The right of certain persons of not giving statements as witnesses in the Romanian Code of Criminal Procedure

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Abstract

The Code of Criminal Procedure provides some exceptions, from the general rule according to which any persons can be heard as witness, as there are certain persons that can not become witnesses in a criminal trial; these persons are as follow: persons that can not be heard as witnesses and persons that are entitled to decline to testify. We consider that the stipulations of the current Code of Criminal Procedure regarding the persons that can not be forced to testify in some criminal cases is criticisable in terms of requirements of legislative technique regarding the usage of a concise, clear style and a correct terminology. Also, in order to correlate the stipulations of the Code of Criminal Procedure with the ones of the current Criminal Code, we propose, de lege ferenda, a modification of the criminal procedural stipulations regarding the persons that can refuse to testify as witness, by using the expression "family member of the suspect or of the defendant".

Keywords: *witness, criminal trial, family member, the current Code of Criminal Procedure, the current Criminal Code.*

JEL Classification: K14

1. The notion of witness

The Romanian Code of Criminal Procedure (CCP)[3], which entered into force on February 1 2014, has brought changes also regarding the stipulations on witness statements, as evidence in the criminal trial.

According to the CCP (art.114 para.1), *witness* is the person that has knowledge of facts or circumstances that constitute evidence in a criminal trial.

The role that the witness statements have in the criminal trial and the importance that the legislator recognizes, to this category of means of evidence, is also emphasized by the stipulation according to which the quality of witness takes precedence to that of expert, lawyer, mediator, representative of one of the parties

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[3] Law no.135/2010 on the new Code of Criminal Procedure, published in the Official Gazette no.486/15 July 2010, with subsequent amendments.

or that of a main procedural subject, regarding the facts and circumstances that the person knew before gaining such a quality (art.114 para.3 CCP)[4].

Unlike the previous Code of Criminal Procedure[5], the current code stipulates (at art.114 para.4) that the persons that drew up a minute ascertaining a crime, can also be heard as witness[6].

As a general rule, any person may be heard as witness in the criminal trial.

The person that, due to his physical condition (blind, deaf, mute) or mental condition (mentally deficient), is not capable of understanding the phenomena through his senses, or is unable to correctly describe the facts perceived, can still be heard as witness, the judicial body assessing, depending on the specificity of each case, if the hearing of such a person serves to reveal the truth (for example the blind can be heard on the facts heard)[7]. In this regard, art.115 para.2 CCP states that the persons that are in a situation that puts a reasonable doubt on their capacity of being a witness can be heard only when the judicial body establishes that the person is capable of consciously describing the facts and circumstances, according to the reality.

In order to decide regarding the ability of a person to become witness, the judicial body orders, upon request or ex officio, any necessary examination, by means provided by the law (art.115 para.3 CCP).

The minor can also be heard as witness, as a special rule, until the reaches the age of 14, the hearing of the juvenile witness is being made in the presence of one of the parents, the tutor or of the legal representative to which he was entrusted for raising and education (art.124 para.1 CCP). Also as a special rule, the minor witness, which at the date of the hearing, did not reach the age of 14, is excepted from taking the oath and the obligation to give statements according to reality, under the sanction of punishment for crime of perjury is not communicated to him, but it is brought to his attention that it is necessary for him to tell the truth (art.124 para.5 CCP[8]).

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[4] Also, by corroborating art.174 with art.64 para.1 letter c) CCP results that a person cannot become expert if he was a witness in the same case, and if he was appointed, the court ruling cannot be based on his findings and conclusions. Also, according to art.88 para.2 letter b CCP, a person cannot be witness and lawyer of one of the parties in the same case.

[5] The Code of Criminal Procedure adopted in 1968, republished in the Official Gazette no.78/30 April 1997, with subsequent amendments.

[6] It refers to the fact-finding bodies stipulated by art.61 and 62 CCP: bodies of state inspection, other state bodies, as well as other public authorities, public institutions or other public law legal entities; bodies of control and leadership or public administration authorities, other public authorities, public institutions; bodies of public order and national security; vessel or aircraft commandants.

[7] Grigore Theodoru, Lucia Moldovan, *Drept procesual penal (Criminal procedural law),* Publishing House Didactică şi Pedagogică, Bucharest, 1979, p. 134.

[8] Paragraph 5 of the art.124 CCP, as it has been modified by the Government Emergency Ordinance no.18/2016, published in the Official Gazette no.389/23 May 2016; besides, by this modification an inadvertence which existed in the content of paragraph 5 has been removed – Anca Lelia Lorincz, *Drept procesual penal conform noului Cod de procedură penală* (*Criminal procedural law accordingly with the new Code of Criminal Procedure*), vol. I, Publishing House Universul Juridic, Bucharest, 2015, p. 189.

2. Procedural rights and obligations of the witnesses

According to the art.114 para.2 and art.120 CCP, any person that is cited as witness has the following ***obligations***:

- to present himself in front of the judicial body that cited him, at the date, place and hour mentioned in the subpoena;

Unjustified absence of the witness, or leaving without permission or without justified reason, constitutes judicial misconduct and is sanctioned with judicial fine (art.283 para.2 CCP); also, as it results from analyzing the content of art.265 para.1, in case of unjustified absence, if the hearing or the presence of the witness was necessary or the communication of the subpoena was not possible and the circumstances unequivocally indicate that the person evades the receipt of the subpoena, a warrant may be issued to summon the witness.

- to take an oath or solemn declaration in front of the court;

Whilst according to letter b of the para.2 art.114 CCP, states that the oath or the solemn declaration is taken in front of the court, according to art.121 ("The oath or solemn declaration of the witness")[9] the deposition of the oath or solemn declaration take place during the criminal pursuit and also during the trial.

We notice that, initially, according to the project for a new Code of Criminal Procedure (art.119)[10] the deposition of an oath or solemn declaration occurs during the trial or the "preliminary procedure of administrating evidence, in front of the judge for rights and freedoms[11]. Therefore, in the conception of the legislator, the person heard as a witness was not obliged to take an oath or solemn declaration, in front of the criminal investigation body. However, in the definitive form of the Code of Criminal Procedure (art.121), even after the subsequent amendments, the legislator has decided that the witness is obliged to take an oath or solemn declaration not only in front of the criminal investigation body or the judge for rights and freedoms but also during the trial, in front of the president of the panel of judges. Therefore, in order to avoid the inadvertence between art.114 para.2 letter b and art.121, we propose the modification of art.114 para.2 letter b of the CCP as follows: "to take an oath or solemn declaration in front of the judicial body"[12].

- to tell the truth;

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[9] „The criminal investigation body and the president of the panel of judges asks the witness if he wishes to take a religious oath or a solemn declaration" – art. 121 para. 2 CCP.

[10] The project for the New Code of Criminal Procedure, www.just.ro.

[11] This procedure was subsequently transformed in the "preliminary hearing procedure" and it unfolds (according to art.308 CCP) during the criminal investigation, when there is the risk that a witness can not be heard during trial, as well as when the prosecutor considers that repeated hearing might be harmful for the juvenile witness; in this case, the prosecutor can notify the judge of rights and freedoms for the preliminary hearing of the witness. The preliminary hearing of the witness is made by the judge of rights and freedoms, at the date and place he chooses, with the subpoena of the parties and the main procedural subjects and the mandatory participation of the witness.

[12] Anca Lelia Lorincz, *op. cit.*, pp. 176-177.

The violation of the obligation to give testimony in accordance with the facts may constitute the crime of false testimony (art.273 Criminal Code)[13].

- to communicate, in writing, during 5 days, any change of his address.

Failure to comply with this obligation is punishable by fine.

At the same time, the witness has the following ***procedural rights***:

- the right to protection, accordingly with the principle of good faith in the administration of evidence, against violence, threats or other means of constraint that might be exercised against him in order to obtain statements (art.101 para.1 CCP);
- to avoid self-incrimination (art.118 CCP);

The principle is expressly regulated in the current Code of Criminal Procedure, in agreement with the E.C.H.R. jurisprudence (Serves vs. France[14]); the so called "privilege against self-incrimination" exists not only for the suspect or the culprit, but also for the witness. In this regard, art.118 states that the witness testimony given by a person that, in the same criminal case, prior to or subsequent to his testimony, had or acquired the quality of suspect or defendant, can not be used against him. Therefore, the right to avoid self-incrimination is recognized for the witness that was also a suspect or a defendant, in the same criminal case[15].

In order to avoid self-incrimination of the witness, the legislator establishes the obligation for the judicial body to mention, when recording the statement, the previous quality of the witness[16].

- the right of not being subjected to measures of protection[17] and to benefit of the reimbursement of expenses, when the criteria stipulated by the law are met (art.120 para.2 letter c CCP).

Thus, pursuant art.273 CCP, the witness summoned by the criminal judicial body or by the court has the right to the reimbursement of his expenses with transportation, sustenance, housing and other necessary expenses caused by his summoning.

Also, the witness that is employed is entitled to his revenues, during his absence from work caused by his summoning. The witness that is not employed, but has revenues, is entitled to compensation.

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[13] „The act of a witness who, in a criminal, civil or other proceeding in which witnesses are heard, gives false statements, or does not tell everything they know regarding the essential acts or circumstances in relation to which they are heard, shall be punishable by no less than 6 months and no more than 3 years of imprisonment or by a fine."

[14] E.C.H.R., decision from October 20th 1997 in *the case Serves vs. France*, para.42-47, May 4, 2000, 38642/97, www.hotararicedo.ro; the Court enunciated the generic right of the witness to remain silent and not to contribute to his own incrimination.

[15] For example, the situation when one of the defendants signs an agreement on admission of guilt.

[16] Anca Lelia Lorincz, *op.cit.*, p.177-178.

[17] We are referring to the measures of protection stipulated by the CCP (art.125-130), as well as to measures stipulated by the Law no.682/2002 regarding witness protection, published in the Official Gazette no.964/28 December 2002, with subsequent amendments.

3. The capacity of becoming a witness in a criminal trial

The Code of Criminal Procedure institutes some exceptions, from the general rule according to which any person may be heard. Thus, there are certain categories of persons that cannot be heard as witnesses in a criminal trial, as follows: persons that cannot be heard as witnesses and persons that are entitled to decline to testify[18].

Persons that cannot be heard as witnesses, according to art.115 and art.116 CCP:

a) the parties and the main trial subjects (art.115 para.1 CCP);

According to the principle *nemo testis idoneus in re sua* (no one ca testify as a witness in his own trial), both parties and main trial subject, as they have a personal interest in the criminal case, are forbidden to become witnesses.

b) the people about whom there is a reasonable doubt that they can be heard as witnesses (art.115 para.2 CCP);

It results that persons that find themselves in such a situation (for example a person that are mentally ill) cannot be heard as witnesses. The judicial body can appreciate the capacity of a person of being witness, bases on any necessary examination, realized according to means provided by the law[19].

c) persons that have the legal obligation of keeping professional secret or confidentiality.

According to art.116 para.3 and 4 CCP, the facts or circumstances in connection to which secrecy or confidentiality may be opposed to the judicial bodies, can be the object of the witness testimony, when the competent authority or the person entitled expresses his agreement regarding this aspect, or when there is another legal cause which removes the obligation to keep secrecy or confidentiality.

Unlike the previous Code, the current Code of Criminal Procedure distinguishes, in this regard, between the obligation of secrecy[20] and the bound to confidentiality[21].

If the secrecy or the confidentiality may be legally opposed to judicial bodies, the persons that are bound with keeping them cannot be heard as witnesses; for example, according to art.1 of the Law nr.51/1995[22], the lawyer is compelled to keep professional secrecy regarding any aspect of the case and according to art.8

[18] Anca Lelia Lorincz, *op.cit.*, p.174.
[19] For example, legal psychiatric expertise.
[20] Law no.182/2002 regarding the protection of classified information (published in the Official Gazette no.248/12 April 2002) distinguishes (at art.15) between state secret information (information regarding national security, which, if disclosed, may prejudice national safety and defense) and secret information (which, if disclosed, may prejudice public or private legal persons).
[21] The bound to confidentiality is an expression of professional secrecy, considered a different category of information, for example the obligation to keep professional secrecy of the: lawyers, public notaries, doctors, private investigators, psychologists, architects, priests etc.
[22] Law no.51/1995 regarding the organization and the exercise of the profession of lawyer, published in the Official Gazette no.116 /9 June 1995, with subsequent amendments.

para.3 of the Statute of the profession of lawyer[23], the lawyer may not be unbound of professional secrecy, nor by his clients nor by other authority or person. In the same regard, according to art.306 para.6 CCP, banking and professional secrecy, excepting the professional secret of the lawyer, are not opposable to the prosecutor after the beginning of the criminal pursuit.

There are however situations when the law stipulates the removal of the obligation of secrecy or confidentiality; for example, according to art.3 para.2 of the Law nr.329/2003[24], the data and information obtained by the private detective, related to which professional secrecy may be held, can be communicated at request, according to law, only to courts of law and Public Ministry, if they are useful for finding the truth in criminal cases[25].

Persons that are entitled to refuse testimony as witnesses. There are certain persons that can be heard as witnesses only with their consent; in other words, these persons cannot be forced to testify in criminal cases. Thus, according to art.117 para.1 CCP, the following persons can refuse to testify:

a) a suspect's or defendant's spouse, ancestors and descendants in direct line, as well as their siblings;
b) persons who were a suspect's or defendant's spouse.

If the persons mentioned above agree to testify, they will have the same legal rights and obligations as any other witness[26], as it results from the content of art.117 para.3 CCP.

An obligation has been instituted, for the judicial bodies, in order to guarantee the right of these persons of not testifying, to communicate the right to the persons provided by the law, after they are informed about other procedural rights and obligations, according to art.120 CCP.

Unlike the previous Code, the current Code of Criminal Procedure states that the person that is the suspect's or defendant's spouse, ancestor and descendant in direct line, or one of their siblings, cannot be forced to testify against other suspects or defendants, if the declaration cannot be limited to them.

The right recognized for some categories of persons of not testifying is the expression of the feelings of affection[27] that these persons have towards the suspect or the defendant.

The previous Code was stipulating, similar to the dispositions of art.117 para.1 letter a CCP, that "the spouse or the close relatives of the accused or of the defendant cannot be forced to testify: (art.80 para.1 of the previous Code of Criminal Procedure). The notion of "close relatives" was defined (at art.149 of the

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[23] The Statute of the profession of lawyer, adopted by the Decision of the Council of U.N.B.R. no.64/2011, published in the Official Gazette no.898/19 December 2011.

[24] Law no. 329/2003 regarding the exercise of the profession of private investigator, republished in the Official Gazette no.178/12 March 2014.

[25] Anca Lelia Lorincz, *op. cit.*, p.175.

[26] This implies that if they give false testimony they can answer for this crime, according to art.273 of the Criminal Code.

[27] Ion Neagu, *Tratat de procedură penală, (Treaty of Criminal procedural law),* Publishing House PRO, Bucharest, 1997, p. 276.

previous Criminal Code[28]) as: "ascendants and descendants, brothers and sisters, their children as well as persons that have become, through adoption, according to the law, such relatives".

The current Criminal Code[29] no longer defines the notion of "close relatives", as it uses the notion of "family member" (art.177), notion which includes the one of "close relatives". Thus, according to the art.177 para.1 of the Criminal Code, by "family member" we understand:

"a) ascendants and descendants, brothers and sisters, their children, as well as the persons becoming such relatives as a result of adoption;

b) spouse;

c) persons establishing relations similar to those existing between spouses or between parents and children, if cohabiting".

Also, as it results from interpreting paragraph 2 of art.177 Criminal Code[30], in case of adoption, the adopted person or his descendants maintain the quality of family member with his natural relatives, in the acceptance of the criminal law.

In this context, we consider that the stipulation of art.117 para.1 letter a CCP can be criticized in terms of legislative technique requirements regarding the usage of a clear, concise style and a correct legal terminology. The notions of "ascendants" and "descendants" are referring only to the relatives in a direct line (straight line); in conclusion, the expression "ascendants and descendants in a direct line" used in art.117 para.1 letter a CCP is pleonastic.

Also, art.177 of the Criminal Code, when referring to "family member" includes "ascendants and descendants, brothers and sisters, their children etc."; thus, there is a distinction between descendants (meaning relatives in a direct line) and the children of brothers or sisters. If the legislator would have considered the children of the brothers and sisters as descendants as well (in collateral line), they would not have been mentioned separately from the category of descendants, as they would have been included in the notion of "descendants".

We ascertain that, the current regulation, on the one hand narrows the sphere of persons that are entitled to refuse to testify (by excluding the children of the suspect`s or defendant`s brothers or sisters) but, on the other hand, widens the sphere of these persons by including the ones that previously had the quality of spouse[31].

Also, one might ask if the concubine of the suspect or defendant has the right to refuse to testify. Considering that art.177 of the Criminal Code refers to family members as being persons that have established relations similar to the ones

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[28] The Criminal Code adopted in 1968, republished in the Official Gazette no. 6/16 April 1997, with subsequent amendments.

[29] Law no. 286/2009 on the Criminal Code, published in the Official Gazette no. 510/24 July 2009, with subsequent amendments.

[30] According to art.177 para.2 of the Criminal Code., „In case of adoption, criminal law stipulations on family members, to the extent provided under para.1 letter a, shall also apply to the adopted person or the descendants of the same, with respect to kin".

[31] According to the previous Code of Criminal Procedure, only the spouse had the possibility of refusing to testify.

between spouses, if cohabiting, the concubines should also have the right to refuse to testify in the criminal cases where the concubine is a suspect or a defendant.

Concubinage is not explicitly defined in Romanian law. The doctrine has defined concubinage as the "cohabitation between a man and a woman, for a relatively longue period of time"[32] (we ascertain that, according to the art.177 of the Criminal Code, at the moment, the condition of differentiation of sexes is obvious).

The legislator does not establish, and we believe that he could not establish, a minimum duration of time according to which the relationship between two persons could be considered "cohabitation" or "concubinage". Regardless these considerations, it is necessary for the cohabitation to have a character of continuity since the Criminal Code refers to "relations similar to those existing between spouses". We consider that both concubinage and engagement (provided that engaged couples to live together), can constitute such a relationship, within the meaning of the provisions of the Criminal Code.

Regarding the persons that cohabitate without having the quality of spouses, we ascertain a lack of unitary vision both at the level of the whole legal system, as well as in the criminal law, between substantial criminal law and procedural law. Firstly, concubinage does not produce legal effects in civil law, as the concubines don't have a legal obligation one towards the other (excepting some obligations in case of engagement and regarding the goods acquired by the concubines during cohabitation).

Secondly, as we have shown before, according to the Criminal Code, the persons that establish "relations similar to those existing between spouses", if cohabiting, have the quality of family members, fact that generates extremely important consequences; for example, according to art.266 para.2 of the Criminal Code, failure to denounce committed by a family member is not punishable.

Also, persons that have the quality of family members can refuse to testify, according to art.117 CCP. Accepting that, as we have previously shown, the reason why some persons are not forced to testify can be found in the feelings of affection that exists between these persons and the suspect or the defendant, it results that, according to the legislator such feelings can exist between former spouses, but they cannot exist between persons that are cohabiting, regardless of the duration of the cohabitation. We consider that such a conclusion denotes the lack o unitary vision that should exist, at the very least, in the criminal law.

4. Conclusions

In conclusion, for a better correlation between the stipulations of the Code of Criminal Procedure and the Criminal Code, we propose a modification of art.117 para.1 letter a CCP thus: "family members of the suspect or of the defendant".

[32] Ion Imbrescu, *Tratat de dreptul familiei (Treaty on family law)*, Publishing House Lumina Lex, Bucharest, 2010, p. 50.

Also, a modification of art.119 para.2 CCP would be necessary, regarding the questions that are addressed to the witness, in order to verify the existence of a possible relation between him and the suspect, as it stipulates that "he is asked if he is a family member or if he was the husband of the suspect, defendant, the injured person or other parties of the criminal trial….".

We ascertain, also, that there are stipulations in the current Code of Criminal Procedure that refer to the notion of "family member", for example art. 455 refers to "persons that may ask the revision". Thus, if in matters related to the revision, the formulation "spouse and close relatives of the convicted" from the previous Code (art.396 para.1 letter c) has been replaced with "a family member of the convicted" (art.455 para.1 letter b CCP), also regarding the persons that may refuse to testify as witness, the formulation "spouse and close relatives of the accused or defendant" from the previous Code (art.80 para.1) could have been replaced with "family members of the suspect or of the defendant" in the art.117 para.1 letter a) of the current Code of Criminal Procedure.

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