

# THE RIGHT TO SILENCE – AN EXCLUSIVE RIGHT OF PERSONS –

*Emilian CIONGARU\**

## Abstract

*An individual's right to remain silent and to not contribute with anything to their own incrimination represents a basic exigency for the carrying out of a fair trial, despite the fact that the right to not testify against one's self is not expressly guaranteed by the Constitution. International conventions and laws implicitly result from this as a right valorised in the process of communication under different forms, some of them regulated under the law. Thus, the right to silence may not be considered as an absolute right and, in order to check whether it is accepted so that the courts may draw conclusions from the silence of the accused person, one must verify the circumstances of the case. Despite the right to silence, a person suspected of an illicit deed is free to answer or not the questions addressed to them, as long as they consider this as serving their interests or not.*

**Keywords:** *right to silence; fair trial; illicit deed; their own incrimination; circumstances of the case.*

## I. Introduction

The legal protection of the person's rights and freedoms is accomplished by way of certain procedures and mechanism accepted by the states and even one of the international community missions is to ensure supervision of the manner in which protection is guaranteed<sup>1</sup>. The human rights, freedom, responsibility and justice, form a large part of the purposes sought by any law-maker while developing rights.

The right of the persons, either legal or natural, to not self-incriminate<sup>1</sup> or to remain silent and not contribute with anything to their self-incrimination is a basic requisite of the fair process, although the right to not testify against themselves is not guaranteed in an express manner<sup>2</sup>. In Roman law<sup>3</sup>, the saying *tacio facit ius* – silence makes the law, supposed that the person had rights and obligations and, by remaining silent, they could consent or not to the occurrence, amendment, supplementation or extinguishing of certain rights and obligations.

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\* Ph.D., Associate scientific researcher, Institute of Legal Research „Acad. Andrei Radulescu” of the Romanian Academy, Bucharest, Romania. Associate scientific researcher, Constantin Brancusi University of Tg. Jiu. Scientific Researcher, Hyperion University of Bucharest.

<sup>1</sup> T. Padovani, *Diritto penale*, Giuffr  Editore, Milan, 1995, p. 143.

<sup>2</sup> M. Dutu, *The Right to Silence. Notion. Significance. Jurisprudence. ECHR, CJEC French Romanian*. Economica Publishing House, Bucharest, 2005, pp. 55-56.

<sup>3</sup> E. Molcut, *Private Roman Law*, Universul Juridic Publishing House, Bucharest, 2007, p. 156.

As such, a first meaning of the *right to silence* is the faculty, the ability of natural and legal persons, as guaranteed by law, to not answering explicitly, to not communicating the requested information or, simply, to not communicating information by way of just remaining silent, when the law or the convention developed based on the law defines the informational contents of silence and the effects thereof.<sup>4</sup>

This right is not explicitly consecrated by Constitution, international conventions and laws, but it implicitly derives therefrom, as a right materialising in the process of communication.

## II. The right to silence in the international and European law

The study of the matter of the *right to silence* can be found in Art. 14 (3) (g) of the International Covenant on Civil and Political Rights<sup>5</sup> which provides that any person accused of having committed a criminal act has the right to not testify against themselves or confess guilt, which is a real *right to silence*.

The right to silence also results from the regulatory manner of other legal institutions. For instance, the immunity for jurisdiction, as regulated by the General Agreement on Privileges and Immunities of the Council of Europe also involves the *right to silence* when an authority is questioned in terms of facts by way of which the immunity thereof has been breached, especially immunity relating to words. At a conceptual level, as part of the interpretation of the criminal legal rule of the European Union, there is a significant mutation determined by the occurrence of a new mentality, according to which, the multiculturalism and the multilingualism of the Member States converge towards a new social value, which is the European dimension.<sup>6</sup>

The right to a fair trial benefits under Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, from both general and specific guarantees. These are as follows: the right to be judged by an independent and impartial jury, the right to be judged within a reasonable timeframe, the publication of the procedure and the presumption of innocence, the right to defence. The right to a fair hearing is an implicit guarantee of the right to a fair trial.<sup>7</sup> The fairness requirement is consecrated by the first words of Art. 6 and the importance thereof is significant. Fairness supposes an appreciation *in concreto* of the case. In order to meet this requirement, implicit guarantees having a significant importance such as the

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<sup>4</sup> M. Ayat, *Silence is Golden: The Right to Remain Silent in International Criminal Law*, *Revue de droit international de sciences diplomatiques et politiques*, Genève, vol. 79, No. 3 (septembre-décembre 2001), pp. 303-338.

<sup>5</sup> *The International Covenant on Civil and Political Rights* was adopted and open for signing by the United Nations General Assembly of the 16<sup>th</sup> of December 1966 and was ratified by Romania on the 31<sup>st</sup> of October 1974 by Decree no. 212/1974.

<sup>6</sup> I. Friedmann-Nicolescu, *Interpretation of the Criminal Legal Rule in the Current Development Stage of the Romanian Law*, Universul juridic, Bucharest, 2014, p. 71.

<sup>7</sup> V. Dongoroz and all, *Theoretical Explanations of the Romanian Criminal Code, volume IV*, Academiei Publishing House, Bucharest, 1972, p. 179.

following ones are needed: the obligation to reason the legal decisions, the principle of equal weapons, *the right not to self-incriminate*, the person's presence during the hearing and the contradiction of the procedure. The European judge has consecrated the principle of the implicit guarantees of the right to a fair trial, namely, of those guarantees that are expressly referred to in Article 6 of the CEDO text, but without which the concept of *fair trial* is not complete. The scope of the right to remain silent is circumscribed to the *criminal matter* for the purposes of the Convention, therefore being likely for or applicable to the criminal proceedings in terms of all types of criminal deed, from the simplest to the most complex one.<sup>8</sup>

Art. 9 of the General Agreement on Privileges and Immunities of the Council of Europe, as ratified by Romania by Law 43/1994 provides that: "Representatives at the Committee of Ministers shall, while exercising their functions and during their journeys to and from the place of meeting, enjoy the following privileges and immunities: a) immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their official capacity ..."

While exercising the right to have an interpreter as provided by Art. 6 (3) (e) of the Convention for the Protection of Human Rights and Fundamental Freedoms, the accused has the right to remain silent if they have difficulties in understanding or speaking the language used for the hearing until they are provided with a certified interpreter.

Moreover, Art. 10 (1) of the European Convention on Human Rights provided the freedom of communication, and this also involves the right to not communicate, namely, the right to silence. Since communication is considered as a freedom, the person is free to remain silent, to not communicate, which seems to be a right to silence. In Art. 21 (a) of the European Social Charter as revised, when the right to information and consultation is regulated, a reference is also made to a *right of silence*, as follows: "on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality."

Art. 29 of *Corpus Juris* – criminal provisions on the protection of the financial interests of the European Union<sup>9</sup> provides the following: "in any proceedings brought for an offense committed against the financial interests of the European Union, the accused enjoys the rights to the defence guaranteed by Art. 6 of the European Convention on Human Rights and by Art. 10 of the UN International Covenant on Civil and Political Rights. From the time of his first questioning, the accused has the right to know the content of the charges against him, the right to be assisted by a defender of their choice and, when needed by an interpreter; they are recognised the right to remain silent."

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<sup>8</sup> F. Sudre, *European and International Law of Human Rights*, Polirom Publishing House, Bucharest, 2006, pp. 296-297.

<sup>9</sup> *Corpus Juris*, French-Romanian bilingual edition translated and published under the patronage of the Romanian Academy for Communitarian law Research, Efemerida Publishing House, 2000, p. 18.

According to the jurisdiction of the European Court of Human Rights, the right to silence is breached by the law when the accused is obliged to answer the questions or to provide documents to the authorities.<sup>10</sup>

### III. The right to silence in the Romanian regulatory system

The Romanian lawmaker has introduced, for the first time in the Code of Criminal Procedure, the right of the defendant or accused to not testify against themselves in 2003, by Law 281<sup>11</sup>. From this perspective, the *right to silence* was consecrated within a distinctive previous procedure, in principle, that of the taking the first statement, a procedure during which the defendant or accused is communicated the following matters: the description of the deeds, the legal classification thereof, the fact that they have the right to defence and be provided with a defender of their choice, that they are not obliged to state anything and they are informed of the possibility for their declarations, should they consent to giving such, to be used durian the criminal trial.<sup>12</sup>

In the Constitution of Romania, the right to silence derives from the following:

Art. 14 (3) 3 of the International Covenant on Civil and Political Rights, which provided the right to silence of the persons; the Covenant was ratified by Romania by Decree no. 212 of the 31<sup>st</sup> of December 1974, which are a part of the internal law according to Art. 20 (1) of the Constitution;

Art. 24, which regulates the right to defence, involving the right to defend oneself also by being silent, in the absence of an attorney or even in the presence of the defender;

Art. 28, which regulates the secrecy of correspondence, involving the right to be silent and not disclosing the secrecy of the correspondence of those having acknowledged thereof legally or by accident; please note that such a right is, at the same time, a professional obligation for public servants and public dignitaries;

Art. 29 and Art. 30 regulate the freedom of conscience and freedom of expression, involving the right to remain silent and to not express the thought, opinions, belief, creation, in brief, to not communicate unless wanting to do so or considering it to be required and appropriate.

Art. 48 of the Constitution regulates the fact that the silence, expressed as the failure to settle an application within the legal timeless, signifies the communication of a denial of the application. To this effect, Art. 21 (1) of Law 544/2001 regulates an assumptions according to which silence is a refusal: "The express or implied refusal of the employee appointed by a public authority or institution for the application of the

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<sup>10</sup> V. Berger, *Jurisprudence of the European Court of Human Rights*, Romanian Institute for Human Rights, Bucharest 1998, p. 387, case Funche versus France.

<sup>11</sup> Law 281 of the 24<sup>th</sup> of June 2003 amending and supplementing the Criminal Procedure Code and certain special laws was published in the Romanian Official Journal, Part I, no. 468 of the 1<sup>st</sup> of July 2003.

<sup>12</sup> G. Antoniu, *Material Element in the Incrimination Rule*, Review of Criminal Law, nr. 2/1999, Academiei Publishing House, Bucharest, p. 22.

provisions stipulated by the present law shall be a violation and shall lead to the disciplinary liability of the guilty person.”

Moreover, the presumption of the right to silence is also taken into consideration in the absence of an attorney either “of their own choosing or appointed ex officio”, as provided by the Constitutional provisions of Art. 24.<sup>13</sup>

In criminal law, a *violation of the right to silence* can be considered to be a witness, suspect or accused who: has been determined to self-incriminate, has been determined to take on himself/herself the guilt of other persons for pecuniary reasons; has been determined to take on himself/herself the guilt with a view to saving a close relative; he has been provoked to praise themselves with what he/she has done or to exaggerate about what he/she has done thereby altering the truth.

A *right to silence* is also that of a person for whom the lawmaker grants the protection of the professional secrecy, such as attorneys, physicians, notaries and other such, clearly, subject to certain limitations provided by law<sup>14</sup>. This right is confirmed by the legal obligation to keep professional secrecy.

The Romanian legislation includes certain regulations also covering other matters relating to the right to silence.

Therefore, Art. 99 (1) of the Criminal Procedure Code provides as follows: “(1) It is forbidden to use violence, threats with an unfair or any other constraints, as well as promises, encouragement with the purpose of obtaining evidence”. As outlined above, the lawmaker forbids obtaining evidence, including admission or confession, by way of promises or encouragement, either directly or by an intermediary such as an informer, friend or relative. Obtaining a confession this way is illegal, just as is the use thereof as an evidence during trials, but there is not anything preventing the use of the information obtained in a legitimate manner from a witness, suspect or accused in relation to certain offenses committed, the place where an object can be found and the result of the offense, the research for such and the legal producing of such evidence during trials.

According to Art. 282 (1) of the Criminal Procedure Code, the breach of any legal provision on the impairment of the fairness of the criminal trial or of the rights of the parties or of the main subjects of the trial, and therefore, of Art. 99 of the Criminal Procedure Code also, are sanctioned by the voidance of the act only when a damage was caused that can only be cured by way of the voidance of such act. It is an application of the principle *nemo tenetur se detegere* namely, no one can be bound to act against his/her own benefit, and, for this reason, the mere admission of the deed by the accused is not a piece of evidence against him/her.<sup>15</sup> A mere unproved accusation is meaningless before the presumption of innocence when the authorities conform to the law, and the social environment<sup>16</sup> does this also. Therefore, it can also be presumed that the presumption of innocence justifies the silence, because nobody

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<sup>13</sup> *Constitution of Romania*: “(1)The right to defence is guaranteed. (2) All throughout the trial, the parties shall have the right to be assisted by a lawyer of their own choosing or appointed ex officio”.

<sup>14</sup> I. Flaminzeanu, *Legal Liability*, ProUniversitaria Publishing House, Bucharest, 2010, p. 90.

<sup>15</sup> T. Pop. *Criminal Trial Law, vol. II*, National Printing House, Cluj Napoca, 1946, pp. 330-331.

<sup>16</sup> E. Durkheim, *Rules of Sociological Method*. Stiintifica Publishing House, Bucharest, 1974, p. 116.

has the obligation to prove his/her innocence, all the more when the accusation is not proved or it is non-credible.

For the silence and the refusal to speak, the suspect or the accused is not to be compelled or sanctioned in any manner, because it is the former's right to do so. The compulsion is useless and absurd, because it is certain that an accused that remains silent does not do that because of a well-calculated tactics, or because he/she is an innocent person that is indignant. In this first case, when he/she decides to talk, a compelled accused will, certainly, make up a ruse denial; the innocent will shout his/her innocence out loud or he/she will, in despair, admit guilt only to cease suffering.<sup>17</sup> For this reason, any constraint to this effect is unacceptable, and the law is to leave to each accused the choice to speak or not to speak. The accused may remain silent, not as much in order to deny or avoid being judged, but simply in order to use the defender's advice to his/her benefit. The right to silence is also involved by the right to defence provided in Art. 24 of the Constitution.<sup>18</sup>

For instance, when the arrested or the suspect is not communicated the accusation in the absence of a defender, the suspect or accused has the right not to respond to the accusations brought against him/her because he/she cannot exercise the right to defence on his/her own. Since the provisions of Art. 23 (5) of Thesis II of the Constitution are compulsory, the use of the phrase *only* in the context *only in the presence of a defender*,<sup>19</sup> and the Minutes communicating the defender's absence to the accused, even though signed by the suspect or accused, is null and void.

There is not any legal provision in the Romanian law stipulating that the exercising of the right to silence may be an aggravating circumstance devolving upon the accused.<sup>20</sup> Nevertheless, in the doctrine, some authors claim that, if the suspect of accused refrains from making statements, thereby exercising his/her right to silence, this attitude may represent a circumstance to his/her disfavour.<sup>21</sup>

In *civil law*, the example is the renewal of the rent by the tenant's silence, as provided by the Civil Code which stipulates that "upon expiry of the term under the rental agreement, if the tenant remains and continues to have possession, the rent shall be considered renewed"; therefore, the tenant's silence equals to a consent for the extension of the expired rental agreement and the tenant's silence, as corroborated with a payment of the rent equals to a new acceptance of the previous rent amount and, implicitly, to the *tacita reconductio* extension of the expired agreement. The parties may agree in advance on the mere silence after receipt of the offer being deemed as an acceptance thereof. When, according to the customs as laid-down or accepted by law, silence signifies a *tacito consensu* acceptance.

An example in *commercial law* is the case when the parties having been involved in previous business relationships are presumed, when a new offer is launched for the

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<sup>17</sup> I. Tanoviceanu, *Treaty of Law and Criminal Procedure, vol. IV*, Curierul Judiciar Printing, Bucharest, 1912, pp. 675-676.

<sup>18</sup> Gh. Mihai, *About Silence as Work in Law*, in *Revue Romaine* nr. 5/2007, pp. 18-24.

<sup>19</sup> Ch. Girard, *Culpabilité et silence en droit comparé*, Harmattan, Paris, 1997, p. 90.

<sup>20</sup> I. Doltu, *The Statements of the Accused or Defendant – a Means of Protection in the Criminal Trial*, *Law Magazine*, No. 10-11/1994, Bucharest, p. 80.

<sup>21</sup> Gh. Mateut, A.Mihaila, A., *Juridical Logic*, Lumina Lex Publishing House, Bucharest, 1998, p. 166.

same business partner, based on a simple act of silence, to accept the same prices and provisions previously applied. When the offer to contract is made exclusively for the benefit of the addressee, the silence thereof after having acknowledged the new offer is considered to represent an acceptance of the offer.

In *notary law*, according to Art. 53 of Law 36/1995, “The parties, consent shall be presumed to exist if, when legally subpoenaed, they do not express opposition”.

The right to silence of the public servants and of the authorities is the right which, on the grounds of the law and of the obligation to protect economic or State secrets, involves the possibility to reasonably refuse to communicate information have been classified<sup>22</sup> or being deemed to be economic secrets and which really is.

Another example can be found in Art. 9 of the Law on Patient Rights 46 of the 21<sup>st</sup> of January 2003, which regulates a right of the patients to request to the healthcare personnel to not inform him/her on his/her health condition and the related risks when the information provided by the physicians would cause suffering: “the patient shall have the right to expressly request not to be informed and to select another person to receive such information instead”. As a result, the patient has the right to request the *physician’s silence* by reference to his/her illness and the physician has the obligation to remain silent in regard to this matter.

#### IV. Conclusions

In conclusion, the right to silence is a subjective right, which is consecrated in the objective right. The legal nature and the contents of the right to silence supposes an analysis of the legal principles and regulations in this field, including the connections thereof at an European and international level. There is not any legal provision in the Romanian legal system stipulating that the exercising of the right to silence may be an aggravating circumstance devolving upon the concerned person. By remaining silent, the persons are able to consent or not to the occurrence or extinguishing of certain rights and obligations or they can express neutrality, while the right to silence is a legal institution available to the persons appearing in court with a view to providing protection against potential abuses from the bodies responsible for law enforcement and accomplishment. The right to silence has been developed, seeks and must evolve specifically in order to protect any person from becoming, by his/her own statements, subject matter of a criminal trial or causing any prejudice to himself/herself or to a third party person.

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<sup>22</sup> Law 182 of the 12<sup>th</sup> of April 2002 on protection of classified information, published in the Romanian Official Journal, Part I, no. 248 of the 12<sup>th</sup> of April 2002.