestic law systems which might endanger the actual protection of the right in lack of a common standard, of consistency, imposed by Strasbourg Court.

Thus, a "charge" is "the official notification of an individual by the competent authority that he is suspected of committing a criminal offence", the definition corresponds to the test whether "the situation of the [suspect] has been substantially affected"[8].

The exam whether the charge was "criminal" is by taking the *Engel* test[9], which has as a starting point *the classification of the offence under the domestic law*, the second point is *the nature of the offence*, and the third refers to the *severity of the penalty.*

The first criterion is absolute or relative, depending on the way the offence is stipulated under the domestic law, whether it is a crime or, on the contrary, it is not stipulated at all, and it falls under other areas (e.g. the civil law, the administrative law, etc.). Therefore, the test ends when according to the domestic law, the offence is stipulated under the criminal law, the criteria from point two and three are no longer analyzed, but they are used when under the appropriate domestic system either the offence was no

[2] Art. 14 pct. 3/g of International Covenant on Civil and Political Rights.
[3] CEDO, *John Murray v. UK*, 18731/91, 08 Feb. 1996, para. 45.
[4] CEDO, *Funke v. France*, 10828/84, 25 Feb. 1993, para. 44.
[5] CEDO, *Saunders v. UK*, 19187/91, 17 Feb. 1996, para. 68.
[6] J.F. Renucci, *Tratat de drept european al drepturilor omului*, Editura Hamangiu, Bucureşti, 2009, p. 517.
[7] CEDO, *König v. Germany*, 6232/73, 28 June 1978, para. 88.
[8] CEDO, *Deweer v. Belgium*, 6903/75, 27 Feb. 1980, para. 46.
[9] CEDO, *Engel and others v. The Netherlands*, 5100/71, 5101/71, 5102/71, 5370/72, 8 June 1976, para. 82.

longer considered a crime[10], or it has never been part of the criminal law and was stipulated under other areas. This approach, more substantial than formal, is nothing but the mirror of the guaranty of the rights in a real and effective manner, not in a theoretical and illusory one.

As according to the hypothesis of this study the offence is a crime according to the domestic law, which legitimates the criminal procedure where the parties of the trial are heard, we assess that it is no need to dwell upon this aspect.

Returning to the first element, respectively the hypothesis of a person who committed or took part in the commitment of a crime, we refer only to the situation when the party had not been granted the status of a charged person, with all the consequences deriving from, and he was invited by judicial authorities to testify as a witness.

This particular case, as the court itself noticed, places the person in the position of choosing one of three possibilities, all of them reaching the point of getting the person sanctioned or charged: either he does not make any statement and he would probably be fined, or he agrees to make statements, but he does not tell everything he knows about the case or he decides to distort the truth, and then he would probably be charged with false testimony, or he tells the whole truth and he places himself amongst the participants to the offence, as he confesses all the facts and circumstances[11].

To avoid such a judicial trap, the European Court emphasized that the subject of a crime has to acquire the quality of a defendant as soon as the judicial authorities have reasonable doubts that the person was involved in the commitment of the crime. His hearing as a witness is purely formal when the judicial authorities have consistent evidence proving he took part in the commitment of the crime[12].

As a first conclusion, we identify that the authorities have the negative obligation not to hear as a witness the person who is under the suspicion of participating or committing the crime, as the moment of turning him into a defendant does not lie in the hands of the judicial authorities. If such evidence does not appear in the case, the judicial authority has no reason to presume the person committed the crime, the criminal party is heard as a witness during the criminal trial, and the negative obligation of the judicial authority stays latent up to the moment when that person incriminates himself by the data and information he provides. As soon as the witness provides the incriminating elements, the judicial authority has to bring to his attention the right to remain silent and the right to an attorney, otherwise, it does not mean that the witness gave up his rights as he continues to make statements[13].

This is one of the two cases identified by the European Court as breaches of the right to remain silent and the privilege against self-incrimination, respectively the use of constraint in order to obtain information against the person who is invited to provide that information, the person who holds the status of a charged person according to the autonomous concept under Article 6 § 1. If the case has no elements leading to the conclusion that the witness had any implication, the European Court verifies whether the incriminating information was used in a subsequent criminal case[14].

3. The witness in the Romanian criminal trial.

During a criminal trail, the following persons can be heard: the suspect, the defendant, the injured party, the party who pays money to victim of a crime, the witnesses and the experts (art. 104). Any person can be heard as a witness, except for the parties [art. 115 paragraph. (1)]. A witness is also a person who suffered an injury from a criminal offence in case of an internally generated investigation, if the person states he does not wish to take part in the criminal trial [art. 81 paragraph (2)].

Hence, the witness is the natural person who is aware of any offence or circumstance that helps in finding the truth and who is invited by the judicial authorities to be heard about the knowledge he poses.

The doctrine underlined the social duty the witness has to help the judicial authorities to find the truth, and also the legal obligation that calls for the witness to come to the judicial authorities when invited and to tell the truth about the facts and the circumstances he knows, and not fulfilling this can bring along judicial constraints[15]. The law asks for the witness to be objective and to efficiently contribute to the finding of the truth because his status, outside the interests of the legal relationship, fully permits him to do so[16].

3.1. Domestic standard regarding the witness's rights and obligations.

During the criminal trial, the witness has the *obligation* to come in front of the judicial authorities when he is summoned, at the place, day and hour mentioned in the citation, the obligation to sworn testimony or to solemnly make statements, the obligation to tell the truth about the case [art. 114, paragraph (2)] and the obligation to write, in a five days

[10] CEDO, *Öztürk v. Turkey*, 8544/79, 21 Feb. 1984, para. 49.
[11] CEDO, *Serves v. France*, 20225/92, 20 Oct. 1997, para. 45.
[12] CEDO, *Brusco v. France*, 1466/07, 17 Oct. 2010, para. 47.
[13] CEDO, *Stojkovic v. France and Belgium*, 25303/08, 27 Oct. 2011, para. 54.
[14] CEDO, *Weh v. Austria*, 38544/97, 08 Apr. 2004, para. 41-43.
[15] Gr. Theodoru, *Tratat de drept procesual penal*, ed. a 2-a, Editura Hamangiu, București, 2008, p. 387.
[16] Trib. Suprem, *secția penală,* dec.nr. 1957/1979, in CD 1979, p. 441.

term, any change in the address to be cited [art. 120 paragraph (2) letter c)].

The witness has the *right* to protective measures and to get back the money paid during the trial [Article 120 paragraph (2) letter a)].

3.3. The right not to contribute to self-incrimination.

As a novelty, the new criminal procedure law introduced the right of the defendant against self-incrimination (Article 118), which is defined as the interdiction to use against himself the statement he made as a witness if, in the same case, before or after the statement he became a suspect or a defendant.

The meaning of the criminal procedure provision seems to be a real a criminal procedure aporia, thus the doctrine developed several possible opinions.

Thus, according to one opinion, the criminal procedure law does not regulate under the provisions of Article 118, or under any other provision, *in terminis,* a virtual right of the witness to remain silent or against self-incrimination. The new provision regulates in fact a right associated with the exclusion of evidence[17].

According to another opinion, the witness cannot raise the right to remain silent, as, in principle, the quality he has when heard, does not reveal the formulation of a criminal charge against him[18]. At the same time, it was noticed that the witness's right against self-incrimination is defined by the domestic law-maker as a negative procedural obligation of the judicial authority which cannot use the statement made by the witness against the same person who obtained the status a suspect or a defendant[19]. According to both opinions, obtaining the status of a charged person in the criminal trial does not lead, *per se,* to the exclusion of evidence as being unfaithfully or illegally taken.

We consider this last opinion to be just, the conclusion derives *proprio motu* by simply reading the incident texts, the statement made as a witness by a party on whom, at that time the judicial authority had no suspicion that he had been involved in the commitment of the crime as it was legally taken, but, due to the law, the authorities will not be able to use it against him.

In other words, the judicial authority will not be able to ground the solution on this evidence when the former witness is charged, as the use of this information is forbidden including as a test to confirm the other evidence taken in the case.

A contrario, the statement will have probative force for the benefit of the person who was a witness and then turned into a defendant and in the detriment of the other persons involved in the commitment of the crime.

Thus, the mere successive assignment of several status in the same case, especially at the beginning of the criminal investigation, cannot be considered as being, per se, an unfaithful procedural behaviour of the judicial authority, because the necessary elements for the preservation of all the aspects appear, due to the nature of things, during and at the end of the criminal investigation.

Coming back to the witness's right against self-incrimination, as it is stipulated under Article 118 Criminal Procedure Law, we notice a difference of content from the right to remain silent that the defendant has during the criminal case[20]. This is because the subject against whom there is no evidence showing he was involved in the commitment of the crime, has the obligation to respond when the judicial authorities invite him to testify as a witness, and the right to decline the invitation by claiming the right to remain silent is not accepted.

The same meaning was given also by the legal constitutional court; the judicial authorities have the liability to take all the available evidence in order to find the truth regarding the offence and the person who committed it, the witness's self-incriminating statements are, at the same time, the statements necessary to resolve the case, regarding another charged person[21].

The legislative solution of neutralizing the statement made against the charged witness shows that the defendant's right against self-incrimination is rescued, the subject who is heard as a witness shall not be asked to choose from one of the three above mentioned options that injure him, as the statement he made is never going to be unfavourable to him.

As a procedural remedy for the hypothesis of the judicial authority had sufficient incriminating data against the subject, the hearing of the person as a witness will be illegal, having as consequence the exclusion of the evidence from the criminal case and those deriving from it. Likewise, when the witness's statement brings self-incriminated evidence and the judicial authority does not immediately stop the hearing and does not warn the subject that he has the right to remain silent and the right to be assisted by an attorney, his statement shall be excluded as illegally taken.

4. Elements of comparative law.

In other legal systems, the problem is treated the same way and there is no breach in the procedural law

[17] T-V. Gheorghe, *Audierea martorilor* in N. Volonciu, A.S. Uzlău, *Codul de procedură penală. Comentat,* ed. a 3-a, revizuită și adăugită, Editura Hamangiu, 2017, p. 334; G.-D. Pop, *Dreptul martorului de a nu se acuza, [www.juridice.ro]* accessed on 15 Mar. 2018.

[18] M. Udroiu, *Procedură penală. Partea generală,* ed. 3, Editura C.H. Beck, București, 2016, p. 333.

[19] V. Constantinescu, *Capitolul II. Audierea persoanelor* in M. Udroiu, coord., *Codul de procedură penală. Comentariu pe articole,* ed. 2, Editura C.H. Beck, București, 2017, p. 575.

[20] A. Zarafiu, *Drept procesual penal. Partea generală. Partea specială,* ed. a 2-a, Editura CH Beck, București, 2015, p. 195.

[21] DCC nr. 519/2017, p. 16, *[www.ccr.ro]*.

if the person who is supposed to have committed the crime is heard as a witness if the circumstances of the case did not bring sufficient solid clues of culpability[22]. In case there are clues of culpability that are not sufficient to state a criminal charge, the judicial authorities will hear the subject as an assisted witness *(témoin assisté)*[23].

Likewise, according to Article 63 Criminal Procedure Law of Italy, if a person is heard during the criminal case and, in case he is not under investigation, he makes statements that provide circumstances against him, the judicial authority shall stop the hearing and worn the person that his statements can trigger investigations against him, and invites him to bring a lawyer. The witness's statements are unusable if he makes them as a witness, when narcotic substances were found at his dwelling place, because this circumstance reveals sufficient elements of culpability to state a charge against him from the very beginning of the investigation[24].

Conclusions

As a conclusion, we consider that the solution of the Romanian law-maker caters to the conventional test, the privilege against self-incrimination outlined by the extreme solution of neutralization of the statement in the detriment of the charged-witness by safeguarding his rights, for the benefit of which the European Court developed and acknowledged the right to remain silent and the right to not contribute to self-incrimination.

References

- Beltrani, Sergio, coord., *Codice di Procedura Penale,* Giuffré Editore, Milano, 2016
- *Code de procédure pénale*, 54e édition, Editions Dalloz, 2013
- Culegere de Decizii ale Tribunalului Suprem pe anul 1979, Editura Științifică, 1980
- Pop, George-Dominic, Dreptul martorului de a nu se acuza, [www.juridice.ro]
- Renucci, Jean-François, *Tratat de drept european al drepturilor omului,* Editura Hamangiu, București, 2009
- Theodoru, Grigore, *Tratat de drept procesual penal,* ed. a 2-a, Editura Hamangiu, București, 2008
- Udroiu, Mihail, *Procedură penală. Partea generală,* ed. 3, Editura C.H. Beck, București, 2016
- Udroiu, Mihail, coord., *Codul de procedură penală. Comentariu pe articole,* ed. 2, Editura C.H. Beck, București, 2017
- Volonciu, Nicolae, Uzlău, Andreea-Simona, *Codul de procedură penală. Comentat,* ed. a 3-a, revizuită și adăugită, Editura Hamangiu, 2017
- Zarafiu, Andrei, *Drept procesual penal. Partea generală. Partea specială,* ed. a 2-a, Editura CH Beck, București, 2015

[22] Art. 105 French Criminal Procedure Code, Crim. 18 dec. 1963 în *Code de procédure pénale*, 54e édition, Editions Dalloz, 2013, p. 354.
[23] J. Pradel, *Procédure pénale,* 17e édition, Editions Cujas, Paris, 2013, p. 694.
[24] Cass. III, 24944/2015 in Sergio Beltrani coord., *Codice di Procedura Penale,* Giuffré Editore, Milano, 2016, p. 199.