FREEDOM OF SELF-INCRIMINATION

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Abstract: *Certain publication is dedicated to one of the principles of the criminal process – the freedom to testify against oneself. That principle is found in the domestic legislation of most democratic countries, as well as in international legislation. The article in reference invokes the analysis of the spectrum of problems regarding the fundamental right of the person to decide whether he wants to submit statements to the judicial bodies that bring him criminal charges. The given analysis is based on the jurisprudence of the Republic of Moldova, international and, in particular, of the European Court of Human Rights. The authors identify the problems that have arisen and give solutions to eliminate the divergences, through practical recommendations and proposals for ferenda law, emphasizing the importance of respecting human rights in the criminal process through the prism of art. 6 of the ECHR and art. 21 of the Code of Criminal Procedure of the Republic of Moldova.*

Keywords: *confession against himself, the right to remain silent, penal trial.*

Introduction

The freedom of self-incrimination is a principle and a fundamental right of the person, which represents a fundamental guarantee of a fair trial. The right of the suspect, the accused and the defendant not to give any statement is a specific right in order to ensure an effective and concrete defense.

"An important component of the right to defense is the right to remain silent and the right not to contribute to self-incrimination."[1] The right to

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[1] Gheorghe Teodor-Viorel, *Discovering the Truth, Fundamental Principle of the Criminal Process*, Hamangiu Publishing House, 2021, p. 87.

remain silent is a principle that guarantees every person the right to refuse to answer questions asked by judicial bodies or to avoid self-incrimination. It is a legal right, expressly or conditionally recognized in many of the world's legal systems.

Discussion and results

The right to remain silent arose from Sir Edward Coke's challenge to the ecclesiastical courts and their oath *ex officio*. In the late 17th century, it was enshrined in English law as a popular reaction to the excesses of the royal inquisition. In the 16th century people brought before the Star Chamber and the High Commission of England had to take an oath *ex officio*, by which they swore to answer the questions asked, not knowing what they are accused of.

Sir Edward Coke's call is the source of the right to remain silent. According to American jurist and evidence expert John Henry Wigmore, the abandonment of the Star Chamber and High Commission proceedings eventually led to the principle that "no person shall be bound to testify against himself on any charge, as well as in any court". This principle was extended during the English Restoration, beginning in 1660, to include "an ordinary witness, and not merely the accused party".

"In Great Britain and in former British Empire, particularly, in countries such as the United States of America and the Republic of Ireland, the right to remain silent has remained enshrined in the common law tradition inherited from England. This right existed even before the American Revolution in the USA. However, it was considered one of the most important guarantees to protect citizens against arbitrary state actions, and was enshrined in the Fifth Amendment of the Constitution, along with the term "fair trial", which was mentioned for the first time by Edward III in 1354 and containing wording similar to that of the Fifth Amendment."[2]

Later, that right found its regulations in several normative acts in different states, but as a fundamental right of the person, it was introduced in the International Covenant on Civil and Political Rights, where, in art. 14 point 3 letter g), guarantees the accused person's right to remain silent, regulating that, "*Any person charged with a criminal offense has the right not to be compelled to testify against himself or to admit his guilt*."

In the ECHR case, Ibrahim and Others v. the United Kingdom[3], the Court held that, "*(...) The UN Human Rights Committee has made it clear*

[2] Cluj Criminal Lawyer, 25.07.2021, *The Right to Remain Silent: Legal Nature and Who Can Prevail*. Available: http://avocatripan.ro/dreptul-la-tacere-natura-juridica-si-cine-se-poate-prevala/ [accessed: 11.08.2022].

[3] ECHR Judgment, *Ibrahim and Others v. the United Kingdom*, of 13.09.2016 (§ 271). Available: https://hudoc.echr.coe.int/eng?i=001-166680 [accessed: 28.07.2022].

that the right to a fair trial under Article 14 ICCPR implies the right to be notified of procedural rights, including the right to legal assistance and the right to remain silent (...)."

A case known to the legal world, which gave rise to standards regarding this right, is the case of Miranda v. Arizona[4]. According to this case, the defendant, being deprived of his liberty, was heard by the judicial bodies without being fully and effectively informed of his rights. The US Supreme Court held that, "*The prosecution may not use statements, either impeachment or defense, from hearings initiated by law enforcement officers after a person has been deprived of their liberty unless they demonstrate that they have provided all effective Fifth Amendment safeguards against self-incrimination. (...). If the person indicates, before or during the questioning, that he wishes to remain silent, the questioning must cease; if he states that he wants a lawyer, the questioning must stop until a lawyer is present. If the detainee answers some questions during interrogation, he can later invoke his right to remain silent (...).*"

"Thus, what we call today the "Miranda Warning" was developed, i.e., the result of enshrining the obligation of the criminal investigation bodies to inform the persons heard or interrogated, suspects or defendants, regarding the right not to incriminate themselves, respectively the possibility of exercising the right to remain silent, regarding any of the facts or circumstances about which the person is being asked. ... If the criminal investigative bodies refuse to use the Miranda Warning during the questioning or hearing of the suspect or defendant, the evidence will not be able to be used against him in a criminal trial. In 1984, the Supreme Court of the United States of America came back in the case of Berkemer v. McCarty, ruling that a person subject to questioning and who is also in a state of restraint or arrest, has the right to benefit from the procedural guarantees arising from the Miranda Warning, regardless of the nature or severity of the crime of which it is suspected or for which the person in question has been arrested."[5]

On 09.03.2016, the European Parliament and the Council of Europe adopted (EU) Directive 2016/343 on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal

[4] Decision No. 759, 384 U.S. 436, *Miranda v. Arizona*, of 13.06.1966. Available: https://supreme.justia.com/cases/federal/us/384/436/ [accessed: 23.08.2022].

[5] Sorin-Adrian, Predescu, *The Miranda Warning – How the concept taken from American law came to be indispensable to criminal proceedings in any state of law*. Available: https://www.juridice.ro/602377/avertismentul-miranda-cum-a-ajuns-conceptul-preluat-din-dreptul-american-sa-fie-indispensabil-procedurilor-penale-din-orice-stat-de-drept.html#comments [accessed: 19.07.2022].

proceedings.[6] This Directive regulates a series of provisions on the presumption of innocence.

According to art. 7 of (EU) Directive 2016/343, which regulates the right to remain silent and not to incriminate oneself, stipulates: "*(1) Member States shall ensure that suspected and accused persons have the right to remain silent in relation to the crime of which they are suspected or accused. (2) Member States shall ensure that suspected and accused persons have the right not to incriminate themselves. (3) The exercise of the right not to incriminate oneself does not prevent the competent authorities from collecting evidence which can be legally obtained through the use of coercive measures provided for by law and which has an existence independent of the will of the suspected or accused persons. (4) Member States may allow their judicial authorities to take into account the cooperation of suspected and accused persons when passing judgments. (5) The exercise by suspected and accused persons of the right to remain silent and the right not to incriminate themselves shall not be used against them and shall not be considered to be evidence of the commission of the crime in question by them. (6) This Article shall not prevent Member States from deciding that, in the case of minor offences, the trial or some phases thereof may be conducted in writing or without the questioning of the person suspected or accused by the competent authorities in relation to the offense in question, provided that this respects the right to a fair trial.*"

"*(...) The importance of notifying suspects of their rights has also been recognized by the adoption of Directive 2012/13/EU on the right to information in criminal proceedings (...). The Directive's preamble explains that the right to information about procedural rights, which is inferred from this Court's case-law, should be explicitly established. Article 3 of the Directive requires that suspects be notified of five procedural rights, including the right to a lawyer and the right to remain silent (...).*"[7]

"*Although art. 6 of the European Convention does not expressly mention the right to remain silent and one of its components - the right not to contribute to self-incrimination, the European Court in its jurisprudence mentioned that the right to a fair trial also includes "the*

[6] (EU) Directive 2016/343 *on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings*, adopted on 09.03.2016 by the European Parliament and the Council of Europe. Available: https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32016L0343&from=FI [accessed: 19.07.2022].

[7] ECHR Judgment, *Ibrahim and Others v. the United Kingdom*, of 13.09.2016 (§ 271). Available: https://hudoc.echr.coe.int/eng?i=001-166680 [accessed: 28.07.2022].

right for any accused in autonomous sense, to remain silent and not to try to contribute to one's own incrimination" (...).[8]

The European Court closely linked *the privilege against self-incrimination and the right to remain silent* **with the right to legal assistance**. Early access to a lawyer is part of the procedural guarantees that the court will consider, especially when analyzing whether a procedure has extinguished the very essence **of the right against self-incrimination** (*The case Pishchalnikov v. Russia*,[9] 24 September 2009, §. 69). During the investigation stage, the suspect is in a particularly vulnerable position, and *this vulnerability can only be adequately compensated for by the assistance of a lawyer whose job is, among other things, to help ensure respect for an accused person's right not to incriminate himself* (*The case Salduz v. Turkey*,[10] 27 November 2008, no. 36391/02, § 54).

In the ECHR case, Funke v. France, of 25.02.1993[11], "*(...) The Court notes that the customs secured Mr. Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. (...) cannot justify such an infringement of the right of anyone "charged with a criminal offence", within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself.*"

Moreover, the jurisprudence of the European Court determined that **even when the person suspected of committing the crime is heard as a witness**, **he also benefits from the right to remain silent**. Thus, in the case *Brusco v. France*[12] of 14.10.2010 (§. 44-55), *the applicant, suspected of being the instigator of an attack, was detained, then questioned as a witness after having to take an oath. According to the Court, however, he was not a simple witness, but was, in reality, the subject of a "criminal accusation" and, therefore,* ***benefits from the***

[8] Decision of the Constitutional Court of the Republic of Moldova no. 28 of 18.11.2014 *for the control of the constitutionality of article 234 of the Criminal Code of the Republic of Moldova (misdemeanor sanctioning of the vehicle owner for not communicating the identity of the person to whom he entrusted the driving)* (point 35).

[9] ECHR Judgment, *Pishchalnikov v. Russia*, of 24.09.2009 (§ 69). Available: https://hudoc.echr.coe.int/eng?i=001-94293 [accessed: 28.07.2022].

[10] ECHR Judgment, *Salduz v. Turkey*, of 27.11.2008 (§ 54). Available: https://hudoc.echr.coe.int/eng?i=001-89893 [accessed: 28.07.2022].

[11] ECHR Judgment, *Funke v. France*, of 25.02.1993 (§ 44). Available: https://hudoc.echr.coe.int/eng?i=001-57809 [accessed: 01.09.2022].

[12] ECHR Judgment, *Brusco v. France*, of 14.10.2010 (§ 44-55). Available: https://hudoc.echr.coe.int/eng?i=001-100969 [accessed: 01.09.2022].

right not to contribute to self-incrimination and to remain silent. *This situation was aggravated by the fact that a lawyer did not assist Mr. Brusco even though twenty hours had passed since he was placed in detention. If his lawyer had been present, he could have informed Mr. Brusco of his right to remain silent*.

Later, however, a detailed clarification of the right to remain silent is given by the European Court in the case Saunders v. the United Kingdom, where the Court's exclusive concern was the use of statements relevant to the applicant's criminal trial. Thus, the Court ruled that, "*(...) although not specifically mentioned in Article 6 of the Convention (...), the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6 (...). Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfillment of the aims of Article 6 (...). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 paragraph 2 of the Convention (...).*"[13] Therefore, it follows that, the right to remain silent and the right not to contribute to one's own incrimination, presupposes, among others, that the criminal investigation body and the prosecutor are obliged to administer evidence without acting by coercion or pressure against the suspect or accused.

On the other hand, "*The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. (...) it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing. (...) the Court is only called upon to decide whether (...) the statements obtained from the applicant (...) amounted to an unjustifiable infringement of the right. This question must be examined by the Court in the light of all the circumstances of the case. In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial offended the basic principles of a fair procedure*

[13] ECHR Judgment, *Saunders v. the United Kingdom*, of 17.12.1996 (§ 68). Available: https://hudoc.echr.coe.int/eng?i=001-58009 [accessed: 01.09.2022].

inherent in Article 6 paragraph 1 (art. 6-1) of which the right not to incriminate oneself is a constituent element."[14]

Regarding coercion, the European Court, in its jurisprudence, has identified at least three situations that raise concerns about improper coercion, leading to a violation of Article 6 of the ECHR. Thus, in the case Ibrahim and Others v. the United Kingdom[15], the Court examines the three situations, namely: "*(...) The first is where a suspect is obliged to testify under threat of sanctions and either testifies in consequence (see, for example, Saunders, cited above; and Brusco v. France, no. 1466/07, 14 October 2010) or is sanctioned for refusing to testify (see, for example, Heaney and McGuinness, cited above; and Weh v. Austria). The second is where physical or psychological pressure, often in the form of treatment, which breaches Article 3 of the Convention, is applied to obtain real evidence or statements (see, for example, Jalloh, Magee and Gäfgen). The third is where the authorities use subterfuge to elicit information that they were unable to obtain during questioning (see Allan v. the United Kingdom).*"

"However, the exercise of the right not to incriminate oneself does not prevent the collection of evidence that can be legally obtained from the suspect, using legal coercion measures, evidence that exists independently of his will, such as evidence obtained through search or technical surveillance, or through the taking of biology evidence."[16]

We support this position, because the criminal investigation body and the prosecutor are obliged to administer evidence regardless of the will of the suspect or the accused, through procedural actions and special investigative measures, which must be properly authorized when there is a need to interfere with the rights of these persons. A problem, in this sense, may arise when there is a need to carry out on-site research in the person's home or another room, with written consent obtained in accordance with art. 118 paragraph (2) of the Code of Criminal Procedure. The question is whether in this case the right not to incriminate oneself is violated when a family member could have committed the crime? We consider that this right is not violated. The provisions of art. 118 paragraph (2) of the Code of Criminal Procedure support this position, according to which "*(...) In the case of a crime of domestic violence, the on-site search of the residence can be carried out with the consent of the victim, and if the victim is a*

[14] ECHR Judgment, *Saunders v. the United Kingdom*, of 17.12.1996 (§ 69).

[15] ECHR Judgment, *Ibrahim and Others v. the United Kingdom*, of 13.09.2016 (§ 267).

[16] Georgeta-Raluca, Ancuța, *Theoretical and Practical Aspects Regarding Self-incrimination in the Criminal Process*, Premium Legal Universe no. 11/2017. Available: https://lege5.ro/Gratuit/gi3dcnjxgm4a/aspecte-teoretice-si-practice-privind-autoincriminarea-in-procesul-penal [accessed: 01.07.2021].

minor, with the consent of the adult family member other than the perpetrator (...)." By using the text "other than the perpetrator", the legislator establishes that through this action there can be no interference with the analyzed right.

In order to determine whether the applicant's right against self-incrimination has been violated, the Court will, in turn, take into account the following factors: "*the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put*."[17]

In other case, Serves v. France, the applicant was summoned to appear as a witness and testify. Appearing before the investigating judge, he refused to make statements at the risk of self-incrimination, for which he was fined. In this case, the Court examined whether the applicant's sentence was nevertheless a charge within the meaning of art. 6 § 1 of the ECHR. Thus, the Court held that, "*(...) the charge should be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (...). In these circumstances, the Court accepts that when (...) was summoned to appear as a witness and fined (...), he could be considered the subject of a "charge" within the autonomous meaning of Article 6 § 1."*[18]

At the same time, the Court ruled that, "*It is understandable that the applicant should fear that some of the evidence he might have been called upon to give before the investigating judge would have been self-incriminating. It would thus have been admissible for him to have refused to answer any questions from the judge, that were likely to steer him in that direction. (...) Whilst a witness's obligation to take the oath and the penalties imposed for failure to do so involve a degree of coercion, the latter is designed to ensure that any statements made to the judge are truthful, not to force witnesses to give evidence*."[19]

A special interest, in this sense, was awakened by the ECHR case, Weh v. Austria[20], which mentions the "theory of the three difficult choices

[17] ECHR Judgment, *Jalloh v. Germany*, of 11.07.2006 (§ 117). Available: https://hudoc.echr.coe.int/eng?i=001-76307 [accessed: 02.09.2022].

[18] ECHR Judgment, *Serves v. France*, of 20.10.1997 (§ 42). Available: https://hudoc.echr.coe.int/eng?i=001-58103 [accessed: 02.09.2022].

[19] ECHR Judgment, *Serves v. France*, of 20.10.1997 (§ 47).

[20] ECHR Judgment, *Weh v. Austria*, of 08.04.2004 (§ 41-55). Available: https://hudoc.echr.coe.int/eng?i=001-61701 [accessed: 05.09.2022].

facing the witness" when testifying under oath, risking accountability for perjury or refusal to testify, in order to avoid self-incrimination and remain silent. Thus, in order not to infringe these rights, the judicial bodies must not create situations in which they place the person to choose between being held responsible or cooperating with these bodies, submitting statements by which they incriminate themselves in their own trial or submitting false statements and be held criminally liable.

In the case John Murray v. the United Kingdom[21], the European Court differentiated two aspects: the person's obligation to take an oath (i.e., to tell only the truth) in relation to the obligation to testify and incriminate himself. The European court made it clear, noting that the purpose of taking the oath is important, which is manifested by ensuring the sincerity of the statements (when taking the oath) and by no means that of answering incriminating questions.

The analysis of the mentioned ECHR practice shows that it is prohibited to use coercive methods to obtain statements, against the will of the person interviewed, implicitly also of the witness who is included in the accusation in criminal matters if his statements could contribute to his own incrimination.

In a recent case, Wang v. France, the plaintiff, in addition to the violation of the right to defense and to the interpreter, invoked the non-respect of the right to remain silent. Thus, at the initial stages of the investigation, she was summoned to the police, where she was informed that she is suspected of illegally practicing the medical profession. At the same time, the policeman informed her that she has the right to interrupt the hearing at any time, without concrete explanation that she has the right not to make statements. In this case, the Court notes that, "*(...) during the open session, the applicant, who was not given the opportunity to remain silent, described, precisely and in detail, the practice of her activity, which in itself constituted the crime with which she was accused (...). Therefore, she must be considered to have incriminated herself in the sense of the Court's jurisprudence (...), even though, in the subsequent proceedings, she supported her statements*."[22]

Therefore, it is necessary that when the criminal investigation body or the prosecutor, as well as the court, until the hearing of the person are obliged to explain to him his rights, implicitly the right to remain silent (not to make statements). The explanation of the right must be clear, precise and understandable. Otherwise, it will be considered a violation of this right. In

[21] ECHR Judgment, *John Murray v. the United Kingdom*, of 08.02.1996 (§ 47). Available: https://hudoc.echr.coe.int/eng?i=001-57980 [accessed: 17.07.2022].

[22] ECHR Judgment, *Wang v. France*, of 28.04.2022 (§ 84). Available: https://hudoc.echr.coe.int/eng?i=001-216926 [accessed: 03.09.2022].

this sense, the European Court, in the case Wang v. France, also noted that, "*(...) the decision of an accused person to exercise or waive the rights guaranteed by article 6 § 3 c) can only be taken if he clearly understands the facts of which he is accused in order to be able to measure the stake of the procedure and evaluate the opportunity of a possible derogation. Furthermore, to be meaningful, notification of the right to an interpreter as well as the other fundamental rights of the defense must be made in a language that the applicant understands (...).*"[23]

In this vein, we would like to touch on a sensitive topic from a practical point of view. Making the person aware and explaining the right to remain silent or not to make statements against the persons mentioned in art. 21 of the Code of Criminal Procedure is done within the criminal process or is it also an obligation of the ascertaining body? According to our opinion, this is also the obligation of the ascertaining body. On the other hand, according to art. 273 paragraph (2) of the Code of Criminal Procedure, by using the text "*(...) have the right, under the conditions of this code (...)*", the legislator also imposes conditions on the ascertaining body. At the same time, by using in art. 21 paragraph (1) of the Code of Criminal Procedure of the text "*No one can be forced to confess (...)*", it is understood that the person (any person) does not have to have a procedural status of being suspected or accused, it is enough that there is a suspicion that the person is the one who probably committed the act (for example, it results from the complaint addressed to the police).

According to art. 264 paragraph (3) of the Code of Criminal Procedure of the Republic of Moldova, *the person who makes a self-denunciation statement, **before doing so**,* (so on) *is explained **the right not to say anything and not to incriminate himself*** (so on)*, as well as that in case of self-slander, which prevents the establishment of the truth, he will not have the right to reparation of the damage according to the law, **and this is mentioned in the minutes regarding the self-denunciation or in the content of the self-denunciation declaration***. (so on)

In the case Erkapić v. Croatia, the Court took into account the fact that the co-accused, whose statements were used against Erkapić, **they were not represented by defenders chosen by them**. The Court ruled that the national courts acted in violation of art. 6 of the ECHR, because they used the evidentiary statements **of the co-accused without assessing the circumstances surrounding the police interrogation, including the lack of effective representation by a lawyer.**[24]

[23] ECHR Judgment, *Wang v. France*, of 28.04.2022 (§ 70).

[24] ECHR Judgment, *Erkapić v. Croatia*, of 25.04.2013 (§80-84). Available: https://hudoc.echr.coe.int/eng?i=001-118734 [accessed: 03.09.2022].

Thus, when the statements play a predominant role for the trial, regardless of whether they were given by a witness, in the strict sense of the word, or a co-accused, they constitute evidence of the accusation to which the guarantees provided for in art. 6 paragraph 1 and paragraph 3 letter d) of the ECHR (*The case Ferrantelli and Santangelo v. Italy*, of 7 August 1996, § 51 and 52).[25]

Considering the fact that the statements of the co-accused, **administered in the absence of procedural guarantees against self-incrimination**, were used to the extent that it allowed to establish the facts that are important for the qualification of the applicant's actions, the Court considers that the protection of his rights were restricted, to an extent **that undermines the fairness of the process** (*The case Luțenko v. Ukraine*, of 12 December 2008, application no. 30663/04, § 52).

Factors the Court will consider in determining whether there has been a breach, include: *the nature and degree of coercion, the existence of appropriate guarantees, as well as the use of the material thus obtained in subsequent procedures* (*The case Allan v. the United Kingdom*,[26] of 5 November 2002, no. 48539/99, § 44; *The case Heaney and McGuinness v. Irland*,[27] of 21 December 2000, no. 34720/97, § 55; *The case Jalloh v. Germany*,[28] of 11 July 2006, no. 54810/00, § 112-123).

With respect to the enforcement of the right to remain silent and the privilege against self-incrimination, the finding of a violation depends on the alleged incriminating evidence obtained through coercion or contrary to the right to remain silent or the privilege against self-incrimination, when it occurred in criminal proceedings (*The case Marttinen v. Finland*,[29] of 21 April 2009, no. 19235/03, §. 64).

An issue we wish to consider is whether the right to remain silent is a relative right or an absolute right. In this sense, the judicial practice must be analyzed.

The cause that aroused our interest is Salinas v. Texas.[30] In that case, the petitioner, without being placed in custody or given Miranda Warnings, voluntarily answered some of a police officer's questions about a murder, but remained silent when asked about the tubes found at the scene, which matched those of the weapon he is holding. The use of silence was used as evidence of guilt in the trial. The defense invoked the

[25] Available: https://hudoc.echr.coe.int/eng?i=001-57997 [accessed: 03.09.2022].
[26] Available: https://hudoc.echr.coe.int/eng?i=001-60713 [accessed: 03.09.2022].
[27] Available: https://hudoc.echr.coe.int/eng?i=001-59097 [accessed: 03.09.2022].
[28] Available: https://hudoc.echr.coe.int/eng?i=001-76307 [accessed: 03.09.2022].
[29] Available: https://hudoc.echr.coe.int/eng?i=001-92233 [accessed: 17.10.2022].
[30] Decision 570 U.S. 178 (2013) of the SCJ of the United States of America, *the case Salinas v. Texas*, no. 12–246, of 17.06.2013 (369 S.W.3d 176) (letters a), b), c)). Available: https://supreme.justia.com/cases/federal/us/570/178/ [accessed: 17.10.2022].

violation, in this case, of the Fifth Amendment of the Constitution of the United States of America. In this case, the US Supreme Court held that, "*In order to prevent the violation of the right against self-incrimination, Minnesota v. Murphy, 465 U.S. 420, 427, where a witness who "desires to secure the right (...) it must be claimed". (...) The Court recognized two exceptions to this requirement. First, the person must not incriminate himself in his own trial (Griffin v. California, 380 U.S. 609, 613–615). Petitioner's silence falls outside this exception because at that time he did not have procedural standing during his discussions with the police. Secondly, the right of the witness not to incriminate his act is violated if there is coercion from the judicial authorities (see, for example, Miranda v. Arizona, 384 U.S. 436, 467–468 and no. 37). The petitioner was not infringed on this right (principle) as it is indisputable that he agreed to accompany the officers to the police station and was free to leave at any time (...). The Court held that the Fifth Amendment (...) it should not be extended to the defendant's silence during a preventive interview (...)*."

According to ECHR practice, for example, the case John Murray v. the United Kingdom[31], the Court held that, "*On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. Wherever the line between these two extremes is to be drawn, it follows from this understanding of "the right to silence" that the question whether the right is absolute must be answered in the negative. It cannot be said therefore that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him. In particular, (...), established international standards in this area, while providing for the right to silence and the privilege against self-incrimination, are silent on this point. Whether the drawing of adverse inferences from an accused's silence infringes Article 6 (art. 6) is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation*." Therefore, the European Court admits that the person's right to remain silent is a relative one, when there

[31] ECHR Judgment, *John Murray v. the United Kingdom*, of 08.02.1996 (§ 47-49). Available: https://hudoc.echr.coe.int/eng?i=001-57980 [accessed: 17.07.2022].

is indisputable evidence, and the court can appreciate the silence in favor of the defendant, provided that all the circumstances of the case are taken into account and without prejudice to the presumption of innocence, as well as the fairness of the trial. At the same time, it should be noted that the criminal investigation body and the prosecutor are obliged to provide evidence both in favor and against the suspect and/or the accused, and their silence must not influence the decision, especially when there are circumstances that exclude the criminal prosecution or removes the criminal nature of the act.

Unlike the previous legislation, the criminal procedural legislation in force comes with guarantees in order to ensure the freedom of confession against him. According to art. 21 of the Code of Criminal Procedure entitled "Freedom of self-incrimination", "*No one can be forced to testify against himself or his close relatives, husband, wife, groom, bride or to admit guilt. The person to whom the criminal prosecution body proposes to make exculpatory statements against himself or his close relatives, the husband, wife, groom, bride has the right to refuse to make such statements and cannot be held responsible for it*."

Two rules emerge from this procedural rule, namely:

1) Immunity to make statements;
2) Freedom to testify against oneself or admit guilt.

Regarding the first rule, "(...) it belongs to certain moral categories such as conscience, clemency, family relations."[32] At the same time, the relevant procedural norm specifically indicates the circle of persons against whom no one can be forced to testify. The law comes with effective guarantees, by granting the right to refuse to make statements, and for all these the person is not held liable.

ECHR, in the case Hummer v. Germany[33], held that, *"(...) the present application does not concern witnesses whose identity or whereabouts are unknown to the accused. In the instant case the only available eye witnesses of the events in issue were the applicant's mother, brother and sister (the applicant's father having refrained from participating in the proceedings, see above §§ 7 and 12) who all refused to give evidence at the trial, as they were entitled to in their capacity as family members of the accused pursuant to section 52 of the German Code of Criminal Procedure. They could thus neither be heard by the trial court nor were the*

[32] Igor Dolea, *Witness Immunities and Privileges in Criminal Proceedings, Current Issues of Jurisprudence: Achievements and Perspectives*, Scientific Annals of the State University of Moldova, Legal Sciences, CE SUM, Chisinau, 2002, p. 350.

[33] ECHR Judgment, *Hummer v. Germany*, of 19.07.2012 (§ 41). Available: https://hudoc.echr.coe.int/eng?i=001-112280 [accessed: 12.08.2022].

prosecution or the defense able to examine them during trial. The Court recalls in this context that provisions granting family members of the accused the right not to testify as witnesses in court with a view to avoiding their ***being put in a moral dilemma*** *can be found in the domestic law of several member States of the Council of Europe and are, as such, not incompatible with Article 6 §§ 1 and 3 (d) of the Convention (see Unterpertinger v. Austria, 24 November 1986, § 30, Series A no. 110).*"

In accordance with art. 6 point 41) of the Code of Criminal Procedure, by close relatives we mean "*children, parents, brothers and sisters, grandparents, grandchildren*." This list is comprehensive. According to us, husband and wife must be included as close relatives. In this sense, we propose to amend and complete art. 6 point 41) of the Code of Criminal Procedure.

From the provisions of art. 21 paragraph (2) of the Code of Criminal Procedure it appears that the rule to propose the person to make revealing statements (...) belongs only to the criminal investigation body. We believe that the procedural-criminal law must be amended and supplemented, as this rule should also expressly refer to the ascertaining body, prosecutor and court. Alternatively, in all phases and stages of the criminal process there may be a situation where these subjects inform the person about these desired.

Another guarantee established by the criminal procedural law is provided in art. 105 paragraph (7) of the Code of Criminal Procedure, according to which, "*compulsory, each witness is asked if he is a spouse or close relative of any of the parties and what kind of relationship he has with the parties. If it turns out to be the spouse or close relative of the suspect, the accused, the defendant; the witness is explained the right to remain silent and is asked if he agrees to make statements*." We note that the criminal procedural law imposes effective guarantees also in the case of the witness, compulsorily informing him of the right to remain silent, in the cases mentioned in art. 105 paragraph (7) of the Code of Criminal Procedure.

Art. 63 paragraph (7) of the Code of Criminal Procedure prohibits hearing as a witness the person against whom there is certain evidence that he committed a crime. Based on art. 92 paragraph (3) point 8) of the Code of Criminal Procedure: "*As witness cannot be called*: (besides other categories of persons), *the person against whom there is certain evidence that he committed the crime under investigation*." At the same time, "*The witness has the right: to refuse to make statements, to present objects, documents, samples for comparative research or data if they can be used as evidence testifying against him or his close relatives*," in accordance with the provisions of art. 90 paragraph (12) point 7) of the Code of Criminal Procedure.

In the case, Ibrahim and Others v. the United Kingdom, it was found that the applicant was initially heard as a witness, i.e. without being granted the right to a defense. During the hearing, it was established that he contributed to the commission of the crime. Although, from this moment on, the authorities were supposed to stop the hearing and guarantee the rights of an accused, implicitly the right to defense, the authorities prolonged his hearing as a witness, and then deprived him of his liberty and sentenced him. "*(...) Recital 21 of Directive 2013/48/EU on access to a lawyer also explains that where, in the course of police questioning, a witness becomes a suspect, questioning may only continue once he has been made aware that he is a suspect and is able to fully exercise his right to legal advice (...).*"[34]

CC of the Republic of Moldova did not depart from the constant jurisprudence of the ECHR in this matter.

"*Therefore, the reason for the criticized ban [article 90 paragraph (3) point 8) of the Code of Criminal Procedure] consists in the effective provision of the guarantees benefiting the person in respect of whom the criminal investigation body has certain evidence that he has committed a crime,* i.e., *the right to be assisted by counsel, the right not to incriminate oneself and the right to remain silent. In this sense, the persons considered by article 90 paragraph (3) point 8) of the Criminal Procedure Code - persons "accused of committing a crime", within the meaning of Article 6 of the European Convention on Human Rights - must be informed of their rights.*"[35]

"*In the event that the prosecuting body does not have evidence that a certain person committed the crime under investigation and would cite him as a witness in the context of the ongoing investigation, and the person in question would give statements that would contribute to his own accusation, then the prosecuting authority must stop his hearing and notify him about his procedural rights (in this regard, see point 21 of the Preamble of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013). Otherwise, it is possible to find a violation of art. 6 of the European Convention (see* Ibrahim and Others v. the United Kingdom *[MC], 13 September 2016, § 301-311).*"[36]

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[34] ECHR Judgment, *Ibrahim and Others v. the United Kingdom*, of 13.09.2016 (§ 271). Available: https://hudoc.echr.coe.int/eng?i=001-166680 [accessed: 28.07.2022].

[35] Decision of the Constitutional Court of the Republic of Moldova of 29.01.2019 *of inadmissibility of notification no. 17g/2019 regarding the exception of unconstitutionality of Article 90 paragraph (3) point 8) of the Code of Criminal Procedure (the prohibition of hearing as a witness a person accused of having committed a crime)* (point 20).

[36] Decision of the Constitutional Court of the Republic of Moldova of 29.01.2019 *of inadmissibility of notification no. 17g/2019 regarding the exception of*

The suspect, the accused, the defendant, has the right: "*to make statements or refuse to make them, drawing his attention to the fact that if he refuses to make statements he will not suffer any unfavorable consequence, and if he makes statements they can be used as evidence against him*" (art. 64 paragraph (4); 66 paragraph (2) point 8) of the Code of Criminal Procedure).

"The exercise of the right not to give any statement cannot be used against the suspect or the accused in any phase of the criminal process, not being able to form the basis of forming the conviction of the judicial bodies. Before being heard, the suspect and the accused must be informed by the judicial authorities that they have the right not to make any statement; failure to comply with this obligation may attract the sanction of excluding the illegally administered evidence."[37]

The suspect, the accused, the defendant cannot be forced in accordance with art. 103 paragraph (3) of the Code of Criminal Procedure "*to testify against himself or his close relatives or to admit his guilt and cannot be held responsible for refusing to make such statements*." This provision corresponds to the international rigors in the matter.

In accordance with art. 109 paragraph (7) of the Code of Criminal Procedure, "*Compulsorily, each witness is asked if he is a spouse or close relative of any of the parties and what kind of relationship he has with the parties. If it turns out to be the spouse or close relative of the suspect, the accused, the defendant, the witness is explained the right to remain silent and is asked if he agrees to make statements*." In this regard, the criminal procedural law provides effective and concrete guarantees regarding the observance of the right to remain silent.

The analysis of the procedural rules presented allows us to conclude that the principle established by art. 21 of the Code of Criminal Procedure and other criminal procedure rules include both the right of the person being heard to remain silent in some situations strictly determined by the Code of Criminal Procedure, as well as the right not to testify against other persons - close relatives. We can distinguish two categories of subjects benefitting from this right. Firstly, it is about the accused's right to remain silent; secondly, about the right of the witness to benefit from immunities and privileges. The privilege against self-incrimination and the incrimination of other close persons, exempts from liability for refusal to

unconstitutionality of Article 90 paragraph (3) point 8) of the Code of Criminal Procedure (the prohibition of hearing as a witness a person accused of having committed a crime) (point 21).

[37] Mihail Udroiu, *Syntheses of Criminal Procedure. General Part*, 2nd edition, Volume I, C.H. Beck Publishing House, Bucharest, 2021, p. 68.

give statements and from any unfavorable consequences for the person who benefited from such guarantee.

"In the case Funche v. France, the Court found a violation of the person's right to remain silent through a request to provide precisely identified documents, namely: the extract from his bank accounts abroad, under the threat of criminal sanctions in case of refusal."[38]

There are situations when the person originally cited as a witness is questioned as a suspect. In practice, such situations leave room for abuses, especially in terms of ensuring the right to remain silent.

"In order to ensure the witness this privilege of silence, the court must establish from the circumstances of the case and the nature of the evidence, for the presentation of which he was summoned, that there are reasonable grounds to expect dangerous consequences for the witness, if he will be forced to answer questions. If, after the witness made use of his immunity, he was still required to answer the questions that compromise him (incriminating questions), then, in the further examination of the cause of incrimination of the witness, his answers will not be able to be used in evidence quality."[39]

"The privilege against self-incrimination must be respected at any stage of the process, at all levels of jurisdiction. It spreads not only to judicial debates, but also to other procedures related to official hearing. Thus every question, the answer to which the witness can expose, can remain unanswered, if he does not want to speak freely, thus manifesting his consent."[40]

"According to art. 51 of the Constitution of the Russian Federation, the investigator is obliged to explain to the witness and the injured party the right to refuse to submit statements that expose them and their close relatives in the commission of the crime. This fact is recorded in the minutes confirmed by the signature of the witness (the injured party)."[41]

The ECHR has consistently criticized the violation of the right to remain silent, as an indispensable component of the right to defense. The Court concludes that the applicant's right to legal defense was restricted at the initial stage of the criminal investigation, that there are no compelling reasons for this restriction, and that his self-incriminating statements made during police interrogation without access to a lawyer were used to

[38] Vincent Berger, *The Jurisprudence of the European Court of Human Rights*, Romanian Institute for Human Rights, Bucharest, 1998, p. 387.

[39] Wimshir A.M., *Criminal Process (translation from English)*. Moscow: Foreign Literature, 1947, p. 188–189.

[40] V.M. Nikolaychik., *United States Criminal Procedure*. Science, 1981, p. 20.

[41] R.Kh. Yakupov, *Criminal Process. Textbook for Universities*. Zertsalo, 1998, p. 126.

convict him. It follows that, in this respect, there was a violation of art. 6 paragraph 1 together with art. 6 paragraph 3 letter (c) of the Convention.[42]

In the case Alexandr Zaichenko v. Russia, the ECHR also established that persons questioned by the police, other than suspected persons, must be able to be assisted by a lawyer if, during the interrogation, they became persons suspected of having committed a crime.[43] In that case, in the context of examining the applicant's complaint regarding the failure to respect his privilege against self-incrimination and the right to remain silent, the Court explained that once there was a suspicion of theft against the applicant, it was up to the police, in all the circumstances of the case, to inform them of these rights.

In the ECHR case, Schmid-Laffer v. Switzerland[44], The Court held that when the applicant was first interviewed by the police, there was nothing in the case file to suggest that she should have been treated as a person accused of a crime and should have been informed of her right to keep silent. However, during the second interrogation, when she was subjected to a "criminal charge" within the meaning of art. 6 of the ECHR, in the circumstances of the case it was up to the police to inform her of her right to remain silent and the privilege against self-incrimination.

Particularly, in the ECHR case, Ţurcan and Ţurcan v. the Republic of Moldova, the Court noted that the refusal to disclose to the prosecution the names of witnesses who could prove the innocence of the person in the trial not only cannot constitute a reason for the arrest of a person, but also constitutes a violation of the accused's right to remain silent.[45]

Also, in the case of Cebotari v. Republic of Moldova, the ECHR emphasized that, in the absence of *reasonable suspicion*, the detention or arrest of a person should never be applied with the aim of making him admit his guilt or give statements against other people or to obtain facts or information which could form a basis for reasonable suspicion against it.[46]

In the ECHR case, Tiron v. Romania, it was found that the national courts refused to order the release of the applicant because he did not admit certain facts imputed to him. The ECHR mentioned that this circumstance cannot constitute a reason for arresting the person and that

[42] ECHR Judgment, *Sobko v. Ukraine*, of 17.09.2015, (§§ 62, 63). Available: http://hudoc.echr.coe.int/eng?i=001-159212 [accessed: 16.06.2022].

[43] ECHR Judgment, *Zaichenko v. Russia*, of 18.02.2010 (§§ 52-60). Available: http://hudoc.echr.coe.int/eng?i=001-97346 [accessed: 17.06.2022].

[44] ECHR Judgment, *Schmid-Laffer v. Switzerland*, of 16.06.2015 (§§ 29, 39). Available: https://hudoc.echr.coe.int/eng?i=001-155189 [accessed: 17.06.2022].

[45] ECHR Judgment, *Ţurcan and Ţurcan v. the Republic of Moldova*, of 23.10.2007 (§ 51). Available: http://hudoc.echr.coe.int/eng?i=001-112787 [accessed: 16.06.2022].

[46] ECHR Judgment, *Cebotari v. the Republic of Moldova*, of 13.11.2007 (§ 48). Available: http://hudoc.echr.coe.int/eng?i=001-112794 [accessed: 16.06.2022].

the rights not to give statements and not to contribute to self-incrimination, guaranteed by art. 6 of the ECHR.[47]

"*However, the imposition of arrest in any state is not conditional on the person having pleaded guilty to the offense charged*."[48]

A very interesting topic is the relationship between the privilege against self-incrimination and computer data encryption. In this sense, we were very interested in the analysis made by George Zlati in the research "The Privilege Against Self-incrimination and Cryptography."[49]

According to him, forcing a person to provide the key for decrypting computer data to the authorities is a violation of art. 6 of the ECHR, which is closely related to art. 8 of the ECHR. In other words, this obligation infringes on the privilege of not incriminating oneself. We support this position because requiring the individual by judicial authorities to provide passwords for decryption (including fingerprints, voice or other means) would jeopardize the individual's right against self-incrimination. Judicial bodies can obtain information from electronic systems through other legal means (for example, ordering computer expertise, monitoring telegraphic and electronic communications connections, monitoring or controlling financial transactions and access to financial information, collecting information from electronic communications service providers and computer data traffic), other than forcing the individual to disclose those passwords.

As noted, art. 21 of the Code of Criminal Procedure establishes the freedom of the person to testify against himself or against his close relatives, husband, wife, groom, bride or to admit his guilt. The scope and limits of the application of this principle is regulated in other criminal procedural norms that we would like to cite, as follows:

Art. 63 paragraph (7) of the Code of Criminal Procedure prohibits hearing as a witness the person against whom there is certain evidence that he committed a crime.

Based on art. 92 paragraph (3) point 8) of the Code of Criminal Procedure, "*cannot be summoned and heard as witnesses*: (in addition to other categories of people), *the person against whom there is certain evidence that he committed the crime under investigation*."

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[47] ECHR Judgment, *Tiron v. Romania*, of 07.04.2009 (§ 43). Available: http://hudoc.echr.coe.int/eng?i=001-123238 [accessed: 17.06.2022].

[48] Decision of the Constitutional Court of the Republic of Moldova no. 27 of 30.10.2018 *regarding the control of the constitutionality of some provisions of Article 185 of the Code of Criminal Procedure (preventive arrest in case the person did not admit his guilt in committing the imputed act)* (point 38).

[49] George Zlati, *The Privilege Against Self-incrimination and Cryptography*, in Penalmente/Relevant No. 1, 2016, January-June, first year, Solomon Publishing House, p. 20-49.

"*The witness has the right: to refuse to make statements, to present objects, documents, samples for comparative research or data if they can be used as evidence testifying against him or his close relatives*," in accordance with art. 90 paragraph (12) point 7) of the Code of Criminal Procedure.

The suspect, the accused, the defendant, has the right "*to make statements or refuse to make them, drawing his attention to the fact that if he refuses to make statements, he will not suffer any adverse consequences, and if he makes statements they can be used as evidence against him*" (art. 64 paragraph (4); 66 paragraph (2) point 8) of the Code of Criminal Procedure).

The suspect, the accused, the defendant cannot be forced in accordance with art. 103 paragraph (3) of the Code of Criminal Procedure "*to testify against himself or his close relatives or to admit his guilt and cannot be held responsible for refusing to make such statements*."

In accordance with art. 109 paragraph (7) of the Code of Criminal Procedure, "*compulsory, each witness is asked if he is a spouse or close relative of any of the parties and what kind of relationship he has with the parties. If it turns out to be the spouse or close relative of the suspect, the accused, the defendant, the witness is explained the right to remain silent and is asked if he agrees to make statements*."

We consider that the provisions of art. 90 paragraph (2) of the Code of Criminal Procedure - ***no person can be forced to make statements contrary to his or his close relatives' interests -*** do not meet the requirements of quality, predictability in application and clarity, examined both in the context of all the norms cited above, and in the context of the conclusions that can be made on their side.

Conclusions

To correspond to the three quality criteria – *accessibility, predictability* and *clarity* – the rule of law must be formulated with sufficient precision, so as to allow the person to decide on his conduct and foresee, reasonably, depending on the circumstances of the case, the consequences of this conduct. Otherwise, although the law contains a rule of law, which apparently describes the conduct of the person in the given situation, the person can claim that he does not know his rights and obligations. In such an interpretation, the norm that does not correspond to the criteria of clarity is contrary to art. 23 of the Constitution, which stipulates the state's obligation to guarantee every person the right to know their rights (point 10 of the DCC no. 26 of 23.11.2010 *on the exception of unconstitutionality of the provisions of paragraph (6) art. 63 of the Code of Criminal Procedure*).

It is not clear whether the provisions of art. 90 paragraph (2) of the Code of Criminal Procedure refers only to witnesses or only to other participants in the process, because the title art. 90 of the Code of Criminal Procedure is **The Witness.** The criminal procedural norm in question could also concern other participants in the process, given the fact that the phrase **No person** is used in this norm ***(...)***. We could reasonably assume that by the phrase **No person** (...) - both the witness and other participants in the process are considered.

It is also not clear what is the meaning intended by our legislator when expressing the phrase (...) ***to make statements contrary to his interests or those of his close relatives.*** We might assume that when it is mentioned - ***No person can be forced to make statements contrary to his interests or those of his close relatives,*** the legislator had in mind the right not to incriminate oneself and the right not to incriminate close relatives.

Nevertheless, there can be another interpretation, given the fact that several rules of the Code of Criminal Procedure, which regulate the privilege of non-self-incrimination of the witness, the suspect, the accused, the defendant (art. 21, art. 63 paragraph (7), art. 64 paragraph (4), art. 66 paragraph (2) point 8), art. 90 paragraph (3) point 8), art. 90 paragraph (12) point 7), art. 103 paragraph (3), art. 109 paragraph (7) of the Code of Criminal Procedure) do not reserve this right by using the expression: ***against his interests and those of his close relatives,*** but, as noted, - by using other expressions that regulate the right to remain silent:

- *No one can be forced to* ***testify against himself or his close relatives****, (...) or* ***to confess his guilt*** (art. 90 paragraph (1) of the Code of Criminal Procedure);
- *The witness has the right* ***to refuse to make statements****, ...* ***if they can be used as evidence against him or his close relatives*** (art. 90 paragraph (12) point 7) of the Code of Criminal Procedure);
- *The suspect, the accused, the defendant, has the right: to make statements or* ***refuse to make them****, drawing his attention to the fact that if he refuses to give statements, he will not suffer any adverse consequences (...)* (art. 64 paragraph (4), art. 66 paragraph (2) point 8) of the Code of Criminal Procedure);
- *The suspect, the accused, the defendant* ***cannot be forced to testify against himself or his close relatives or to admit his guilt*** (art. 103 paragraph (3) of the Code of Criminal Procedure);
- ***the right to remain silent*** (art. 109 paragraph (7) of the Code of Criminal Procedure).

The fact that no person can be compelled ***to make statements contrary to his interests and those of his close relatives*** - can be interpreted otherwise than in the sense of the privilege against self-incrimination.

The analysis of the procedural rules presented allows us to conclude that the principle established by art. 21 of the Code of Criminal Procedure and other rules of criminal procedure:

- includes both the right of the person being heard to remain silent in some situations strictly determined by the Code of Criminal Procedure, as well as the right not to testify against other people - close relatives;
- two categories of subjects benefiting from this right are distinguished: first of all, it is about the accused's right to remain silent; secondly, about the right of the witness to benefit from immunities and privileges;
- the privilege against self-incrimination and the incrimination of other close persons exempts from liability for refusal to give statements and from any unfavorable consequences for the person who benefited from such guarantee.

References:

Ancuța G.-R., (2017), *Theoretical and Practical Aspects Regarding Self-incrimination in the Criminal Process*, Premium Legal Universe no. 11/2017. Available: https://lege5.ro/Gratuit/gi3dcnjxgm4a/aspecte-teoretice-si-practice-privind-autoincriminarea-in-procesul-penal [accessed: 01.07.2021].

Cluj Criminal Lawyer, 25.07.2021, *The Right to Remain Silent: Legal Nature and Who Can Prevail*. Available: http://avocatripan.ro/dreptul-la-tacere-natura-juridica-si-cine-se-poate-prevala/ [accessed: 11.08.2022].

Berger, V., (1998), *The Jurisprudence of the European Court of Human Rights, Romanian Institute for Human Rights*, Bucharest. 743 p. ISBN: 973-9316-18-2

Decision of the Constitutional Court of the Republic of Moldova of 29.01.2019, *inadmissibility of referral no. 17g/2019 regarding the exception of unconstitutionality of article 90 paragraph (3) point 8) of the Code of Criminal Procedure (the prohibition of hearing as a witness a person accused of having committed a crime).*

Directive (EU) 2016/343 *on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings*, adopted on 09.03.2016 by the European Parliament and the Council of Europe. Available: https://eur-lex.europa.eu/legal-

content/RO/TXT/PDF/?uri=CELEX:32016L0343&from=FI [accessed: 19.07.2022].

Dolea, I., (2002), *Witness Immunities and Privileges in Criminal Proceedings, Current Issues of Jurisprudence: Achievements and Perspectives*, Scientific Annals of the State University of Moldova, Chisinau, Legal Sciences, CE SUM.

Decision 570 U.S. 178, (2013), of the SCJ of the United States of America, the case Salinas v. Texas, no. 12–246, din 17.06.2013 (369 S.W.3d 176) (letters a), b), c)). Available:

https://supreme.justia.com/cases/federal/us/570/178/ [accessed: 17.10.2022].

ECHR Judgment, *Allan v. the United Kingdom*, of 5 November 2002, no. 48539/99, § 44. Available: https://hudoc.echr.coe.int/eng?i=001-60713 [accessed: 03.09.2022].

ECHR Judgment, *Brusco v. France*, of 14.10.2010 (§ 44-55). Available: https://hudoc.echr.coe.int/eng?i=001-100969 [accessed: 01.09.2022].

ECHR Judgment, *Cebotari v. the Republic of Moldova*, of 13.11.2007 (§ 48). Available: http://hudoc.echr.coe.int/eng?i=001-112794 [accessed: 16.06.2022].

ECHR Judgment, *Erkapić v. Croatia*, of 25.04.2013 (§80-84). Available: https://hudoc.echr.coe.int/eng?i=001-118734 [accessed: 03.09.2022].

ECHR Judgment, *Ferrantelli and Santangelo v. Italy*, of 7 August 1996, § 51 and 52. Available: https://hudoc.echr.coe.int/eng?i=001-57997 [accessed: 03.09.2022];

ECHR Judgment, *Funke v. France*, of 25.02.1993 (§ 44). Available: https://hudoc.echr.coe.int/eng?i=001-57809 [accessed: 01.09.2022].

ECHR Judgment, *Heaney and McGuinness v. Irland*, of 21 December 2000, no. 34720/97, § 55. Available:

https://hudoc.echr.coe.int/eng?i=001-59097 [accessed: 03.09.2022].

ECHR Judgment, *Hummer v. Germany*, of 19.07.2012 (§ 41). Available: https://hudoc.echr.coe.int/eng?i=001-112280 [accessed: 12.08.2022].

ECHR Judgment, *Ibrahim and Others v. the United Kingdom*, of 13.09.2016 (§ 271). Available: https://hudoc.echr.coe.int/eng?i=001-166680 [accessed: 28.07.2022].

ECHR Judgment, *Jalloh v. Germany*, of 11.07.2006 (§ 117). Available: https://hudoc.echr.coe.int/eng?i=001-76307 [accessed: 02.09.2022].

ECHR Judgment, *John Murray v. the United Kingdom*, of 08.02.1996 (§ 47). Available: https://hudoc.echr.coe.int/eng?i=001-57980 [accessed: 17.07.2022].

ECHR Judgment, *Marttinen v. Finland*, of 21 April 2009, no. 19235/03, §. 64. Available: https://hudoc.echr.coe.int/eng?i=001-92233 [accessed: 17.10.2022].

ECHR Judgment, *Pishchalnikov v. Russia*, of 24.09.2009 (§ 69). Available: https://hudoc.echr.coe.int/eng?i=001-94293 [accessed: 28.07.2022].

ECHR Judgment, *Salduz v. Turkey*, of 27.11.2008 (§ 54). Available: https://hudoc.echr.coe.int/eng?i=001-89893 [accessed: 28.07.2022];

ECHR Judgment, *Saunders v. the United Kingdom*, of 17.12.1996 (§ 68). Available: https://hudoc.echr.coe.int/eng?i=001-58009 [accessed: 01.09.2022].

ECHR Judgment, *Schmid-Laffer v. Switzerland*, of 16.06.2015 (§§ 29, 39). Available: https://hudoc.echr.coe.int/eng?i=001-155189 [accessed: 17.06.2022].

ECHR Judgment, *Serves v. France*, of 20.10.1997 (§ 42). Available: https://hudoc.echr.coe.int/eng?i=001-58103 [accessed: 02.09.2022].

ECHR Judgment, *Sobko v. Ukraine*, of 17.09.2015, (§§ 62, 63). Available: http://hudoc.echr.coe.int/eng?i=001-159212 [accessed: 16.06.2022].

ECHR Judgment, *Tiron v. Romania*, of 07.04.2009 (§ 43). Available: http://hudoc.echr.coe.int/eng?i=001-123238 [accessed: 17.06.2022].

ECHR Judgment, *Țurcan and Țurcan v. the Republic of Moldova*, of 23.10.2007 (§ 51). Available: http://hudoc.echr.coe.int/eng?i=001-112787 [accessed: 16.06.2022];

ECHR Judgment, *Wang v. France*, of 28.04.2022 (§ 84). Available: https://hudoc.echr.coe.int/eng?i=001-216926 [accessed: 03.09.2022].

ECHR Judgment, *Weh v. Austria*, of 08.04.2004 (§ 41-55). Available: https://hudoc.echr.coe.int/eng?i=001-61701 [accessed: 05.09.2022].

ECHR Judgment, *Zaichenko v. Russia*, of 18.02.2010 (§§ 52-60). Available: http://hudoc.echr.coe.int/eng?i=001-97346 [accessed: 17.06.2022].

Decision of the Constitutional Court of the Republic of Moldova no. 28 of 18.11.2014 *for the control of the constitutionality of article 234 of the Contravention Code of the Republic of Moldova (misdemeanor sanctioning of the vehicle owner for not communicating the identity of the person to whom he entrusted the driving)* (point 35).

Decision of the Constitutional Court of the Republic of Moldova no. 27 of 30.10.2018 *regarding the control of the constitutionality of some provisions of Article 185 of the Code of Criminal Procedure (preventive arrest if the person has not admitted his guilt in committing the imputed act)* (point 38).

Decision No. 759, 384 U.S. 436, *Miranda v. Arizona*, of 13.06.1966. Available:
https://supreme.justia.com/cases/federal/us/384/436/ [accessed: 23.08.2022].

Gheorghe, T.-V., (2021), *Discovering the Truth, Fundamental Principle of the Criminal Process*, Hamangiu Publishing House, 510 p. ISBN/ISSN: 978-606-27-1829-9

Nikolaychik, V.M., (1981), *United States Criminal Procedure*. Science. 224 p.

Predescu, S.-A., *The Miranda Warning - How the concept taken from American law came to be indispensable to criminal proceedings in any state of law*. Available: https://www.juridice.ro/602377/avertismentul-miranda-cum-a-ajuns-conceptul-preluat-din-dreptul-american-sa-fie-indispensabil-procedurilor-penale-din-orice-stat-de-drept.html#comments [accessed: 19.07.2022].

Udroiu, M., (2021), *Syntheses of Criminal Procedure*. General Part, 2nd Edition, Volume I, Bucharest, C.H. Beck Publishing House. 1176 p. ISBN: 978-606-18-1091-8

Wimshir A.M., (1947), *Criminal Process (translation from English)*. Moscow: Foreign Literature.

Yakupov R.Kh., (1998), *Criminal Process. Textbook for Universities*. Zertsalo. 448 p.

Zlati, G., (2016), *The Privilege Against Self-incrimination and Cryptography*, in Penalmente/Relevant Nr. 1, January-June, first year, Solomon Publishing House, p. 20-49.