Consejo General del Poder Judicial
Escuela Judicial

ejtn
European Judicial Training Network
Réseau européen de formation judiciaire

THEMIS COMPETITION 2022

Semi-Final A: EU and European Criminal Law

May 3rd – 6th

THE DEFENDANT'S RIGHT TO REMAIN SILENT

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INTRODUCTION

This paper aims to cover the current state of the right to remain silent. First, we try to define it and present its grounds. After that, we examine how it is recognized in the European Convention of Human Rights,and Spanish and European Union law. Finally, we will offer some proposals for regulation.

Except for the International Covenant on Civil and Political Rights (Article 14, section 3, paragraph g), the right to remain silent is not explicitly recognized in many international human rights treaties. Nevertheless, that does not mean that the right to remain silent is not protected under some of those treaties. We focus specifically on the European Convention mentioned above and the European Charter on Fundamental Rights.

THE RIGHT TO REMAIN SILENT: CONCEPT AND GROUNDS

When a crime is committed, the police begin a procedure, and judicial proceedings are initiated. Case-law of the International Courts and much national legislation recognize several rights of the accused to ensure a fair trial.

This trend toward recognizing the rights of the accused is a consequence of the accusatory system, where the prosecution is conducted by someone other than the judge, and of the rule of law, where human rights are the centre of the legal system and all rules must be construed in accordance with them. It is essential to consider the passive part of the procedure as a subject and not the object, as occursin the inquisitive system, where the procedure is usually secret and written, making it easier to violate human rights. Hence, there are fundamental rights that must be respected to avoid defencelessness.

One of these rights is to silent, or *ius tacendi*, meaning not obliging a person to disclose information with potentially damagingconsequences. It cannot be understood simply the right to passivelysay nothing because it also involves the possibility of declaring without compulsion while understanding the consequences of one’s statements. Furthermore, the right to remain silent also includes interrogation at the police station, with administrative authorities and finally in court.

Silence may be complete, refusing to declarethroughout the procedure, or partial.A partial silence can occur in different scenarios: Only answering questions that the accused considers appropriate, or only questions from the defendant’s lawyer, or indeed refusing to

declare at the police station but doing so in court with an investigating judge, or only during the trial.

The foundation of this right is principally the right to a fair trial with full judicial guarantees. Determining what constitutes a fair trial include the presumption of innocence, the right against self-incrimination and not to plead guilty and the right to defence.

Finally, we need to differentiate between the common law and continental systems. In the United kingdom and North America and the legal systems which derive from them, the accused has the right to remain silent and the police must inform the accused that they do not have to answer any questions and to ensure that they understand this during the police interview,and voluntarily confessions are considered as evidence in court, whereas the continental system is different. In that system accused have the right to remain silent or to declare whatever they consider pertinent for their defence, but the evidence is the accused's statement before the court, which assesses the evidence in accordance with its own approach.

THE RIGHT TO REMAIN SILENT AND ITS LIMITS IN THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention on Human Rights does not recognize the right to remain silent during a procedure in any of its articles. However, according to ASENCIO GALLEGO, this does not mean that the right to remain silent has no such constitutional relevance;otherwise it would not be part of the right to defence[1]. The most relevant line of investigation begins with the presumption of innocence which is recognized in Article 6 of the Convention.

The ECHR has delivered several judgments developing this right, including:

1. Funke v. France (judgment of 25 February 1993)

Abstract: The Strasbourg customs authorities required M. Funke to produce his bank documents, but he refused to collaborate with them, and there was insufficient evidence to proceed with a criminal case. Furthermore, M. Funke was sentenced to pay several penalty fees; the authorities even called for a prison sentence.

Judgment: The European court agreed that the characteristics of the customs legislation did not contravene the right to remain silent, especially when there was no charge

evidence. Hence, article 6 (1) had been violated, because there's no reason to impose penalty flees for not collaborate with the justice.

2. Murray v. United Kingdom (judgment of 8 February 1996)

Abstract:Mr Murray was arrested for false imprisonment of a police informer about the Irish Republican Army. At all times during police questioning,his only reaction was silence. Besides, the police allowed Murray's lawyer to intervene 48 hours after the first police questioning. Because of his silence, the trial judge informed Mr. Murray and the seven other accused, according to article 4 of the criminal evidence Order 1988, that their refusal to answer questions would be considered by the court as grounds to declare him guilty.

Judgment: The European court considers that there has been no violation of the agreement in relation to Mr. Murray's silence, since there is evidence against him that obliges him to justify the proven facts. But the court also condemned United Kingdom for the 48 hours during which Mr. Murraywas denied access to a defence lawyer.

3. Saundersv. United Kingdom (judgement of 9 May 2000)

Abstract: In 1986, the companies Guinness PLC and Argyll Group PLC were competing with one another to acquire another company, Distillers Company PLC. Guinnessacted illegallyto win the takeover battle. This led to several investigations by inspectors from the Secretary ofState for Trade and Industry. During the investigations, they obtained statements that the judgeadmitted as evidence during the proceedings, even though the inspectors failed to warn him about self-incrimination and the accused were in an obvious situation of compulsion.

Judgment: The European Court upheld its caselaw about the right to fair trial recognized in article 6 (1), including that the right not to self-incriminate appliesto criminal proceedings regarding all kinds of crimes without distinction from the simplest to the most complex. The public interest cannot be invoked to justify the use of responses obtained under duress in a non-judicial investigation to incriminate the accused during trial. Furthermore, the Court introduced a nuance of this: The statements could only be used to start a trial or doing some investigation, but never for dictating a sentence.

4. Serves v. France (judgement of 20 October 1997)

Abstract: The applicant was a French military captain,and he and his soldiers had been serving in the Central African Republic. As a result of this service, the appellant was arrested and accused of homicide;a charge later changed to murder. Afterwards, the trials were quashed on procedural grounds, but the preliminary investigation and other evidence remained effective. A second trial against other members of his unit was opened, and the defendant was called as a witness. He refused to take the oath because the initial proceedings might have been reopened with his statement since the preliminary investigation and otherevidence remained on file, and he was fined for failing to give evidenceand finally also found guilty of murder.

Judgment: Whereas he claimed his right to not self-incriminate and therefore the need not to testify as a witness, the European court ruled that there was no violation of article 6 of the convention because to take an oath is a solemn act to guarantee the truth of the witness' statement.The penalty exists as coercion to ensure the truth of the witness' testimony, but it is not a measure that compels the witness to self-incriminate.

5. Condron v. United Kingdom (judgement of 2 May 2000)

Abstract: A couple addicted to heroin were arrested by police for drug trafficking. At the police station,their lawyer recommended remaining silentbecause they suffered withdrawal symptoms. However, the doctor examined them and decided that they were fit to testify, so a transcript of the interview was given to the jury. During the proceedings,the accused declared about questions which they had not answeredabout in the interview. The jury interpreted their silence as incriminating them.They appealed to the ECHR asserting violation of article 6 (1) concerning the right to fair process on two grounds: 1)Taking account of the accused's silence. 2) The judge's due diligence because he failed to warn the jury not to assess their silence as evidence. The State argued that the procedural guarantees such jury, and not a judge, for knowing the case distinguish this case from the Murray case.

Judgment: The European court stressed that this case is different from the Murray case because the accused declared during the procedure, and the trial was in front of a jury. Besides, they could explain why they didnot answer the police questions. However,the question about why the judge let the jury take the silence as a tool for appreciating the incrimination of the accused created legal uncertainty. First of all, because the jury does not have a judge's experienceand their assessment falls short of legal consideration. The latter is

linked to the impossibilityof appealing the jury's argument. For all these reasons, the European court declared the violation of Article 6 (1) of the ECHR.

6. Heany and McGuinness v. Ireland (judgement of 21 December 2000)

Abstract: An explosion at a British army control point in Northern Ireland caused the death of five British soldiers and one civilian.The police arrested seven people because they were linked to the IRA, and the explosion was also related to that organization. They remained silent during questioning at the police station and during the proceedings.They were acquitted of membership of an illegal organization, but they were found guilty of not collaborating with the proceedings. After raising a question about the constitutionality of the Law on crimes against the State, the Government argued the supremacy of the public order as a criterion for declaring the Law constitutional and upholding the sentence against the defendants.

Judgment: The European Court emphasised that the right not to self-incriminate and to remain silent are generally recognized international standards which are the basis of the right to a fair trial and the presumption of innocence (articles 6 (1) and (2)). Furthermore, the court remarked that there was a similar situation in the Funke case because it was possible to impose penalties without testimony. The 1939 Law did not provide sufficient guarantees for declaring without a level of duress under which the accused felt free to declare or not. Finally, concern for maintaining public order could not justify a disposition that violated the abovementioned rights.

7.Allan v. The United Kingdom (judgment of 5 November 2004)

Abstract: On 3rd February of 1995, Mr. David Beesley, store manager, was shot dead. Fifteen days later, the appellant and Mr. Leroy Grant were arrested on suspicion of robbery at the Late Saver shop and were in possession of a replica handgun. Mr. Leroy Grant admitted this and other offences, but the applicant denied any involvement. During his detention, police requested judicial authorization to place a microphone in his cell. Besides, the appellant was subjected to extensive interviews about Mr. David Beesley's death, and furthermore, they used a convict, H., to obtain a forced confession. He remained silent, but in thehomicide proceedings, the prosecution used the interviews and the recorded conversations with H. Consequently the jury found the appellant guilty of Mr. David Beesley's death. Mr. Allan considered that was a violation of Article 6 (1) ECHR because police used H. as an

intermediary, and in that case he had the right to a lawyer, as he thought it was an official interview.

Judgment: European Court reaffirmed that the right to remain silent is necessary to respect a fair trial. Furthermore,its purpose is to avoid improper coercion by the police. The recording of conversations was the principal evidence at the trial, but it was not illegal under international law. Furthermore, the appellant had suspected that he was being recorded, so his statement was voluntary, so in that case, it was not a violation of ECHR. However, the question concerning the use of H. is more complicated, and the court had to analyze the relationship between H. and the State and the relationship between H. and the appellant. First, H. was coached by the police in order to obtain useful statements. H. was able to obtain them because of his insistent effort about the case, which could be understood as similar police interview, but without a lawyer who could inform the appellant about his rights, especially since H. and the appellant were not friends. So, the European Court considered in that case that Article 6 (1) indeed was violated.

8.Shannon v. The United Kingdom (judgement of 4 October 2006)

Abstract:In May 1997, the Royal Ulster Constabulary searched the premises of the Irish Republican Felons Club, of which the claimer was chairman. He was subsequently required to attend an interview with a financial investigator, and he answered the questions put to him. In April 1998, the applicant was accused of false accounting and conspiracy to defraud, and he was again required to attend an interview with a financial investigator at a police station.However,in this case, the financial investigator did not receive reasonable assurance that the declaration would notbe used as evidence to continue the investigation. The Northern Ireland Court of Appeal considered that there was no reasonable excuse for condemning the lack of cooperation with justice, but latterly the prosecution appealed because it considered that the right to not self-incriminatedid notapply to the financial investigator because Article 6 (1) refers to the proceedings and not the extrajudicial investigations.

Judgment: The European Court noted that the proceedings for the false accounting and conspiracy to defraud were never pursued, so it cannot rule about self-incrimination in that way. However, it also declared that the requirement for the financial investigator to state and answer his questions linked to facts about the prosecution of the defendant violated

Article 6 (1) ECHR because it would be used as evidence and would be gathered in an interview with compulsion.

9. Krumpholz v. Austria (judgement of 18 March 2010)

Abstract: On 26th February 2003, the applicant's car was recorded by a radar speed detector, and the Graz-Umgebung District Authority ordered him to identify the driver, but he refused. On 14th April, the authorities issued a provisional penal orderagainst the applicant. This applicant claimed that he could not have been driving the carhad not even been in Austria at the time, and he had the right not to do anything that would lead to him incriminating himself. The case-law of the administrative Court presumesthat the driver is responsible if it is impossible to determine precisely who performed the punishable action. Besides, the applicant claimed that the Murray case applied in this case. The Government expressed the principle issue about exceeding the speed limit and the need for one person to be answerable for that, despite there being no evidence.

Judgment: The European Court has recognized that the existence of adverse interference does not contravene Article 6, but these should evaluate the circumstances and the personal situation and more details. There was no evidence of the driver'sidentity, so Austria violated the convention.

THE RIGHT TO REMAIN SILENT IN THE SPANISH LEGAL ORDER AND CASE-LAW

The right to remain silent is not explicitly stated in the Spanish Constitution. Instead, Article 24 establishes the legal protection of legitimate rights and interests before judges and Courts of Justice. In this context, the second section of the article states, among others, the rights "not to make self-incriminating statements [and] to not plead guilty". Furthermore, it proclaims the right to "the defence and assistance of a lawyer [and] to be presumed innocent", which, as stated above, can be taken as grounds for the right to remain silent.

The Spanish Constitutional Court (Judgement 127/2000, of 16th May, among others) states that the right to remain silent cannot be mistaken for excluding self-incrimination. According to the Court, the latter is a concretion of the right to remain silent.

Conversely, the right to remain silent is explicitly referred to in Spanish Criminal Procedural Law. According to Article 118, letters g) and h), those charged with criminal offences are entitled to remain silent, answer only some questions and not to be forced to

self-incriminate themselves or plead guilty. Similar rights are attributed to detainees under article 520 a) and b) of the same text.

Articles 118 and 520 of the Criminal Procedural Law imply that this right can either be exercisedfully or partially, depending on how many questions are unanswered by the defendant. Moreover, the right may be put into practice in an absolute or relative manner regarding the party or parties whose questions receive no answer (Judgement 126/2011, of 18th July). Given the broad scope of article 118, we can also conclude that the right to remain silent can be exercised consecutively: during detention, investigation, trial or appeal.

Regarding the content of the right, Spain's Constitutional Courtsays that it covers "the inactivity of the subject that faces or could be facing indictment" (judgement 21/2021, of 15th February). Nonetheless, professors such as MORENO CATENA[1]consider that it should also include actions taken by the defendant to impede the investigation or the actual proceedings, as long as it respects legal limits.

In one of its first judgements (18/1981, of 8th June), the Court concluded that the rights listed in article 24.2 of the Constitution are applicable not only in criminal proceedings but also in those concerning administrative penalties. This has also been confirmed in other judgments, such as 76/1990, of 26th April, 74/2004 of 22nd April, 272/2006, of 25th September, or 142/2009, of 15th June. However, their contentmay diverge, given the different nature of the legal interests concerned in each kind of procedure. (Judgement 117/2002, of 20th May, among others).

All in all, the right to remain silent can be breached if defendants are compelled to testify against themselves or forced to produce self-incriminating evidence (Judgment 21/2021 of 15th February). Furthermore, according to ASENCIO GALLEGO[2] the right would only hinder the obligationto act, but not the obligation to tolerateactions by the authorities. For example, there is no breach of the right in article 363 of the Criminal Procedural Law, which allows judges to authorize the taking of biological samples from defendants in order to determine their DNA profile.

However, the Constitutional Court has declared that there is no violation of the right to silencein some situations which, according to the Court, cannot be considered as "testimony". One of them is the obligation to produce certain types of documents. In its judgement 76/1990, of 26th April, the Court concluded that there was no breach of the right regardingadministrative penalties imposed for failing to cooperate with tax authorities.

Moving to criminal procedures, the Court has also stated (Judgement 103/1985, of 4th October) that criminal punishment of drivers refusing alcohol tests does not violate the right to silence. Taking these tests cannot be considered an active obligation but a passive one, given theaforementioned obligation to tolerate. In application of this doctrine, Judgement 161/1997, of 2nd October, concluded that the former article 380 of the Criminal Code (currently, article 383) cannot be deemed unconstitutional. Nevertheless, Ruiz Vadillo casts a dissenting opinion, in which he concludes that there is a violation of the right because he sees an active obligation to cooperatewith the authorities.

Under article 10.2 of the Spanish Constitution, its dispositions regarding fundamental rights must be interpreted according to international treaties on this subject. The Constitutional Court states that this article must be extended to the case-law proclaimed by the institutions and courts created by the treaties, which can be implied from almost every judgement resolving complaints by individuals. Consequently, the Court (*for example,* judgement 202/2000, of 24th July) has assumed the criteria established by the European Court of Human Rights in *Murray v. the United Kingdom*, which will be thoroughly covered in the following sections.

The Spanish Supreme Court has also dealt with the right to silence, abiding by the case-law of the Constitutional Court and the European Court of Human Rights. In its judgement 10/2022, of 12th January, the Court recognizes that defendants can choose not to answer any questions and that silence or unconvincing explanations of the facts cannot by themselves lead to criminal punishment. The Court concluded that there was no violation of the right because the conviction can be grounded on the evidence given beyond any reasonable doubt.

Even though the Court came to similar conclusions in application to this doctrine (Judgement 474/2016, of 2nd June, among others), it has held widely divergent criteria. For instance, in its judgement 1736/2000, of 15th November, the Court stated that silence cannot be used to prove guilt, or strengthen the set of evidence conceived to prove this guilt. Furthermore, in its judgements 874/2013 of 21st November and 711/2014, of 15th October, the Court stated that no conclusion should be taken from the defendant’s silence or insufficient explanation of the facts.

The right to remain silent has laid out many relevant questions that the Supreme Court had to solve in its judgements. We will focus on two of them:

1. Whether unanswered questions have to be written in trial records or the declaration that has taken place during the investigation,

2. Whether declarations made during the investigation proceedings can be taken into account if defendants refuse to testify during the trial.

As regards the first question, the Court disapproves of this practice. Indeed, in its judgement 686/2016, of 26th July, it says that these questions cannot be considered "positive evidence", thereby assuming that they cannot be written in the record. Judgement 176/2008 explicitly states that too and reminds us that the exercise of the right should not lead to negative consequences for the defendant.

When it comes to the second question, we have to bear in mind two articles of the Spanish Criminal Procedural Law. On the one hand, article 714 states that when a witness' declaration diverges from the one given during the investigation proceedings, this one can be read if any of the parties asks for it. After that, the judge will ask the witness to explain the differences observed. On the other hand, the first section of article 730 states that, if any of the parties apply for it, declarations made during the investigation can be read during the trial if the latter cannot take place, as long as it cannot be attributed to the parties' will.

Even though both articles refer to witnesses, the Supreme Court has discussed whether they can be extended to the defendants or not. More specifically, if the defendant's silence can be considered a "contradiction" or "impossibility", which could lead to the application of the articles mentioned above. The Supreme Court assumed these criteria in some judgements (, 1443/2000, of 20th September or 2545/2001, of 4th of January, among others). 2002. However, the declarations have to be produced in the trial, either by reading the record of the declaration during the investigation or through interrogation, so that it respects the core principles of the criminal procedure: publicity, immediacy and contradiction (judgements 790/2021 of 18th October and 106/2022, of 9th February)

THE RIGHT TO REMAIN SILENT IN THE EUROPEAN UNION LAW

Directive 2016/343, of 9th March

The European Union's Primary Law does not explicitly recognise the right to remain silent. However, Articles 47 and 48 of the European Charter on Fundamental Rights refer to, among others, the right to a fair trial, the presumption of innocence and the right of defence.

Regarding the Union's secondary law, the European Parliament and the Council passed the Directive 2016/343, of 9th March, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. The period for transposition expired on 1st April 2018, and it entered into force on 31st March 2016, pursuant to Articles 14 and 15, respectively.

According to its first recital, this Directive is founded on Articles 47 and 48 of the Charter, Article 6 of theEuropean Convention on Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 11 of the Universal Declaration of Human Rights, all of which grant the presumption of innocence and the right to a fair trial. Recitals 3 and 4 also mention the principle of mutual recognition, which cannot be understood without safeguardingrights granted to suspects, such as those conferred by the Directive.

It should be borne in mind that under Article 2, the Directive applies only to criminal procedures .Indeed, recital 11 excludes both civil and administrative proceedings, including those involving sanctions, "such as proceedings relating to competition, trade, financial services, road traffic, tax or tax surcharges, and investigations by administrative authorities in relation to such proceedings". The Directive is applicable to any stage of criminal proceedings, from "the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence" until "the decision on the final determination of whether the suspect or accused person has committed the criminal offence has become definitive" (Article 2 and recital 12). Consequently, it does not apply to interrogations before police authorities.

Article 2 also states that the Directive is only applicable to natural persons. As regards legal persons, and according to recitals 13 to 15, the presumption of innocence and all the rights attached to it must be guaranteed "by the existing legislative safeguards and case-law", including those laid down by the European Court of Human Rights and the European Court of Justice. The Directive avoids the regulation for legal persons, given the current stage of development of both national and Union law and case-law.

The rights can be found in the second and third chapters of the text, whose rubrics are "Presumption of innocence" and "Right to be present at the trial", respectively.

More specifically, Article 7, within Chapter Two, proclaims the right to remain silent and not to incriminate oneself. These rights shall be interpreted pursuant to recitals 24-30. As

far as the content of the rights is concerned, recital 27 states that they prevent authorities from compelling suspects or accused persons from revealing information against their will. Moreover, this recital refers to the European Court of Human Rights' case law, to determine whether these rights have been breached or not.

Finally, recitals 28-30 refer to the limits of these rights. These limits resemble those mentioned in other sections of this paper. According to recital 28, the rights are established "without prejudice to national rules concerning the assessment of evidence by courts or judges". Furthermore, pursuant to recital 29, the rights to remain silent and not to incriminate oneself do not prevent "the competent authorities from gathering evidence which may be lawfully obtained from the suspect or accused person through the use of legal powers of compulsion and which has an existence independent of the will of the suspect or accused person". For minor offences,Recital 30 allows Member States to establish written procedures or procedures without questioning the suspect.

Article 7 contains six sections. The first two sections proclaim the rights to remain silent and not to incriminate oneself in these terms: "Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed" and "Member States shall ensure that suspects and accused persons have the right not to incriminate themselves". According to the fifth section, the exercise of these rights shall not be regarded as evidence that the suspect or accused person has committed the criminal offence allegedly attributed to them.

The third section reproduces recital 29, regardingthe possibility of gathering evidence by public authorities. Recital 30 of the Directive, on procedures involving minor offences, is covered in the sixth section, whose content is similar to that of the recital.

Finally, the fourth section allows judicial authorities to consider, in sentencing, "cooperative behaviour of suspects and accused persons". According to the European Court of Justice (order of 24th September 2019, case C-467/19, *Spetsializirana prokuratura,* paragraph 42), this section reserves for Member States "the option to allow their judicial authorities, when sentencing, to take into account the cooperation of the accused persons". In other words, it is not an obligation imposed on Member States, and thus it does not confer any right to suspects or accused persons.

<u>The European Court of Justice's Case-law</u>

The European Court of Justice has developed its own case-law on the right to remain silent, mostlybased on that of the European Court of Human Rights, whose judgments it cites more often than not. Indeed, Article 52, section 3 of the European Charter on Fundamental Rights states that the rights proclaimed in it shall be guaranteed with the meaning and scope of the Convention for the Protection of Human Rights and Fundamental Freedoms, in so far as the rights are also contained in the latter.

As we have described above, the right to remain silent is one of the rights tacitly proclaimed in the Convention, in the scope of Article 6. The European Court of Justice states that this right is enshrined in Articles 47 and 48 of the European Charter on Fundamental Rights. These Articles have to be interpreted in accordance with Article 6 of the Convention "as a minimum threshold of protection" (judgement of 6th October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, paragraph 124, among others).

The Court states that the right to remain silent is meant "to ensure that, in criminal proceedings, the prosecution establishes its case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused" (judgement of 2nd February 2021, *Consob*, C-481/19, paragraph 39). According to paragraphs 40 and 41 of the same judgement, the right not only seeks to avoid "statements of admission of wrongdoing or […] remarks which directly incriminate the person questioned", but also information about facts that might eventually be used to ground the prosecution. However, the Court also remarks that "the right to silence cannot justify every failure to cooperate with the competent authorities".

The rights institutionalized in Articles 47 and 48 not only apply to criminal proceedings, but also to those involvingadministrative, criminal penalties. In order to determine whether a penalty is of that nature or not, three criteria should be taken into account: how the penalty is classified under national law, the intrinsic nature of the offence and the severity of the penalty which could eventually be imposed (among others, judgment of 20th March 2018, *Garlsson Real Estate and Others*, C-537/16, paragraph 28 and judgement of 9 September 2021, *Adler Real Estate and Others*, C-546/18, paragraph 44).

Regardingthe first criterion, the determination of the criminal nature corresponds to each Member State and its authorities, which have to abide by the European Court of Justice's case-law (judgement of 2 February 2021, *Consob*, C-481/19, paragraph 43). Indeed, it might have a criminal consideration in the light of the other two criteria (judgment of 20

March 2018, *Garlsson Real Estate and Others*, C-537/16, paragraph 32), regardless of the administrative nature of national law.

In the light of the second criterion, the aim of the sanction must be taken into consideration to establish its criminal nature. In particular, it will be criminal if its aim is repressive (judgement of 5 June 2012, *Bonda*, C-489/10, paragraph 39) or mainly repressive (judgment of 20th March 2018, *Garlsson Real Estate and Others*, C-537/16, paragraph 33), given the fact that a sanction can also serve to preventive purposes.

Finally, the criminal nature under the third criterion is established on a case-by-case basis. However, it has to match the severity of the infringement and be proportional to it (judgment of 6 October 2021, *ECOTEX Bulgaria,* C-544/19, paragraph 97). For instance, the Court has determined that it exists in a sanction that may reach up to ten times the benefit obtained (judgement of 20 March 2018, *Consob*, C-596/16 and C-597/16, paragraph 38), or up to €50.000, which could eventually lead to a deprivation of freedom if the fine is not paid (judgment of 9 September 2021, *Adler Real Estate and others,* C-546/18, paragraph 55).

THE RIGHT TO REMAIN SILENT IN COMPARATIVE LAW

Germany

In the German law, the right to remain silent is granted in the *Strafprozeßordnung* (StPO) (Criminal Procedure Code).

It mentions this right in several places. As Section 114b(2) states, “in the instruction (…), the accused shall be advised that he (…) 2. Has the right to reply to the accusation or to remain silent”. Section 115 highlights the right to remain silentduring this stage of the process, as it is mentioned again concerningthe right to be brought before a competent court without delay. In its third paragraph, this article states that “During the examination -before the competent court-, the incriminating circumstances shall be pointed out to the accused and he shall be informed of his right to reply to the accusation or to remain silent”.

As Section 136(1) states, “(1) At the commencement of the first examination, the accused shall be informed of the offence with which he is charged and of the applicable criminal law provisions. He shall be advised that the law grants him the right to respond to the charges or not to make any statement on the charges and the right, at any stage, even prior to his examination, to consult defence counsel of his choice.”

The German Constitutional Court (*Bundesverfassungsgeright*) has also established this principle in several rulings. As judgement 2 BvR 2462/18 states: “The principle of freedom from self-incrimination guarantees that no one is forced to accuse himself of a criminal act by making his own statement or to actively contribute to his conviction and thus to have to create the conditions for a criminal court conviction or the imposition of a corresponding sanction himself. The provisions in Section 9 (4) GGBefG and in Section 55 OWiG in conjunction with Section 136 (1) sentence 2 StPO are simple statutory expressions of this constitutional principle.”

France

The French Criminal Procedure Code (*Code de ProcédurePénale*) grants the right to remain silent at various stages. The very first mention of this right is made in its Preliminary Article.

Furthermore, Article 61-1 grants this right to*the person in respect of whom there are plausible reasons to suspect that he has committed or attempted to commit an offence*. Article 63-1 refers to the right to silence regardingdetainees.

French law also grants the right to remain silentduring interrogations and confrontations, that are also included in the instruction phase. Article 116 states that when the investigating judge indicts or interrogates a person, he must inform that person of some rights, includingthe right to remain silent.

Estonia

The right to remain silent is enshrined in the Criminal Procedure Code of the Republic of Estonia (Kriminaalmenetluse koodeks). The first mention of this right is in Chapter 1, Division 4 (Suspect and accused), which defines the suspect, and sets out his or her rights.Regardingthe rights and obligations of suspects, Article 34states that a suspect has theright to know the content of the accusation and give or refuse to give testimony regardingthe content of the suspicion.

Chapter 3 of the code relates to “Proof”, and Division 3 of that chapter regulates the interrogation of a suspect. Article 75(2) states that (2). “At the beginning of interrogation, it shall be explained to the suspect that he or she has the right to refuse to give statements and that the statements given may be used against him or her.”

The Supreme Court has also stated that the right to remain silent and the right to not incriminating oneself in a fair trial in accordance with the requirements of Article 6 § 1 of the ECHR is a central component of the proceedings, also closely linked to the presumption of innocence principle set out in Article 6 (2). (RKKKo 01.06.2005, nr 3-1-1-39-05, p 13.)[1]

Italy

Italian law regulates the right to silence in the *Codice di procedurapenale*. This code is divided into two parts. The *Parte prima*-which focuses on the *Soggetti/*Subjects of the procedure- regulates, amongst others, the rights of a person under investigation.

Title IV in the First Part of the Criminal Procedural Code focuses on the defendant. The right to silence during the instruction phase is granted in Article 64.3.b) of the Procedural Code. That article states that: "3. Before the interrogation begins, the person must be warned that: (...) b) subject to the provisions of article 66, paragraph 1, he has the right not to answer any questions, but in any case the procedure will follow its course; "-Article 66.1 of the *Codice* refers to the obligation of the defendant to give enough information to identify him-.

Portugal

In Portugal, the right to silence is established in the *Código de Processo Penal*.It mentions this right in several places. The most important is Article 61.1.d (*Direitos e deveresprocessuais* -regarding the defendant-).

The mentioned Article regulates this right when it states that: "The defendant enjoys, in particular, at any stage of the process and subject to the exceptions of the law, the rights to: d) Not answer questions made by any entity about the facts imputed to him and about the content of the statements concerning of them provide;"

Finally, Libro VII (*Do julgamento*), Title II (*Da audiência*), Chapter III (*Da produção da prova*) mentionstherighttosilence. Article 343.States that, during the trial, the judge shall inform the defendant that he or she has the right to answer questions at any time of the audience, that he cannot be compelled to answer, and that the fact that the defendant refuses to answer that shall not put him in a disadvantaged position.

Romania

In Romania, the right to remain silent is established in the Criminal Procedure Code of the Republic of Romania (Codul de procedurăpenală). It is covered in Title IV *Regarding*

evidence, methods of proof and evidentiary process, Chapter II -*Hearing of persons*, Section 2 *Hearing of a suspect or defendant*, while Article 109 grants the right to silence.

As it states, "(1) (…) A suspect or defendant shall be allowed to declare everything they wish referring to the act set forth by the criminal law that was communicated to them, after which questions can be asked. (2) A suspect or defendant has the right to consult their counsel both prior to and during the hearing, and judicial bodies, when they deem it necessary, may allow them to use their own notes. (3) During the hearing, a suspect or defendant may use their right to remain silent in respect of any of the facts or circumstances about which they are asked."

Chile

Since European legal systems are similar to those in Latin America, it is appropriate to examine at least one regulation from that region. As described above, almost every country mentions the defendant'sright to silence, usually in criminal procedural codes.

Chile has also regulated this right. The Chilean Criminal Procedural Code states, in Article 93, that every defendant has, until the termination of the process, several rights. One of those is the right to silence, and paragraph g) of that Article states that the defendant can "remain silent or, in the case that he decides to declare, not to be under oath".

REGULATION PROPOSALS

The right to remain silent is recognised in most Member States. In some cases, it is explicitly recognised in Constitutions, and in other cases, it is stated in the Criminal Procedural Codes. In some countries, the Constitutional Court has established the scope of this right or completed the regulations with its rulings. In any case, and, as described above, the European Union has shown a particular interest in this right, as it is directly linked to the right to a fair trial.

The right to remain silent can be studied in the several phases of a criminal procedure. Although the states do not regulate criminal procedure in the same way, there is a resemblance between Member States that can justify a common regulation of this right.

The following phases can be identified in any criminal procedure:

- Police investigations and detention.
- Investigation phase and declarations before the InstructingJudge or Public Prosecutor.

- Declaration before the Judge, during the trial.
- Legal validity and interpretation of this right

Police investigations:

The initial stages of many criminal procedures take place under police jurisdiction. Whenever a police officer detains a person suspected of having committed an offence, most Member States regulations state that the police shall explain this person's rights.

These rights normally include the right to remain silent. For example, as we have seen, the French *Code de ProcédurePénale* grants the right to remain silent during this stage.

Investigation phase and declarations before the Instructing Judge or Public Prosecutor:

The next stage of a criminal procedure is, normally, the declaration of a person under investigation, orsuspected of having committed an offence. That person will be brought before the instructing Judge, or the authority that the law requires, to give a declaration. The Instruction Judge is a figure that exists only in a few countries, so the reference to the Instruction Judge should be understood as referring to the person the law assigns to do the investigation.

Even though this declaration may not be used in the trial, the right to remain silent must be respected at all times. So, many Member States also include in their Criminal Procedural Codes the right to remain silent during judicial investigations, as this declaration can lead to a trial.

For instance, the Spanish Criminal Procedural Code states that the Instruction Judge shall order to carry out all proceedingsnecessary to determine whether there is a possibility that a person committed a crime or not. Whenever the Judge is convinced that some behaviour may constitute an offence, he or she shall order the conclusion ofthe investigation phase and start the trial. With this regulation, it is of the utmost importance to grant the right to remain silent during this phase.

Declaration before the judge during the trial:

The most crucial stage of a criminal proceeding is the trial. During this phase, the right to remain silent isextremely important, so it must be ensured at all times. Asdescribed

above, Member States have taken into consideration this right during the trial. For instance, the Portuguese Criminal Procedural Code grants this right during the trial.

Legal validity and interpretation of this right:

The last issue to consider is the interpretation of this right and the consequences ofexercising it. As stated above, the right to silence has been interpreted by the European Court of Justice and the European Court of Human rights.

We have described above, this interpretation, so, in conclusion, it can be said that the right to silence implies that its use cannot be used against the defendant. However it is interpreted, remainingsilent is a right and must never have negative consequences for the person subject to a proceeding.

Proposals:

To conclude this section, we propose that Member States regulate the right to silence during the various stages of the process. The European Union has already passed several directives on the rights of a person under investigation. As we have stated above, the European Union specifically regulated this right in the Directive 2016/343 of 9th March, sothereis no need for a new directive concerning therighttoremainsilent.

Consideringthe importance of this right, as it is part of the right to due process, the regulation by the Member States must be clear about its scope, validity, and the consequences of exercising it.

Regarding the scope of this right, every person under investigation must be informed of the right to remain silent throughout all stages of the process. As we have described, some countries have already regulated this issue. From the first moment of a criminal procedure, until the end of a trial and passing sentence, the right to remain silent has to be ensured.

One way to enhance the effectiveness of this right could be to establish protocols for police behaviour or to regulate that every detainee be informed about this right.

Concerning the validity and consequences of the exercising this right, as stated above, the fact that a defendant or detainee decides to remain silent should not have negative consequences. The fact that the European Court of Justice and the European Court of Human rights have already passed judgements on the effect of the exercise of the right to remain silent means that European Judges must observe those judgements.

Finally, we consider that there is no need to pass a Directive on this right or encourage Member States to legislate on it. They could include it in their Criminal Procedural Codes, as many Members States already have.