REFLECTIONS REGARDING THE WITNESS'S RIGHT AGAINST SELF-INCRIMINATION

Luminița CRIȘTIU-NINU[*]
Cătălin-Nicolae MAGDALENA[**]

Abstract

Considered for a long time as the "eyes and ears of justice", the witness has become a procedural subject around which several controversies have arisen since the entry into effect of Law No. 135/2010 on the Code of Criminal Procedure. The suspected witness, the one against whom further criminal prosecution has not been ordered yet, has acquired a distinct position, shaped by the case-law of the European Court of Human Rights and redefined by Decision No. 236/2020 of the Constitutional Court of Romania. Although the European Court of Human Rights has repeatedly ruled that the guarantees of fairness in proceedings apply once an accusation is formulated, it has also recognized the same guarantees for individuals who are heard as witnesses, but are simultaneously suspected of committing offences. Even after the official release of the contentious constitutional court's decision, there are a series of aspects that generate debates and controversies, the most important one being whether there is a genuine right for the witness to remain silent. Has the phrase "cannot be used against him/her" in Article 118 of the Code of Criminal Procedure become predictable and, at the same time, a barrier against potential abuses? Can a "right to silence and privilege against self-incrimination" be recognized ab initio? The balance between the general interest for a good performance of the criminal proceedings and the rights of the "suspected" witness has required and continues to require practical solutions from the judicial authorities, so that the right to defence and the right to a fair trial are observed.

Keywords: *criminal case, witness, statement, privilege against self-incrimination, right to remain silent, perjury.*

1. Introduction

The roots of this right can be found among the principles of the Roman law - the "*brocard nemo tenetur se ipsum accusare*" (no man is bound to accuse himself), having a practical application as of the 17th century in England, as a response to the 16th century royal inquisition, where the accused individuals were required to answer under oath to the questions of the court, without knowing the facts they were being charged of[1].

The right to silence and the right against self-incrimination do not have a long-standing tradition in the Romanian criminal procedural law. They were first regulated in the provisions of the criminal procedural law once with the amendment of the Code of Criminal Procedure in 1969 by means of Law 281/2003[2]. Thus, article 70

[*] Lecturer, Ph.D., Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: luminita.cristiu@scj.ro).
[**] Assistant Professor, Ph.D., Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: magdalena.catalin@gmail.com).
[1] Ripan, Alexandru Dabin, *The Right to Silence. Legal Nature and Who Can Invoke It*, www.avocatripan.ro.
[2] Published in Official Journal no. 468/1 July 2003.

paragraph (2) of the Code of Criminal Procedure (1969)[3] provided the obligation of the judicial authorities to inform the accused on the right to silence, a right that was recognized not only during the actual hearing, but also during the procedures of detention and pretrial arrest, in Article 143 paragraph (3) of the Code of Criminal Procedure[4]. Later on, the legislator made a corresponding amendment to the Cde of Criminal Procedure regarding the stage of judicial investigation through Law 356/200[5], within the provisions of Article 322 of the Code of Criminal Procedure[6].

The new Code of Criminal Procedure, which came into effect on 1 February, 2014, continued to regulate these procedural guarantees for the suspect and for the defendant, providing similar provisions within Article 10 paragraph (4)[7], Article 83 letter a)[8], Article 209 paragraph (6)[9], Article 225 paragraph (8)[10] and Article 374 paragraph (2)[11] of the Romanian Code of Criminal Procedure.

As a novelty, this Code of Criminal Procedure also regulated the witness's right against self-incrimination within the provisions of Article 118, which state that the testimony given by a person who, within the same case, had or subsequently acquired the status of suspect or defendant, cannot be used against him or her. In conjunction with the witness's right, the obligation of the judicial authorities to mention the previous procedural status when recording the witness's statement was provided.

In order to assess whether the guarantee established by law in favour of procedural fairness regarding the witness operates with full effectiveness, this work aims to address, on one hand, the perspective of the European Court of Human Rights regarding this guarantee, considering that the case-law of the Strasbourg Court played a crucial role in shaping the new regulation,

[3] Article 70 paragraph (2) of the Code of Criminal Procedure: "The accused or the defendant shall be informed (...) on the right to remain silent, while being duly cautioned that anything he/she declares may be used against him/her."

[4] Article 143 paragraph (3) of the Code of Criminal Procedure: "The prosecutor or the criminal investigation body shall inform the defendant or the accused that (...) he/she has the right to remain silent, and shall draw the attention on the fact that everything he/she declares may be used against him/her."

[5] Published in Official Journal no. 677/7 August 2006.

[6] Article 322 of the Code of Criminal Procedure: "The presiding judge (...) explains to the accused the nature of the charges against him/her. At the same time, the accused is informed of the right to remain silent, and draw the attention on the fact that everything he/she declares may be used against him/her."

[7] Article 10 paragraph (4) of the Code of Criminal Procedure: "Before being questioned, the suspect and the accused must be advised that they have the right to remain silent."

[8] Article 83 paragraph (a) of the Code of Criminal Procedure: "During the criminal proceedings, the accused has the following rights: a) the right to remain silent throughout the criminal proceedings, with the warning that if he/she refuses to make statements, he/she will not suffer any adverse consequences, but if he/she do makes statements, they may be used as evidence against them."

[9] Article 209 paragraph (6) of the Code of Criminal Procedure: "Before the hearing, the criminal investigation body or the prosecutor is obliged to inform the suspect or the accused that he/she has the right to be assisted by a chosen or appointed lawyer and the right to remain silent, except for providing information regarding his/her identity, and he/she is warned that everything he/she declares may be used against him/her."

[10] Article 225 paragraph (8) of the Code of Criminal Procedure: "Before proceeding with the interrogation of the accused, the judge of rights and freedoms informs of the accused on the offense he/she is charged of and his/her right to remain silent, warning him/her that everything he/she declares may be used against him/her."

[11] Article 374 paragraph (2) of the Code of Criminal Procedure: "The presiding judge explains to the accused the nature of the charges against them, notifies them of their right to remain silent, warning them that anything they declare may be used against him/her, as well as the right to question co-defendants, the injured party, other parties, witnesses, experts, and provide explanations throughout the judicial investigation when deemed necessary."

and on the other hand, the case-law of the national courts, especially of the contentious constitutional court.

2. The justification of the right to silence and the right not to incriminate oneself in the case-law of the European Court of Human Rights. The situation of the suspected witness

At the level of regulation, this right is provided for in the International Covenant on Civil and Political Rights - Article 14 paragraph (3) letter (g), which states that the right not to be compelled to testify against oneself or to acknowledge guilt is among the guarantees of a person accused of a crime.

At the European level, the right to silence of a suspect or a person accused of committing a crime is provided for in Directive (EU) no. 2016/343 of the European Parliament and of the Council of 9 March 2016 regarding the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings. Article 7 paragraph (1) of the Directive states that Member States must ensure that suspects and accused persons have the right to remain silent in relation to the offence they are suspected or accused of having committed. Moreover, Member States ensure that suspects and accused persons have the right not to incriminate themselves, but the exercise of this right shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons.

In the preamble of the Directive, it is specifically stated that its measures should apply to individuals who are suspects or accused persons in criminal proceedings, even before the person is informed by the competent authorities of a Member State, through official notification or by other means, that the person is a suspect or accused person. It is further acknowledged that the right against self-incrimination is an important feature of the presumption of innocence, and when asked to make a statement or answer questions, suspects and accused persons should not be compelled to provide evidence or documents or communicate information that could lead to self-incrimination. It is also mentioned that the exercise of the right to remain silent or the right against self-incrimination should not be used against the suspect or accused persons and should not be considered, in itself, as evidence that the person has committed the alleged crime.

Although the European Convention on Human Rights does not expressly provide for this right, the European Court has developed a plentiful case-law from which the reasons for this guarantee can be derived: (i) protecting the accused person from potential abuses by judicial authorities in obtaining self-incriminating evidence, and (ii) ensuring the fair resolution of the case by avoiding judicial errors generated by the coercion of the suspect/accused person of committing an offence[12].

Indeed, the Court has held that the privilege against self-incrimination requires prosecutors to prove the accusations raised in criminal proceedings without using the evidence obtained through coercion against the will of the accused person. This protected right is closely related to the presumption of innocence. Therefore, the privilege against self-incrimination

[12] Voicu Puşcaşu, *Right to Silence and Right Against Self-Incrimination. Ratio essendi*, available at https://drept.uvt.ro.

primarily refers to comply with the choice of the accused person to remain silent[13].

As it is well known, the European Court of Human Rights has established in its case-law that the guarantees of the right to a fair trial provided for in Article 6 of the Convention become applicable when an accusation is made in a criminal matter, as stated in the judgment rendered in the case of *Engel and Others v. the Netherlands*[14].

In this regard, including the situation where a person suspected of committing an offense is questioned as a witness has been indicated as the moment of formulation of an accusation, therefore of the applicability of the guarantees of the right to a fair trial[15]. It is the so-called **suspected witness**[16], in relation to whom the criminal prosecution bodies have not ordered the continuance of the criminal investigation yet, but there is a suspicion that the person in question has committed the offence for which he is being heard as a witness. This refers to the witness who, under French law, is referred to as "*temoin assisté*" (assisted witness), an intermediate status between the one of a witness and a suspect, who can be heard in this capacity when there is a possibility based on available data that the witness may have been involved in some way in the commission of the offence (Article 113-2 of the French Code of Criminal Procedure)[17]. In this capacity, the assisted witness has the right to refuse to provide statements, the right to engage a lawyer, and the right to examine the case files.

The European Court of Human Rights has recognized the right of the assisted witness, who is called for a hearing in relation to his own acts, and not to acts of which he is aware and in which he did not participate, not contribute to his own self-incrimination and to remain silent.

In the judgment of October 20, 1997, in the case of *Serves v. France*[18], it was held that assigning the status of a witness to a person and hearing him in that capacity, under circumstances where a refusal to provide statements would result in sanctions, is contrary to Article 6 paragraph (1) of the Convention. Furthermore, a witness who fears that he may be interrogated regarding potential incriminating elements has the right to refuse to answer questions about the facts.

In the judgment of 18 December 2008, in the case of *Loutsenko v. Ukraine*[19], and respectively in the judgment of 19 February 2009, in the case of *Shabelnik v. Ukraine*[20], the European Court of Human Rights has emphasized the vulnerable position of the witnesses compelled to disclose everything they know, even at the risk of self-incrimination. The Court held that a person

[13] *Saunders v. United Kingdom*, application no. 19187/91, judgment of 17 December 1996, available in English at https://hudoc.echr.coe.int/eng?i=001-58009.

[14] *Engel and Others v. the Netherlands*, application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, judgment of 23 November 1976 available in English at https://hudoc.echr.coe.int/eng?i=001-57478.

[15] *Kalēja v. Latvia*, application no. 22059/08, judgment of 5 October 2017, available in English at https://hudoc.echr.coe.int/eng?i=001-177344.

[16] In this regard, Georgiana Sas, *The Right of the Witness against Self-Incrimination and the Right to Legal Assistance*, in the Cluj Bar Journal No. 1/2020.

[17] In this regard, V. Constantinescu in M. Udroiu et alii, *The Code of Criminal Procedure. Commentary on Articles*, 3rd Edition, C.H. Beck Publishing House, Bucharest, 2020, p. 836.

[18] *Serves v. France*, application no. 82/1996/671/893, judgment of 20 October 1997, available in English at https://hudoc.echr.coe.int/eng?i=001-58103.

[19] *Lutsenko v. Ukraine*, application no. 30663/04), judgment of 18 December 2008, available in English at https://hudoc.echr.coe.int/eng?i=001-90364.

[20] *Shabelnik v. Ukraine*, application no. 16404/03, judgment of 19 February 2009, available in English at https://hudoc.echr.coe.int/eng?i=001-914011.

who has been heard as a witness, based on his request to bring certain facts to the attention of the judicial authorities, on the occasion of which he self-denounced the commission of a murder offense, had the status of "accused" person and was entitled to all the guarantees of the right to a fair trial, including the right to remain silent and the right against self-incrimination. In this regard, the Court did not accept the argument put forward by the state that the status of a suspect would only be acquired after certain verification of the procedures following the self-accusation.

A turning point decision in this regard is the case of *Brusco v. France*[21], where the Court found that, erroneously, the individual was only regarded as a witness and, therefore, was compelled to take an oath, whereas in reality, a "criminal charge" was being brought against him and he should have been afforded the right against self-incrimination. The Court also held that the plaintiff was not informed at the beginning of the interrogation of his right to remain silent or the possibility of not answering questions. At the same time, the accused person was only able to have contact with his/her lawyer 20 hours after the charge was formulated, which prevented the lawyer from informing the accused person about his/her procedural rights and providing assistance during the interrogation, as required by Article 6 of the Convention.

In the case of *Heany and McGuinness v. Ireland*[22], the European Court of Human Rights held that the statements obtained through coercion violated the applicants' right to silence, while they were being interrogated under a criminal charge, yet there was no evidence in the file to prove the initiation of criminal proceedings against them. The two applicants were arrested on charges of terrorism. After being informed of their right to remain silent, the police officers, based on Article 52 of law of 1939 on offences against the state, requested them to provide details about their location at the time the offences in question were committed. The applicants declined to answer these questions, and due to their refusal to provide information about their location at the time of the events, they were sentenced to six months of imprisonment under the same provision of the law of 1939.

The Court held that the applicants were being charged with criminal offenses, as they were detained and interrogated regarding certain crimes, even though there were no formal acts to initiate criminal proceedings against them and no such procedure had been started. The Court considered that the applicants' right to remain silent was completely nullified by the application of that legal disposition since they were left with the choice of either speaking and potentially incriminating themselves or facing criminal sanctions. The Court found that such domestic law led to obtaining statements through extremely harsh coercion, which contradicted the right to silence, and that concerns for security and public order could not justify such a legal provision. Therefore, the presumption of innocence and the right to a fair trial of the applicants were violated.

The Court also held that in the situation where a person is heard as a witness under oath, but especially under the criminal penalty for perjury, regarding facts or

[21] *Brusco v. France*, application no. 1466/07, judgment of 14 January 2011, available in French at https://hudoc.echr.coe.int/eng?i=001-100969. Please also see Lucian Criste, *The right to silence and the right to be assisted by a lawyer. ECHR, Brusco v. France* at https://www.juridice.ro/126078/dreptul-la-tacere-si-dreptul-de-a-fi-asistat-de-un-avocat-cedo-brusco-vs-franta.html.

[22] *Heaney and McGuinness v. Ireland*, application no. 34720/97, judgment of 21 December 2000, available at https://hudoc.echr.coe.int/eng?i=001-59097.

circumstances that could incriminate him (the theory of the difficult choice), it is not reasonable to ask that person to choose between being sanctioned for refusing to cooperate, providing authorities with incriminating information, or lying and risking being convicted for it[23].

3. Some guidelines regarding the applicability of domestic norms in relation to the witness' right against self-incrimination

3.1. The case-law of the Constitutional Court of Romania

The recently introduced national regulations regarding the right of the witness against self-incrimination under Article 118 of the Code of Criminal Procedure stipulate that a witness statement given by a person who, in the same case, prior the statement, acquired the capacity of suspect or defendant cannot be used against him. At the same time, judicial authorities are bound to mention the previous procedural status when recording a statement.

Given the lack of tradition regarding this procedural guarantee in the domestic legal system, as it has been borrowed from *common law*, the difficulties in interpreting the newly introduced norm have been and remain almost inevitable.

Before examining some of the jurisprudential approaches concerning the interpretation of this witness's right against self-incrimination, we believe that it is important to recall the perspective of the contentious constitutional court regarding the content and limits of this right, within the constitutional review conducted by it.

In 2017, the Romanian Constitutional Court, when challenged on the unconstitutionality of the aforementioned provisions, arguing that the phrase "against him" contained therein is unconstitutional since the witness statement given by a person who subsequently becomes a defendant in the same case cannot be used against him but can be used against co-defendants, dismissed the constitutional challenge[24], concluding that the dispositions of Article 118 of the Code of Criminal Procedure are constitutional in relation to the raised criticisms.

Essentially, in the reasoning of its decision, the Court stated, in paragraphs 13-18 of Decision no. 519/2017, that:

(i) the provisions of Article 118 of the Code of Criminal Procedure regulate a new legal institution within the existing criminal procedural law, namely the right of the witness against self-incrimination;

(ii) the national criminal procedural law, through the challenged norm, does not regulate the right of the witness to refuse to give statements, therefore, it does not establish an actual right of the witness against self-incrimination, on one hand, and it does not fall under the scope of the institution of excluding evidence from criminal proceedings, on the other hand;

(iii) the purpose of the norm is that a witness statement - given by a person who, in the same case, had previously made a statement or subsequently became a suspect or defendant - is not excluded from the case file and can be used to establish factual circumstances unrelated to the witness himself. This is expressly regulated in the last paragraph of Article 118 of the Code of Criminal Procedure, which imposes an

[23] *Weh v. Austria*, application no. 38544/97, judgment of 8 April 2004, available in English at https://hudoc.echr.coe.int/eng?i=001-61701.

[24] Decision no. 519 of the Constitutional Court of 6 July 2017, published in Official Journal of Romania, Part I, No. 879 of 8 November 2017.

obligation on the judicial authority to mention the witness's previous procedural status when recording the statement;

(iv) the provisions of Article 118 of the Code of Criminal Procedure constitute a guarantee of respecting the right to a fair trial of the person testifying, who, before or after making the statement, had or acquired the capacity of suspect or defendant on a potential charge, preventing his/her own statements from being used against him/her;

(v) the self-incriminating statements of the witness are, at the same time, necessary for resolving the case concerning another accused person since a fundamental principle of criminal proceedings is the discovery of the truth in order to achieve the purpose of criminal proceedings, which is the complete and accurate knowledge of the material facts and the person who committed them, thereby holding the latter criminally responsible;

(vi) admitting self-incriminating evidence in criminal proceedings against a witness who, before or after making the statement, had or acquired the capacity of suspect or defendant, and excluding self-incriminating statements of the witness concerning another accused person, would affect the fairness of the criminal trial and discredit the administration of justice.

By Decision no. 236/2020[25], a new constitutional challenge was raised and the court found that the legislative provision contained in Article 118 of the Code of Criminal Procedure, which does not regulate the right of a witness to remain silent and to the right against self-incrimination, is unconstitutional.

The Constitutional Court held that in its current form, subject to examination, Article 118 of the Code of Criminal Procedure regulates the "right of the witness against self-incrimination" as a negative procedural obligation of the judicial body, which cannot use the statement given as a witness against the person who, after the statement, had or acquired the capacity of suspect or defendant in the same case. Thus, the Court found that the challenged text considers two hypotheses, namely: (i) the hypothesis in which the person is questioned as a witness after the initiation of the criminal investigation regarding the act, and subsequently acquires the status of a suspect, and (ii) the hypothesis in which the person already has the capacity of a suspect or defendant and subsequently the judicial body orders the separation of the case, and in the newly formed file, the person acquires the status of witness.

It was therefore noted that compared to the current wording, Article 118 of the Code of Criminal Procedure does not allow the application of the right against self-incrimination similar to the suspect or defendant. At the same time, the witness does not have the possibility to refuse to provide a statement under Article 118 of the current criminal procedural law, being bound to declare everything he/she knows, under the penalty of committing the offence of perjury, even if through his statement incriminates himself/herself.

The Court thus found that a person summoned as witness, who tells the truth, can incriminate himself, and if he/she does not tell the truth, avoiding self-incrimination, he/she commits the offence of perjury. With regard to the first hypothesis provided for in Article 118 of the Code of Criminal Procedure, in the absence of a regulation of the right of a witness to remain silent and to the right against self-incrimination, the criminal investigation authorities are not obliged to give effect to this right concerning the *de facto* suspect who has not acquired the status of a *de jure*

[25] Published in Official Journal no. 597 of 8 July 2020.

suspect yet. Therefore, this situation leads to the charging of the person heard as a witness, even in the hypothesis where, prior to the hearing, the criminal investigation authorities had information indicating his/her involvement in the commission of the offence that was the subject of the hearing as a witness, and the lack of official suspect status may result from the lack of will on the part of the judicial authorities, who do not issue the order under the conditions of Article 305 paragraph (3) of the Code of Criminal Procedure.

As for the second hypothesis regulated in Article 118 of the Code of Criminal Procedure, when the person has already acquired the capacity of suspect or defendant, and subsequently the judicial body orders the separation of the case, and in the newly formed file, the person acquires the capacity of witness, even if the criminal procedural law allows for the questioning of a participant in the commission of the offence, as a witness, in the separated case, he/she cannot be a genuine witness. The genuine witness is the one who did not participate in any way in the commission of the offence, but only has knowledge of it, specifically knowledge of essential facts or circumstances that determine the fate of the trial.

Moreover, the Constitutional Court noted that the High Court of Cassation and Justice - Panel for the resolution of legal issues in criminal matters, by Decision no. 10 of 17 April 2019[26], ruled that "a participant in the commission of a crime who has been separately tried from the other participants and subsequently questioned as a witness in the separated case cannot have the status of an active subject of the offence of perjury, provided for in Article 273 of the Criminal Code".

The Constitutional Court held that in a separate case, a participant who has been finally convicted can be heard as a witness in the cases of other participants in the same offence. However, his/her new statement continues to retain the "original" traces of a statement made as a suspect or accused person, even though formally, the person has the status of a witness in the new procedural framework.

The Court further noted that, from a procedural standpoint, the witness is vulnerable, as he/she cannot bear the capacity of secondary passive subject of the offence of abusive prosecution, as regulated in Article 280 of the Criminal Code. The protection under criminal law only applies to individuals who are under a criminal investigation or in the course of a trial. The same vulnerable situation may persist if a person heard as a witness has limited access to a lawyer. Additionally, Article 118 of the Code of Criminal Procedure does not settle the right of a witness to have access to a lawyer, or the obligation of the judicial authorities to inform him in this regard or to appoint a lawyer *ex officio* in particular situations.

Therefore, the proper guarantees for a person heard as a witness are missing. The witness's protection is limited only to the obligation of the judicial authorities not to use his statement against him. The witness does not have a level of protection similar to that enjoyed by a suspect or accused person.

At the same time, the Court noted that the norm does not make any reference to the subsequent effects of such a statement. It can be used to obtain other means of evidence, and the derived evidence, in the absence of a contrary provision, can be used against the witness and influence the subsequent procedural conduct of the judicial authorities. However, such procedural

[26] Published in Official Journal, Part I, No. 416 of May 28, 2019.

conduct of the judicial authorities cannot be sanctioned under the provisions of Article 102 paragraph (4) of the Code of Criminal Procedure since a witness statement is not included in the scope of illegally obtained evidence.

Therefore, the criminal procedural provisions of Article 118 of the Code of Criminal Procedure do not establish an effective protection for the witness in relation to a potential criminal liability. Also, they do not regulate adequate procedural and substantive guarantees for a person heard as a witness, and do not prohibit the use of evidence indirectly obtained, based on his/her own statement. The only evidence against which the witness is protected is his/her own statement.

It was concluded that the legislative solution contained in Article 118 of the Code of Criminal Procedure, which does not regulate the witness's right to silence and against self-incrimination, is unconstitutional, being contrary to the provisions of Article 21(3), Article 23 paragraph (11), and Article 24 paragraph (1) of the Romanian Constitution, as well as to Article 6 paragraphs (1) and (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Considering the manner in which the Constitutional Court has defined the content, meaning and guarantees of the witness's right against self-incrimination, in light of extensive case-law of the European Court of Human Rights, it is necessary to further analyse how the courts have applied this right in practice, following the publication of the aforementioned decision in the Official Journal.

3.2. The case-law of the High Court of Cassation and Justice and other judicial courts

I) By the criminal decision of 14 March 2023, rendered by the Court of Appeal of Galați, the appeal filed by the Public Ministry against the criminal judgment of 8 November 2022, pronounced by the Court of Galați, whereby defendant AA was acquitted for the offence of perjury under Article 273 paragraph (1) of the Criminal Code, was dismissed on the grounds that the act is not provided for by the criminal law.

The criminal investigation authorities charged the defendant with making false statements on 4 January 2019, when he was heard as a witness in criminal case no. 9/D/P/2019 of the Directorate for Investigating Organized Crime and Terrorism (DIICOT) - Galați Territorial Office. He falsely declared that he did not know defendant BB, who was under investigation for the offence of trafficking in high-risk drugs under Article 2 paragraph (1) of Law no. 143/2000, and that he had not purchased drugs from him, although in reality, he knew him and had bought drugs from him on multiple occasions.

In the considerations of the acquittal decision, the court found that even without a detailed analysis, it became evident that if defendant AA had stated that he had purchased drugs from BB, there would have been a possibility of his incrimination for the offence under Article 4 paragraph (1) of Law no. 143/2000, an offence in which the material element is provided for alternately, the legislator listing a series of actions including the purchase of high-risk drugs.

Thus, defendant AA had to choose between affirming the purchase of drugs, exposing himself to the risk of a new criminal investigation for the offence under Article 4 paragraph (1) of Law no. 143/2000,

for which he had previously been fined, and denying the purchase of drugs, which led to his prosecution and indictment for the offence of perjury.

The court noted that from the content of the statement recorded during the criminal investigation, it does not appear that the criminal investigation authorities informed witness AA of his right against self-incrimination. The mention in the standard declaration on page 30, stating that he was informed of his right to refuse to give statements as a witness, is formal and devoid of substance, as it does not indicate the basis on which this aspect was brought to his attention or the reason why he could refuse to provide such statement.

The court found that although two years have passed since Constitutional Court Decision no. 236/2020, the legislator has not adopted an appropriate legislative solution as a consequence of admitting the constitutional challenge (neither Article 273 of the Criminal Code, nor Article 118 of the Code of Criminal Procedure have undergone any changes since the existing form at the time the constitutional challenge was pronounced), therefore, we find ourselves, to some extent, in a situation similar to the decisions of unconstitutionality concerning Article 155 of the Criminal Code, regarding the statute of limitation of criminal liability.

Therefore, in light of this constitutional flaw, the case-law is obliged to analyse and apply the provisions of Article 273 of the Criminal Code and Article 118 of the Code of Criminal Procedure in relation to Decision no. 236/2020 of the Constitutional Court, as stated, among others, in paragraph 84 of the aforementioned decision.

In conclusion, in the light of the above, the court stated that the witness enjoys the right to remain silent and not contribute to his own incrimination, to the extent that his statement could incriminate him, under Article 6 of the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR). Decision no. 236/2020 of the Constitutional Court is considered as a more favourable criminal law for individuals who were not informed of their right to remain silent and against self-incrimination, and who were subsequently charged with perjury.

The judicial authority cannot use a person's statement made in the capacity of witness against the accused person, but only in favour of the suspect or defendant. The obligation to inform the witness of his right against self-incrimination shall be incumbent on the judicial authority that was in the possession of data giving rise to suspicions that the witness was involved in the commission of a criminal offence. A person summoned as a witness, who tells the truth, may incriminate himself, and if he does not tell the truth to avoid self-incrimination, he may commit the offence of perjury. In reality, this mechanism leads to the prosecution of the person who was questioned as a witness, which is unfair if the criminal investigation authorities had indications of his involvement in the offence under investigation before his testimony as a witness.

Analysing the chronology of events in this case, it can be noted that at the time of the questioning of defendant AA's as a witness, the criminal investigation authorities had plausible reasons to suspect his involvement in the potential offence of drug trafficking for personal use, especially considering that the defendant had previously been convicted for such an offence. Moreover, even in the hypothesis that they proceeded with his questioning, the criminal investigation authorities had the obligation to inform him of the consequences that arise when the information provided indicates involvement

in a crime, including his right against self-incrimination.

With reference to these considerations, the court concluded that in the specific situation of defendant AA, he does not meet the required quality of an active subject under the incriminating norm, which is an essential condition for the offence of perjury. Therefore, since the condition of typicality has not been met, the offence of perjury held against him is not provided for by the law, and the acquittal decision must be adopted.

II) According to the criminal sentence issued on 10 February 2022, by the Court of Constanța, defendants AA, BB, and CC were acquitted of the offence of perjury, as provided under Article 273 paragraph (1), paragraph (2) letter (d) of the Criminal Code, because the act is not covered by criminal law.

In order to reach this decision, the court noted that the defendants were indicted by the Public Prosecutor's Office attached to the Court of Constanta for the offence of perjury, as provided under Article 273 paragraph (1) of the Criminal Code. They were heard as witnesses in a case pending before the Tribunal of Constanța, involving a defendant (a police officer) who was indicted for corruption offences. During their testimony, the defendants made false statements regarding the essential facts and circumstances about which they were questioned.

Based on the evidence adduced, the court found that the defendants in the respective case were not genuine witnesses in the case where the police officer was indicted for the offence of bribery. There were reasonable suspicions that they had also committed the offence of bribery as regulated under Article 290 of the Criminal Code.

Considering the aspects highlighted by the criminal investigation authorities, the defendants were in a situation where they had to provide false statements or withhold information, which would attract criminal liability for the offence of perjury, or to declare everything they knew, which would attract criminal liability for the offence of bribery.

The court appreciated that this situation was analysed in an abstract manner in the considerations of the aforementioned decision by the Constitutional Court, which concluded that this situation violates the defendants' constitutional right against self-incrimination.

Therefore, the court concluded that the conditions required by law for convicting the defendants were not met, and it ordered their acquittal considering that the committed act is not provided for by criminal law, invoking the provisions of Article 16 paragraph (1) letter (b), first paragraph of the Code of Criminal Procedure.

III) Through conclusion no. 299 issued on 4 October 2021, by the judges of the preliminary chamber of the Tribunal of Suceava, the appeal against the conclusion of the judge of the preliminary chamber of the Court of Câmpulung Moldovenesc was admitted. The contested conclusion was completely annulled, and upon retrial, the exception of nullity regarding multiple pieces of evidence and acts of criminal investigation was admitted, including the witness statements given by AA on 27 November 2017 and 28 November 2017, ordering their exclusion from the case.

From the documents in the case file, it was held against the defendant that on 27.11.2017, at around 4:00 a.m., while driving his VW Passat on public roads, he was involved in a road accident resulting only in material damage and being tested with a breathalyzer, the result was a concentration of 0.68 mg/l pure alcohol in the breath and a blood alcohol content above the legal limit.

By the order of the criminal investigation authorities dated 27 November 2017, the criminal investigation *in rem* for the offence of driving a vehicle under the influence of alcohol or other substances, as provided under Article 336 paragraph (1) of the Criminal Code, was initiated.

Furthermore, the defendant was heard as a witness on 27 November 2017, and 28 November 2017. Subsequently, through the order dated 22 March 2018, confirmed on the same date, the further prosecution of the defendant was ordered regarding the offence of driving a vehicle under the influence of alcohol or other substances, as provided under Article 336 paragraph (1) of the Criminal Code. After the initiation of the criminal action, the defendant was indicted for the commission of the mentioned offence.

Referring to Decision no. 236/02.06.2020 of the Constitutional Court, the judges of the preliminary chamber noted that the prosecutor cannot attribute the status of witness to a person whom he knows to be involved in the commission of a criminal offence, solely for the purpose of using the mechanism described in the recitals of the constitutional court's decision[27], in order to formulate a criminal charge.

Based on these theoretical considerations, the judges have found that indeed, on 27.11.2017 and 28.11.2017, when defendant AA was heard as a witness, the prosecutor had sufficient information that he was the presumptive author of the offence, as he was questioned regarding the materiality of the act. However, the defendant was heard as a witness, despite the fact that a witness is bound, under penalty of criminal liability for the offence of perjury, to declare the truth in the matter.

In this situation, the defendant, in his capacity as a witness, could not use the right against self-incrimination, a prejudice which cannot be covered during the judicial proceedings. His statements were used as evidence in the order initiating criminal proceedings no. 1405/P/2017 dated 20.05.2021, the confirmation order for the further conduct of the criminal investigation no. 1405/P/2017 dated 22.03.2018, and the order for the further conduct of the criminal investigation no. 1405/P/2017 dated 22.03.2021, as well as in the reasoning of the indictment, mentioned in Chapter II "Means of evidence."

b.4) A judgment contrary to the aforementioned was pronounced by the Court of Appeals of Cluj (criminal decision no. 413/A/22 March 2021).[28]

In fact, defendant P.G.D. was heard as a witness regarding the offences of disturbing public order and possession or use of dangerous objects without authorization, committed by defendant B.I.P. At the time of his testimony, P.G.D. cooperated with the criminal investigation body, disclosing everything he knew, with one notable exception. When asked whether defendant B.I.P. had a knife on him (a knife that defendant B.I.P. indeed had on him and that P.G.D. picked up from the ground), P.G.D. falsely declared that such knife did not exist. Before the first instance and the court of appeal, defendant P.G.D. stated that he lied to protect himself from potential criminal liability for helping defendant B.I.P., by attempting to conceal the knife.

By criminal decision no. 413/A/2021 dated 22 March 2021, the Court of Appeal of

[27] A person subpoenaed to be heard as a witness, with the obligation to tell the truth, may be charged if he/she incriminates himself/herself. On the other hand, if he/she does not tell the truth to avoid self-incrimination, he/she would commit the offence of perjury.

[28] Răzvan Anghel, *Critical Note on Criminal Decision No. 413/A/22 March 2021 of the Court of Appeal of Cluj*, in "Caiete de Drept Penal" (Notebooks of Criminal Law), No. 2/30 June 2021.

Cluj rejected the appeal of defendant P.G.D., stating that his petition for acquittal cannot be admitted. In support of this ruling, the Court indicated that the defendant was heard in accordance with the legal norms in force at the time of the hearing and that the defendant did not invoke the right to remain silent at that time, choosing instead to make false statements. Additionally, the Court, referring to the case law of the European Court of Human Rights, the supreme court, and the Constitutional Court, held that the witness's right against self-incrimination is not absolute, essentially stating that having been heard in relation to offences committed by another person, he was not entitled to make false statements.

Defendant B.I.P. was indicted for the offences of possession or use of dangerous objects without authorization and disturbing public order, while defendant P.G.D. was charged with perjury. According to the indictment, defendant B.I.P. was inside Club N., located in Cluj-Napoca, and got into a conflict with witness B.F.A. The security guard asked the defendant to leave the premises and accompanied him until he left the club. However, at the exit, the defendant became unruly, taking out a knife from his pants pocket and gesturing towards the security guards. They subsequently restrained the defendant and during this procedure, defendant P.G.D. dropped the knife on the ground, which was then picked up by defendant P.G.D.

By being heard as a witness, defendant P.G.D. partially confirmed the statements of other witnesses regarding the existence of an incident. As for the existence of the knife, he claimed not to have seen any such object on the defendant and not to have picked up any knife from the ground. It was held that the witness' statement was false, as surveillance camera footage showed him picking up the knife that defendant B.I.P. had.

The trial court noted that the defendant referred to Decision no. 236/02.06.2020 of the Constitutional Court of Romania, which declared unconstitutional the legislative resolution contained in Article 118 of the Code of Criminal Procedure, which did not regulate the witness' right against self-incrimination.

However, the Court considered that the witness' testimony was given in compliance with the law, as he was made aware of the provisions of Article 118 of the Code of Criminal Procedure (which were unaffected at that time by the aforementioned decision, which was rendered later).

Decision no. 236/02.06.2020 of the Constitutional Court of Romania was published in Official Journal no. 597 of 8 July 2020, and it started to produce effects, according to Article 26 of Law no. 47/1992, as of the moment of publication and only for the future.

Secondly, the court found that defendant P.G.D. was informed on the subject of the investigation ("the incident at club N") and the person under investigation (defendant B.I.P.). P.G.D. was not involved in that incident (did not cause the incident or commit any acts of violence) and did not use the knife (he only picked up the knife after it was dropped by defendant B.I.P., without using it in any way).

It cannot be accepted that the defendant felt compelled to lie in order to avoid criminal responsibility for acts he did not commit (acts that do not exist) and for which he was not under investigation or accused.

Furthermore, the court found that the defendant did not commit the offence of perjury by refusing to give statements or by concealing details, but rather presented a deliberately false and obviously favourable state of affairs for defendant B.I.P.

The Court of Appeal of Cluj dismissed the defendant's appeal as unsubstantiated,

stating that the witness statement was taken in accordance with the law, and the provisions of Article 120 paragraph (2) letter d) of the Code of Criminal Procedure were brought to his attention. P.G.D. was not involved in the incident (did not cause the incident or commit any acts of violence) and did not use the knife (he only picked up the knife after it was dropped by defendant B.I.P., without using it in any way).

The judicial authorities, at the time of his testimony as a witness, had no indication/information/data regarding his involvement in the incident under investigation. P.G.D. did not have the status of a suspect/defendant in the case being investigated for the offenses of unauthorized use of dangerous objects and disturbance of public order prior to or after giving his witness statement. Finally, the defendant did not invoke the right to remain silent at the time of the hearing and did not refuse to make statements.

Additionally, it was noted that the witness' right to remain silent and right against self-incrimination must be analysed in each specific case and cannot be recognized *ab initio*, without any distinction, as a general and absolute right. It should be assessed based on the particularities of each case, especially in relation to whether the judicial authority has plausible reasons to believe that the statements of the witness could incriminate him, i.e., whether the judicial authority has minimal indications that the witness may be involved in the facts about which he is being questioned.

In this decision, a separate opinion was also formulated, advocating for the acquittal of defendant P.G.D. based on the grounds of Article 16 letter b) of the Code of Criminal Procedure. The difference of opinion in this litigation essentially revolves around the interpretation of Decision no. 236/2020.

Contrary to those held by the majority opinion, the separate opinion considers that the correct interpretation of this decision is to grant any witness who is heard, regardless of the nature or object of the case, an absolute right to remain silent and the right against self-incrimination.

It was noted that according to the case-law of the European Court of Human Rights (ECtHR), it is not natural to request the alleged perpetrator to choose between being punished for refusing to cooperate, providing incriminating information to the authorities, or lying and risking conviction for perjury[29]. In conjunction with Decision no. 236/2020 of the Constitutional Court, three conclusions can be drawn: no one can be punished for exercising the right to remain silent, regardless of his formal role in the trial; no one can be compelled to provide incriminating information to the authorities; no one can be punished for lying to avoid self-incrimination. The decisions of the Constitutional Court, as in case of legal norms, are mandatory and must be observed, and direct censorship of these decisions performed by the courts can only occur in exceptional circumstances.

Defendant P.G.D. faced these three difficult decisions at the time of the commission of the offence. This is certain, just as it is certain that he chose to lie about those details which he believed could incriminate him, details that were known to the judicial authorities from the rest of the evidence adduced to the case.

The court held that it must be determined whether the fact that the defendant lied to conceal the possible commission of a separate offence, rather than the offence for which he was being heard, is relevant. In this context, it was stated that although it is extremely important to rely on the testimony of witnesses, it is

[29] See the case of *Weh v. Austria* cited above.

essential to recognize their right against self-incrimination or self-denounce. It is undeniable that the witness's right to remain silent cannot be exercised arbitrarily and absolutely, just as the "right to lie" cannot be used in this way.

However, the only limitation should be the proof that, *in abstacto*, the witness could not incriminate himself by telling the truth.

The second issue that arises is whether the statement made by defendant P.G.D., assuming he was not lying, could have incriminated him. The analysis of this issue should remain concise and abstract, as the court is not called upon to judge the potential offense of aiding the perpetrator. In this regard, it has been held that it is sufficient to determine that, in the abstract, the concealment of a weapon used in the commission of a crime, immediately after the commission of the crime, could meet the constituent elements of the offence of aiding and abetting the offender.

In conclusion, at the time of his testimony during the criminal investigation, defendant P.G.D., without knowledge of his right not to make statements that could incriminate him (Decision no. 236/2020 being subsequent to this moment), was put in a situation where he had to choose between self-incrimination, refusal to testify (which at that time could lead to a reasonable presumption that he would be held criminally liable for perjury), and lying (which at that time could also lead to a reasonable presumption that he would be held criminally liable for perjury, with the mention that he believed there was a possibility that his action would not be discovered).

On a spur of the moment, the defendant chose to lie. However, beyond the more or less moral nature of this choice, in light of Decision no. 236/2020 of the Constitutional Court and the case-law of the European Court of Human Rights, this choice was made in a forced context where there was no right choice from the defendant's perspective on the one hand, and it cannot be criminally sanctioned, on the other hand.

In the critical note to this decision, it was pointed out that through Decision no. 651/2018, the contentious constitutional court had stated that decisions pronounced by the Constitutional Court must also have the power to apply retroactively, as a form of criminal law decriminalization.

However, by transforming the right to remain silent and the right against self-incrimination into an absolute right, a series of conducts that previously met the elements of the offence of perjury were decriminalized. The fact that the defendant was not heard as a witness in a case where an offence committed by him was being investigated cannot be considered a reason to disregard the right to remain silent or against self-incrimination.

The interpretation given by the court, which did not take into account the possibility of multiple separate offences being committed in a closely related context by different individuals (some of which could easily come to light through self-incrimination or even self-denunciation), is unacceptable. Regarding this issue, it was considered that the separate opinion clearly demonstrates why such an approach is incorrect. Essentially, it would ignore the entire case-law of the European Court of Human Rights, which has shaped the concept of a (in fact) witness.

Moreover, such an interpretation would encourage a return to abusive practices of interrogating the perpetrator as a witness, only with the mention that this interrogation would be related to another person or a different legal classification of offences.

It was held that the judicial authorities acted unlawfully when they heard P.G.D. as

a witness. The judicial authorities, even in the absence of the Constitutional Court's decision, in light of the European Court of Human Rights case-law, could and should have informed the witness that if he believed that by disclosing certain facts he could incriminate himself, he had the right to remain silent. It is indisputable that concealing a weapon used in the commission of a crime immediately after the offence can meet the elements of the offence of abetting the perpetrator.

The judicial authorities not only failed to inform P.G.D. that he could exercise his right to remain silent, even though at that stage of the criminal investigation they were aware of his action of taking the knife and attempting to hide it, but they even asked him questions explicitly related to this aspect.

The defendant's choice to provide false information was considered by the court as a reason for conviction, arguing that the defendant should have chosen not to declare anything. Apart from the fact that such a statement contradicts the real possibilities that a person heard as a witness has, most of the time it also contradicts the objective reality of the case, given that the defendant was not informed of his right to remain silent.

Furthermore, it is of the essence of the theory of the three difficult choices that the witness faced with this choice has the possibility to exercise any option without suffering consequences.

b.5) A different solution regarding the analysed aspect was ruled by the supreme court, which upheld the decision pronounced by the judge of the preliminary chamber of the Court of Appeal of Bucharest, Criminal Division I (High Court of Cassation and Justice, Criminal Division, conclusion no. 508 of 20 May 2021, of the panel of 2 judges of the preliminary chamber).

Thus, by the conclusion of 23 November 2020, the Court of Appeal of, Criminal Division I, based on Article 346 paragraph (2) in conjunction with Article 345 paragraphs (1) and (2) of the Code of Criminal Procedure, dismissed as unsubstantiated the requests and exceptions formulated, among others, by defendants A and B regarding the legality of the court's referral, the performance of procedural acts, and the evidence adduced in the criminal investigation phase. It found the legality of the court's referral, as well as the legality of the performance of procedural acts and the evidence adduced in the criminal investigation phase, and ordered the initiation of the trial.

The judge of the preliminary chamber of the court of first instance noted that the indictment of the National Anticorruption Directorate dated 20 July 2020, referred to the following defendants: defendant A, charged with the offences of abuse of office if the public official obtained an undue benefit for himself or another person, in the form of instigation, as provided by Article 297 paragraph (1) of the Criminal Code, related to Article 13^2 of Law no. 78/2000, with the application of Article 47 of the Penal Code, and continuous intellectual forgery in the form of instigation, provided by Article 321 paragraph (1) of the Penal Code, in conjunction with Article 35 paragraph (1) of the Criminal Code, with the application of Article 47 of the Criminal Code, both with the application of Article 38 paragraph (2) of the Criminal Code; defendant B, for complicity in the use, in any way, directly or indirectly, of non-public information or allowing unauthorized persons access to such information, as provided by Article 48 paragraph (1) of the Criminal Code, related to Article 12 letter b) of Law no. 78/2000.

In the preliminary chamber procedure, defendant A, through his chosen defence

counsel, invoked, among other things, requests and exceptions concerning the fact that the statements of the named Z and the statement given as a witness by defendant W were unfairly obtained since, although those statements concerned their own actions, they were not informed of their right against self-incrimination before the hearing, as required by Decision no. 236 of the Constitutional Court of 2 June 2020.

Regarding the reason invoked by defendant A through his lawyer, the judge of the preliminary chamber found it unsubstantiated, and the lawyer's request to establish the unfair manner of obtaining the statements and to exclude them from the overall evidence of the case is unsubstantiated.

Regarding the witness statements of Z and the statement given as a witness by defendant W, which were obtained without informing the persons questioned of their right against self-incrimination, as established by Decision no. 236 of the Constitutional Court of 2 June 2 2020, the judge of the preliminary chamber found that the conditions for applying the relative nullity sanction, provided for in Article 282 paragraph (1) of the Code of Criminal Procedure, are not met for the following reasons.

Regarding the witness Z, it was essentially noted that a decision to close the case was taken against her in the indictment. Therefore, in relation to what was established by the contentious constitutional court in Decision no. 236/2020 (published in Official Journal no. 597 of 8 July 2020), her questioning without being informed by the prosecutor of the right to remain silent and the right against self-incrimination, as procedural rights recognized in favour of the "accused person," did not cause her any concrete harm, given that those statements were never used against her.

Regarding the statement given as a witness by defendant W, by not being informed about the right to remain silent and against self-incrimination, it is not affected by any grounds for relative nullity under Article 282 of the Code of Criminal Procedure. On the one hand, at the time of this questioning by the prosecutor himself, based on the evidence in the case, the prosecutor did not have sufficient conclusive information to suspect the possible involvement of defendant W in the investigated offences, so it could not be considered that W had already acquired the status of "accused person" in the autonomous meaning of this term, as laid in the case-law of the European Court of Human Rights.

On the other hand, from the examination of the content of this statement, it does not appear that the holder of the statement made incriminating statements against herself or other defendants in the case, and the aspects recorded in that statement were not used by the prosecutor to prove the factual situation described in the indictment.

Against this ruling, within the legal deadline, various parties, including defendant A, filed appeals, reiterating the objections raised before the judge of the preliminary chamber of the court of first instance, arguing that the ruling pronounced by the judge was unsubstantiated, illegal, and inadequately motivated.

Examining the legality and validity of the appealed conclusion, based on the grounds of appeal invoked and *ex officio* within the limits conferred by Articles 347 paragraph (4) and 281 of the Code of Criminal Procedure, the High Court, with a panel of two judges, considered the appeals to be unsubstantiated for the following reasons.

The objection of defendant A regarding the legality of obtaining evidence

from the perspective that the statements of witness Z and defendant W, given as witnesses, were obtained unfairly by violating their right against self-incrimination was deemed unsubstantiated.

The High Court noted that the witness statements of the two persons were made on 12 March 1 2020, prior to the publication of Decision no. 236 of the Constitutional Court of 2 June 2020 (in the Official Journal, Part I, no. 597 of 8 July 2020), which recognized the unconstitutionality of the legislative solution provided in Article 118 of the Criminal Procedure Code, which does not regulate the witness's right to remain silent and against self-incrimination. In this context, it was noted that the decision of the constitutional contentious court cannot, unconditionally, invalidate these means of evidence without the risk of producing retroactive effects.

According to Article 147 paragraph (4) of the Constitution of Romania, republished, "Decisions of the Constitutional Court shall be published in the Official Journal of Romania. From the date of publication, the decisions shall be generally binding and shall only have future effect.".

On the other hand, the right of a witness to remain silent and right against self-incrimination is intended, in principle, to protect the freedom of any person questioned to choose whether to speak or remain silent when interrogated by the police regarding illicit activities in which he may have been involved. This freedom of choice is compromised when, suspecting the possible contribution of the person questioned to the illicit activities under investigation, the authorities resort to the subterfuge of questioning him as a witness (obliged to provide complete statements) and fail to inform him not only of the suspicions against him but, more importantly, of his procedural right not to contribute to his own incrimination.

From the analysis of the provisions of Article 282 of the Code of Criminal Procedure regarding relative nullity, in relation to the considerations of Decision no. 236 of the Constitutional Court of 2 June 2020, the right to remain silent and against self-incrimination belongs to the person who provided the statement as a witness, as she is the holder of the procedural interest in giving statements only when fully aware of their value and purpose in the proceedings, in order to effectively benefit from all the guarantees of a fair trial.

Given the circumstances, the alleged violation of the right against self-incrimination was not invoked by the witnesses themselves, namely Z and W, but rather by defendant A, who does not justify a specific procedural interest in relation to the analysed provisions of criminal procedure. Furthermore, in accordance with the preliminary judge at the trial court, upon examining the content of the witness statements in question, the court of appeal held, at a formal analysis level inherent to the preliminary stage, that these statements do not appear to provide incriminating information regarding appellant A. Therefore, the preliminary judge of the court of first instance correctly concluded that the conditions for applying the sanction of relative nullity, as provided by Article 282 paragraph (1) of the Code of Criminal Procedure, are not met in this case with regard to the witness statements of Z and W.

4. Conclusion

Based on the aforementioned, it can be concluded that Decision no. 236/2020 of the Constitutional Court has significantly changed judicial practice regarding the witness's right to remain silent and against self-incrimination. Although there was already a rich case-law of the European Court on this matter, its application has been

somewhat timid, perhaps indicating the need for a stronger impetus, which was which was given with the jurisprudential revival of the Constitutional Court.

However, the debate still remains open regarding the temporal application of the aforementioned decision and the practical method of recognizing the witness' right to remain silent. The identified case-law allows us to draw the conclusion that, although the witness' right to remain silent has been created, more or less explicitly, it is not recognized *ab initio*, even when viewed from the perspective of the *de facto* defendant.

At least for now, it seems to be the responsibility of the preliminary judge to determine whether, with respect to the witness, the investigating authorities had sufficient evidence at the time of the hearing to conclude that the witness could potentially incriminate himself through his statements, thus facing a difficult choice.

The current state of the law, as interpreted by the Constitutional Court, requires a careful examination of the specific circumstances of each case to assess the potential violation of the witness's rights. The role of the preliminary judge is crucial in evaluating whether there were enough proofs for the witness to be put in a position where his statements could potentially lead to self-incrimination.

References

- Anghel, Răzvan, Critical Note on Criminal Decision No. 413/A/22 March 2021 of the Court of Appeal of Cluj, in Caiete de Drept Penal (Notebooks of Criminal Law), No. 2/30 June 2021;
- Constantinescu, Victor in Udroiu, Mihai et alii, The Code of Criminal Procedure. Commentary on Articles, 3rd Edition, C.H. Beck Publishing, Bucharest, 2020;
- Criste, Lucian, The right to silence and the right to be assisted by a lawyer. ECHR, Brusco v. France at https://www.juridice.ro/126078/dreptul-la-tacere-si-dreptul-de-a-fi-asistat-de-un-avocat-cedo-brusco-vs-franta.html;
- Ripan, Alexandru Dabin, The Right to Silence. Legal Nature and Who Can Invoke It, www.avocatripan.ro;
- Sas, Georgiana, The Right of the Witness against Self-Incrimination and the Right to Legal Assistance, Cluj Bar Journal No. 1/2020;
- Voicu, Pușcașu, Right to Silence and Right Against Self-Incrimination. Ratio essendi, available at https://drept.uvt.ro;
- www.echr.coe.int..