REFLECTIONS REGARDING THE WITNESS'S RIGHT AGAINST SELF-INCRIMINATION

Luminița CRIȘTIU-NINU[*]

Cătălin-Nicolae MAGDALENA[**]

Abstract

Considered for a long time as the „eyes and ears of justice", the witness has become a procedural subject around which several controversies have arisen since the entry into effect of Law no. 135/2010 on the Criminal Procedure Code.

The suspected witness, the one against whom further criminal prosecution has not yet been ordered, has acquired a distinct position, shaped by the ECtHR jurisprudence and redefined by CCR dec. no. 236/2020. Although the ECtHR has repeatedly ruled that the guarantees of fairness in proceedings apply once an accusation is formulated, it has also recognized these same guarantees for individuals who are heard as witnesses, but are simultaneously suspected of committing offenses.

Even after the official release of the constitutional court's decision, there are a series of aspects that automatically, are rising debates and controversies, with the most important one being whether there is a genuine right for the witness to remain silent. Has the phrase „cannot be used against them" in art. 118 CPP become predictable and, at the same time, a barrier against potential abuses? Can a „right to silence and non-self-incrimination" be recognized ab initio?

The balance between the general interest of a fair conduct of the criminal proceedings and the rights of the „suspected" witness has required and continues to require practical solutions from the judicial authorities, ensuring that the right to defense and the right to a fair trial are respected.

Keywords: *criminal case, witness, statement, privilege against self-incrimination, right to remain silent, perjury.*

1. Introduction

The roots of this right can be found among the principles of Roman law – the brocard „nemo tenetur se ipsum accusare" (no one is obliged to accuse oneself), having a practical application as early as the 17th century in England, as a reaction to the 16th century royal inquisition, where the accused individuals were required to answer under oath to the questions of the court, without knowing the facts they were being charged of.[1]

In Romanian criminal procedural law, the right to silence and non-self-incrimination does not have a long-standing tradition. It was first regulated in the provisions of criminal procedural law with the amendment of the Criminal Procedure Code 1968 through Law no. 281/2003.[2] Thus, according to art. 70 para. (2) CPP 1968[3], the judicial authorities were required to inform the accused of the right to silence, a right that was recognized not only during the actual questioning, but also during the procedures of detention and pretrial arrest, as stated in art. 143 para. (3) CPP 1968[4]. Later on, the legislator made a corresponding amendment to the Criminal Procedure Code regarding the stage of judicial investigation through Law no. 356/2006[5], within the provisions of art. 322 CPP 1968[6].

[*] Lecturer PhD, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: luminita.cristiu@scj.ro).

[**] PhD Candidate, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: magdalena.catalin@gmail.com).

[1] A.S. Ripan, *The Right to Silence. Legal Nature and Who Can Invoke It*, available at *www.avocatripan.ro*.

[2] Published in the Official Gazette of Romania no. 468/01.07.2003.

[3] Art. 70 para. (2) CPP 1968: „The accused or the defendant shall be informed (...) of the right to remain silent, while being duly cautioned that anything they declare may be used against them."

[4] Art. 143 para. (3) CPP 1968: „The prosecutor or the criminal investigation body shall inform the defendant or the accused that (...) they have the right to remain silent, and shall draw their attention to the fact that anything they declare may be used against them."

[5] Published in the Official Gazette of Romania no. 677/07.08.2006.

[6] Art. 322 CPP 1968: „The presiding judge (...) explains to the accused the nature of the charges against them. At the same time, they inform the accused of their right to remain silent, and draw their attention to the fact that anything they declare may be used against them."

The new Code of Criminal Procedure, which came into effect on February 1, 2014, continued to regulate these procedural guarantees for the suspect and for the defendant, providing similar provisions within art. 10 para. (4)[7], art. 83 letter a)[8], art. 209 para. (6)[9], art. 225 para. (8)[10] and art. 374 para. (2)[11] CPP.

As a novelty, this Criminal Procedure Code also regulated the witness's right to avoid self-incrimination within the provisions of art. 118, which state that the testimony given by a person who, within the same case, had or subsequently acquired the status of a suspect or defendant, cannot be used against him or her. Correspondingly, the judicial authorities are obliged to mention the previous procedural status when recording the witness's statement.

In order to assess whether the guarantee established by law in favor of procedural fairness regarding the witness operates with full effectiveness, this work aims to address, on one hand, the perspective of the ECtHR regarding this guarantee, considering that the jurisprudence of the Strasbourg Court played a crucial role in shaping the new regulation, as well as the case law of national courts, especially the constitutional court, on the other hand.

2. The justification for the right to silence and the right not to incriminate oneself in the ECtHR jurisprudence. The situation of the suspected witness

At the level of regulation, this right is provided for in the International Covenant on Civil and Political Rights – art. 14(3)(g), which states that among the guarantees for a person accused of a crime is also the right not to be compelled to testify against oneself or to acknowledge guilt.

At the European level, the right to silence of a person suspected or accused of committing a crime is provided for in Directive (EU) no. 2016/343 of the European Parliament and of the Council of 9 March 2016 regarding the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings. Art. 7(1) of the Directive states that Member States must ensure that suspected and accused persons have the right to remain silent in relation to the offense they are suspected or accused of. Moreover, Member States ensure that suspected and accused persons have the right not to self-incriminate, but while this right is being exercised, competent authorities are not obstructed from lawfully gathering evidence through the use of coercive measures provided by law and which have an existence independent of the will of the suspected or accused persons.

In the preamble of the Directive, it is specifically stated that its measures should apply to individuals who are suspected or accused in criminal proceedings, even before the person is informed by the competent authorities of a Member State, through official notification or by other means, that they are suspected or accused. It is further acknowledged that the right not to self-incriminate is an important feature of the presumption of innocence, and when asked to make a statement or answer questions, suspected and accused persons should not be compelled to provide evidence or documents or communicate information that could lead to self-incrimination. It is also mentioned that the exercise of the right to remain silent or the right not to self-incriminate should not be used against suspected or accused persons and should not be considered, in itself, as evidence that the person has committed the alleged crime. Although the European Convention does not expressly provide for this right, the European Court has developed a plentiful jurisprudence from which the reasons for this guarantee can be derived: (i) protecting the accused from potential abuses by judicial authorities in obtaining self-incriminating evidence, and (ii) ensuring the fair resolution of the case by avoiding judicial errors generated by the coercion of the suspect/accused to admit to an offense.[12]

---

[7] Art. 10 para. (4) CPP: „Before being questioned, the suspect and the accused must be advised that they have the right to remain silent."

[8] Art. 83 letter (a) CPP: „During the criminal proceedings, the accused has the following rights: a) the right to remain silent throughout the criminal proceedings, with the warning that if they refuse to make statements, they will not suffer any adverse consequences, but if they do make statements, they may be used as evidence against them."

[9] Art. 209 para. (6) CPP: „Before the questioning, the criminal investigation body or the prosecutor is obliged to inform the suspect or the accused that they have the right to be assisted by a chosen or appointed lawyer and the right to remain silent, except for providing information regarding their identity, and they are warned that anything they declare may be used against them."

[10] Art. 225 para. (8) CPP: „Before proceeding with the interrogation of the accused, the judge of rights and freedoms informs them of the offense they are accused of and their right to remain silent, warning them that anything they declare may be used against them."

[11] Art. 374 para. (2) CPP: „The presiding judge explains to the accused the nature of the charges against them, notifies them of their right to remain silent, warning them that anything they declare may be used against them, as well as their right to question co-defendants, the injured party, other parties, witnesses, experts, and provide explanations throughout the judicial investigation when deemed necessary."

[12] V. Puşcaşu, *Right to Silence and Non-Self-Incrimination. Ratio essendi*, available at *https://drept.uvt.ro*.

Indeed, the Court has held that the privilege against self-incrimination requires prosecutors to prove the accusations risen in criminal proceedings without using the evidence obtained through coercion against the will of the accused. This protected right is closely related to the presumption of innocence. Therefore, the privilege against self-incrimination primarily refers to comply with the accused's choice to remain silent (ECtHR, *Saunders v. United Kingdom*, judgment of 17 December 1996).

As it is well known, the ECtHR has established in its caselaw that the guarantees of the right to a fair trial provided for in art. 6 ECHR become applicable at the moment an accusation is made in a criminal matter, as stated in the judgment rendered in the case of *Engel and Others v. the Netherlands*[13].

In this regard, it has been indicated as the moment of formulation of an accusation, thus the applicability of the guarantees of the right to a fair trial, including the situation where a person suspected of committing an offense is questioned as a witness.[14] It is the so-called **suspected witness**[15], in relation to the fact that the law enforcement authorities have not yet ordered the continuance of the criminal investigation, but there is a suspicion that this individual has committed the offense for which is being heard as a witness. This refers to the witness who, under French law, is referred to as „temoin assisté" (assisted witness), an intermediate status between the one of a witness and a suspect, who can be heard in this capacity when there is a possibility based on available data that the witness may have been involved in some way in the commission of the offense (art. 113-2 of the French Code of Criminal Procedure)[16]. In this capacity, the assisted witness has the right to refuse to provide statements, the right to engage a lawyer, and the right to examine the case files.

The ECtHR has recognized the right of the assisted witness, who is called for questioning regarding their own actions rather than facts they have knowledge of and did not participate in, to not contribute to their own self-incrimination and to remain silent.

In the judgment of October 20, 1997, in the case of *Serves v. France*[17], it was held that assigning the status of a witness to a person and questioning them in that capacity, under circumstances where a refusal to provide statements would result in sanctions, is contrary to art. 6(1) ECHR. Furthermore, a witness who fears that they may be interrogated regarding potential incriminating elements has the right to refuse to answer questions about the facts.

In the judgment of December 18, 2008, in the case of *Loutsenko v. Ukraine*[18] and respectively in the judgment of February 19, 2009, in the case of *Shabelnik v. Ukraine*[19], ECtHR has emphasized the vulnerable position of witnesses compelled to disclose everything they know, even at the risk of self-incrimination. The Court held that a person who has been heard as a witness, based on their request to bring certain facts to the attention of the judicial authorities, thereby self-reported their involvement in a murder offense, is considered an „accused" and is entitled to all the guarantees of a fair trial, including the right to remain silent and not to incriminate oneself. In this regard, the Court did not accept the argument put forward by the state that the status of a suspect would only be acquired after certain verification of the procedures following the self-report.

A tuning point decision in this regard is the case of *Brusco v. France*[20], where the Court found that, erroneously, the individual was only regarded as a witness and, therefore, was compelled to take an oath, whereas in reality, a „criminal charge" was being brought against him and he should have been afforded the right against self-incrimination. The Court also held that the plaintiff was not informed at the beginning of the interrogation of their right to remain silent or the possibility of not answering questions. At the same time, the accused was only able to have contact with their lawyer 20 hours after the charge was formulated, which prevented the lawyer from informing the accused about their procedural rights and providing assistance during the interrogation, as required by art. 6 ECHR.

---

[13] *Engel and Others v. the Netherlands* (art. 50) (app. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), available in English at *https://hudoc.echr.coe.int/eng?i=001-57478*.

[14] *Kalēja v. Latvia*, Judgment of October 5, 2017.

[15] In this regard, G. Sas, *The Right of the Witness against Self-Incrimination and the Right to Legal Assistance*, JBC no. 1/2020.

[16] In this regard, V. Constantinescu, in M. Udroiu (coord.), *Criminal Procedure Code. Commentary on Articles*, 3rd ed., C.H. Beck Publishing House, 2020, p. 836.

[17] *Serves v. France* (82/1996/671/893), October 20, 1997, available in English at *https://hudoc.echr.coe.int/eng?i=001-58103*.

[18] *Lutsenko v. Ukraine* (app. no. 30663/04), December 18, 2008, available in English at *https://hudoc.echr.coe.int/eng?i=001-90364*.

[19] *Shabelnik v. Ukraine* (app. no. 16404/03), February 19, 2009, available in English at *https://hudoc.echr.coe.int/eng?i=001-91401*.

[20] *Brusco vs. France, available online at http://bit.ly/3aNTar5.*

In the case of *Heany and McGuinness v. Ireland*[21], ECtHR held that the statements obtained through coercion violated the applicants' right to silence, while they were being interrogated under a criminal charge, yet there was no evidence in the file to prove the initiation of criminal proceedings against them. The two applicants were arrested on charges of terrorism. After being informed of their right to remain silent, the police officers, based on art. 52 of the 1939 law on offenses against the state, requested them to provide details about their whereabouts at the time when the offenses in question were committed. The applicants declined to answer these questions, and due to their refusal to provide information about their location at the time of the events, they were sentenced to six months of imprisonment under the same provision of the 1939 law.

The Court held that the applicants were being charged with criminal offenses, as they were detained and interrogated regarding certain crimes, even though there were no formal acts to initiate criminal proceedings against them and no such procedure had been started. The Court considered that the applicants' right to remain silent was completely nullified by the application of that legal disposition since they were left with the choice of either speaking and potentially incriminating themselves or facing criminal sanctions. The Court found that such domestic law led to obtaining statements through extremely harsh coercion, which contradicted the right to silence, and that concerns for security and public order could not justify such a legal provision. Therefore, the presumption of innocence and the right to a fair trial of the applicants were violated.

The Court also held that in the situation where a person is heard as a witness under oath, but especially under the criminal penalty for perjury, regarding facts or circumstances that could incriminate them (the theory of the difficult choice), it is not reasonable to ask that person to choose between being sanctioned for refusing to cooperate, providing authorities with incriminating information, or lying and risking being convicted for it (Judgment of April 8, 2004, in the case of *Weh v. Austria*).

3. Some guidelines regarding the applicability of domestic norms in relation to the witness' right against self-incrimination

3.1. The case law of the Constitutional Court of Romania

The recently introduced national regulations regarding the right of the witness not to incriminate themselves under art. 118 CPP stipulate that a witness statement given by a person who, in the same case, prior the statement, became a suspect or defendant, cannot be used against them. At the same time, judicial authorities are obliged to mention the previous procedural status when recording a statement.

Given the lack of a tradition regarding this procedural guarantee in the domestic legal system, as it has been borrowed from *common law*, the difficulties in interpreting the newly introduced norm have been and remain almost inevitable.

Before examining some of the jurisprudential approaches concerning the interpretation of this witness right not to self-incriminate, we believe that it is important to recall the perspective of the contentious constitutional court regarding the content and limits of this right, within the conducted constitutional review' framework.

In 2017, when presented with a constitutional objection in law regarding the aforementioned provisions, arguing that the phrase „against themselves" contained therein is unconstitutional because a witness statement given by a person who subsequently becomes a defendant in the same case cannot be used against them but can be used against co-defendants, the Constitutional Court dismissed the constitutional challenge[22], concluding that the dispositions of art. 118 CPP are constitutional in relation to the raised criticisms.

Essentially, in the reasoning of its decision, the Court stated, in para. 13-18 of Decision no. 519/2017, that:

(i) The provisions of art. 118 CPP regulate a new legal institution within the existing criminal procedural law, namely the right of the witness not to incriminate themselves.

(ii) The national criminal procedural law, through the denounced norm, does not regulate a right of the witness to refuse to give statements, therefore, it does not establish an actual right of the witness not to self-incriminate on one hand, and it does not fall under the scope of the institution of excluding evidence from criminal proceedings on the other hand.

[21] ECtHR, Section IV, Case *Heaney and McGuinness v. Ireland*, judgment from 21.12.2000, app. no. 34720/97.

[22] CCR dec. no. 519 of July 6, 2017, published in the Official Gazette of Romania, Part I, no. 879/08.11.2017.

(iii) The purpose of the norm is that a witness statement - given by a person who, in the same case, had previously made a statement or subsequently became a suspect or defendant - is not excluded from the case file and can be used to establish factual circumstances unrelated to the witness themselves. This is expressly regulated in the last paragraph of art. 118 CPP, which imposes an obligation on the judicial authority to mention the witness's previous procedural status when recording the statement.

(iv) The provisions of art. 118 CPP constitute a guarantee of respecting the right to a fair trial of the person testifying, who, before or after making the statement, has become a suspect or defendant, preventing their own statements from being used against them.

(v) The self-incriminating statements of the witness are, at the same time, necessary for resolving the case concerning another accused person since a fundamental principle of criminal proceedings is the discovery of the truth in order to achieve the purpose of criminal proceedings, which is the complete and accurate knowledge of the material facts and the person who committed them, thereby holding the latter criminally responsible.

(vi) Admitting self-incriminating evidence in criminal proceedings against a witness who, before or after making the statement, has become a suspect or defendant, while excluding self-incriminating statements of the witness concerning another accused person, would undermine the fairness of the criminal process and discredit the administration of justice.

By Decision no. 236/2020[23], a new constitutional exception was raised, which found that the legislative provision contained in art. 118 CPP, which does not regulate the right of a witness to remain silent and not to self-incriminate, is unconstitutional.

CCR held that in its current form, subject to examination, art. 118 CPP regulates the „right of the witness not to incriminate oneself" as a negative procedural obligation of the judicial body, which cannot use the statement given as a witness against the person who, after the statement, becomes a suspect or defendant in the same case. Thus, the Court found that the criticized text considers two hypotheses, namely: (i) the hypothesis in which the person is questioned as a witness after the initiation of the criminal investigation regarding the act, and subsequently acquires the status of a suspect, and (ii) the hypothesis in which the person already has the condition of a suspect or defendant and subsequently the judicial body orders the separation of the case, and in the newly formed file, the person acquires the status of a witness.

It was therefore noted that compared to the current wording, art. 118 CPP does not allow the application of the right not to self-incriminate similar to that of a suspect or defendant. At the same time, the witness does not have the possibility to refuse to provide a statement under art. 118 of the current criminal procedural law, being obliged to declare everything they know, under the penalty of committing the offense of perjury, even if through their statement incriminates themselves.

The Court thus found that a person cited as a witness, who tells the truth, can self-incriminate, and if they do not tell the truth, avoiding self-incrimination, they commit the offense of perjury. With regard to the first hypothesis provided for in art. 118 CPP, in the absence of a regulation of the right of a witness to remain silent and not to self-incriminate, the criminal investigation authorities are not obliged to give effect to this right concerning the *de facto* suspect who has not yet acquired the status of a *de jure* suspect. Therefore, this situation leads to the charging of the person questioned as a witness, even in the hypothesis where, prior to the questioning, the criminal investigation authorities had information indicating their involvement in the commission of the offense that was the subject of the questioning as a witness, and the lack of official suspect status may result from the lack of will on the part of the judicial authorities, who do not issue the order under the conditions of art. 305 para. (3) CPP.

As for the second hypothesis regulated in art. 118 CPP, when the person is already pointed as suspect or defendant, and subsequently the judicial body orders the separation of the case, and in the newly formed file, the person acquires the status of a witness, even if the criminal procedural law allows for the questioning of a participant in the commission of the offense, as a witness, in the separated case, they cannot be a genuine witness. The genuine witness is the one who did not participate in any way in the commission of the offense, but only has knowledge of it, specifically knowledge of essential facts or circumstances that determine the fate of the trial.

[23] Published in the Official Gazette of Romania no. 597/08.07.2020.

Moreover, CCR noted that the HCCJ, Panel for the resolution of legal issues in criminal matters, by dec. no. 10/17.04.2019[24], ruled that „a participant in comission of a crime who has been separately tried from the other participants and subsequently questioned as a witness in the separated case cannot have the status of an active subject of the false testimony offense, provided for in art. 273 CP."

The Constitutional Court held that in a separate case, a participant who has been finally convicted can be heard as a witness in the cases of other participants in the same offense. However, their new statement continues to retain the „original" traces of a statement made as a suspect or accused, even though formally, the person has the status of a witness in the new procedural framework.

The Court further noted that, from a procedural standpoint, the witness is vulnerable, as they cannot be subject to secondary prosecution for abusive investigation, as regulated in art. 280 CP. The protection under criminal law only applies to individuals who are under a criminal investigation or in the course of a trial. The same vulnerable situation may persist if a person heard as a witness has limited access to a lawyer. Additionally, art. 118 CPP does not settle the right of a witness to have access to a lawyer, nor does it impose an obligation on the judicial authorities to inform them in this regard or to appoint a lawyer *ex officio* in specific situations.

Therefore, there are insufficient proper guarantees for a person heard as a witness. The witness's protection is limited only to the obligation of the judicial authorities not to use their statement against them. The witness does not have a level of protection similar to that enjoyed by a suspect or accused.

At the same time, the Court observed that the norm does not make any reference to the subsequent effects of such a statement. It can be used to obtain other means of evidence, and the derived evidence, in the absence of a contrary provision, can be used against the witness and influence the subsequent procedural conduct of the judicial authorities. However, such procedural conduct of the judicial authorities cannot be sanctioned under the provisions of art. 102 para. (4) CPP since a witness statement is not included in the scope of illegally obtained evidence.

Therefore, the procedural provisions of art. 118 CPP do not establish an effective protection for the witness concerning potential criminal liability. Also, they do not regulate adequate procedural and substantive guarantees for a person heard as a witness, nor do they prohibit the use of evidence indirectly obtained, based on their statement. The only evidence protected for the witness is their own statement.

It was concluded that the legislative solution contained in art. 118 CPP, which does not regulate the witness's right to silence and against self-incrimination, is unconstitutional. It contradicts the provisions of art. 21 para. (3), art. 23 para. (11), and art. 24 para. (1) of the Romanian Fundamental Law, as well as art. 6 para. (1) and (2) ECHR.

Considering the manner in which the Constitutional Court has defined the content, meaning, and guarantees of the witness's right against self-incrimination, in light of ECtHR extensive jurisprudence, it is necessary to further analyze how the courts have applied this right in practice, following the publication of the aforementioned decision in the Official Gazette.

3.2. The HCCJ and other judicial courts case law

- By the criminal decision of March 14, 2023, rendered by the Galați CA, the Public Ministry's appeal against the criminal judgment of November 8, 2022, pronounced by the Galați CA, acquitting the defendant A.A. for the offense of false testimony under art. 273 para. (1) CP, was dismissed on the grounds that the act is not provided for by criminal law.

The criminal investigation authorities charged the defendant with making false statements on January 4, 2019, when he was questioned as a witness in criminal case no. 9/D/P/2019 of DIICOT, Galați Territorial Office. He falsely declared that he did not know the named individual B.B., who was under investigation for the offense of trafficking in high-risk drugs under art. 2 para. (1) of Law no. 143/2000, and that he had not purchased drugs from him, although in reality, he knew him and had bought drugs from him on multiple occasions.

In the considerations of the acquittal decision, the court found that even without a detailed analysis, it becomes evident that if the defendant A.A. had stated that he had purchased drugs from B.B., there would have been a possibility of his incrimination for the offense under art. 4 para. (1) of Law no. 143/2000, which defines the offense alternately, listing a series of actions including the purchase of high-risk drugs.

[24] Published in the Official Gazette of Romania, Part I, no. 416/28.05.2019.

Thus, the defendant A.A. had to choose between affirming the purchase of drugs, exposing himself to the risk of a new criminal investigation for the offense under art. 4 para. (1) of Law no. 143/2000, for which he had previously been fined, and denying the purchase of drugs, which led to his investigation and prosecution for the offense of false testimony.

The court noted that from the content of the statement recorded during the criminal investigation, it does not appear that the criminal investigation authorities informed the witness A.A. of his right not to incriminate himself. The mention in the standard declaration on page 30, stating that he was informed of his right to refuse to give statements as a witness, is formal and devoid of substance, as it does not indicate the basis on which this aspect was brought to his attention nor the reason why he could refuse to provide such statements.

The court found that although two years have passed since CCR dec. no. 236/2020, the legislature has not adopted an appropriate legislative solution as a consequence of admitting the unconstitutionality exception (neither art. 273 CP nor art. 118 CPP have undergone any changes since the existing form at the time the unconstitutionality exception was pronounced), which puts us, to some extent, in a situation similar to the decisions of unconstitutionality concerning art. 155 CP, regarding the prescription of criminal liability.

Therefore, in light of this constitutional flaw, the caselaw is obliged to analyze and apply the provisions of art. 273 CP and art. 118 CPP in relation to CCR dec. no. 236/2020, as stated, among others, in para. 84 of the mentioned decision.

In conclusion, based on the above exposition, the court stated that the witness benefits the right to remain silent and not contribute to their own incrimination, to the extent that their statement could self-incriminate them, under art. 6 ECHR and the ECtHR case law. CCR dec. no. 236/2020 is considered as more favorable criminal law for individuals who were not informed of their right to remain silent and not contribute to their own incrimination, and later faced charges of false testimony.

The judicial authority cannot use a person's statement as a witness against the accused, but only in favor of the suspect or defendant. The obligation to inform the witness of their right not to self-incriminate lies with the judicial authority that possesses information giving rise to suspicions of the witness's involvement in the commission of a criminal offense. A person summoned as a witness, who tells the truth, may self-incriminate, and if they do not tell the truth to avoid self-incrimination, they may commit the offense of false testimony. In reality, this mechanism leads to the prosecution of the person who was questioned as a witness, which is unfair if the criminal investigation authorities had indications of their involvement in the offense under investigation before their testimony as a witness.

Analyzing the chronology of events in this case, it can be observed that at the time of the defendant A.A.'s questioning as a witness, the criminal investigation authorities had plausible reasons to suspect his involvement in the possible offense of drug trafficking for personal use, especially considering that the defendant had previously been convicted for such an offense. Moreover, even in the hypothesis that they proceeded with his questioning, the criminal investigation authorities had the obligation to inform him of the consequences that arise when the information provided indicates involvement in a crime, including his right not to self-incriminate.

With reference to these considerations, the court concluded that in the specific situation of the defendant A.A., he does not meet the required quality of an active subject under the incriminating norm, which is an essential condition for the offense of false testimony to be imputed to him. Therefore, since the condition of typicity is not fulfilled, the act of false testimony attributed to him is not provided for by law, and the acquittal solution must be adopted.

- According to the criminal judgment issued on February 10, 2022, by the Constanța Court, the defendants A., B., and C. were acquitted of the offense of false testimony, as provided under Article 273(1), (2)(d) of the Criminal Code, because the act is not covered by criminal law.

In order to reach this decision, the court noted that the defendants were indicted by the Constanța Court Prosecutor's Office for the offense of false testimony, as provided under art. 273 para. (1) CP. They were heard as witnesses in a case pending before the Constanța Trib., involving a defendant (a police officer) who was indicted for corruption offenses. During their testimony, the defendants made false statements regarding the essential facts and circumstances about which they were questioned.

Based on the evidence presented, the court found that the defendants in the current case were not genuine witnesses in the case where the police officer was indicted for the offense of bribery. There were reasonable suspicions that they themselves had committed the offense of bribery as regulated under art. 290 CP.

Considering the aspects highlighted by the criminal investigation authorities, the defendants were in a situation where they had to provide false statements or withhold information, which would have led to criminal liability for the offense of false testimony, or disclose everything they knew, which would have resulted in criminal liability for the offense of bribery.

The court appreciated that this situation was analyzed in an abstract manner in the considerations of the aforementioned decision by the Constitutional Court, which concluded that this situation violates the defendants' constitutional right not to contribute to their own incrimination.

Therefore, the court concluded that the conditions required by law for convicting the defendants were not met, and it ordered their acquittal considering that the committed act is not provided for by criminal law, invoking the provisions of art. 16 para. (1) letter (b), first paragraph CPP.

- Through ruling no. 299 issued on October 4, 2021, by the judges of the preliminary chamber of the Suceava Trib., the appeal against the ruling of the judge of the preliminary chamber of the Câmpulung Moldovenesc Court was upheld. The contested ruling was completely annulled, and upon retrial, the exception of nullity regarding multiple pieces of evidence and acts of criminal investigation was accepted, including the witness statements given by A. on November 27, 2017, and November 28, 2017, ordering their exclusion from the case.

Based on the documents in the case file, the defendant was charged with the offense of driving a motor vehicle under the influence of alcohol or other substances. On November 27, 2017, around 04:00, while driving a car on public roads, the defendant was involved in a traffic accident resulting only in material damages. When tested with a breathalyzer, a concentration of 0.68 mg/l of pure alcohol in the breath and an alcohol concentration in the blood above the legal limit were recorded.

By the order of the criminal investigation authorities dated November 27, 2017, the criminal investigation *in rem* for the offense of driving a vehicle under the influence of alcohol or other substances, as provided under art. 336 para. (1) CP, was initiated.

Furthermore, the defendant was heard as a witness on November 27, 2017, and November 28, 2017. Subsequently, through the order dated March 22, 2018, confirmed on the same date, the further prosecution of the defendant was ordered regarding the offense of driving a vehicle under the influence of alcohol or other substances, as provided under art. 336 para. (1) CP. After the initiation of the criminal action, the defendant was indicted for the commission of the mentioned offense.

Referring to CCR dec. no. 236/02.06.2020, the judges of the preliminary chamber noted that the prosecutor cannot attribute the status of a witness to a person whom they know to be involved in the commission of a criminal offense, solely for the purpose of using the mechanism described in the considerations of the constitutional court's decision[25], in order to formulate a criminal accusation.

Based on these theoretical considerations, the judges have found that indeed, on the dates of 27.11.2017 and 28.11.2017, when the defendant A. was heard as a witness, the prosecutor had sufficient information that he was the presumptive author of the offense, as he was questioned regarding the materiality of the act. However, the defendant was heard as a witness, despite the fact that a witness is obliged, under penalty of criminal liability for the offense of false testimony, to declare the truth in the matter.

In this situation, the defendant, in his capacity as a witness, could not invoke the right not to self-incriminate, which cannot be remedied during the judicial proceedings. His statements were used as evidence in the indictment order no. 1405/P/2017 dated 20.05.2021, the confirmation order for the further conduct of the criminal investigation no. 1405/P/2017 dated 22.03.2018, and the order for the further conduct of the criminal investigation no. 1405/P/2017 dated 22.03.2021, as well as in the reasoning of the indictment, mentioned in Chapter II „Means of evidence".

3.3. A judgment contrary to the aforementioned (Cluj CA, crim. dec. no. 413/A/22.03.2021)[26]

In fact, the defendant P.G.D. was heard as a witness regarding the offenses of disturbing public order and possession or use of dangerous objects without authorization, committed by the defendant B.I.P. At the time of his testimony, P.G.D. cooperated with the criminal investigation authority, disclosing everything he knew, with

[25] A person subpoenaed to be heard as a witness, with the obligation to tell the truth, may be charged if they self-incriminate. On the other hand, if they do not tell the truth to avoid self-incrimination, they would commit the offense of false testimony.

[26] R. Anghel, *Critical Note on Criminal Decision no. 413/A/22.03.2021 of the Cluj CA*, in Caiete de Drept Penal no. 2/30.06.2021.

one notable exception. When asked whether the defendant B.I.P. had a knife on him (a knife that the defendant B.I.P. indeed had on him and that P.G.D. picked up from the ground), P.G.D. falsely declared that such knife did not exist. Both before the first instance and the appellate court, the defendant P.G.D. stated that he lied to protect himself from potential criminal liability for aiding the defendant B.I.P., with the assistance consisting of attempting to conceal the knife.

By criminal decision no. 413/A/2021 dated 22.03.2021, the Cluj CA rejected the appeal of the defendant P.G.D., stating that his request for acquittal cannot be granted. In support of this ruling, the Court indicated that the defendant was heard in accordance with the legal norms in force at the time of the hearing and that the defendant did not invoke the right to remain silent at that time, choosing instead to make false statements. Additionally, the Court, referring to the ECtHR case law, the supreme court, and the Constitutional Court, held that the witness's right against self-incrimination is not absolute, essentially stating that being heard in connection with offenses committed by another person does not entitle the witness to make false claims.

The defendant B.I.P. was indicted for the offenses of possession or use of dangerous objects without authorization and disturbing the public order, while the defendant P.G.D. was charged with perjury. According to the indictment, the defendant B.I.P. was inside Club N., located in Cluj-Napoca, and got into a conflict with the witness B.F.A. The security guard asked the defendant to leave the premises and accompanied him until he left the club. However, at the exit, the defendant became unruly, taking out a knife from his pants pocket and gesturing towards the security guards. They subsequently immobilized the defendant, during which process the defendant P.G.D. dropped the knife on the ground, which was then picked up by the defendant P.G.D.

As a witness, the defendant P.G.D. partially confirmed the statements of other witnesses regarding the existence of an incident. As for the existence of the knife, he claimed not to have seen any such object on the defendant and not to have picked up any knife from the ground. It was determined that the witness' statement was false, as surveillance camera footage showed him picking up the knife that the defendant B.I.P. had.

The trial court noted that the defendant referred to the CCR dec. no. 236/02.06.2020, which declared unconstitutional the legislative resolution contained in art. 118 CPP, which did not regulate the witness' right against self-incrimination. However, the Court considered that the witness' testimony was given in compliance with the law, as he was made aware of the provisions of art. 118 CPP (which were unaffected at that time by the aforementioned decision, which was rendered later). CCR dec. no. 236/02.06.2020 was published in the Official Gazette of Romania no. 597/08.07.2020, and its effects produced, according to art. 26 of Law no. 47/1992, from the moment of publication and only for the future.

Secondly, the court found that the accused P.G.D. was informed about the subject of the investigation („the incident at club N.") and the person under investigation (the accused B.I.P.). P.G.D. was not involved in that incident (did not cause the incident or commit any acts of violence) and did not use the knife (he only picked up the knife after it was dropped by the accused B.I.P., without using it in any way).

It cannot be accepted that the defendant felt compelled to lie in order to avoid criminal responsibility for acts he did not commit (acts that do not exist) and for which he was not under investigation or accused.

Furthermore, the court found that the accused did not commit the offense of false testimony by refusing to give statements or by concealing details, but rather presented a deliberately false and obviously favorable state of affairs for the defendant B.I.P.

The Cluj CA dismissed the accused's appeal as unfounded, stating that the witness statement was taken in accordance with the law, and the provisions of art. 120 para. (2) letter d) CPP were brought to his attention. P.G.D. was not involved in the incident (did not cause the incident or commit any acts of violence) and did not use the knife (he only picked up the knife after it was dropped by the accused B.I.P., without using it in any way). The judicial authorities, at the time of his testimony as a witness, had no indication/information/data regarding his involvement in the incident under investigation. P.G.D. did not have the status of a suspect/accused in the case being investigated for the offenses of unauthorized use of dangerous objects and disturbance of public order prior to or after giving his witness statement. Finally, the accused did not invoke the right to remain silent at the time of the hearing and did not refuse to give statements.

Additionally, it was noted that the witness' right to remain silent and not incriminate oneself must be analyzed in each specific case and cannot be recognized *ab initio*, without any distinction, as a general and absolute right. It should be assessed based on the particularities of each case, especially in relation to whether the judicial authority has plausible reasons to believe that the statements of the witness could incriminate him,

i.e., whether the judicial authority has minimal indications that the witness may be involved in the facts about which he is being questioned.

In this decision, a separate opinion was also formulated, advocating for the acquittal of the accused P.G.D. based on the grounds of art. 16 letter b) CPP. The difference of opinion in this litigation essentially revolves around the interpretation of CCR dec. no. 236/2020. Contrary to the views held by the majority opinion, the separate opinion considers that the correct interpretation of this decision is to grant any witness who is questioned, regardless of the nature or object of the case, an absolute right to remain silent and not self-incriminate.

It was noted that according to the ECtHR jurisprudence, it is not natural to ask the alleged perpetrator to choose between being penalized for refusing to cooperate, providing incriminating information to the authorities, or lying and risking conviction for perjury (*Weh v. Austria*, 2004). When combined with CCR dec. no. 236/2020, three conclusions can be drawn: no one can be penalized for exercising the right to remain silent, regardless of their formal role in the process; no one can be compelled to provide incriminating information to the authorities; no one can be penalized for lying to avoid self-incrimination. The decisions of the Constitutional Court, like legal norms, are imperative and must be respected, and direct censorship of these decisions by the courts can only occur in exceptional circumstances. The accused P.G.D. faced these three difficult decisions at the time of the commission of the offense. This is certain, just as it is certain that he chose to lie about those details which he believed could incriminate him, details that were known to the judicial authorities from the rest of the evidence presented in the case.

It was noted that it needs to be determined whether the fact that the accused lied to conceal the possible commission of a separate offense, rather than the offense for which he was being questioned, is relevant. In this context, it was stated that although it is extremely important to be able to rely on the testimony of witnesses, it is essential to recognize their right not to self-incriminate or self-denounce. It is undeniable that the witness's right to remain silent cannot be exercised arbitrarily and absolutely, just as the „right to lie" cannot be used in this way. However, the only limitation should be the proof that, in the abstract, the witness could not self-incriminate by telling the truth.

The second issue that arises is whether the statement given by the accused P.G.D., assuming he was not lying, could have incriminated him. The analysis of this issue should remain concise and abstract, as the court is not called upon to judge the potential offense of aiding the perpetrator. In this regard, it was argued that it is sufficient to determine that, in the abstract, concealing a weapon used in the commission of a crime immediately after the offense could meet the elements of the accusation of aiding the perpetrator.

In conclusion, at the time of his testimony during the criminal investigation, the accused P.G.D., without knowledge of his right not to make statements that could incriminate him (CCR dec. no. 236/2020 being subsequent to this moment), was put in a situation where he had to choose between self-incrimination, refusal to testify (which at that time could lead to a reasonable presumption that he would be held criminally liable for perjury), and lying (which at that time could also lead to a reasonable presumption that he would be held criminally liable for perjury, with the mention that he believed there was a possibility that his action would not be discovered). In a spur of the moment decision, the accused chose to lie. However, beyond the more or less moral character of this choice, in light of CCR dec. no. 236/2020 and the ECtHR jurisprudence, this choice was made under duress, in a context where there was no correct choice from the accused's perspective, and it cannot be criminally sanctioned.

In a critical note to this decision, it was pointed out that through dec. no. 651/2018, the Romanian Constitutional Court had stated that decisions pronounced by CCR must have the vocation of retroactive application, as a form of criminal law decriminalization. However, by transforming the right to remain silent and not self-incriminate into an absolute right, a series of behaviors that previously met the elements of the offense of perjury were decriminalized. The fact that the accused was not heard as a witness in a case where an offense committed by him was being investigated cannot be considered a reason to disregard the right to remain silent or not self-incriminate. The interpretation given by the court, which did not take into account the possibility of multiple separate offenses being committed in a closely related context by different individuals (some of which could easily come to light through self-incrimination or even self-denunciation), is unacceptable. Regarding this issue, it was considered that the separate opinion clearly demonstrates why such an approach is incorrect. Essentially, it would ignore the entire jurisprudence of the ECtHR, which has shaped the concept of a (true) witness. Moreover, such an interpretation would encourage a return to abusive practices of interrogating the

perpetrator as a witness, only with the mention that this interrogation would be related to another person or a different legal framework.

It was appreciated that the judicial authorities acted unlawfully when they heard P.G.D. as a witness. The judicial authorities, even in the absence of the CCR's decision, in light of the ECtHR jurisprudence, could and should have informed the witness that if he believed that by disclosing certain facts he could self-incriminate, he had the right to remain silent. It is indisputable that concealing a weapon used in the commission of a crime immediately after the offense can meet the elements of the offense of aiding the perpetrator. The judicial authorities not only failed to inform P.G.D. that he could exercise his right to remain silent, even though at that stage of the criminal investigation they were aware of his behavior of raising the knife and attempting to hide it, but they even asked him questions explicitly related to this aspect. The accused's choice to provide false information was considered by the court as a reason for conviction, arguing that the accused should have chosen not to declare anything. Apart from the fact that such a statement contradicts the real possibilities that a person questioned as a witness has, most of the time it also contradicts the objective reality of the case, given that the accused was not informed of his right to remain silent. Furthermore, it is essential to the theory of the three difficult choices that the witness faced with this choice has the possibility to exercise any option without suffering consequences.

b.5) A nuanced solution regarding the analyzed aspect was given by the supreme court, which upheld the decision pronounced by the judge of the preliminary chamber of the Bucharest CA, 1st crim. s. (HCCJ, crim. s., dec. no. 508/20.05.2021, by the panel of 2 judges of the preliminary chamber).

Thus, by the ruling dated November 23, 2020, the Bucharest CA, 1st crim. s., based on art. 346 para. (2) in conjunction with art. 345 para. (1) and (2) CPP, dismissed as unfounded the requests and exceptions formulated, among others, by the defendants A. and B. regarding the legality of the court's referral, the performance of procedural acts, and the administration of evidence in the criminal investigation phase. It found the legality of the court's referral, as well as the legality of the performance of procedural acts and the administration of evidence in the criminal investigation phase, and ordered the commencement of the trial.

The judge of the preliminary chamber at the trial court noted that the DNA indictment dated July 20, 2020, referred to the following defendants: defendant A., charged with the offenses of abuse of office if the public official obtained an undue benefit for himself or another person, in the form of instigation, as provided by art. 297 para. (1) CP, related to art. 132 of Law no. 78/2000, with the application of art. 47 CP, and continuous intellectual forgery in the form of instigation, provided by art. 321 para. (1) CP, in conjunction with art. 35 para. (1) CP, with the application of art. 47 CP, both with the application of art. 38 para. (2) CP; defendant B., for complicity in the use, in any way, directly or indirectly, of non-public information or allowing unauthorized persons access to such information, as provided by art. 48 para. (1) CP, related to art. 12 letter b) of Law no. 78/2000.

In the preliminary chamber procedure, defendant A., through his chosen defense counsel, invoked, among other things, requests and exceptions concerning the fact that the statements of the named Z. and the statement given as a witness by the defendant W. were unfairly obtained since, although those statements concerned their own actions, they were not informed of their right not to self-incriminate before the questioning, as required by CCR dec. no. 236/02.06.2020[27].

Regarding the reason invoked by defendant A. through his defense counsel, the judge of the preliminary chamber found it unfounded, and the defense counsel's request to establish the unfair manner of obtaining the statements and to exclude them from the overall evidence of the case is unfounded.

Regarding the witness statements of Z. and the statement given as a witness by the defendant W., which were obtained without informing the persons questioned of their right not to self-incriminate, as established by CCR dec. no. 236/02.06.2020, the judge of the preliminary chamber found that the conditions for applying the relative nullity sanction, provided for in art. 282 para. (1) CPP, are not met for the following reasons:

As for witness Z., it was essentially noted that a decision to close the case was taken against her in the indictment. Therefore, in relation to what was established by the constitutional administrative court in dec. no. 236/2020, her questioning without being informed by the prosecutor of the right to remain silent and the right not to contribute to her own incrimination, as procedural rights recognized in favor of the „accused", did not cause her any concrete harm, given that those statements were never used against her.

[27] Published in the Official Gazette of Romania no. 597/08.07.2020.

Regarding the statement given as a witness by the defendant W, in the absence of her being informed about the right to remain silent and not self-incriminate, it is not affected by any grounds for relative nullity under art. 282 CPP. On the one hand, at the time of this questioning by the prosecutor himself, based on the evidence in the case, the prosecutor did not have sufficient conclusive information to suspect the possible involvement of defendant W. in the investigated offenses, so it could not be considered that W. had already acquired the status of an „accused" in the autonomous sense of this notion, as configured in the ECtHR jurisprudence. On the other hand, from the examination of the content of this statement, it does not appear that the holder of the statement made incriminating statements against herself or other defendants in the case, and the aspects recorded in that statement were not used by the prosecutor to prove the factual situation described in the indictment.

Against this ruling, within the legal deadline, various parties, including defendant A, filed appeals, reiterating the criticisms raised before the judge of the preliminary chamber at the trial court, arguing that the ruling pronounced by the judge was unfounded, illegal, and inadequately motivated.

Examining the legality and validity of the appealed ruling, based on the grounds of appeal invoked and *ex officio* within the limits conferred by art. 347 para. (4) and art. 281 CPP, the High Court, with a panel of two judges, considered the appeals to be unfounded for the following reasons:

Defendant A.'s criticism regarding the legality of obtaining evidence from the perspective that the statements of witness Z. and defendant W., given as witnesses, were obtained unfairly by violating their right not to self-incriminate was deemed unfounded.

The High Court noted that the witness statements of the two individuals were given on March 12, 2020, prior to the publication of CCR dec. no. 236/02.06.2020 (in the Official Gazette of Romania, Part I, no. 597/08.07.2020), which recognized the unconstitutionality of the legislative solution provided in art. 118 CPP, which does not regulate the witness's right to remain silent and not self-incriminate. In this context, it was noted that the decision of the constitutional administrative court cannot, unconditionally, invalidate these means of evidence without the risk of producing retroactive effects. According to art. 147 para. (4) of the Romanian Constitution, republished, „Decisions of the Constitutional Court shall be published in the Official Journal of Romania. From the date of publication, the decisions shall be generally binding and shall only have future effect".

On the other hand, the right of a witness to remain silent and not self-incriminate is intended, in principle, to protect the freedom of any person questioned to choose whether to speak or remain silent when interrogated by the police regarding illicit activities in which they may have been involved. This freedom of choice is compromised when, suspecting the possible contribution of the person questioned to the illicit activities under investigation, the authorities' resort to the subterfuge of questioning them as a witness (obliged to provide complete statements) and fail to inform them not only of the suspicions against them but, more importantly, of their procedural right not to contribute to their own incrimination.

From the analysis of the provisions of art. 282 CPP regarding the relative nullity, in relation to the considerations of CCR dec. no. 236/02.06.2020, it is apparent that the right to remain silent and not self-incriminate belongs to the person who provided the statement as a witness, as they are the holder of the procedural interest in giving statements only when fully aware of their value and purpose in the proceedings, in order to effectively benefit from all the guarantees of a fair trial.

Given the circumstances, the alleged violation of the right not to self-incriminate was not invoked by the witnesses themselves, namely Z. and W., but rather by the defendant A., who does not justify a specific procedural interest in relation to the analyzed provisions of criminal procedure. Furthermore, in line with the preliminary judge at the trial court, upon examining the content of the witness statements in question, the appellate court determined, at a formal analysis level inherent to the preliminary stage, that these statements do not appear to provide incriminating information regarding the appellant A. Therefore, the preliminary judge at the trial court correctly concluded that the conditions for applying the sanction of relative nullity, as provided by art. 282 para. (1) CPP, are not met in this case with regard to the witness statements of Z. and W.

4. Conclusions

Based on the aforementioned, it can be concluded that CCR dec. no. 236/2020 has significantly changed judicial practice regarding the witness's right to remain silent and not to self-incriminate. Although there was already a rich jurisprudence from the European Court on this matter, its application has been somewhat timid,

perhaps indicating the need for a stronger impetus, which was provided by the resurgence of jurisprudence from the Constitutional Court.

However, the debate still remains open regarding the temporal application of the aforementioned decision and the practical method of recognizing the witness' right to remain silent. The identified jurisprudence allows us to draw the conclusion that, although the witness' right to remain silent has been created, more or less explicitly, it is not recognized *ab initio*, even when viewed from the perspective of the *de facto* defendant.

At least for now, it seems to be the responsibility of the preliminary judge to determine whether, with respect to the witness, the investigating authorities had sufficient evidence at the time of the hearing to conclude that the witness could potentially self-incriminate through their statements, thus facing a difficult choice.

The current state of the law, as interpreted by the Constitutional Court, requires a careful examination of the specific circumstances of each case to assess the potential violation of the witness's rights. The role of the preliminary judge is crucial in evaluating whether there were enough proofs for the witness to be put in a position where their statements could potentially lead to self-incrimination.

References

- A.S. Ripan, The Right to Silence. Legal Nature and Who Can Invoke It, available at *www.avocatripan.ro*;
- V. Puşcaşu, *Right to Silence and Non-Self-Incrimination. Ratio essendi*, available at *https://drept.uvt.ro*;
- R. Anghel, Critical Note on crim. dec. no. 413/A/22.03.2021 of the Cluj CA, in Caiete de Drept Penal no. 2/30.06.2021;
- G. Sas, *The Right of the Witness against Self-Incrimination and the Right to Legal Assistance*, JBC no. 1/2020;
- V. Constantinescu in M. Udroiu (coord.), *Criminal Procedure Code. Commentary on Articles*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2020;
- Case *Engel and Others v. the Netherlands* (app. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), available in English at *https://hudoc.echr.coe.int/eng?i=001-57478*;
- Case *Kalēja v. Latvia*, Judgment of October 5, 2017;
- Case *Serves v. France* (82/1996/671/893), October 20, 1997, available in English at *https://hudoc.echr.coe.int/eng?i=001-58103*;
- Case *Lutsenko v. Ukraine* (app. no. 30663/04), December 18, 2008, available in English at *https://hudoc.echr.coe.int/eng?i=001-90364*;
- Case *Shabelnik v. Ukraine* (app. no. 16404/03), February 19, 2009, available in English at *https://hudoc.echr.coe.int/eng?i=001-914011*;
- Case *Brusco vs. France,* available online at *http://bit.ly/3aNTar5*;
- Case *Heaney and McGuinness v. Ireland*, December 21, 2000, app. no. 34720/97;
- CCR dec. no. 519 of July 6, 2017, published in the Official Journal of Romania, Part I, no. 879/08.11.2017.