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**THE RIGHT TO SILENCE
IN CRIMINAL PROCEEDINGS
IN THE LIGHT OF CONTEMPORARY EVOLUTIONS**
(table of contents and summary)

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SUMMARY

The first chapter, entitled “Introduction”, is enshrined to some preliminary considerations on the PhD thesis.

Therefore, regarding the legal provisions regulating the right to silence, rendered within the first section, under the second section are pointed out the arguments which sustain the expediency of the chosen research topic. As part of this subdivision of the first chapter, the author briefly presents the previous Romanian legislative experiences concerning this fundamental procedural right, as compared to the incurrence and evolution of this institution in countries whose legal systems are unanimously regarded as being representative for the two criminal trial concepts contemporary accepted as consistent with the principle of rule of law, respectively, on one hand, France – the continental system, and on the other hand, United Kingdom and United States of America – the adversarial system. Furthermore, in this context, the author highlights the main differences separating the ways in which the right to remain silent is comprehended by the actors of the referred legal systems, and also the view of the European Court of Human Rights on the importance and

configuration of this privilege, given that the European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain any explicit reference to this basic procedural safeguard. Although to be reaffirmed and analyzed in an exhaustive manner in the wording of the subsequent chapters, the brief explanations summarized above were necessary in order to reveal the controversies occurred by the emergence of this criminal procedure institution.

Due to the implications arising from the regulation of the right to silence in the Criminal procedure code, the objective of the thesis ought to be dualistic.

Thus, primarily, it is necessary to clarify all the respects of this right's meaning because, beyond the simplicity and suppleness characterizing Articles 70, 143 and 322, the legal transplant initiated by the legislator in 2003 and continued in 2006 introduces in the Romanian criminal procedure system, based upon the continental model, the core of the entire philosophy embraced by the adversarial system. For this reason, in order to achieve the goal of this study, it is crucial to approach systematically, following the formula *procedural culture – reason – rule*, the way the right to remain silent was established prior to its retrieval in the domestic law. Merely understanding all the aspects in conjunction with the genesis of the wording under which this privilege is today legally acknowledged will ensure the effectiveness in applying the provisions providing it.

In addition, the overarching objective of the thesis is seconded by the urge for awareness of the fact that the compulsoriness warning on the right to silence, corroborated with the rule of exclusion of illegally obtained evidence, undoubtedly require the recognition of the right to remain silent theory as a condition of admissibility of evidence as far as the accused statements are concerned.

Within the fourth section the research topic of the thesis is being specified, namely the warning on the right to silence and its significance, as they result from the legislator's option expressed by the explicit regulation of the fact that the suspect or defendant is notified about "(...) the right to silence, being also cautioned that anything he states can be used against him (...)". Therefore, the author analyzes the accused right to silence when criminal proceedings are conducted against him, as an application of the privilege against self-incrimination in the hypothesis of communicative collaboration. Thus, the issue of the right to refuse to furnish real evidence against him, as the second application of the privilege against self-incrimination in the particular hypothesis of non-communicative collaboration and neither the issue of the right to remain silent during administrative or disciplinary proceedings were not dealt with, these being subject of distinctive studies.

As a consequence of the fact that the warning represents a legal transplant from the adversarial system, in order to be fully able to achieve the goal of this scientific endeavor, the chosen research method is the comparative one, this being the only one which allows the approach of the subject from a triple perspective: *procedural culture – reason – rule*.

Before analyzing the right to silence in its double stance, as a procedural right, but also as an exclusionary rule, the second chapter, as suggested by its title, is enshrined to some preliminary explanations of the concepts that are often used throughout the thesis and which are especially important for an accurate understanding of the research topic.

The first section is devoted to an analysis of the criminal trial culture, understood as the core of any legal system. As part of this review the author emphasizes that a criminal trial culture does not merely involve an ensemble of rules, but also an assembly of mentalities of the judicial system actors. Briefly, both the law and the people comprise a criminal trial system, and if the rules are easily changeable, the mentalities are unlikely to undergo such a process without difficulties. Therefore, the retrieval of an institution from a different system should be accompanied by a change of mentality by the people building up the judicial system.

Throughout this section are presented the two main concepts governing the criminal trial cultures, namely the continental model and the adversarial one. Given that Romania was for almost half a century under the leadership of the communist totalitarian regime, the socialist model was also presented. All these three patterns promote a certain role of the accused in criminal procedures and a particular kind of relationship with the state, and these are the defining elements of the manner in which the accused right to remain silent is understood.

The second section contains the arguments which determined the author not to choose the due process model and the crime control model, known as Herbert Packer's models, as reference patterns in the analysis of criminal trial systems. The main argument is that these models do not represent themselves criminal trial systems, but two poles able to guide such a system.

The concept of legal transplant is defined within the third section as an operation consisting in the retrieval of a rule, institution or idea from another legal system. The accused right to silence constitutes such a legal transplant, being born in the adversarial culture and subsequently taken over by the continental one.

The last section, entitled "The accused right to remain silent or the privilege against self-incrimination" brings into question the necessity to analyze the right to silence as a legal transplant even in the terms of its naming and contents. Thus, the concept of privilege was genuinely

recognized by the adversarial system, being later adapted to the continental system by the imposition of the concept of right, without affecting its significance.

The circulation of the right to remain silent between the adversarial system, as its system of origin, and the continental one, as the system of retrieval, is being analyzed within the third chapter.

The first section presents the process which lead to the emergence of the right to silence in the British system. In this context it was highlighted the idea that this right has occurred as a result of the imposition of the adversarial system, the model which understands the criminal trial as a dispute between the prosecution and the accused. Therefore, the warning on the right to remain silent, as it was regulated for the first time in 1848, also includes the notification on the fact that everything the accused states will also be used against him.

The need to acknowledge the history of the right to silence and its meanings in the system of origin is required by the fact that Law no. 281/2003 brought in the Romanian legal system the warning on the right to remain silent precisely as it was regulated by the British legislator in 1848.

The second section describes the manner in which the right to silence was retrieved by the continental culture in the light of the experience of the French system. This system does not embrace the adversarial criminal trial model, but the pattern according to which the criminal trial represents an official investigation carried out to find out the truth. Such a conception hardly assimilates the idea of the accused right to remain silent, him being expected to cooperate and to give statements, especially before the court. This is precisely why the retrieval of the right to silence and the regulation of the warning on the right to remain silent were carried out with difficulty. Thus, after the warning on the right to silence was introduced in 2000 by the French legislator in the procedure of withhold, after approximately three years this legal provision was repealed. The warning on the right to remain silent, with a form adapted to the continental culture, was reinforced only in 2011, due to a decision of the Constitutional council. The difficulty of the French system to assimilate concepts of an adversarial nature actually reveals the hindrance in carrying out a legal transplant to a distinctive criminal trial culture.

Following the analysis of the right to silence as a procedural right throughout the third chapter, the fourth one is devoted to the examination of this privilege as a rule in the admissibility of the accused statements in the adversarial system, but also in the continental one.

Within the first section it is overviewed the process through which the right to remain silent was imposed as a rule of exclusion of evidence in the adversarial system. The adduction began with the presentation of the theory of voluntary statements as it represents the first applicable rule in the question of admissibility of the statements given by the accused, rule which is still recognized

nowadays by the British system. Further, the author analyzed the way in which the right to silence has been imposed as a rule to be pursued with priority in the American system.

The United States Supreme Court's decision in *Miranda c. Arizona* (1966) determined a rift within the adversarial culture between the British and the American systems, because the first one remained attached to the theory of voluntary statements, and the second one enforced the right to remain silent as a priority rule. In consequence, the American standard regarding the admissibility of the accused statements is even higher, being inadmissible any statement obtained without providing prior warning or by application or threat of application of sanctions. The difference between the two systems concerns therefore the definition of coercion, behavior leading to the inadmissibility of the accused statements as evidence.

The manner in which the continental system approached the admissibility of the accused statements was examined throughout the second section. In this criminal trial system, which only applies the principle of loyalty, the right to silence was never developed as a stand-alone rule, but it was embedded in the human rights protection segment of the recalled principle.

The fifth chapter is devoted to the analysis of the European Court of Human Rights case law.

Throughout the first section the European court is presented as a point of confluence between the two great criminal trial cultures, namely the adversarial and the continental one.

The description of the manner in which the European Court of Human Rights has recognized as legitimate a certain form of criminal trial during which the accused gives statements constitutes the subject of the second section. In this context the author stressed out the importance of the jurisprudence initiated by the *Murray v. Great Britain* decision (1996), within which the European Court of Human Rights ruled that the right to remain silent does not represent an absolute right and, when the prosecution presents a *prima facie* case, the accused must provide some explanations.

The case law of the European Court of Human Rights regarding the definition of the behaviors which infringe the right to silence was highlighted in the third section. In the opinion of the European court, there exist two forms of coercion, namely direct constrain and indirect constraint. Direct constraint concerns the exercise of physical or psychical violence or the criminalization of the refusal to give statements, while indirect coercion refers to drawing negative conclusions from the accused silence. Out of these forms of coercion the European Court of Human Rights revealed that only direct coercion may lead to a violation of the right to remain silent. Equally, in the European court's view, the right to silence can be breached in the absence of coercion, when the authorities obtain information from the accused with the help of an undercover agent or a collaborator placed in custody alongside the accused.

The presentation of the European Court of Human Rights case law has concluded with the analysis of the manner in which the court analyzed the issue of evidence derived from a statement obtained with the violation of the right to remain silent.

An important part of the thesis is dedicated to the Romanian system and the manner it has assimilated the idea of the defendant's right to silence. Chapter VI examines therefore the right to remain silent in Romania.

The historical evolution of the Romanian criminal procedure and the way it treated the accused in the criminal trial, the requirement for the accused to provide statements or, on the contrary, its right to silence, were overviewed within the first section. The author presented the conceptions of the Criminal procedure codes from 1864 and 1936, the ideas promoted during the communist regime and the transition subsequent to the return to a democratic regime in December 1989.

The second section is enshrined mainly to the Romanian case law regarding the accused statements. First of all there have been analyzed the significances of the principle of loyalty, as it was set out by the law and doctrine. The most substantial part of the section was dedicated to the Romanian jurisprudence concerning accused statements obtained by coercion.

The third section was focused on the retrieval of the right to remain silent in the Romanian system. Therefore, it was presented the mechanism by which the Romanian system retrieved this right, firstly the French pathway and then the adversarial one, choosing the wording of the warning on the right to silence as it known in the American system. An important part of this section is devoted the way in which jurisprudence interpreted the right to remain silent as a procedural right and as a rule in the admissibility of the accused statements. This analysis was concentrated on emphasizing the significant differences regarding certain problems identified in the jurisprudence, such as taking account of the refusal to make statements as a reason for ordering the arrest or as a sentencing guideline.

Within the last section of the chapter the author presents the consequences that are desired following the retrieval of the right to silence, namely the transfer to an adversarial system and the construction of an evidence law regarding the accused statements.

The thesis ends with a closing speech. In this part it is stressed the idea according to which people have a greater importance than the legal provisions when it comes to the retrieval of a crucial institution from a distinctive criminal trial culture. Basically, the author believes that in this matter a change of rule cannot become effective without a change of mentality of the judicial system actors.