Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 17(66) Special Issue – 2024
https://doi.org/10.31926/but.ssl.2024.17.66.3.24

THE WITNESS'S RIGHT TO SILENCE AND NON-SELF-INCRIMINATION. CASE-LAW: CONSIDERATIONS ON THE SCOPE OF THE CONCEPT OF WITNESS

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Abstract: *This paper aims to present the witness's right to silence and the right to non-self-incrimination, with reference to the legal regulations, as they were interpreted in the jurisprudence of the ECHR, the Romanian Constitutional Court and the Romanian High Court of Cassation and Justice. In this regard, it is important to first of all delimit the scope of the concept of witness, which also includes assimilated witnesses. On the other hand, it is equally important to emphasize the solutions to which the application of this right may lead in practice, in the absence of an express regulation in Romanian law.*

Key words: *witness, right to silence, non-self-incrimination, assimilated witness, case law.*

1. The Witness – An Essential Participant in Criminal Proceedings

The criminal doctrine defines the witness as "the natural person, other than the suspect, the injured person and the parties in the criminal proceedings, who has knowledge of facts and factual circumstances that serve to establish the existence or non-existence of a crime, to identify the person who committed it and to know the circumstances necessary for the just resolution of the case and finding out the truth in the criminal trial". The scope of persons who can be witnesses in criminal proceedings is delimited by the provisions of Articles 114 and 115 of the Criminal Procedure Code. Thus, a witness may be "any person who has knowledge of facts or factual circumstances which constitute evidence in the criminal case".

According to the Code of Criminal Procedure, constitutes evidence the witness's statements, which consist of a statement made to the judicial body, in which the witness presents his or her knowledge of facts or factual circumstances necessary for the just resolution of the case. Being outside the specific legal relationship at issue, the witness must be objective and, through his or her statements, must contribute to ascertaining

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the truth of the case. For this to happen, however, the status of witness must be maintained throughout the trial, because only then can he or she be expected to be consistent in telling the truth.

If the witness does not tell the truth before the judicial authorities, he/she is liable to criminal sanctions and can be charged with the offense of perjury. According to Article 273 (1) of the Criminal Code, this is the act of a witness who, in a criminal or civil case or in any other proceeding in which witnesses are heard, makes false statements or does not tell everything he knows about the essential facts or circumstances about which he is questioned and is punishable by imprisonment from 6 months to 3 years or a fine.

Essential facts or circumstances are those elements which relate to the substance of the case and are important for the decision. The essential character shall be determined by reference to the subject-matter of the evidence, if it is conclusive, and by reference to the charge against the accused or to any other matter which may have a bearing on his criminal responsibility.

In order for a witness's statements to be false, it is necessary that the elements he or she has shown do not correspond to the objective truth, that they are contrary to what actually happened, and it is up to the judicial authorities to prove that the witness perceived a certain reality, contrary to what was indicated in the statement.

2. The Regulation of the Witness's Right to Silence and Non-Self-Incrimination in European Law

2.1. The Regulation of the right in the Case-Law of the European Court of Human Rights

The European Court of Human Rights has been seized over the years with numerous cases alleging violations of the right to non- self-incrimination and the right to silence of the witness in criminal proceedings, so that it has developed a complex jurisprudence by which it has established, on the one hand, the legal nature of these rights, and on the other hand, the scope of the participants to whom they can be applied.

According to the case law of the Strasbourg Court, the right of an accused person to remain silent about the acts of which he is accused and not to contribute to his own incrimination is an implicit guarantee, essential aspects of a fair procedure in criminal proceedings: Although Article 6 of the Convention does not expressly mention these rights, they are nevertheless generally recognized norms which are at the core of the notion of "fair trial" enshrined in this text. Their recognition arose from the need to protect the person accused of committing a crime from pressure from the judiciary.

One of the leading cases in this respect is Saunders v. the United Kingdom, in which the Court held that the witness's right not to incriminate oneself and the right to silence are a direct consequence of the presumption of innocence, but have a self-standing existence, arising from the requirement of procedural fairness referred to in Article 6(1) of the Convention (Judgment of 29 November 1996, paragraph 68). In the following paragraph, the European Court pointed out that the right not to self-incriminate is closely linked to the presumption of innocence. The same aspects were also emphasized in Heaney and McGuinness v. Ireland (Judgment of 21 December 2000, paragraph 40).

In another case, even earlier than those mentioned, the Strasbourg Court examined the applicant's allegations of violation of the right to silence and the right not to incriminate oneself, both in the light of Article 6, paragraphs 1 and 2, of the Convention, finding a violation not only of the general fairness of the trial, but also of the rule that the prosecution must prove its case without the support of the accused, a guarantee specific to the presumption of innocence (Case of John Murray v. the United Kingdom, Judgment of 25 January 1996, paragraph 41).

In the light of this case-law, the doctrine has held that the right to remain silent and the right not to contribute to one's own incrimination are both a direct consequence of the presumption of innocence as well as a guarantee of procedural fairness, enshrined in Article 6(1) and (2) of the Convention, since paragraph 1 contains safeguards for the 'accused' in criminal matters, while the scope *ratione personae* of Article 6(2) of the Convention is broader, including the witness.

In the same sense, it has been held that the presumption of innocence aims to protect a person accused of committing a criminal offense against a verdict of guilt that has not been legally established and concerns the entire criminal proceedings, including the manner of administration of evidence, namely the evidentiary regime, being an essential element of the right to a fair trial.

However, according to the same jurisprudence, the right to silence and the right not to self-incriminate is not absolute, because in certain situations, the silence of the accused may have adverse consequences for him. In such a situation, in order to determine whether there has been a violation of Article 6 of the Convention from this perspective, all the circumstances must be taken into account, in particular the weight given to them by the national courts in weighing the evidence and the degree of duress inherent in the situation (Judgment of 8 February 1996, John Murray v. the United Kingdom, paragraphs 47 and 49). The nature and degree of the coercion used must therefore be analysed, in conjunction with the existence of an appropriate safeguard in the proceedings, but also the way in which the evidence thus obtained is used.

Thus, on the one hand, a conviction should not be based exclusively or principally on the silence of the accused or his refusal to answer questions or to give evidence, and on the other hand, the right to remain silent cannot prevent the silence of the person concerned from being taken into account in situations which clearly require an explanation from him in order to assess the evidence on the file. An accused person's decision to remain silent throughout criminal proceedings should therefore not necessarily be without implications, since in certain circumstances his or her silence may also be interpreted against him or her (Judgment of 6 June 2000, Averill v. the United Kingdom, and Judgment of 20 March 2001, Telfner v. Austria).

Also in Serves v. France (Judgment of 20 October 1997), the European Court held that assigning the status of witness to a person and hearing him as such, in a context where refusal to give evidence would entail punitive consequences, is a practice contrary to Article 6 para. 1 of the Convention, since a witness who fears that he might be questioned on self-incriminating matters has the right to refuse to answer questions in that direction.

2.2. The Regulation of the Right at EU Level

The right to silence and the right not to self-incriminate has been analysed and regulated also by other legal provisions at European level. In the preamble to Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016, it was stipulated that, in a broad sense, the right to not self-incriminate is that consequence of the presumption of innocence which confers on the suspect or accused person the aforementioned prerogative, the right to silence, but also, additionally, the right of the witness, suspect or accused person not to be compelled to make potentially self-incriminating statements (in the case of the witness) or to produce evidence against him (in the case of the suspect or accused person) which does not exist or cannot be judicially administered independently of his will. The European legislator referred to the European Court of Human Rights' interpretation of the right to a fair trial under the European Convention on Human Rights to determine whether the right not to incriminate oneself or the right to remain silent had been violated.

In the situation of hearing a person as a witness, under oath and, more importantly, under the criminal sanction of committing the offense of perjury, about facts or circumstances that could incriminate him - the Strasbourg court has developed the so-called *theory of the three difficult choices facing the person*, according to which it is not natural to ask the alleged offender to choose between: (i) being punished for his refusal to cooperate, (ii) providing incriminating information to the authorities, or (iii) lying and risking being convicted for doing so (Judgment of 8 April 2004, Weh v. Austria).

At European level, both persons accused of committing acts covered by criminal law (de jure suspects) and witnesses (de facto suspects; persons suspected prior to a formal notification, who subsequently become de jure suspects) benefit from identical protection in terms of the right to silence and the right to be protected from self-incrimination.

3. The Regulation of the Witness's Right to Silence and Non-Self-Incrimination in National Law

According to Article 118 of the Criminal Procedure Code, in force at the time the law entered into force, "a witness statement given by a person who, in the same case, prior to the statement, had or subsequently acquired the status of suspect or defendant cannot be used against him/her. The judicial bodies are obliged to mention, when recording the statement, the previous procedural capacity".

This provision regulates the right of the witness not to incriminate himself, the legislator defining this right as a negative procedural obligation of the judicial body which may not use the statement given as a witness against the person who has acquired the status of suspect or defendant in the same case.

The application of this legal text has encountered a number of impediments in judicial practice, since a person summoned as a witness who tells the truth may incriminate himself, and if he does not tell the truth, avoiding self-incrimination, he may commit the crime of false testimony, which led to the adoption of decisions by the Constitutional

Court and the High Court of Cassation and Justice, respectively, and, finally, to the amendment of the regulation.

3.1. The Situation of the Witness Prior to the Constitutional Court Decision No 236 of 2 June 2020. Genuine Witness vs. Assimilated Witness

In the first years after the entry into force of the new Code of Criminal Procedure, even the supreme court was faced with the interpretation of the provisions of Article 118 of the Criminal Procedure Code, in force at that time (currently Article 118 para. 3 Criminal Procedure Code) and with the delimitation of the scope of the legal notion of "witness".

Thus, in one case, the High Court of Cassation and Justice (Criminal Decision No 397 of 21 November 2014) held that the initiative to inform the witness that he has the right not to incriminate himself had to be taken by the judicial body in possession of data that gave rise to suspicions of the witness's involvement in the perpetration of a criminal act. A person summoned to be heard as a witness, in which capacity he or she has an obligation to tell the truth, if he or she incriminates himself or herself, could be prosecuted, and if he or she does not tell the truth, avoiding self-incrimination, he or she would commit the crime of perjury. This mechanism always leads, in fact, to the person being incriminated and is unfair if, prior to hearing the person as a witness, the prosecution authorities had clues that gave rise to the suspicion that the person was involved in the commission of the act when being heard as a witness. The right of the witness not to testify to facts which expose him to prosecution derives from the generally recognized principle at the heart of a fair trial enshrined in Article 6 of the Convention, namely the right not to contribute to one's own incrimination (*nemo tenetur se ipsum acussare*).

In another case, the High Court of Cassation and Justice (Criminal Decision No 231/A of 9 June 2015) upheld the acquittal of the defendant accused of committing the offense of perjury, holding that *(....) in national doctrine and case law it has been consistently held, as a matter of principle, that if the witness, in order not to incriminate himself of the perpetration of a crime, makes untrue statements or intentionally conceals certain essential circumstances about which he has been questioned, he would not commit the crime of perjury. In reality, such a person is no longer "a witness" because he can no longer appear in that capacity in relation to a possible prosecution against him, since the questions asked would, if he answered truthfully, lead to his involvement in a criminal trial. In such a situation, the witness can no longer be required to be objective, at the same time as the criminal penalty is hanging over him*.

The Constitutional Court has been seized with an exception of constitutionality of the provisions of Article 118, first sentence of the Code of Criminal Procedure, according to which "a witness statement given by a person who, in the same case, prior to the statement, had or, subsequently, has acquired the status of suspect or defendant cannot be used against him/her". By Decision no. 519 of 6 July 2017, the Court rejected as unfounded the exception of unconstitutionality and found that the criminal procedural rules criticized meet the requirements imposed by the case law of the European Court of

Human Rights on the protection against self-incrimination, since the legal text regulates a safeguard of respect for the right to a fair trial of a person who gives evidence and who, before or after that statement, had or has acquired the status of suspect or accused, with regard to a possible indictment, and his own statements cannot be used against him. In this regard, the Court noted that the second sentence of Article 118 of the Code of Criminal Procedure provides for the obligation of the judicial body to mention the previous procedural capacity of the witness. At the same time, the Court held that the self-incriminating statements of the witness are, at the same time, also statements necessary for the resolution of the case, regarding another accused, given that a fundamental principle of the criminal process is to find out the truth, in order to achieve the purpose of the criminal trial, namely the complete and accurate knowledge of the facts in their materiality, as well as of the person who committed them, so that the latter can be held criminally liable. The obligation of the judicial bodies is to administer all available evidence in order to find out the truth about the crime and the person who committed it, and the right of the witness not to be accused is safeguarded under Article 118 of the Code of Criminal Procedure, thus the criminal procedure rule under criticism is not contrary to Article 16 of the Constitution.

Subsequently, by Decision no. 10/2019 of 17 April 2019, the High Court of Cassation and Justice, the Panel for the resolution of certain questions of law in criminal matters, established that "the participant in the perpetration of a crime who was tried separately from the other participants and subsequently heard as a witness in the separate case cannot be an active subject of the crime of false testimony under Article 273 of the Criminal Code".

In this decision, it was held that, from the point of view of the witness's right not to incriminate himself, it has been held in doctrine that, in both civil and criminal proceedings, if the witness, in order not to incriminate himself of the perpetration of a crime, makes false statements or, with intent, withholds certain essential circumstances about which he has been questioned, he would not be guilty of the offense of perjury, since he cannot appear in that capacity in relation to any possible prosecution against him, since the questions asked would lead to his involvement in criminal proceedings if he answered them truthfully. In such a situation, the witness cannot be asked to be objective, as long as the criminal sanction is hanging over him.

The Supreme Court has emphasized that a genuine witness is a witness who did not participate in any way in the perpetration of the crime, but merely has knowledge of it, that is to say, has knowledge of the essential facts or circumstances which determine the outcome of the trial. However, the participant in the perpetration of an act under criminal law is, in reality, an "assimilated witness", for whom the law does not establish a specific procedural status, but who is closely connected with the crime at trial. This was also the interpretation adopted by most case law.

It has also been emphasized in case law that it is important that the facts about which the witness is asked for information may incriminate him, since the right to silence does not apply to any other possible criminal facts, on which the witness is obliged to make a statement.

Thus, in one case (Oradea Court of Appeal, Criminal Decision no. 22/2017), the defendant P.G.D. was heard as a witness, on 14.12.2014, in the criminal case in which the defendant B.I.P. was being investigated, on which occasion he made false statements, declaring that he did not see the pocketknife with which the defendant was armed, he did not take that pocketknife after the defendant dropped it, although in reality, from the other evidence administered in the case, it resulted that the defendant saw that pocketknife and took it after the defendant B.I.P. dropped it.

Analysing the application of the defendant P.G.D.'s right to silence and non-self-incrimination, with reference to the statement, the Court of Appeal held that it observed that: it was taken in legal conditions, the witness being informed of the provisions of Art. 120 (2) (d) of the Criminal Procedure Code (the obligation to give statements in conformity with reality) and he was warned that the law punishes the crime of false testimony, he was made aware of the subject of the investigations (the scandal in the NOA Club) and the person under investigation (the defendant B.I.P.).

As the defendant P.G.D. was not involved in that scandal (he did not cause that incident and did not commit any act of violence) and did not use that knife (he only took the knife after the defendant B.I.P dropped it, without using it in any way, and the judicial bodies, at the time of his hearing as a witness, had no indication whatsoever of his involvement in the scandal, the defendant P.G.D. did not have, prior to his statement as a witness, nor after that statement, the status of suspect/defendant in the case, in which investigations were being conducted for the offenses of unlawful use of dangerous objects and disturbing public order and public peace, but at the time when he gave his statement he deliberately presented an untrue state of facts, so that his situation does not fall within the prerequisite situation set out in Article 118 of the Code of Criminal Procedure.

3.2. The Situation of the Witness after the Decision of the Constitutional Court No 236 of 2 June 2020

The witness's right not to be compelled to make statements that could incriminate himself was even more clearly recognized by the Constitutional Court Decision No 236 of 2 June 2020, which imposed a higher standard of protection against self-incrimination in favour of the witness than the one previously established, at the legislative level, by the provisions contained in Article 118 of the Criminal Procedure Code.

By this decision, the Constitutional Court established that "the legislative solution contained in Article 118 of the Code of Criminal Procedure, which does not regulate the right of the witness to silence and to not self-incriminate, is unconstitutional", since it does not establish sufficient guarantees for the witness, since he may be put in a position to indirectly contribute to his own incrimination, in disagreement with the respect for the presumption of innocence, which every person enjoys under Article 23 (11) of the Constitution and Article 6 (2) of the Convention, and, at the same time, impedes the fair resolution of the case, contrary to the right to a fair trial, enshrined in Article 21 (3) of the Constitution and in Article 6 (1) of the Convention, including by violating the witness's right of defence.

The Constitutional Court has expressly pointed out that the right to silence and the right not to contribute to one's own incrimination are both a direct consequence of the presumption of innocence and a guarantee of procedural fairness, enshrined in Paragraphs 1 and 2 of Article 6 of the Convention, and according to the case-law of the European Court of Human Rights, in certain cases, a person who is heard as a witness in criminal proceedings may be considered to be the subject of a criminal charge, and the rights of the person heard as a witness to remain silent and not to contribute to his or her incrimination may thus be relevant.

The Court noted that the right to silence and the right not to self-incriminate are listed among the procedural rights of the suspect and the defendant, Article 83 (a) of the Code of Criminal Procedure providing that the defendant has the right to refuse to give a statement without the risk of suffering any unfavourable consequences as a result of such refusal, Article 78 of the same normative act providing that the suspect has the rights provided by law for the defendant, unless otherwise provided by law. Therefore, there is a relative presumption of a partiality in the case of persons who are parties or main parties to the main proceedings – no person can be a witness in his own case (*nemo testis idoneus in re sua causa*), since, having a substantial interest in the way the case is decided, they cannot be considered impartial observers of the facts of the case.

In practical terms, the Court pointed out, in the absence of a regulation of the witness's right to silence and non-incrimination, the criminal investigation bodies were not obliged to give effect to this right as regards the *de facto* suspect, who had not yet acquired the status of *de jure* suspect. Thus, in this way, the person heard as a witness could be indicted, even if, prior to the hearing, the criminal prosecution authorities had data resulting from his participation in the commission of the offense that was the subject of the hearing as a witness, and the lack of official status of suspect could result from the lack of expression of will of the judicial authorities, which do not issue the order under Article 305 (3) of the Criminal Procedure Code.

At the same time, the Court found that obtaining a statement under Article 118 of the Code of Criminal Procedure – under the penalty of the offense of perjury, if the witness does not make truthful statements, and in circumstances where the witness assumes the risk that the matters stated may be used against him – constitutes a coercive mechanism incompatible with the right to a fair trial. Accordingly, the Court found that the right against self-incrimination and the right of the "accused" to remain silent, implicit guarantees of the right to a fair trial and of the presumption of innocence, which require the necessity to prohibit the use of any means of coercion to obtain evidence against the will of the accused, having also regard to the autonomous nature of the concepts of “criminal charge” and “witness”, also applied to the witness to the extent that the statement he makes could incriminate himself.

4. The Current Wording of Article 118 of the Criminal Procedure Code, After the Adoption of Law No. 201 of 5 July 5 2023

Approximately 3 years after the adoption of the Constitutional Court Decision no. 236/2020, the Romanian legislator intervened by Law no. 201/2023 and amended the

provisions of Article 118 of the Code of Criminal Procedure, in the manner indicated by the Constitutional Court.

First of all, the marginal title, "The right of the witness not to incriminate himself", has been changed to "The right of the witness to silence and non self-incrimination". Paragraph 1 expressly states that the witness has the right not to state facts and circumstances which, if known, would incriminate him, the judicial body being obliged to inform him of this right before each hearing. Paragraph 2 provides that evidence obtained in violation of paragraph 1 may not be used against the witness in any criminal proceedings, the sanction being the exclusion of such evidence from the evidentiary material, in accordance with the provisions of Article 102 (3) and (4), which shall apply accordingly.

Paragraph 3 takes over the content of the previous form of the regulation, stating that a witness statement given by a person who, in the same case, prior to the statement, had or subsequently acquired the status of suspect or defendant cannot be used against him/her. At the same time, the obligation of the judicial authorities to indicate the previous procedural capacity when recording the statement is maintained.

Thus, at present, the criminal procedure rule laid down in Article 118 of the Code of Criminal Procedure provides for the right of the witness not to incriminate himself, the legislator defining this right as a negative procedural obligation of the judicial body which cannot use the statement given as a witness against the person who has acquired the status of suspect or defendant in the same case. The text takes into account the two hypotheses previously identified in case law, namely: a) the situation in which the person is heard as a witness after the criminal proceedings have been opened in relation to the crime, and subsequently, he has acquired the status of suspect; b) the situation in which the person is already a suspect or defendant and, subsequently, the judicial body orders the case to be disjoined, and in the newly-formed case file the person acquires the status of witness.

Even after the legislative amendment, the courts refer not only to the legal text, but also to the reasoning of the decisions of the Constitutional Court and the High Court of Cassation and Justice presented above.

Thus, national case law is unanimous in holding that the witness's right to silence and non self-incrimination must be analysed in concrete terms, because it cannot be recognized, *ab initio*, without any distinction, as a general and absolute right, but according to the particularities of each case. In particular, it must be taken into account whether or not the judicial authority has plausible grounds to believe that the statements of the defendant could incriminate him or her, i.e. whether or not the judicial authority has even the slightest indication that the witness was involved in the facts about which he or she is being questioned, and it is therefore necessary to assess the situation of the witness, from the point of view of the right not to incriminate oneself in relation to the facts under investigation or about which he is being questioned, in the situation where the judicial authorities have indications, data or information that he participated in the facts under investigation or that he would be at risk of criminal investigations against him for the facts about which he is being questioned as a witness.

5. Conclusions

Concluding on the issues presented, we emphasize that the right to silence and not to incriminate oneself is an essential right that must be recognized not only to the accused in a criminal case, but also to the "assimilated witness", that is to say, the person about whom the judicial authorities have information, data or even evidence that he or she participated, in any way, in the commission of the crime committed by the accused or in relation to it, regardless of whether any decision has been taken in relation to this witness. As this right is a guarantee not only of the presumption of innocence, but also of the right of defence, as a component of the right to a fair trial, its violation should be sanctioned by the exclusion of evidence obtained by violating the legal provisions.

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