

Respecting the Right to Silence in Criminal Matters

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DOI: [10.36348/sijlci.2020.v03i09.001](https://doi.org/10.36348/sijlci.2020.v03i09.001)

| Received: 24.08.2020 | Accepted: 01.09.2020 | Published: 03.09.2020

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Abstract

The European Convention on Human Rights plays a key role in ensuring the protection of human rights, whereas, in accordance with the principle of subsidiarity, the guarantee of the rights enshrined in the Convention implies, on the one hand, their observance by national authorities and, on the other, the removal by each signatory State of the Convention of all negative consequences caused in the event of their violation. The provisions of the Convention and its Additional Protocols have direct applicability in domestic law, and their correct applicability and interpretation is made by reference to the jurisprudence of the European Court of Human Rights, jurisprudence having super-legislative force in the national law of the signatory states and interpreted working authority. The existing situations in practice show numerous abuses of the authorities by which the rights of the accused persons were limited, harming their interests. In the administration of the evidences in criminal proceedings, the observance of the presumption of innocence has a special role in ensuring the protection of the rights of accused persons, while contributing to reducing the risk of possible abuse. Therefore, it is necessary at the level of the judicial system to promote the observance of the presumption of innocence and, implicitly, of the right to silence and not to incriminate oneself.

Keywords: the right to silence, the right not to incriminate oneself, the presumption of innocence, the European Convention on Human Rights, the European Court of Human Rights.

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INTRODUCTION

“The principle of presumption of innocence until proven guilty has been found in Islamic law for more than fourteen centuries, as this is mentioned by the Holy Qur’an and the Sunnah, and thus, the Shariah has presided the Conventional law which only knew this principle in late eighteen century (...) [1]”.

The presumption of innocence within the principles of law dates back to the eighteenth century also in the law of the United States of America.

Subsequently, by adopting the Declaration of Human and Citizen's Rights in 1789, it was stated in Article IX, the principle according to which “Everyone is presumed innocent until proved guilty according to law; if it is considered necessary to arrest him, any act of coercion, other than those necessary for his detention, must be severely punished by law [2]”. This principle was later taken up and included in international human rights documents [3].

According to Article 11 of the Universal Declaration of Human Rights [4], any person accused

of committing a criminal act has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary required for its defense; at the same time, no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

The International Covenant on Civil and Political Rights provides in Article 14 (2) that “any person charged with committing a criminal offence shall be presumed innocent until proved guilty according to law”.

The Charter of Fundamental Rights of the European Union enshrines in Article 48 the presumption of innocence and the right to defense, as it follows: “(1) Any accused person shall be presumed innocent until proved guilty according to law. (2) Any accused person is guaranteed the observance of the right to defense”.

Last but not least, the European Convention on Human Rights stipulates in Article 6, paragraph 2, that "any person charged with a criminal offence shall be presumed innocent until proved guilty according to law". We emphasize that although this paragraph does not mention either the right to silence or the right not to incriminate oneself, the European Court of Human Rights has ruled that these principles are essential for the observance of the right to a fair trial enshrined in Article 6 of the Convention.

RESEARCH METHODS

"The research represents an analytical, conceptual and statutory approach to a complex issue, [...] much debated at international level [5]", namely the principle of the presumption of innocence and its intrinsic components: the right to remain silent and the right not to incriminate oneself. Specific to this paper it is normative legal research supported by "used established research methods: documentation method, comparative method, analytical method, the logical method, examination of judicial practice or application method [6]".

All data are selected and processed "from literature, cases and reports [...] in order to explain, states the fact clearly in addition to avoid using irrelevant data [7]".

DISCUSSIONS AND RESULTS

The Right to Silence – Intrinsic Component of the Principle of the Presumption of Innocence

The presumption of innocence presupposes two particularly important aspects in the criminal process. A first aspect implies that the burden of proof lies with the authorities invoking the accusation, and the second has as a consequence the interpretation of all doubts in favor of the accused (*in dubio pro reo*). Therefore, the accused person only has to defend himself against the accusations brought against him, without having to prove his innocence. The accused person will be considered innocent until the moment of a final conviction. If, during the criminal process, the authorities fail to prove the guilt of the accused person, the court will order the acquittal of the defendant, which means, in practice, the proof of innocence.

The first evidence that is administered in a criminal process is represented by the statement of the accused person, its procedural value being equivalent to the value of the other evidence. The statement of the accused person may contain true or false information, in the latter case the consequences being unfavorable to the defendant. However, it may happen that, in the statement made, the accused person to admit his guilt without the authorities resorting to illegal methods to determine him to consent to the confession of the deed. In the present case, the question arises as to whether the accused person is nevertheless the

perpetrator of the recognized deed. In the context of the other circumstances and evidence in the case file, the admission of guilt could be considered conclusive evidence on the premise that it would be impossible for an innocent person to incriminate himself. An example in this regard would be the agreement of pleading guilty, internationally recognized in some states. However, as it may also be possible for the accused person to incriminate himself in order to try to cover up another person, we consider it is necessary that, in all cases, the accused person's statements to be corroborated with other evidence proving that the accused's statement it is a true one.

The Right to Silence and the Right not to incriminate oneself in ECHR Case Law

The European Court has ruled that every accused person has the right to remain silent and not to incriminate himself [8], in order to ensure the protection of the defendant against any coercive manifestations abusively exercised by the authorities that could result in judicial errors [9], regardless of the type of crime committed by him.

The right to silence is recognized to the suspect or defendant throughout the criminal proceedings, from the stage when the first interrogation takes place before the police [10], which means that he has the possibility to refuse to answer the questions or to testify, if he considers that this way he creates an unfavorable situation, contrary to his own interests.

The defendant's right not to incriminate himself implies compliance with an essential requirement on the part of the competent authorities to construct the charge, namely that the evidence not to be obtained through the use of coercion or pressure, contrary to the will of the accused [11]. Of course, we must not understand that recognizing a defendant's right not to incriminate himself also implies the impossibility of obtaining by certain coercive forces, independently of his will, the taking of respiratory, blood and urine samples, the taking of tissue samples for the purpose of a DNA test or obtaining documents based on a warrant [12]. However, a person investigated for a crime may not be compelled to contribute to the gathering of evidence against him and may not be held liable if he refuses to provide documents, information or any other evidence that incriminate him.

When the Court proceeds to the examination of the hypothesis in which a procedure would have resulted in a violation of the right not to incriminate oneself, it first rigorously checks whether the suspect or defendant has had access to a lawyer since the first interrogation took place in front of the police. It should be noted that sometimes, in practice, for special reasons, the right to assistance of a lawyer may be restricted [13]. The Court then examines the nature and extent of the constraint, the existence of adequate

guarantees in the proceedings, and the use of the evidence obtained in this way [14].

We note from the above, that a person detained for investigations is recognized both the right to legal assistance provided by a lawyer and the right to silence and not to incriminate himself. The nature of these rights being different, in the event that the suspect or defendant waives one of them, does not mean that he is obliged to waive the other. On the other hand, those rights have complementarity character, character which results from the fact that, if a detained person has not been notified in advance by the authorities that he has the right to remain silent, he must a fortiori benefit from the legal assistance of a lawyer [15]. "It is unacceptable that a person to not be able to understand from the wording of the relevant provision what acts and omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission [16]". Assuming that the suspect or defendant is informed that anything he says could be used against him, but it is not expressly communicated to him and that he has the right to remain silent, even if he decides voluntarily, but without having been assisted by a lawyer, to give statements, his decision is considered relative [17].

The European Court has ruled that the presumption of innocence is closely linked to the right not to incriminate oneself [18] and that the right to remain silent is not an absolute right [19], but a relative one. If the person accused of committing a crime chooses to exercise his right to remain silent, in the sense of not answering the questions or not testifying, the court should not pronounce a conviction taking into account only these aspects. At the same time, the silence of the accused person can be taken into account in situations where his explanations are necessary to assess the existing evidence in the case file. From the above, we express the opinion that if the accused person chooses to remain silent throughout the criminal proceedings, sometimes this situation may have unfavorable consequences for the defendant, even in the sense of violating the provisions of Article 6 of the ECHR [20].

There are situations in practice when the public interest is major in prosecuting a crime and punishing the perpetrator, but even in such circumstances, no measures can be taken to violate the right to defense and the right not to incriminate oneself [21], nor can be considered justified the use of answers or statements obtained as a result of coercion exercised in non-judicial investigations for the purpose of incriminating the defendant during criminal process [22].

Measure of Pre-trial Detention and the Right to Silence

The exercise of a person's fundamental rights and freedoms may be restricted only in exceptional

circumstances and only in express and restrictive cases provided by the law, in accordance with the specific rules of international law, such restrictions being able to be justified by the need to ensure national security, territorial integrity, national economic well-being, public order, the prevention of criminal phenomenon, and by the need to protect the rights and freedoms of other persons.

Pre-trial detention is a measure that restricts the right to freedom. It is an exceptional measure, which is ordered only when other measures would be insufficient to remove the risks that required its application. The measure may be ordered only in the case of a person, against whom there are sufficient clues or evidences to lead to suspicion that that person may have been the perpetrator, being excluded aspects concerning the certainty of the guilt of the person against whom the measure is ordered. Moreover, it follows from Article 5 (1) (c) of the ECHR that there are only four possible justifications for ordering or extending the measure of pre-trial detention, namely: the risk of a person evading criminal responsibility, the risk of impeding the administration of justice, the risk of committing new crimes and the risk of disturbing public order by releasing the accused person. We specify that, in order to dispose the measure of pre-trial detention or its extension, the four justifications must not be cumulative, being sufficient to establish the existence of only one of them.

Consequently, the right to silence is not an absolute right either. But this does not mean that, in the event that the measure of pre-trial detention is applied to a person, that person may be deprived of her right to remain silent or, in other words, the authorities' choice whether or not to resort to the pre-trial detention measure it is not and cannot be conditioned by the confession or denial of guilt. We emphasize that, throughout the criminal process, the suspect or defendant has the right to refuse to make any kind of statement, but, in the circumstance in which he would give statements, it is not obligatory to admit also his guilt. However, the authorities cannot justify the application of the measure of pre-trial detention on the grounds that the suspect or defendant refuses to confess his guilt.

On the other hand, if we were to admit that the measure of pre-trial detention might be legally required in cases where a suspect or defendant refused to plead guilty, we would be in breach of the provisions of international law, and, implicitly, of the provisions of Article 6 of the ECHR, regarding the presumption of innocence, the right to silence and the right to defense.

In its case law, the European Court has held that, in the absence of a reasonable doubt that a person may have been the perpetrator of a crime, no detention or pre-trial detention may be ordered for the purpose of

causing him to plead guilty, for the purpose of making statements against other persons or in order to obtain information that could substantiate reasonable doubt against him [23]. In another case [24], in which it is stated that the national courts refused to release the detainee because he refused to confess his guilty during the criminal process, the European Court stated that this reason cannot justify deprivation of liberty and that the right to silence and the right not to incriminate oneself, as provided for in Article 6 of the ECHR, are violated. In *Țurcan v. Moldova* [25], the reason for the arrest was the accused's refusal to disclose the names of the witnesses who could have proved his innocence in the criminal trial.

We believe that before proceeding with the pre-trial detention measure or before starting any interrogation or hearing, the prosecuting authorities should inform the person concerned not only that he or she has the right to remain silent and that anything he or she declares may be used against him or her. In our opinion, the prosecuting authority should also inform both that the refusal to give statements will not result in unfavorable consequences and that the exercise of the rights granted to him or, on the contrary, the waiver in their exercise, they will not be interpreted unfavorably to the person in question, nor will they generate negative consequences, in the sense that he will later be accused of contributing to the prevention of finding of the truth and the obstruction of justice through his silence. Therefore, the suspect or defendant should be informed both by the prosecuting authority and by the person providing the necessary legal assistance, on the one hand, about the significance of the exercise of his right to silence and, on the other hand, about the risks to which he is subjected when he waives the exercise of this right by agreeing to give statements.

From the analysis of the text of Article 6 of the ECHR, we note that the right to remain silent and the right not to incriminate oneself are not expressly stipulated in these provisions, but the national law of states and international law include them, they are inherent in compliance the principle of the presumption of innocence, as well as an intrinsic component of the right to a fair trial, expressly enshrined in the article we are referring to.

Practice has shown that in countless cases the police have adopted reprehensible conduct during interrogations obtaining incrimination statements from suspects by force depriving them of any contact with the outside world, deny them access to legal assistance of a lawyer, detaining them in oppressive conditions. Equally numerous are the situations in which such statements have been used as essential evidence before the courts, which have pronounced convictions. The European Court found in one case an infringement of the right to silence, by the causal link between the determination by illegal methods of a

person accused of pleading guilty and the conclusions reached by the national court, conclusions that were unfavorable to the person concerned [26]. Another decision of the European Court ruling in violation of Article 6 (2) of the ECHR was pronounced in December 2000, as the national court violated the right to silence when it found the accused guilty of refusing to answer to the questions of the police [27]. A violation of Article 6 (2) of the ECHR is also the circumstance in which the police provided contradictory or obscure information regarding the right of the accused person to remain silent, a person who was not assisted by a lawyer during interrogations [28].

CONCLUSIONS

We believe that the recognition of human rights must not relate to the importance and to the necessity of discovering and sanctioning the crime, but the correctness of the criminal process presupposes the maximum respect of all human rights. In addition, since any law must be drafted in accordance with fundamental human rights and freedoms, we are of the opinion that if a certain activity of the judicial authorities is not prohibited by a normative act, but neither does the law regulate it as permitted, that activity must be considered as a prohibited activity.

Any limitation of human rights must be enshrined in a text of law, which is predictable and accessible and which pursues a legitimate aim and the limitation must be proportionate to the legitimate aim pursued and necessary for a democratic society.

From the jurisprudence of the Court we note that the European Court has interpreted the provisions of the Convention in relation to the dynamics of the evolution of human society, continuously seeking to adapt these provisions to the needs of current reality.

Following the study, we express the opinion that, in order to achieve the ideal of justice, it is necessary, *inter alia*, that any person accused of committing a criminal act, by virtue of the principle of presumption of innocence, be considered innocent until such time as he is legally guilty during a criminal trial, in which all his rights were respected, including the right to remain silent and not to incriminate himself, and in which all the necessary conditions for his defense were ensured.

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