

THE RIGHT TO INFORMATION ABOUT THE RIGHT TO SILENCE AS EU PROCEDURAL GUARANTEE IN CRIMINAL PROCEEDINGS AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS

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Abstract in original language

Darba mērķis ir analizēt tiesības uz informāciju par tiesībām klusēt kā vienas no neskaidrākajām un pretrunīgākajām procesuālajām tiesībām, kas ir noteiktas Eiropas Parlamenta un Padomes 2012. gada 22. maija Direktīvā 2012/13/ES par tiesībām uz informāciju kriminālprocesā. Autores aplūko aktuālos un problemātiskos jautājumus par minēto tiesību izpratni un efektīvu aizsardzību ES dalībvalstu tiesību sistēmās.

Key words in original language

ES procesuālās tiesības kriminālprocesā; ES krimināltiesības; cilvēktiesības; tiesības uz informāciju; tiesības klusēt; tiesības sevi neapzūdzēt; tiesības neliecināt.

Abstract

The objective of the paper is to analyze the right to information about the right to silence as one of the most ambiguous and controversial procedural guarantees, which are provided in the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. Authors examine the actual and problematic aspects about the comprehension and effective protection of these rights in legal systems of EU member states.

Key words

EU procedural guarantees in criminal proceedings; EU criminal justice; human rights; right to information; right to silence; right not to incriminate oneself; right not to testify.

INTRODUCTION

The Lisbon treaty¹, which entered into force on 1st December 2009, constitutes a major step in the development and protection of human rights in Europe. Article 6 of the Treaty on European Union² provides

¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007.

² Consolidated version of the Treaty on European Union, OJ C 83 of 30.3.2010.

that the Charter of Fundamental Rights of the European Union (the Charter)³ is now legally binding, having the same status as primary European Union (EU) law, and that the EU 'shall accede' to the European Convention on Human Rights (the ECHR)⁴. Furthermore the Lisbon treaty abolished the former "third pillar" (police and judicial cooperation in criminal matters) thus providing that the regulation in this field now takes the form of regulations, directives and decisions, namely by applying the ordinary legislative procedure. However Article 82 (2) of the Treaty on the Functioning of the European Union provides that EU may adopt only directives to "establish minimum rules" in defined areas of criminal procedure, inter alia, concerning the rights of individuals in criminal procedure, if such regulation is necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. The article also provides that rules establishing minimal rules concerning the rights of individuals in criminal procedure shall take into account the differences between the legal traditions and systems of the Member States.⁵

On 30 November 2009 the Council of the European Union adopted a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Roadmap) that proposes the adoption of five legislative measures taking a step-by-step approach: the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communication with relatives, employers and consular authorities (measure D), and special safeguards for suspects or accused persons who are vulnerable (measure E).⁶

³ Charter of Fundamental Rights of the European Union, OJ C 83, 30.03.2010.

⁴ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Available: <http://www.unhcr.org/refworld/docid/3ae6b3b04.html> [accessed 26 November 2012].

⁵ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 83, 30.3.2010.

⁶ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. OJ C 295, 4.12.2009, Available: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF> [accessed 26 November 2012].

The roadmap has to be seen as step-by-step EU activities in the legal regulation of procedural guarantees in criminal proceedings. The first measures in this field was taken already from 2002, which resulted in the adoption of Green paper from the Commission - Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union of 19. February 2003. Available: http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0075en01.pdf [accessed 26 November 2012].

Consequently there have been adopted first directives laying down common minimum standards on the rights of suspects and accused persons in criminal proceedings throughout the European Union.⁷ The directive applied for measure B of the Roadmap is Directive of 22nd of May 2012 on the right to information in criminal proceedings (The Directive on the Right to Information).⁸ Article 3(1) of the Directive on the Right to Information provides the list of the rights about which suspects or accused persons have to be informed. Among the other rights (the right of access to a lawyer, the right to free legal advice, the right to be informed of the accusation, the right to interpretation and translation) it provides also the right to remain silent.

Article 6 of the ECHR and Article 47 of the Charter enshrine the right to a fair trial, but does not include the right to remain silent. The right to remain silent is one of the aspects of the right not to incriminate oneself.⁹ The European Court of Human Rights (the ECtHR) in a number of cases has stated that it is generally recognized international standard, which lies at the heart of the notion of a fair procedure under Article 6.¹⁰ In addition Paragraph 2 (g) and 3 of Article 14 of the International Covenant on Civil and Political Rights sets out two main aspects of the right not to incriminate oneself - the right not to be

See Strada-Rozenberga K., EU Criminal Justice – Development Trends and Impact in Latvia, International Scientific Conference. The Quality of Legal Acts and its Importance in Contemporary Legal Space, 4-5 October, 2012 at the University of Latvia Faculty of Law, Riga, p. 423-435.

⁷ As the first directive for measure A of the Roadmap was adopted Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1–7.

On Measure C of the Roadmap the European Commission has adopted a Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. Available: http://ec.europa.eu/justice/policies/criminal/procedural/docs/com_2011_326_en.pdf [accessed 26 November, 2012]

⁸ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. OJ L 142, 1.6.2012, p. 1–10.

⁹ The detailed analyses of the notions „the Right to Silence“, „the Right not to Incriminate Oneself“, „the Privilege against Self Incrimination“ goes beyond the scope of this article. There has been a broad discussion about the terminology – about these notions. The authors supports the view that the notion „the Privilege against Self-Incrimination“ (in civil law systems equally used – „the Right not to Incriminate Oneself“) includes the right to silence. See Peçi I., Sounds of Silence: A research into the relationship between administrative supervision, criminal investigation and the nemo-tenetur principle. Nijmegen: Wolf Legal Publishers, 2006, p. 78.; Callewaert J., The Privilege against Self-Incrimination in European Law : an Illustration of the Impact of the Plurality of Courts and Legal Sources on the Protection of Fundamental Rights in Europe. ERA-Forum: scripta iuris europaei, 2004, Issue 04, p. 488.

¹⁰ *Saunders v. United Kingdom* (App. no 19187/91), ECHR 1996-VI, no. 24, para. 68; *John Murray v United Kingdom* (App. no18731/91) ECHR 1996-I, no. 1, para. 45.

compelled to testify against himself and the right not to confess guilt.¹¹ These rights constitute the main aspects of the right not to incriminate oneself. The latter is one specific aspect of the general right to fair trial applied to those who are charged with a criminal offence.

Although the right to remain silent is generally recognized procedural guarantee in criminal proceedings which emerges from common traditions of European legal systems, at the same time it is one of the most ambiguous and controversial rights with different interpretation among the Member States that includes cases of serious infringement thus creating ambiguity in the understanding and efficient implementation of the right in national legal systems.¹² This is confirmed by the fact that the right to remain silent was not included in the first proposal of the Directive on the Right to Information.¹³ The authors will try to reveal the actual and problematic aspects about the comprehension and effective protection of these rights in national legal systems.

THE TERMINOLOGY

The notion “the Right to Remain Silent” used in Article 3 (1) of the Directive on the Right to Information may cause confusion in application of these rights in Member States legal systems.

Research analyzing protection of the procedural rights in the EU national legal systems shows that these rights are recognized in EU Member States, however the wording that a suspect has the right to ‘remain silent’ is only used in the Spanish and Dutch Letter of Rights, but does not exist in other Member States. For example, the Letter of rights of Czech Republic provides that the person “is not obliged to testify”.¹⁴ Also Article 66 (1) 15 of Criminal Procedure Law of Latvia (CPL) provides that a suspect and accused has “the right to testify or refuse to provide testimony”.¹⁵

¹¹ UN General Assembly, International Covenant on Civil and Political Rights. 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 Available: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> [accessed 26 November 2012].

¹² Trechsel S., Summers J. S., Human rights in criminal proceedings. Oxford: Oxford University Press, 2005., p. 341.; Zahar A., Sluiter G. K. International Criminal Law: a critical introduction. New York: Oxford University Press, 2008, p. 303.

¹³ Spronken T., de Vocht D., EU Policy to Guarantee Procedural Rights in Criminal Proceedings : "Step by Step", In: North Carolina Journal of International Law and Commercial Regulation, 2011, Vol. 37, Issue 02, p. 466-467.

¹⁴ Spronken T., EU-Wide Letter of Rights in Criminal Proceedings. Maastricht University. 2012., p. 28. Available: <http://arno.unimaas.nl/show.cgi?fid=20056> [accessed 26 November 2012].

¹⁵ Criminal Procedure Law, Latvia (21.04.2005.) Available: <http://www.likumi.lv/doc.php?id=107820> [accessed 26 November 2012].

The notion “the Right to Silence” is characteristic to common law legal systems while in the civil law systems as an equal term is used “the Right not to Testify” or “the Right to Refuse to Provide Testimony”. There is no necessity to change the legislation, however it has to be clarified what does these rights mean.

The provision of the Directive on the Right to Information does not clearly reveal the meaning of the notion “the Right to Remain Silent”. First paragraph of Article 4 of the Directive on the Right to Information provides an obligation on the Member States to ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights. An indicative model Letter of Rights, which is set out in Annex I of the Directive on the Right to Information, as concerns to the right to remain silent contains such information: “While questioned by the police or other competent authorities, you do not have to answer questions about the alleged offence. [...]” So the question is whether the suspect or accused person has right not to speak at all or only not to answer to specific incriminating questions.

The notion “the Right to Remain Silent” has to be interpreted broadly. According to the case-law of the ECtHR the accused persons have the right not to provide testimony regardless of its nature. ECtHR in the case *Saunders v. United Kingdom* states: “ [...] bearing in mind the concept of fairness in Article 6 [...] [of the ECHR - authors' note], the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature - such as exculpatory remarks or mere information on questions of fact - may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility.”¹⁶ Therefore it has to be acknowledged that the right not to testify provided for suspects and accused persons includes the right to refuse to provide testimony completely as well as the right not to give answers to particular questions thus giving a person option to choose whether to use this right, when, and how extensively.

THE IMPORTANCE OF THE RIGHT TO INFORMATION ABOUT THE RIGHT TO SILENCE

The right to information is a general principle which has particular importance in criminal procedure. Article 90 of the Constitution of the Republic of Latvia (the Constitution) provides “Everyone has the right to know about his or her rights.”¹⁷ The Constitutional Court of the

¹⁶ *Saunders v. United Kingdom*, (App. no 19187/91), ECtHR 1996-VI, 24, para. 71.

¹⁷ The Constitution of the Republic of Latvia. (15.02.1922.) Available: <http://www.likumi.lv/doc.php?id=57980> [accessed 26 November 2012].

Republic of Latvia has emphasized the importance of the this constitutional principle by pointing out that it introduces the whole catalog of the fundamental human rights - Chapter XIII of the Constitution - and provides the subjective public right of every person to be informed about their rights and also responsibilities.¹⁸ The right to information as a general principle of criminal procedure can be found in the criminal procedure laws of the Member States, for example, in Article 8 (1) of the Code of Criminal Procedure of Estonia; in Article 15 (3) of the Criminal Procedure Code of Bulgaria. The recognition of the right to information as a general principle in the criminal procedure is important in order to ensure the observance of this principle both within the national legislation and in practice.

The objective of the right to information is to ensure the protection of other fundamental rights in criminal procedure, namely, it creates precondition that lets a person to be aware of the rights he or she has been given. The Constitutional Court has indicated that only a person, who knows his or her rights, is able to use them effectively and in the case of unjustified infringement – defend them in the fair trial.¹⁹ Also Article 3 (1) and 19th recital of the preamble of the Directive on the Right to Information requires that the informing must be carried out in a manner that allows the practical and effective exercise of the rights.

The objective of the right to information about the right to silence is to ensure, that a suspect or accused person who waives the right to silence and testifies, comprehend the importance and consequences of such refusal. Namely, that a person refuses form the right to silence knowingly and intelligently. This requires not just formal informing about the right to silence, but also explaining the nature and legal consequences of the rights (Article 150 (4) of the CPL). It should be noted that a suspect or accused person may not understand the right to silence and even believe that exercising of the right can be used against him or her. Therefore it is important to inform a person that he or she has the right to refuse to provide testimony completely as well as the right not to give answers to particular questions. A person must also be informed, that the failure to provide testimony will not be assessed as a hindrance to ascertaining the truth in a case or an evasion of the pre-trial proceedings (Article 66 (3) of the CPL). Namely, that the use of the right can not have adverse consequences. The authors will return to this issue later.

Another important aspect Article 3 (1) read in conjunction with the 19th recital of the Directive on the Right to Information provides that the information about the rights has to be provided promptly, that is, at

¹⁸ Judgement of the Constitutional Court of Republic of Latvia of 20 Decembre 2006. in case 2006-12-01 “Par Prokuratūras likuma 1. panta pirmās daļas, 4. panta pirmās daļas, 6. panta trešās daļas, 22. panta un 50. panta atbilstību Latvijas Republikas Satversmes 1., 58., 82., 86. un 90. pantam”, *Latvijas Vēstnesis*, 28.12.2006., nr. 06., para. 16.

¹⁹ Ibid.

the latest before the first official interview of the suspect or accused person by the police or by another competent authority.

Article 4 read in conjunction with the 22th recital of the Directive on the Right to Information imposes an obligation for the Member States to ensure that suspects or accused persons who are arrested or detained, are provided with a written Letter of Rights drafted in an easy comprehensible manner so as to assist those persons in understanding their rights. Article 3 (2) read in conjunction with the 26th recital of the Directive on the Right to Information requires to take into account any particular needs of vulnerable suspects or vulnerable accused persons, who cannot understand the content or meaning of the information, for example because of their youth or their mental or physical condition.

The requirement for the conscious decision whether to use the right to silence requires informing not just about the right to silence, but also about other rights that can help a person to take conscious decision regarding whether to provide a testimony or not. The other rights stated in the Directive on the Right to Information such as the right to information about the accusation and the right to free legal advice are essential in order to ensure provision of the right to remain silent.

The above requirements allow the suspects and accused persons effectively exercise the rights to silence.

THE IMPACT ON PRACTICE

Considering the impact of the right to information about the right to silence on national legal systems, the major challenge is to ensure the guarantees defined in the Directive on the Right to Information in practice. Lets us look at the situation in Latvia.

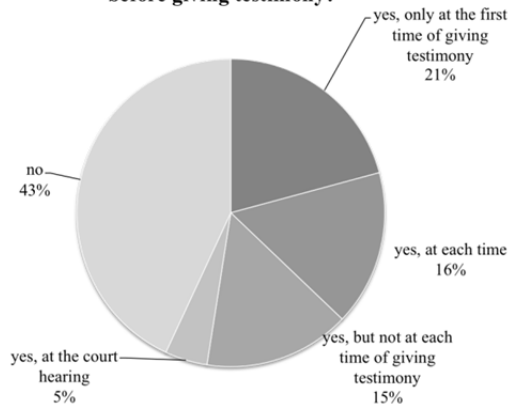
A quantitative survey among 201 accused persons, 42 defenders and 88 officials who perform criminal proceedings was carried out in 2012 with an objective to find out how effective the right not to incriminate oneself is respected in practice.²⁰ The questions also concerned the right to information about the right to silence. The survey shows that in practice the right to information about the right to silence is considerably violated.

The accused persons were asked a question whether the right not to testify was explained to them before the testifying. 43% of the surveyed accused persons answer “no”; 21% - that the right was explained only in the first time of interrogation; 16% answer that the right was explained every time, 15% - that the right was explained but not every time; and 5% - that the right was explained only in the adjudication of case in court (Graph No.1.).

²⁰ The survey was carried out by Irēna Nesterova for her PhD thesis „The Right not to Incriminate Oneself in Criminal Procedure” that are currently being written.

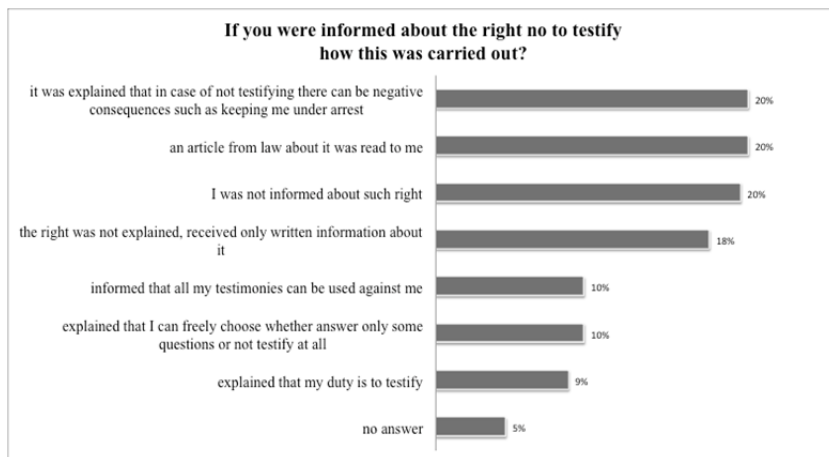
Graph No.1. - Accused persons (201 respondent)

Was the right not to testify explained to you before giving testimony?



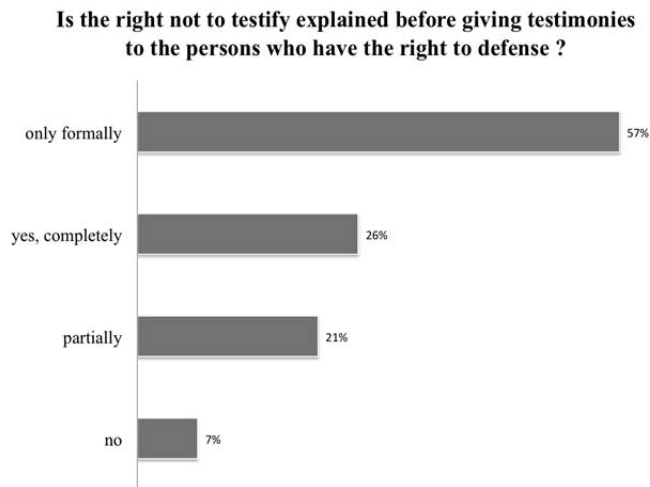
The answers to the next questions clearly show that in practice in many cases instead of the informing persons about the right no refuse to testify, the suspected or the accused person is either only formally informed about the right or even compelled to provide testimony. In response to the question about how the right not to testify was explained 20% of respondents state that they were threatened with unfavorable legal consequences if they choose not to testify, for instance, keeping them under arrest. Another 20% were not informed about this right at all. The corresponding article from the law was read and explained in 20% of cases, in 18% only written information without any explanation was supplied. Only 10% had received a warning that all the given testimonies can be used against them and 10% were informed that they can freely choose whether to answer only some questions or refuse from providing a testimony completely, while 9% were explained that it is their duty to testify. 5% of respondents didn't answer this question (Graph No.2.).

Graph No.2. - Accused persons



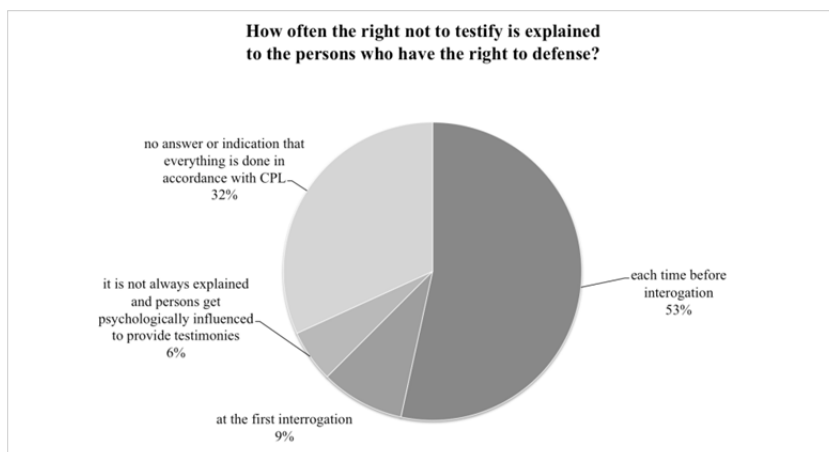
The responses from 42 defenders and 88 officials who perform criminal proceedings also show that in practice the right not to testify often is not explained to suspects or accused persons. 57% of defence counsels state that this right is explained only formally, 26% think that it gets fully explained, 21% - that it gets explained only partially and 7% say that it doesn't get explained at all (Graph No.3.).

Graph No.3. – Defence counsels (42 respondent)



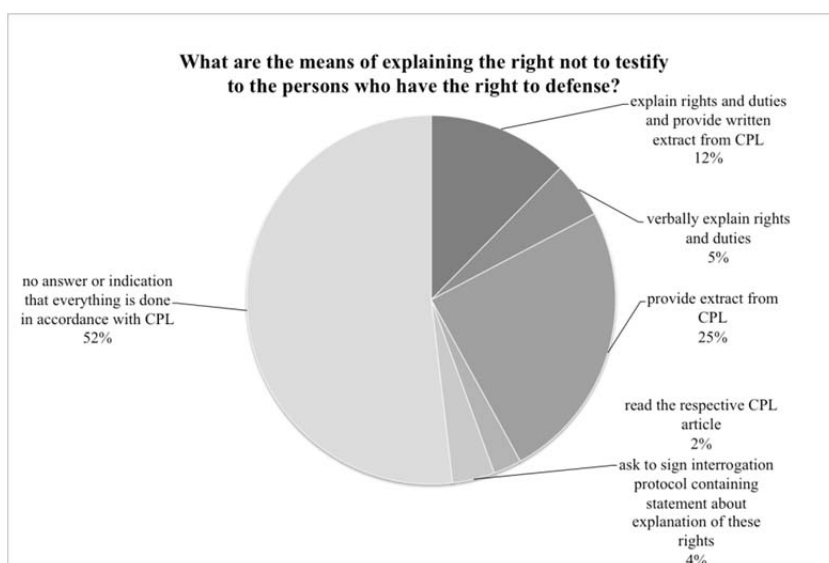
The officials who perform criminal proceedings (judges 23%, police officers 53%, prosecutors 24%) were also asked a question how often the right not to testify is explained to the suspects or accused persons. 53% state that the right not to testify is explained before each interrogation, 9% - before the first interrogation, 6% admit that this right is not always explained and persons get psychologically influenced to provide testimonies, 32% do not answer a question or make an excuse that everything is done in accordance with CPL (Graph. No.4.).

Graph. No.4. – Officials who perform criminal proceedings (88 respondents)



The next question was regarding the methods of explaining the right not to testify to the accused persons. More than a half (52%) don't answer this question or make an excuse that everything is done in accordance with CPL, 25% explained that they provide written extract from the CPL, 2% - read aloud the article from the CPL, 4% ask to sign interrogation protocol containing statement about explanation of these rights and only 12% explain the rights and duties (Graph. No.5.).

Graph. No.5. - Officials who perform criminal proceedings



It can be concluded that in legal practice in Latvia the right to silence is one of the rights which are not explained most frequently. For example, the accused are more often informed about the right to legal advice. The right not to testify often is not explained at all or explained only formally. Likewise there are instances when persons get misled to believe that they have a duty to testify or that exercising the right to silence can cause adverse consequences such as

deprivation of the liberty by applying arrest.

These problems are common to other EU Member States. The research on comparative criminal justice in Europe reveals that also in other countries the suspects and accused persons can suffer from adverse consequences in case of not providing testimony. The decisions on pre-trial detention relied on the fact that a person has remained silent or has not confessed his or her guilt can be found in Italy, Hungary, Belgium and Poland.²¹ This reveals that although adverse consequences for exercising the right to silence are prohibited, in practice they take place, particularly in the form of pre-trial detention.

In order to comply with the Directive on the Right to Information, the Member States should take all appropriate steps including financial, organizational and disciplinary measures to ensure that in practice suspects and accused persons are effectively informed about the right to silence.

TOWARDS HIGHER STANDARDS

When adopting the right to information about the right to silence in national legal systems Member States should not be confined to the implementation of the minimum standards required in EU and other international human right systems. In accordance with Article 82 (2) of the Treaty on the Functioning of the European Union adoption of the minimum rules concerning the rights on individuals in criminal proceedings shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

In the implementation of EU law the interaction between EU law and other international human rights standards, in particular, provided by the ECHR and the case-law of the ECtHR must be considered. According to Article 52 (3) of the Charter in so far as it contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the latter. The Article also provides that the provision shall not prevent Union law providing more extensive protection. ECtHR does not act as a “fourth instance”.²² The ECtHR has emphasized that it is for the national courts to assess the evidence before them, while it is for the ECtHR to ascertain that the proceedings considered as a whole were fair.²³ The ECtHR in the process of developing a self-incrimination principle as a part of the general principle of a fair trial under Article 6 (1) of the ECHR, has to create a doctrine, that accords with the diverse

²¹ Cape E., Namoradze Z., Smith R., Spronken T., *Effective Criminal Defence in Europe*. Antwerp – Oxford – Portland: Intersentia, 2010, p. 405., 349., 86., 459.

²² *Criminal Procedure in Europe*. Vogler R., Huber B. (ed. by) Berlin: Duncker & Humblot, 2008, p.16.

²³ *Telfner v. Austria* (App. no 33501/96), judgment of 20 March 2001, para. 13.

legal systems of its member nations.²⁴ The ECHR harmonizes the protection of the right not to incriminate oneself by creating the minimal not maximal standards. The national legal protection should comply with these standards, but may also increase them.

An important issue in the scope of the right to information about the right to silence is how the non-informing or undue informing about the right to silence affects the validity of acquired evidence and its further use in criminal procedure. The ECtHR doesn't acknowledge that withholding of procedural safeguards such as the right to information²⁵ by itself causes breach of the right against self-incrimination provided that acquired evidence is properly used in further procedure. In several EU Member States – Italy, Slovenia, Hungary - the criminal procedure laws directly provide that a testimony obtained without providing the information about the right to remain silent can not be used as an evidence against the accused person.²⁶ It must be welcomed that Member States ensure that the violation of the requirement to inform accused person about the right to silence can lead to the absolute inadmissibility of evidence.

One of the most controversial and discussed issues is the possibility to draw adverse inferences from the silence of an accused person. In most EU Member States the national legislation does not allow such adverse inferences. An exception is the Criminal Justice and Public Order Act (1994)²⁷ of England, which allows judges and juries to consider as evidence of guilt a suspect's failure to answer police questions during interrogation as well as a defender's refusal to testify during trial. It allows to make a "proper" and "common sense" inferences - a person cannot be convicted on the basis of an inference alone and there must be other sufficient evidence establishing the *prima-facie* case against the suspect person.²⁸ The adverse inference

²⁴ See Berger M., Europeanizing Self-incrimination: the Right to Remain Silent in the European Court of Human Rights. *Columbia Journal of European Law*, 2006, No.12, p. 342.

²⁵ *Zaichenko v. Russia* (App. no 39660/02), judgment of 18 February 2010, para. 55-60.

²⁶ Cape E., Namoradze Z., Smith R., Spronken T., *Effective Criminal Defence in Europe*. Antwerp – Oxford – Portland: Intersentia, 2010, p. 392, 404.-405.; Article 117 (2) of the Criminal Procedural Code of the Republic of Hungary. (1998.) Available:

<http://www.legislationline.org/documents/section/criminal-codes/country/25> [accessed 26 November 2012]; Criminal Procedure Act of Slovenia. (26.01.2006.) Available:

<http://legislationline.org/documents/section/criminal-codes> [accessed 26 November 2012]

²⁷ Criminal Justice and Public Order Act. (1994) Available: <http://www.legislation.gov.uk/ukpga/1994/33/contents> [accessed 26 November 2012]

²⁸ Cape E., Namoradze Z., Smith R., Spronken T., *Effective Criminal Defence in Europe*. Antwerp – Oxford – Portland: Intersentia, 2010, p.139.; Milovanovich Z., *Privilege against Self-incrimination: a Comparative Perspective*. In Fields, C. B., Moore Jr. R.H. *Comparative and international*

issue has generated a number of cases in the ECtHR, which has not found that the drawing of adverse inferences from the silence of accused person by itself is contrary to Article 6 of the ECHR indicating: “Whether the drawing of adverse inferences from an accused’s silence infringes Article 6 [...] is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.”²⁹

These provisions have caused broad discussion and criticism in the legal doctrine.³⁰ Although the provisions cannot be applied arbitrarily, they create significant pressure to give evidence and as a result increase risk of an innocent person to be convicted of a criminal offense. The empirical research has shown that after the provision although the number of suspects exercising their right to remain silent has declined, the rates at which admissions are made and convictions secured have not affected. Therefore they are regarded as pointless weakening of the right not to incriminate oneself.³¹ Thus informing an accused person about the possibility to draw adverse inferences from his or her silence must be considered as unlawful restriction that unduly infringes the right to silence.

Member States should maintain and strive to implement higher standards and refrain from undue restriction of the right to silence in order to avoid miscarriage of justice or in other words - to protect innocent persons from false accusations.

CONCLUSION

1. The right to silence is one of the most ambiguous and controversial rights which are provided in the Directive on the Right to Information with different interpretation among the Member States of the EU that includes cases of serious infringement thus creating ambiguity in

criminal justice: traditional and nontraditional systems of law and control. 2nd ed. Long Grove, IL: Waveland Press, 2005, p. 381.

²⁹ *John Murray v United Kingdom* (App. No 18731/91) ECHR 1996-I, no. 1., para. 48; *Averill v. United Kingdom* (App. no18731/91) ECHR 2000-VI, para. 44.

³⁰ See Easton S. The case for the right to silence, 2nd ed, Aldershot etc.: Ashgate, 1998.; Criminal Procedure in Europe. Vogler R., Huber B. (ed. by) Berlin: Duncker & Humblot, 2008, p. 66.; Cape E., Namoradze Z., Smith R., Spronken T., Effective Criminal Defence in Europe. Antwerp – Oxford – Portland: Intersentia, 2010, p. 140.; Statement of the European Criminal Bar Association (ECBA) on the Greenpaper Presumption of Innocence of 26 April 2006. Available: <http://www.ecba.org/content/index.php> [accessed 26 November 2012].

³¹ Criminal Procedure in Europe. Vogler R., Huber B. (ed. by) Berlin: Duncker & Humblot, 2008, p.66.; Cape E., Namoradze Z., Smith R., Spronken T., Effective Criminal Defence in Europe. Antwerp – Oxford – Portland: Intersentia, 2010, p. 140.

understanding and efficient implementation of the right in national legal systems.

2. The concept “the right to remain silent” which is used in the Directive on the Right to Information may cause confusion in applying these rights in EU Member States legal systems, because it is characteristic to common law legal systems, while in the civil law systems “the right not to testify” is used as an equal term.

3. The major problems in adopting the right to information about the right to silence in the Member States of the EU is ensuring them in practice. Both the comparative studies of European criminal procedure and the survey of the accused persons, defence counsels and officials who perform criminal proceedings, which was carried out in Latvia shows that in practice the right to information about the right to silence is significantly violated.

4. When adopting the right to information about the right to silence in national legal systems the Member States of the EU should not be confined to the implementation of minimum standards, but to maintain and strive to implement higher standards and refrain from undue restriction of the right to silence. For example, it shall be recognised that the violation of the requirement to inform suspect or accused person about the right to silence can lead to the absolute inadmissibility of evidence. Also informing an accused person about the possibility to draw adverse inferences from his or her silence as it is provided in legal framework of England has to be regarded as unlawful restriction of the rights to silence.



IEGULDĪJUMS TAVĀ NĀKOTNĒ

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