THE RIGHT TO SILENCE
THE ROLE OF SILENCE IN THE PROTECTION AND GUARANTEE OF NATURAL SUBJECTIVE RIGHTS

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Résumé
Dans les conditions de la multiplication importante des composantes du droit positif (normes, institutions, branches, droits sans nombre ...) le destinataire du droit risque de perdre son orientation dans l’espace normatif juridique. C’est pourquoi l’analyse et la recherche des droits naturels sous l’aspect de la protection et garantie de ces droits, de la perspective de la présente civilisation juridique, sans rapport a la position du destinataire du droit (titulaire, appliquant, législateur, destinataire ordinaire du droit positif).
La conscience juridique internationale est profondément marquée par une culture de la protection des droits de l’homme, des droits fondamentaux et cette protection se trouve au cœur du concept politique de « pré - éminence du droit » (Rule of Law).

In the context of the remarkable multiplication of the components of positive law (norms, institutions branches, innumerable rights ...) the beneficiaries of law risk to lose their orientation, in the legal normative space. That is why the analysis and research of natural subjective rights under the aspect of the protection and guarantees of the above, from the perspective of the present legal civilisation, irrespective of the position of the beneficiary of the right (bearer, applicant, legislator) is more necessary than ever.
The legal protection of natural rights, in general, and of human rights in particular, exhibits a series of mechanisms and procedures from which the states accept that the very international community monitors the manner in which this protection is assured.
Human rights, liberty, responsibility, justice have always expressed the highest aspirations of man, represent the ideal aimed at by the legislator in the activity of elaboration of law, and in the capacity of elements or premises or the positive legal order, they determine the existence of society’s material legal reality. Seen in this context, the recognition of these rights and of the principles of their exercise poignantly affirm their presence within the legally triggered framework, in the process of the elaboration and achievement of positive law.
The person’s right to freedom and safety refers first of all to the person’s physical liberty.
The principle of the observance of the person’s liberty is essential in a democratic society, no one can be deprived by his / her liberty in an arbitrary manner. The protection of the person’s liberty also supposes the existence of certain guarantees of the person subjected to detention. Any imprisonment must be legal, equitable, and proportional with the situation having triggered it.
The stipulations of article 5 of CEDO are destined to the protection of physical liberty of any person against arrest or arbitrary or abusive detention. Article 5, par. 2-5 contains a series of guarantees applicable to persons deprived of liberty: the right to be informed, the right to be brought immediately before a judge, to be indicted within a reasonable timeframe or released. Paragraph 3 of article 5 stipulates that on the one hand the person arrested has the right to be brought before a judge and on the other hand his/her right to be judged within a reasonable timeframe or released. We talk about a guarantee with a complex content, essential, also completed by the right to appeal (par.4 of art.5). All these guarantees of the person’s liberty can occur only within an equitable trial. The right to an equitable trial is a right of a considerable importance, it is a fundamental right, the “ideal of true justice, made with the observance of the human rights”. This right is at the same time a guarantee of the exercise of the other rights stipulated in the Constitution and the guarantee of this right is consubstantial with the very spirit of the Convention (art.6 of CEDO).

The right to an equitable trial benefits in the content of the Convention both from general guarantees and special guarantees. These are: the right to be judged by an independent and impartial court of law, the right to be judged within a reasonable timeframe, the publicity of the procedure and the presumption of innocence and the right to defence.

The right to a fair hearing is an implicit guarantee of the right to an equitable trial. The requirement of equity is consecrated from the first words of art.6 and its importance is considerable. Equity supposes an “in concrete” of the cause. For the observance of this requirement we need a series of implicit guarantees of remarkable importance such as: obligation to list the motives of the court rulings in court orders, the principle of equality of weapons, the right to not incriminate oneself, the presence of the person at the hearing and the contradictorility of the procedure. European judges consecrated “the principle of implicit guarantees of the right to an equitable trial, i.e. of those guarantees that are not expressly mentioned in art.6 of the CEDO text, but without which the notion of “equitable trial” is not full.

The right to not incriminate oneself is not expressly stipulated in the European Convention. It is also known under the name of “the right to silence”.

The right of the individual or of the person to not incriminate oneself or to “keep silent and not contribute with anything to his/her own incrimination” constitutes an elementary requirement of the equitable trial, although the right to not testify against his/her own person is not expressly guaranteed.

The European judge brought into the light again certain implicit guarantees of procedural equity. Placed by the European judge at the “centre of the notion of equitable trial, the right to silence supposes that the silence of the indicted person should not lead to his/her condemnation or the admission of the alleged deeds. This right is meant to protect the defendant against the abusive coercion of authorities. The domain of application of the right to keep silent is circumcised to the “penal matter” in the sense of the Convention, being thus susceptible or applicable to the penal procedures regarding “all types of penal infringements of law, from the simplest to the most complex one”.

The principle of the guarantee of the person’s liberty and the preoccupation to assure the person’s liberty pass beyond the territorial borders of a state, reason determining the special protection of this fundamental right. Article 23 of the Romanian Constitution is developed in the Code of Penal Procedure (art.5) especially from the viewpoint of the guarantee of liberty, considering that the majority to the legal aspects allowing the intervention in the person’s liberty are to be found within the penal judiciary activity. Moreover, the principle of the observance of human dignity is expressly inscribed among the fundamental principles of the code of penal procedure through the present

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art.5, stipulating that any persons under penal inquiry or under trial should be treated with the observance of human dignity.

The express consecration of this principle as a basic rule of the penal trial represents a consequence, both of constitutional norms, and of those inscribed in the international conventions signed by Romania. Many penal trial norms, directly or indirectly, refer guaranteeing the right to defence, contributing also to the respect of human dignity.

In the Romanian law, the right to defence is realised in many ways, among which the principle of the presumption of innocence; this principle made our legislator inscribed among citizens’ rights and liberties, as a human, fundamental right, the presumption of innocence. It is included in numerous constitutions; the difference lies only in the manner of expressing the principle (being sometimes inscribed in constitutional norms, besides the preamble or in the exposition of motives). The presumption of innocence is inscribed in the present Romanian trial legislation as a norm connected to the task of evidence. According to art.66 of the Code of Penal Procedure, the accused or the defendant is not obliged to prove his / her innocence. The scope of the presumption of innocence is much wider than the factual aspects connected to the evidence administration, manifesting itself at least in several major directions such as: guaranteeing the protection of persons in the penal trial against the arbitrary in the establishment and penal indictment and punishment; it lies at the basis of the trial guarantees linked to the protection of the person in the penal trial; it is closely connected to the finding of truth and the correct proving of the factual circumstances in the case.

The issue is of tremendous theoretical and practical importance, at least as regards the administration and appreciation of evidence, but also the correct perception of the “right to silence”, we may add.

On the other hand, this right, like all the guarantees of the equitable trial, is applicable to the phase previous to that of the trial, and consequently comprises the right to silence during the questioning effected by the police.

The right to silence was expressly recognised, guaranteed and practised in the Romanian law, as a result of the adequate modification of the ordinary procedural legislation through Law 281 of July 1st 2003 for the completion of the Code of penal procedure in two hypostases: the first – as a rule of administration of the accused or defendant’s statements during the penal trial, as a “prior clarification” in the sense that after preliminary questions, the accused or the defendant is communicated the deed constituting the object of the case, the right to have an attorney, as well as the right to remain silent and give no statement, and at the same time he / she is announced that what he / she declares may be used against him / her. (art. 70 par. 2 thesis I of the Code of penal procedure.). If the person concerned understands to use his /her right to silence, his / her option is written down in a report drawn up by the prosecutor and signed by the latter and the holder of the right or in the conclusion of the hearing drawn up by the court.

The second hypostasis represents a trial guarantee, a “condition of arrest”, placed in Title IV (Preventive measures and other trial measures), Chapter I (Preventive measures) section II (Arrest) of the Code of penal procedure constituting in the obligation of the prosecutor to communicated the interested party that “he / she has the right to refuse to give any statement, drawing his her attention to the fact that what he declares may be used against hi / her too” (art. 143 par. 2).

In virtue of the active role, the PROSECUTORS and the courts of law are obliged not only to announce the interested person (holder of the right to silence) the content of the corresponding legal text, but also to explain its concrete significance.

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The legal nature and the content of the right to silence suppose the analysis of the legal regulations in the matter (including in their international connection). In the broad sense, the composing elements suppose:
- The right to make no statement regarding a deed attributed or accusation brought against him, without prior imputation of the lack of sincerity as aggravating circumstance;
- The liberty, in full awareness, to answer all questions or not (the right to total silence) or only to certain questions (the right to partial silence)
- The right to not contribute to his/her own incrimination (nemo tenetur se ipsum acusare).

The first two components (the right to make no statement and the liberty to answer or not the investigators’ questions, and the right to not testify against oneself, to not incriminate himself/herself, are imperative rules of the procedure of evidence administration, and the right to not testify against himself/herself, to not incriminate himself/herself, as element of the right to an equitable trial, not in material and procedural sense is constituted as a human fundamental right, with constitutional basis and in the international law of human rights.9

The subjects of the right to silence are, in the light of the respective international regulations (with direct implications for the internal law): accused, suspect, arrested. The right to silence appeared and aimed at the very protection of any persons against the risk to become the subject of a penal trial through his/her own statements. As the new Penal Code (Law no.301/2004) introduces the institution of the penal liability of the legal person, in the cases stipulated by law, for the infringements of the law committed in its name or in the interest of the legal persons, by their organisms or representative (art. 45) we may think on the manner in which he right to silence will operate in this respect.

The right to silence, in the complexity of its meanings, operates not only in the case of persons heard as witnesses, under oath, in the sense that if they are asked questions that may make them incriminate themselves through the answers he/she is to be given, they have the right to keep silent, involving the right to not incriminate oneself.10

The right to silence may be considered as a protection, a guarantee founded on the right to an equitable trial. In the CEDO jurisprudence it is considered that this right, which is not formally guaranteed by the Convention, constitutes a guarantee granted to the defendants in the name of the right to an equitable trial, of the right to human liberty and dignity. Despite its appearance as a mainly procedure right, due to the fundamental value which is protects and whose requirements it promotes – equity- the right to an equitable trial has also an obvious dimension of substantial law. The UNO’s Committee for Human Rights stipulates the right to an equitable trial not only in the stage of the admissibility of demands, but also and often in the stage of their examination in their essence.

„The fundaments of an equitable trial, the position of the defendant’s defence is shaken if he/she is or was constrained to incriminate himself/herself”11.

As Mircea Duțu invoked Sir Thomas More, one may conclude: “The guilt is found in the words spoken or in the deeds committed, not in silence …”

BIBLIOGRAPHY


