

ON THE RIGHT OF THE DEFENDANT TO REMAIN SILENT

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Abstract: In order to present the topic as clearly and as accurately as possible, the author planned and elaborated the structure of the paper so that the legal and historical aspect of the right to remain silent is discussed first. This right is then presented through the provisions of the valid Criminal Procedure Code of the Republic of Serbia, and in order to cover the topic as thoroughly as possible, the views of court practice are also pointed out. Regarding the position of theory and jurisprudence that the defendant's silence can be viewed exclusively as a denial of a criminal offence, the mutual relationship between these two forms of defence is analysed. The author also deals with the defendant's motivation behind the decision to remain silent and analyses the conditions under which such a decision may be a successful method of defence.

Keywords: right to remain silent, historical aspect, normative aspect.

INTRODUCTION

The procedural position of the defendant has always depended on the political, cultural and economic circumstances prevalent in a society, at the same time indicating the general position of the citizens, as well as the level of humanity and democracy of the society. In that sense, we have come a long way from the period when the defendant was considered the object of criminal proceedings to the present day understanding of the corpus of rights that make up the right to a fair trial. This concept consists of several rights and principles that have long been accepted in many countries, and its significance lies in the fact that an international legal standard, that binds national legislation and represents a model of an "ideal" criminal procedure, was introduced into the contemporary criminal procedure (Grubač, 2007: 6- 7).

One of the rights that are an integral part of the right to a fair trial is the right of the defendant to fully or partially deny the answer to the questions asked during the hearing: this right is referred to as "the right to remain silent" and essentially represents the absence of active defence (Škulić, 2014: 214).

At the national level, the right to remain silent has been instituted in all European countries, and today it represents one of the basic rights in the catalogue of the defendant's defence rights.

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At the supranational level, it is interesting to note that the European Convention for the Protection of Human Rights and Fundamental Freedoms² does not explicitly mention the right to remain silent. However, from the decisions of the European Court of Human Rights, it follows that the right to remain silent and the right against self-incrimination have become international standards that form the core of the notion of a fair trial in accordance with the provision of Art. 6 of said Convention, and that they are closely related to the presumption of innocence (*Zaichenko v. Russia*, 18/02/2010; *Saunders v. the United Kingdom*, 17/12/1996). On the other hand, the International Covenant on Civil and Political Rights provides for a number of rights that are a prerequisite for successful defence, and in the context of the topic, we emphasize that according to the provisions of Art. 14, p. 3 (g), anyone charged with a criminal offense has an equal right not to be compelled to testify against themselves or to plead guilty. This type of protection is called a privilege against self-accusation and does not only imply the right of the defendant to refuse to testify but also their right to refrain from presenting any other evidence in the criminal proceedings against their will (*Bajović*, 2010: 53). It is also necessary to point out that the privilege against self-accusation also belongs to witnesses in the procedure who are not obliged to answer questions if it is probable that they would thereby expose themselves or persons close to them to severe shame, significant material damage or criminal prosecution (Art. 95, p. 2 of the Criminal Procedure Code of the Republic of Serbia³). Thus, the right to a privilege against self-incrimination belongs to a wider circle of persons than the right to remain silent, which belongs exclusively to the defendant as a party to the proceedings. In addition, the right to defend oneself by remaining silent is derived from the privilege against self-accusation, and in that sense, it represents one of its constitutive elements.

The aim of the paper is to provide a complete, precise and scientifically supported presentation of the topic. In that sense, a historical and legal analysis of the evolution of this right will be presented, as well as its content in the sources of criminal procedural law previously applicable in our country. In addition, the normative aspect of this right in our current CPC will be presented, as well as the views of the judiciary, for the purpose of highlighting controversial issues. Although this right has a primary legal component, it is indisputable that silence in itself poses a complex issue, in the consideration of which answers may also be sought through the prism of psychology. In that sense, the paper will also deal with the motivation that may lead the defendant to opt for this type of defence and the analysis of the conditions under which the defence by remaining silent can produce a favourable outcome for the defendant.

THE BEGINNINGS AND EVOLUTION OF THE RIGHT TO REMAIN SILENT

The right to remain silent originated in England, and its development is intimately tied to the great struggle between rival systems of criminal procedure – the accusatorial common law courts and inquisitorial ecclesiastical courts (*O'Reilly*, 1994: 207). While common-law courts functioned based on the accusatory principle and gave the defendant an opportunity to attend their trial and present evidence in their favour, in trials held before ecclesiastical courts the defendant was obliged to answer the questions asked and was not informed on the prosecution's allegations, nor on existing evidence.

2 Law on the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette of Serbia and Montenegro - International Agreements, Nos. 9/2003, 5/2005 and 7/2005 and Official Gazette of RS - International Agreements, Nos. 12/2010 and 10/2015.

3 Official Gazette of RS, Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019. Hereinafter: CPC.



An important stage in the development of the right to remain silent was the activity of a special royal court called the Star Chamber, which gained great importance during the Tudor dynasty. It was primarily responsible for crimes against the authorities. This court applied the methods of inquisitorial procedure, meaning that the criminal proceedings were held in secrecy, the court had wide discretionary powers, used secret informers and torture (O'Reilly, 1994: 413). Trials before this court were held without a jury, the procedure could be initiated without a formal lawsuit – solely based on public rumour, and the court was entitled to question any person under oath, not just the defendant. Although at one point the court became responsible for enforcing royal orders, it still had the authority to use torture, which became especially evident during the 16th century.

The kings of the Stuart dynasty continued to use this court to settle accounts with their opponents. In the mid-16th century, due to the dissatisfaction caused by the work of the Star Chamber Court, the inquisitorial rules became somewhat relaxed. However, at the beginning of the 17th century, the inquisitorial procedure was on the rise again and things escalated to the point where it was considered that the defendant who refused to answer questions actually admitted to committing a crime. The turning point in the establishment of the right to remain silent was the case against John Lilburne, accused of having brought seditious books into England. During the procedure before the Star Chamber Court, he refused to answer questions, believing that in that way he would only cause himself more harm. He was therefore detained in 1639 because his conduct was considered an insult to the court. During 1641, the Parliament deemed Lilburn's punishment illegal, abolished the Star Chamber Court and prohibited the use of inquisitorial procedure methods in criminal matters (Gray, 2013: 531).

However, the right to remain silent was not fully recognized until the enactment of Judge's rules in 1912, which contained the obligation of the police to inform the suspect during the arrest that they were under no obligation to say anything, but that everything they said could be used against them in the court of law. Such a provision is related both to the presumption of innocence and to the fact that the burden of proof lies with the prosecutor (Hostettler, 2009: 241).

On the other hand, in the continental criminal proceedings, the right to remain silent was not introduced immediately after the French Revolution and the abolition of torture, because there were the so-called *poenae inobedientiae*, i.e. penalties for disobedience if the questioned parties refused to answer (Damaška, 2001: 60).

In the 1960s, in Austrian legislation and the legislation of some Swiss cantons, there were still provisions according to which the defendant was obliged to answer questions "specifically, clearly and truthfully" (Damaška, 1962: 69, 119). It was only with the amendments from 1964 that the German criminal procedure legislation foresaw the possibility for the defendant to choose not to testify as a tactic of defence. For example, this right existed in French criminal procedure legislation until 1993, when it was repealed, and then the 2000 reform reintroduced the general obligation of the police and the court to inform the defendant on the right to refuse to testify (Knežević, 2013: 1702).

THE RIGHT TO REMAIN SILENT IN OUR CRIMINAL PROCEDURE LAW – LEGAL AND HISTORICAL ASPECT

The first code that completely regulated the criminal procedure in Serbia came into force on 10 April 1865, as the *Code of Judicial Procedure in Criminal Offenses for the Principality of Serbia*. Prior to the interrogation, the investigator was obliged to warn the defendant to answer the questions "nicely, clearly, decisively and truthfully" (Art. 143, p. 1), after which the defendant was asked to provide per-



sonal data. The defendant was not obliged to answer the questions asked, and the investigator could only warn them that in that way they could worsen their position, as they would miss the opportunity to state the circumstances that could help their case (Art. 152). An investigator who noticed that the defendant denied committing the criminal offense or refused to answer some questions “clearly out of cunning” would present the grounds for suspicion accusing them and thus show the defendant that their defence was not convincing (Art. 146, p. 1).

The Code of Criminal Procedure of the Kingdom of Yugoslavia was passed on 16 February 1929, and entered into force on 1 January 1930. It was modelled on the Austrian Code of Criminal Procedure from 1873 and corresponded to the progressive requirements of social practice and criminal procedure science of the time (Grubač, 2006: 59). After the defendant was informed of the criminal offense they were charged with, they were asked whether they wanted to state something in their defence, implying that the defendant was not obliged to answer the questions asked (Art. 152, p. 2). If the defendant chose to remain silent or refused to answer only certain questions, or even pretended to be “deaf, dumb or crazy”, the investigating judge warned them that the proceedings could not be interrupted by using this tactic and that failure to present the facts that spoke in their favour would only complicate their defence (Art. 153). Even during the main trial, the defendant was not obliged to answer the questions asked, nor was it allowed to force them to answer (Art. 251, p. 1).

On 12 October 1948, the Criminal Procedure Code was passed, with decisions modelled on the Soviet procedural legislation of the time, which significantly interrupted the continuity with the previous Code. The new law introduced a completely new type of criminal procedure in which the protection of “revolutionary achievements” took precedence over the protection of individual civil rights (Grubač, 2006: 59). The investigative action “interrogation of the defendant” was undertaken in such a way as to respect the defendant’s personality (Art. 157, p. 1), while the use of force, threats, deception or similar measures to obtain their testimony or confession was prohibited (Art. 157, p. 2). During the first hearing, general personal information was taken from the defendant. After that, the defendant was told what they were accused of and asked what they had to state in their defence (Art. 158, p. 2). If the defendant decided to answer the questions asked, they were to be allowed to testify on all the circumstances they were charged with and to present all the facts serving their defence (Art. 158, p. 4). The defendant was not allowed a defence counsel during the investigative stage (preliminary proceedings), and their right to defence was also significantly limited by the provision of Art. 110 which provided that the defendant may attend all investigative actions, except for the examination of witnesses and the examination of co-defendants. This practically meant that the defendant could only attend the search of the apartment and persons and the investigation, and be acquainted with the results of the performed expertise.

The Code of Criminal Procedure, passed on 10 September 1953, entered into force on 1 January 1954. The adoption of this Code meant a significant qualitative change in relation to the previous law. The provisions of the 1953 Code additionally protected the bodily integrity of the defendant and their right to freely testify as they wished before the procedural authority. Namely, in addition to the prohibition of using force, threats, deception and similar means against the defendant during interrogation in order to obtain their testimony or confession (Art. 212, p. 7), the provision of Art. 247, p. 3 provided that it was prohibited to offer medical interventions or other means to the defendant or a witness that could potentially influence their will to testify. The defendant was not obliged to provide their defence, nor answer the questions asked (Art. 212, p. 2), in which case they were warned that this could make it more difficult for them to gather evidence for their defence. The defendant had the same rights at the main trial as well – they were not obliged to testify on the indictment or to present their defence. If the defendant was not told what they were accused of prior to testifying, what the grounds for suspicion

against them were, that they were not obliged to present their defence and that they had the right to hire a defence counsel, such a testimony could not have been considered the basis of a valid verdict. There were no significant changes concerning the main trial, but one remark should nevertheless be made. Even at the main trial, the defendant was not obliged to provide a testimony on the indictment and present their defence, but the failure of the editor from 1967 is reflected in the fact that the obligation of the presiding judge to inform the defendant about this fact was not foreseen. It was not sufficient to inform the defendant about this right during the investigative stage because they were not obliged to know that this provision also applied at the main trial (Vasiljević, 1971: 529).

On 24 December 1976, the new Criminal Procedure Code was passed and entered into force on 1 July 1977. Although formally new, this law was essentially the somewhat amended Criminal Procedure Code of 1953, whose principles, most important institutions, system and basic solutions remained unchanged.

The Criminal Procedure Code of FR Yugoslavia, adopted at the end of 2001, entered into force on 29 March 2002. It relied heavily on the previous 1977 Code, retaining good solutions while improving provisions in line with modern needs and eliminating the shortcomings pointed out by case law. Certain rights of the defendant were introduced into the rank of procedural principles and found their place in the introductory provisions of the legal text. For the first time, the defendant had to be explicitly warned that everything they said could be used against them as evidence (Art. 4, p. 2, item 2). At the hearing, the defendant was not obliged to present their defence, nor answer the questions asked (Art. 89, p. 2). At the main trial, the defendant was not obliged to testify on the indictment or present their defence, and their refusal to answer questions had to be interpreted as denial under the law (Art. 320, p. 2 and p. 3).

NORMATIVE ASPECT AND CASE LAW

Contrary to the testimony, given by the defendant in that capacity, about the facts that are the subject of the indictment, silence is a “passive manifestation without logical and cognitive content” (Stanković, 1988: 255). In essence, it represents a method of defence tactics (Ivanović, Baić, 2016: 164; Bošković, Perić, 2018: 270). In the case of defence, by remaining silent, the defendant deprives the procedural authority of all or some information, which could otherwise lead to the clarification of a critical event. In that sense, silence can be: a) complete, when the defendant refuses to answer all questions asked, and b) partial, when the defendant answers only some questions, explicitly refusing to answer others.

In criminal proceedings, defendants have a number of rights at their disposal, enabling them to successfully defend themselves, and in the context of our topic, we will point out the right of the defendant to be informed, without delay and always before the first hearing, in detail and in a language they understand, on the charges against them, the nature and reasons for the indictment, as well as on the fact that everything they say can be used as evidence in the proceedings (Art. 68, p. 1, item 1 of the CPC).⁴ According to case law, there is no obligation of the procedural authority hearing the defendant to warn them that what they say can be used as evidence against another person, because such an obligation was not provided for by the CPC, i.e. it exists only in certain cases when a witness is examined (ruling of the Court of Appeals in Belgrade, Kžl. 496/2012, of 7 March 2012). Also, the defendant has the right to remain silent, deny an answer to a particular question, freely present their

4 When it comes to instructing the defendant about their rights, it should be stressed that it implies not only *communicating* the rights to the defendant, but also *enabling* the defendant to exercise them (Ilić, Majić, Beljanski, Trešnjev, 2014: 276).



defence, admit or not admit guilt (Art. 68, p. 1, item 1 of the CPC). Therefore, the defendant has the right to freely choose, without the influence of the authority conducting the procedure, how to present their defence, which can move in the direction of confession, denial of the commission of a criminal offense or silence on the allegations of the prosecution.

The testimony of the defendant is based on the principle of voluntariness, because it serves, above all, the purpose of their defence, and defence is the right, not the duty of the defendant (Brkić, 2014: 312). This right applies both during the investigative stage and during the main trial. At the main trial, the defendant is not obliged to testify on the indictment or answer the questions asked (Art. 392, p. 2 of the CPC), and the president of the chamber will instruct the defendant that they may testify on all the circumstances they are charged with and present all the facts in their favour and invite them to present their defence (Art. 397, p. 1 of the CPC). However, if the defendant refuses to present their defence or to answer certain questions, their testimony given earlier or part of that testimony will be read, or an optical or audio recording of that testimony will be reproduced. Therefore, the defendant's decision to defend themselves by remaining silent at the main trial will have no effect if they have already given their testimony during the investigation: in such a situation, the testimony from the earlier stage of the procedure will be read. According to case law, this is possible only if the defendant does not want to answer the questions asked, not if contact with the defendant could not be established for other reasons (Grubač, Vasiljević, 2014: 682). In the event when the defendant exercises the right not to present their defence at the main trial, and the court fails to apply the provision on reading the previous testimony and fails to state the reasons why they did not do so, there will be a significant violation of the provisions governing criminal procedure (ruling of the Court of Appeals in Kragujevac, Kž1. 598/2016, of 25 April 2016).

The procedural authority is not authorized to inform the defendant that confession is a mitigating circumstance and that silence may make it more difficult for them to gather evidence in their defence, as was previously the case in our law.⁵ We believe that such a warning, especially if given after the defendant's statement that they wish to remain silent, would affect their will, which must be completely free in terms of choosing the method of defence and that it must not be externally influenced. We are of the opinion that, if it is stated on the record that the defendant wishes to exercise their right to remain silent, the procedural authority must then interrupt any discussion on the circumstances of the prosecution's allegations.

There is no doubt that the defendant's silence cannot be proof of their guilt, nor can it be an aggravating circumstance when imposing a sanction. Our case law explicitly abides by this interpretation. No conclusion can be drawn from the decision of the defendant to remain silent to the detriment of the defendant, with the explanation that they have nothing to say in their defence. The defendant's silence can be viewed only as denial of a criminal offense, and as such it cannot be considered a contribution to establishing the truth in the criminal proceedings (ruling of the Higher Court in Leskovac, K. no. 120/10, dated 10 May 2010, and decision of the Court of Appeals in Niš, Kž. 1, no. 1887/11, dated 6 September 2011).

THE RELATIONSHIP BETWEEN SILENCE AND DENIAL

The view that the silence of the defendant can only be viewed as denial of the criminal offense is also the view of legal theory (Brkić, 2014: 320; Bošković, Perić, 2018: 270), while, for example, the 2011

⁵ See Art. 212, p. 2 of the 1953 CPC.



CPC contained a provision according to which the refusal of the defendant to answer a question should be considered denial (Art. 320, p. 3).

Denial is nothing more than disputing a state of affairs for which one is accused, i.e. negation (Grasberger, 1958: 197). Thus, the denial of the defendant that they committed a criminal offense could be defined as a negation of charges filed against them by the indictment or a confession that the facts from the charges are partially or fully true, but with the statement of certain circumstances that exclude the existence of a criminal offense.

In general, having in mind the content of denial, it can appear in two forms: as substantiated and unsubstantiated, mere denial.⁶ In emphatic denial, the defendant refuses to admit to the truthfulness of the indictment; this can be manifested through body language, for example, shaking one's head, or verbally: "No, I did not do it/You are wrong, it was not me." On the other hand, explanatory denial contains an excuse or reason as the defendant's response as to why they are not responsible for the commission of the criminal offense (Zulawski, Wilander, 2002).

It is wrong to assume that every confession of a criminal offense should be accepted as truthful, and every denial should be immediately rejected as false. Neither form of defence should be accepted uncritically, nor viewed in isolation from other available evidence. This should be kept in mind especially in situations where the defendant opts for explanatory denial, where the facts and allegations they make can be objectively verified. Even unsubstantiated denial, deprived of any information, in a situation where the court remains in irrefutable doubt related to some fact that is important for reaching a decision, may, thanks to the "in dubio pro reo" rule, bear the same consequences as if the accuracy of the denial has been established.

When we look at the relationship between silence and denial from a theoretical standpoint, we notice certain similarities, but also certain differences. Namely, what is common to silence and unsubstantiated denial is that they do not contain the circumstances that the defendant is charged with. Both types of defence must be considered denial, because confession must always be explicit.⁷ However, if the defendant opts for explanatory denial, and after the verification is made the facts they presented in their favour prove to be untrue, then the explanatory denial becomes an indication of the defendant's guilt. On the other hand, a consistent decision of the defendant to remain silent can never become grounds for accusations against them, because negative conclusions on guilt cannot be drawn from silence. Thus, if we wanted to analyse the right to remain silent independently and separately in relation to other evidence, we would not be able to notice possible inconsistencies and illogicalities in its structure. A conclusion on the probative value of such a defence would be impossible, because "nothing can come from nothing" (*Ex nihilo nihil fit*). In that respect, unsubstantiated denial is identical in content to remaining silent. It is completely irrelevant whether the defendant will state that they did not commit the criminal offense and thus end the presentation of the defence or that they wish to remain silent: in no case is there any presentation of circumstances related to the commission of the criminal offense. On the other hand, a defendant who substantially denies the commission of a criminal offense, and is the real culprit, may be inconsistent in presenting their defence or may present contradictory or unrealistic circumstances. Then the credibility of their testimony will be assessed first by an analysis of the content of the testimony, but it will also be assessed in light of other evidence, whereby theoretical criteria for assessing the credibility of the testimony will be used. Stone (1995)

⁶ See: Simonović, 1997: 191-192; Данић, 2001: 113.

⁷ Analyzing the provision of Art. 88 of the CPC, it follows that the confession must also have other characteristics: there must be no doubt as to its truthfulness, it must be complete, non-contradictory, clear and it must not contradict other evidence.



indicates that the assessment of the credibility of the testimony is based on three criteria (according to Delić, 2008: 71-72). In short, the criterion of consistency/inconsistency refers to the internal contradiction of the testimony itself, as well as to the contradiction in relation to other established facts. The criterion of reality/unreality of the testimony is determined similarly, while probability/improbability is assessed based on ordinary life experience.

MOTIVATION FOR REMAINING SILENT AND WHEN SUCH DEFENCE IS USEFUL FOR THE DEFENDANT

It is a fact that all human behaviour is conditioned by some type of motive, so in each specific case, one should look for the reasons why the defendant opted for this particular type of defence. There is no silence in general, just as there is no man in general, and it is always manifested as a specific phenomenon, in specific people, in specific cases and motives (Stanković, 1988: 258).

Viewed from the psychological point of view, the silence of the defendant in criminal proceedings can be a kind of escape from an unpleasant situation. Therefore, silence can occur as a result of the initial fear of the prosecuting authorities or shame of admitting something immoral, e.g. the need to keep from the public some secrets or personal inclinations, characteristic of crimes against sexual freedom. For example, in his practice, the author of this paper had a case where the suspect was reluctant to present his defence because the criminal offense he was charged with was Cohabiting with a Minor from Art. 190, p. 1 of the Criminal Code⁸, and as it became apparent that the underage girl was pregnant, this gave rise to another potential criminal offense – Sexual Intercourse with a Child from Art. 180, p. 1 of the CC.

Practice has shown that recidivists and perpetrators of serious criminal offences usually opt for this type of defence, and this attitude then represents a tactical move to thwart the efforts of law enforcement in establishing the truth, a sign of defiance or a desire to delay the procedure. The motivation of the defendant to remain silent may lie in their desire to get additional time to: a) analyse the situation and devise the most effective defence strategy; b) specify the parameters of the general plan of action and c) implement tactics (Ivanović, Baić, 2016: 164).

It should also be kept in mind that silence may also result from masochistic tendencies, neurosis or mental illness, so if there is any suspicion of the existence of these circumstances, psychiatric expertise should be ordered (Simonović, 1997: 191). There are also those defendants who choose to remain silent only about certain important facts and speak freely about other irrelevant topics.

In practice, it is common for defendants to state, only in general terms, that the allegations from the criminal charges are incorrect and that they do not wish to answer further questions. In this way, the defendants practically combine unsubstantiated denial as a form of testimony, with silence as a form of defence tactic. In the absence of other evidence, this represents a very successful method of defence. A defence counsel may advise the defendant to remain silent as a tactical move, until they get acquainted with other available evidence. Namely, before the first hearing, the suspect and the defence counsel have the right to read only the criminal complaint, the crime scene report and the findings and opinions of the expert witnesses (Art. 68, p. 1, item 6; Art. 71, item 2 of the CPC). However, after the suspect has been questioned, the public prosecutor is obliged to enable them and

8 Official Gazette of RS, Nos. 85/2005, No. 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019. Hereinafter referred to as: CC.



their defence counsel to review the files and examine the items that serve as evidence, within a period sufficient for the preparation of the defence (Art. 303, p. 1 of the CPC).

We should not forget members of criminal organizations who are sworn to silence and loyalty, not only in cases where they find themselves in the position of the defendant but also when they are the injured party in a criminal offence. The defendant will decide to remain silent even when they want to protect the real perpetrator of the criminal offense or an accomplice, although in those situations they can also decide to make a false confession.⁹

These are just some of the situations that lead to the silence of the defendant – it is virtually impossible to list them all, and in the search for a motive for a particular action, one should always look at the specifics of each individual case.

Stanković states that silence, although a passive form of defence, can be effective, if certain conditions are met: a) that the defendant is indeed the perpetrator of the offense they are charged with; b) that they are the only living soul with knowledge about the crime; c) that the defendant did not leave any traces that could be obtained by means (technique and tactics) of criminal investigation; d) that the criminal procedure authorities do not have (or will not be able to have) any valid, authentic evidence of legally relevant facts; and e) that the defendant remains consistent and unwavering in their silence throughout the criminal proceedings, even in their preliminary stage (1988: 257). Although we essentially agree with the above, we believe that it is necessary to make one addition regarding the second and third conditions: we believe that it is not necessary for the defendant to be the only person with knowledge of the crime, nor is the absence of clues necessary for this type of defence to be successful, especially when it comes to the criminal offense Domestic Violence from Art. 194 of the CC. Namely, in practice, it has been demonstrated that this right is often used by suspects in this criminal offense, and when the injured party is a privileged witness who is released from the obligation to testify¹⁰, they may exercise the right to refuse to testify against their relative. Due to the very nature of the offense, it often happens that the event which is the subject of the procedure was not attended by other persons or those other persons are also privileged witnesses. Proving this offense is especially difficult if the criminal offense was committed in the form of a threat of an attack against a person's life or bodily integrity, that does not objectively produce any material change in the outside world and does not leave traces. If the defendant decides to remain silent and the injured party denies their testimony, the procedural authority is faced with a lack of evidence that a criminal offence has even been com-

9 The author of this paper had the following case in his practice: In his defense, the defendant denied committing the criminal offense Endangering Road Traffic from Art. 289, p. 1 of the CC, stating that the vehicle was actually driven by his father. The defendant's father was explicit that he was the one operating the vehicle and admitted to committing the criminal offense charged against his son. However, his claim was not supported by any material evidence, and on the other hand, the guilt of the defendant was supported by the testimonies of the injured parties, as well as the results of forensic examination and expertise of traces inside the defendant's vehicle. By inspecting the case file, it was not difficult to determine the reason behind the defendant's decision to use this defense method and his father's wish to be considered accountable for the crime. Namely, the defendant was previously given a suspended sentence for the criminal offense Violent Behavior from Art. 344, p. 2 in connection with p. 1 of the CC, and he committed this new criminal offense during the probation period, so there was a possibility of revoking the suspended sentence, which his father was also aware of, and this was his mere attempt to protect his son. After the son's verdict became final, an indictment was filed against the father for the criminal offense of Perjury from Art. 335, p. 3 in relation to p. 1 of the CC.

10 The following persons are released from the obligation to testify, in the sense of the provision of Art. 94, p. 1 of the CPC: 1) person with whom the defendant lives in marriage, extramarital or other type of permanent union; 2) blood relative of the defendant in a direct line, or in a collateral line up to the third degree inclusive, as well as a relative by marriage up to the second degree inclusive, and 3) adoptee and adoptive parent of the accused.



mitted. On the other hand, even when the injured party, for example, has been found to have bodily injuries, and the defendant and the injured party refuse to state who caused the injury and what the mechanism of the injury was, the procedural authority may remain in doubt as to how the injured party was injured. It is also possible for the person who was subjected to domestic violence to change their testimony, which is often an aggravating circumstance in prosecuting the defendant (Banović, Turanjanin, Voštinčić, 2014: 198).

CONCLUSION

Today, the right to remain silent represents an international legal standard in securing the right to a fair criminal trial. It is one of the procedural guarantees within the privilege against self-incrimination.

This right originated in England, where, after being recognized in 1641, over time it gained its full meaning through the establishment of other rights (e.g. the right to counsel) and guarantees (e.g. the presumption of innocence). On the other hand, in continental law, the right to remain silent had a different course of development, and even as late as in the 1960s, there was still legislation that prescribed the obligation of the defendant to provide their defence.

In our law, the right to remain silent existed in all sources of criminal procedural law, but it is important to point out that it cannot be viewed in isolation from other rights and types of procedure. For example, the Criminal Procedure Code of 1953 envisaged this right, but significantly narrowed other defence-related rights, such as the right to a defence counsel and the right to attend the presentation of evidence, so it is debatable what the effect of defence by choosing to remain silent actually was.

According to the currently applicable CPC, the defendant must be informed on their right to not say anything, to refuse to answer certain questions, to freely present their defence and admit or not admit guilt, both before the first hearing and before the hearing at the main trial. No conclusions about the defendant's guilt can be drawn from their decision to defend themselves by remaining silent, and such a decision can only be considered as denial.

Silence and denial as defence methods do not contain circumstances which the defendant has been charged with as their starting point. However, if the defendant opts for explanatory denial, such a testimony will gain a new quality in content, and it can then be assessed in its consistency and logic separately, as well as in relation to other evidence.

The most typical motivation for choosing to remain silent is the initial fear of the prosecuting authorities, shame of admitting to something immoral, defiance or desire to delay the procedure, as well as the intention to thwart the efforts of the prosecuting authorities in establishing the truth. Under certain conditions, the defendant's decision to remain silent can be a successful form of defence, and when making such a decision, the defendant must keep in mind the circumstances under which the offense was committed, i.e. the existence of traces of a criminal offense and the presence of other persons as witnesses.

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