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Privilege against Self-Incrimination – Guarantee for Fair Trial in Modern Criminal Procedures (Nemo Tenetur Prodere Seipsum)

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Abstract
The defendant is one of the core subjects of the criminal procedure. As a subject, he has a range of rights, such as: the right to remain silent, the right to defense, the presumption of innocence, the right to be informed for the accusation, the right to be tried within a reasonable time, etc. By some authors, the privilege against self-incrimination is a core right of the defendant, which from derives some of above-mentioned rights! The privilege against self-incrimination does not refer only to the defendant, but it`s main effect must go to the state bodies and not allow them to compel the defendant in a way that he/she would criminalize himself/herself in judicial proceedings. The privilege against self-incrimination is in correlation with the idea that no one is obliged to risk his life or liberty by answering the questions in the course of judicial proceedings. This privilege, particularly contributes to protect the integrity of the individual in official procedure'. The privilege against self-incrimination appears in the International Covenant on Civil and Political Rights, the American Convention on Human Rights, in the Statute of the Tribunal for the former Yugoslavia, in the Statute of the Tribunal of Rwanda, as well as many national acts of different countries through the world: the Charter of Rights and Freedoms of Canada, the Fifth Amendment of US Constitution, the Constitution of India, the Constitution of Pakistan, the Constitution of South Africa, etc. This privilege appears in the Criminal Procedure Law of the Republic of Macedonia, the Criminal Procedure Codes of the Republic of Albania and the Republic of Kosovo. From the most relevant acts presented, privilege against self-incrimination is not provided in the European Convention on Human Rights.

Keywords: *privilege against self-incrimination, remaining silent, burden of proof, the defendant, criminal proceedings*

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Introduction

The privilege against self-incrimination guarantees that men and women cannot lawfully be required to answer questions that will aid in convicting them for a crime. The privilege is widely regarded as both fundamental to human liberty and venerable in the history of the development of civil rights. Some form of the privilege can undoubtedly lay claim to antiquity, boasting a link with the Latin maxim often used to state it, nemo tenetur prodere seipsum that means that no one should be compelled to betray himself in public (Helmholz, 1997: 1). The principal that a person ought not to be compelled to act against his or her own interests and in particular be able to refrain from implicating him or herself in a crime has been traced back to Talmudic Law (Schlauri 2003: 39). However it might be difficult, or quite probably impossible, to trace the modern procedural guarantee back to such a source. It is preferable to think of this principle as having its origins in the development of common law. Although some authors refer to developments in eleventh and twelfth century, the birth of the right is generally traced back to 1641 when both the Star Chamber and the High Commission were abolished and the *ex officio* oath forbidden (Schlauri, 2003: 56-60).

Most important international acts and the largest number of contemporary national acts foresee the privilege against self-incrimination as a part of the rights and opportunities of the defendant in criminal proceedings. Moreover, the privilege against self-incrimination introduces legal protection from getting the confession of the defendant by using violence or torture. Its regulation in international acts, the approach of national acts toward the privilege against self-incrimination, correlation with the presumption of innocence, the right to remain silent and the burden of proof, it`s ratione materiae and the exceptions from the rule shall be subject of this paper.

The privilege against self-incrimination in International and Domestic Acts - a comparative view

International Covenant on Civil and Political Rights (hereinafter: ICCPR) in Article 14, al.3, (g) contains this privilege with other provisions that constitute the minimum rights of a person against whom is being carried out an ongoing criminal process. Having determined that "no one is to be compelled to testify against himself or to confess guilt", ICCPR, the application of the privilege against self-incrimination does not restrict only to non-answering a specific question but also in his non-compelling to plead guilty. The same provisions is provided in the Statute of the Tribunal for ex-Yugoslavia (art. 21, subart. 4 (g)) and in the Statute of the International Tribunal for Rwanda (art. 20, subart.4 (g)). The statutes of both tribunals puts the privilege against self-incrimination in the wake of the rights of the defendant. American Convention on Human Rights (hereinafter: ACHR) provides the same text (art.8, subart. 2, (g)) but also contains a special section (subart.3) which explicitly provides that "A confession of guilt by the accused shall be valid only if it is made without coercion of any kind".

The privilege against self-incrimination is not present in a explicit way in the text of European Convention on Human Rights (hereinafter: ECHR), but is considered as a part of the fair trial principal of the ECHR. In the legal system of United States of America, the privilege against self-incrimination is foreseen in the Fifth Amendment of the

Constitution. The Fifth Amendment to the U. S. Constitution provides, that: "No one, in any kind of criminal proceedings, shall not be compelled to testify against himself".

According to Leonard Levy: "The Framers of the Bill of Rights saw their injunction, that no man should be a witness against himself in a criminal case, as a central feature of the accusatory system of criminal justice. While deeply committed to perpetuating a system that minimized the possibilities of convicting the innocent, they were no less concerned about the humanity that the fundamental law should show to the offender. Above all, the Fifth Amendment reflected their judgment that in a free society, based on respect for individual, the determination of guilt or innocence by just procedures, in which the accused made no willing contribution to this conviction, was more important than punishing the guilty" (Levy, 1988: 260).

However, because the dictates from the Fifth Amendment were not applicable to the states until 1964, a separate line of constitutional jurisprudence developed at the state level to address interrogations and involuntary confessions. In a series of opinions, the U. S. Supreme Court carved out a "totality of the circumstances" standard to examine whether confessions were indeed voluntary. This standard was derived from the due process clause of the Fourteenth Amendment. Relevant factors to be considered in the analysis included: the length of interrogation, the age and intelligence of the suspect, whether the suspect has been physically abused, threatened or intimidated, whether there was a deprivation of food, water or restroom breaks, and the suspect`s previous experience with the criminal justice system (Mack, 2008: 298).

The privilege against self-incrimination is a universal value and is part of many domestic acts of states throughout the world, i.e. in the Canadian Charter for Rights and Freedoms (in art. 11, (c)), among other rights is provided the privilege against self-incrimination. Precisely, by this article: "Any person charged with an offence has the right (among others) not to be compelled to be a witness in proceedings against that person in respect of the offence"; the Constitution of India (in its Part III: Fundamental Rights/ Right to Freedom: Protection in respect of conviction for offences is provided that: "No person accused for any offence shall be compelled to be a witness against himself"); the Constitution of Pakistan (in Part II: Fundamental Rights and Principles of Policy, Chapter 1: Fundamental Rights, provides the disposition: Protection against double punishment and self-incrimination, as follows: "No person: (a) shall be prosecuted or punished for the same offence more than once; or (b) shall, when accused of an offence, be compelled to be a witness against himself"); the Constitution of the Republic of South Africa provides disposition on self-incrimination in its Chapter 2: Bill of Rights as a Right of an arrested, detained or accused persons, précising that: "Everyone who is arrested for allegedly committing an offence has the right (a) to remain silent; (b) to be informed promptly: I. of the right to remain silent; and II. of the consequences of not remaining silent; (c) not to be compelled to make any confession or admission that could be used in evidence against that person, etc. The Law on Criminal Procedure of the Republic of Macedonia, the Code of Criminal Procedure of the Republic of Albania as well as the Code of Criminal Procedure of the Republic of Kosovo provides the privilege against self-incrimination, as well. The Law on Criminal Procedure of the Republic of Macedonia (Official gazette no.150, 18.11.2010) provides the privilege against self-incrimination in the disposition that regulates the rights of the defendant in criminal proceedings (Art. 70), when except other rights like the right to be informed in time and in a detailed way for the accusation against him, the right to have enough time to prepare the defense and so on, is stated that the defendant cannot be compelled to testify against himself or his relatives and cannot be

enforced to confess guilt for a certain crime. In the text, a similar situation is foreseen for the witness as well (Art. 216 provides that the witness is not obliged to answer the questions, if by answering them, he incriminates himself or his relatives or causes huge material damage or considerable shame).

The Code of Criminal Procedure of the Republic of Kosovo (Code nr. 04/L-123, 13 December 2013) contains a disposition for the privilege against self-incrimination in the art.10, p.2 and 3 and in comparison with the disposition of Macedonian law is more detailed one. Consequently, in this disposition is stated that: "the defendant is not obliged to defend himself or to answer a specific question, and if uses the defense, he is not obliged to incriminate himself or his relatives neither to confess guilt. This situation does not include the cases when the defendant voluntarily decides to collaborate with the state prosecutor" and: "It is forbidden and punishable to compel the defendant or any other person that participates in criminal proceedings, to impose a confession or any other statement by torture, force, threat or under the influence of drugs or other similar measures". In this view, the Code of Criminal Procedure of Kosovo, regulates in a supplementary way the issue of this privilege and in particular way emphasizes the main ways of its non-compliance in practice (application of force, torture, threats, etc.). This is a solution nearer to the one that exists in ACHR!

The Code on Criminal Procedure of the Republic of Albania (Edition of Official Publication Center, Tirana, 2013) in the articles 36 and 37 determines the value of defendant`s declaration in general and the one that shows self-responsibility. According to the legal provisions, the statements made by the defendant during the proceeding, cannot be used as proof of the case and if a person, who is not a defendant, in front of proceeding`s authority makes statement that contains incrimination against him, the authority is ought to interrupt the questioning and to warn him that after this statement, he may be a subject of an official investigation and invites him to appoint a defender. This statement cannot be used against the person who gave it! Determining for: "The person who is not a defendant", this procedural code determines the circle of persons (ratione personae*)* whom the privilege against self-incrimination belongs, but at the other hand, inviting him to appoint a defender, it`s seems that is left a chance for his prosecution on the basis of the given statement. Otherwise, why is a defense necessary, if the statement or declarations cannot be used against him?!

The privilege against self-incrimination and the presumption of innocence

The presumption of innocence is one of most important presumption of the criminal procedure law, that is foreseen not only in legal acts, but also in constitutional and international acts (Matovski, Buzharovska, Kalajxhiev, 2011: 63) and is usually defined as a right of e person to be presumed innocent until his guilt is not determined with final court decision. The presumption of innocence is provided in favor of the defendant (Sahiti, Zejneli, 2007) and is reflected in the burden of proof (belongs to authorized prosecutor) and the duty of the court to interpret the dubious facts in favor of the defendant *(in dubio pro reo).*

Correlation between the presumption of innocence and the privilege against self-incrimination comes because those two institutes complements one-another. Starting by the fact that each individual is presumed innocent and argumentation of his guilt is a duty of the authorized plaintiff in criminal proceedings, the defendant has the right to remain silent and even if he is not using this right, he can still refuse to answer specific answers

that incriminates him or his relatives, and his silence or refusal cannot be considered as a circumstance that increase the level of his guilt. Even if he remains silent or refuses to answer, he is still protected by the presumption of innocence that must be "laid down" by the authorized plaintiff. However, the case of *John Murray v. UK (*John Murray v. United Kingdom Application 19731/91, 14.11.1991) to some extend blurs this picture! This applicant was found by the police in a house where a person kidnapped by IRA was held prisoner on the first floor. The applicant came down the staircase when the police entered the building. It is the first case which concerns legislation permitting inferences from the silence of the suspect under certain circumstances. In its report the Commission stated that "whether a particular applicant has been subject to compulsion to incriminate himself in such a way as to render the criminal proceeding unfair… will depend on an assessment of the circumstances of the case as a whole". The court addressed the issue squarely: "What is at stake in the present case is whether these immunities are absolute in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial, or, alternatively, whether informing him in advance that, under certain conditions, his silence may be so used, is always regarded as improper compulsion". 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 the accused, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence produced by the prosecution.

The privilege against self-incrimination and the right to remain silent

One might be tempted, perhaps even seduced, by the rather loose terminology into assuming that the "right to silence" and the "privilege against self-incrimination" are one and the same thing. However, the two guarantees must be seen as being represented two partly overlapping circles. The right to silence is narrower in that it refers to acoustic communication alone, the right not to speak. The privilege clearly goes further in that it is not limited to verbal expression and it also protects against pressure to produce documents (Trechsel, 2005: 342). By the interpretation of European Court for Human Rights, the right to silence and the privilege against self-incrimination are internationally recognized guarantees that "stays at the heart" of the idea for fair trial like it is provided in the article six of the ECHR (Haris, O`Bojl, Varbrik, 2009: 259).

The tight co-relation between the right to remain silent and the privilege against self-incrimination has been subject of many cases from the practice of the courts. A specific case is the case *K v. Austria.* In this case, the applicant was accused before the District Court in Linz in having bought three grams of heroin from a couple M and Ch W, who were being prosecuted in separate proceedings before the Regional Court in Linz. The applicant was charged with having bought and possessing drugs, *inter alia,* from this couple. M and Ch W were charged with drug dealing. The applicant pleaded not guilty and was then summoned to give evidence at the trial of M and Ch W. It can be assumed that in the witness stand he would have had two choices: either to lie or to say that he had in fact bought drugs from the defendants, and thus at the same time, necessarily admit that he had committed an offence. This would certainly have amounted to a confession and would have been incompatible with his right not to incriminate himself and to remain silent. The Commission, however, found that in the proceedings against M and Ch W, K.

could not be considered to be an accused and thus could not claim any rights under Article 6. (Trechsel, 2005: 343). Interpreting this right in the light of Article 6 it was found that while there were situations in which a person could be compelled to make a statement, i.e. when there was a basis in law, a legitimate aim in conformity with Article 10 $ 2, and a pressing social need for a compulsion- such as the duty to testify as a witness- a person, even outside the scope of criminal proceedings or in a different role than that of the accused, could not be compelled to make statements which were self-incriminatory. In particular, the Commission noted that the principle of protection against self-incrimination is, like the principle of presumption of innocence, one of the most fundamental aspects of the right to a fair trial (Trecshel, 2005: 343).

The defendant is not interrogated for getting his confess about the criminal act (even he can do it) but for informing him about the accusation and for giving him the opportunity to defend himself. Even, the state authorities have the right to interrogate the defendant, he is not obliged to declare anything. He has the right to silence (Sahiti, 2005: 88). If the defendant remains silent, his silent cannot be considered as aggravating circumstance and consequently, there must not be negative consequences for the defendant as a result of his remaining silent (Matovski, 2003: 203).

The Supreme Court of U.S. considered that, according to Fifth Amendment of the Constitution that provides the privilege against self-incrimination, it is the duty of the police to warn every suspected person on his Miranda Rights (*Miranda v. Arizona, 348 US 436 (1966))* before starting the interrogative process and after his arrest (*custodial interrogation)*. Miranda Rights consists of: a). the warning that every suspected person has the right to silent and everything that he will say, can be used against him during the criminal proceeding and b). The right to counsel by his choice, and if he does not have enough material sources to pay him – the counsel will be pointed ex officio (Lazhetiq-Buzharovska, Kalajxhiev, Misoski, Iliq, 2011: 45). There is only one exception of the need for warning the suspect for his Miranda Rights. That is the case when it is a threat for the public interest (if the person who must be arrested possess a gun or similar destructive tools that may threat the life of police officers or other present people in the nearby (Lazhetiq-Buzharovska, et. al., 2011: 45). A confession obtained by actual compulsion in violation of the Fifth and Fourteenth Amendment is not admissible as evidence in the trial of the suspect. However, if e confession is allowed in as evidence and is subsequently determined to have been the product of coercion, the Supreme Court has determined that such an error is subject to harmless-error analysis. That is, an appellate court will examine the strength of the remainder of the evidence to determine if the erroneous admission of the remainder of the evidence was harmless beyond a reasonable doubt. By contrast, if an incriminating statement is obtained by violating Miranda rights, that statement may nevertheless be used to impeach the defendant if he takes the stand during his criminal trial (Mack, 2008: 305).

The privilege against self-incrimination and the burden of proof

The privilege against self-incrimination is not only a guarantee that the defendant in a criminal procedure is a subject with certain rights, but mostly it is reflected into the principle that means that the burden of proof belongs to the authorized plaintiff of a criminal procedure (Bilalli, 2011: 81). If the defendant does not answer a specific question, it might not be considered against him and the authorized plaintiff remains the subject who is obliged to prove the guiltiness (nevertheless the defendant has not

answered). There are no doubts that the privilege against self-incrimination is reflected in the discovery of material truth in criminal proceedings, but the guarantee that the privilege gives to the individuals as part of a society is considered more important than the truth revealed in a criminal case!

The privilege against self-incrimination increases the level of confidence in the judiciary system and enables individuals to not disclose certain issues in front of state authorities. If state authorities have doubts or direct/indirect evidences about the guiltiness of an individual, they should materialize or argue that in legal procedure, but not by gaining enforced answers or enforced confessions from the suspect or the defendant (Bilalli, 2011: 81). That argumentation must be on the level of the proof beyond a reasonable doubt. Development of criminal procedure depends on the indictment of the plaintiff (the adversarial principle) and he is ought to prove all the points of accusing act (objective and subjective identity between the accusatory act and judgment) and not the opposite! So, the defendant does not have to argue his innocence because the criminal process is developed to prove the guiltiness and not to prove the innocence!

Application *Ratione Materiae*

The privilege against self-incrimination applies only within the context of criminal proceedings. The state may request that individuals provide many types of information and often the information can have a negative effect, one need only think about tax returns. There can be no doubt that the privilege does not apply outwith the criminal law – a fact evidenced by the very term self-in*crimi*nation (Trechsel, 2005: 349). According to the interpretation of the European Court of Human Rights in Strasbourg, the obligation to submit income and capital in order to calculate the tax is "overall quality of modern states tax system that would not be able to function efficiently without the existence of these tax systems". Therefore, is noted that the correct presentation of income or capital (which is required for tax purposes under threat of criminal sanction) who discovers earlier tax evasion is not considered a violation of the privilege against self-incrimination (Harris, O`Bojl, Varbrik 2009: 264).

Direct effects of the privilege against self-incrimination

The direct aspect concerns the situation of the person who is accepted to give some sort of reaction to questions or requests. At its extreme, this means that it is definitely forbidden to have any resource to torture in order to obtain a statement, whether self-incriminating or not (Treshcel, 2005: 346).

The privilege has not an absolute character. The privilege against self-incrimination prohibits the application of violence against defendants in criminal proceedings. But the issue that deserves consideration in this regard is: "What is considered *violence* applied to the defendant"? Violence can be presented in different forms. It is clear that the application of physical violence against an individual in order to obtain his confession for an offense or for obtaining any other kind of evidences related to the crime, the threat with criminal sanction for not-disclosing information about the crime means violation of the privilege against self-incrimination, regardless if that person, later on, will be indicted and convicted or not. Even the application of the rule of extracting conclusions with negative effect for the defendant because of his remaining silent, also represents a form of violence that is expressed through narrow repression to answer the

questions. Similarly, the use and inclusion of agent-provocateur in order to gather information about the offense, may entails certain degree of violence (Harris, O`Bojl, Verbrik 2009: 260). The notion of voluntariness in U.S. criminal procedure has two separate connotations. One interpretation under the Fifth Amendment privilege against compelled self-incrimination examines various factors to determine whether a confession is voluntary. These factors take into account police conduct as well as the suspect`s personal characteristics (including whether he knew or understood his rights), and balance the totality of those circumstances to determine if the confession was voluntary. The crucial question is whether the suspect`s will was overborne such that his confession could not have been the product of a free and voluntary choice. The alternative definition of "voluntary" arises from the Supreme Court`s decision in *Miranda*, in which the Court determined that the very nature of a custodial interrogation creates and inherently coercive environment that places a suspect at the mercy of skilled interrogators and, consequently, more likely to make incriminating statements unless a barrier is erected between the suspect and the law enforcement. Therefore, if the police does not advise the suspect of his *Miranda* warnings (i.e. do not place the barrier between the suspect and the officers) or if the officers ignore properly invoked *Miranda* rights (i.e. ignoring the barrier), then any statement given under those circumstances is presumed to be involuntary, even though no actual physical coercion has taken place (Mack, 2008: 305). Practical experience shows that sometimes interrogations even on seemingly unimportant questions are particularly risky for an accused. If he or she does not pay particular attention, the risk of unwise admissions or contradictory statements increases. These, in turn, will serve to weaken the position of the suspect and may well affect the credibility of his or her declarations on important points (Treschel, 2005: 342).

Exceptions from the rule

The privilege against self-incrimination, as interpreted by the European Court of Human Rights, exists primarily to guarantee that will be respected the will of the defendant to answer certain questions and does not mean situations where from the defendant are obtained the substances that exists independently of his will as: blood, urine or other materials used for DNA analysis (Treshcel, 2005: 354). Another exception is the situation of disclosure of one`s identity. No one who is accused in criminal proceedings is obliged to say anything. To this, however, there is a generally accepted exception: there is no right to remain anonymous and therefore a person can legitimately be compelled to reveal his or her identity. This is not set out in international human-rights treaties, but is expressly stated in the Third Geneva Convention on prisoners of war: "Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information". This fundamental rule also applies outside the context of war. There can be no right to conceal one`s identity, no right to anonymity. Man, as a *mens sociale*, a social being, needs relations with others and such relations cannot be meaningful if a person refuses to reveal his or her identity (Treshcel, 2005: 355).

Conclusions

The defendant, as provided in the different international and national laws of democratic states, has a range of rights, in criminal proceedings. Among them counts the

privilege against self-incrimination, which explicitly is not provided only in the ECHR, but is considered as an integral part of Article 6 thereof.

When compared ICCPR and ACHR, we saw that the latter one pays more attention to the privilege. Indeed, the practice of non-response to certain questions, is the US known as “taking the fifth”.

The privilege against self-incrimination applies only in the field of criminal law and does not apply, for example in taxation law. The most obvious way of violating the privilege against self-incrimination is the application of violence against the defendant in order to obtain answers to posed questions. Precisely, through this privilege, it is tempted to prohibit such practices of the state authorities. Violence, in this regard is considered: physical violence, threatening with imposing criminal sanctions in case of non-response, psychological violence that affects the defendant as a result of consideration of silence as an aggravating circumstance and (according to some authors, with whom I agree) insertion of the provocative-agent. Although in certain cases, analysis of DNA (blood, saliva, urine of the defendant) or polygraph testing with falsehood seems to vitiate this privilege, they are not included in the terms of violation of the privilege against self-incrimination. The defendant, in terms of war and peace, may invoke the privilege against self-incrimination and the right to silence, to all charges but not to reveal his own identity. Every person may remain silent for other aspects, but is obliged to disclose his/her identity.

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