SEVERAL CONSIDERATIONS REGARDING THE CONFESSION VIEWED FROM A DOUBLE TRIAL PERSPECTIVE CRIMINAL AND CIVIL

Marius NECULCEA*
Bogdan IONESCU ****

*Associate Professor "Vasile Goldiş" Western University Arad, B-dul Revolutiei 94, Arad, nmarius2005@yahoo.com
**Attorney, Arad Attorneys Association Attorney Practice – Ionescu Bogdan Arad, str. Mărășești, nr. 28, ap. 8, av.bogdanionescu@gmail.com

Abstract: *Far from exhausting the subject, we have proposed ourselves, in this article, to present a few aspects of the institution of confession from a dual point of view. In the light of the civil procedure, on one hand, the criminal procedure on the other hand respectively. Although the confession, in its core, is and stays the same, it either comes from the statement of a respondent or of a defendant, still, we won't be able to apply a sole regime, common, not differentiated, for both situations. Between the civil and the criminal, first, fundamentally appears the purpose difference, de ratio legis. Precisely in this purpose differentiation (or of goal, role, sense, finality, if you wish) we believe to be the place of the researches and the souse of answers.*

Keywords: *the confession, Civil Procedure, Criminal Procedure, the right to silence*

The confession is, without a doubt, one of the central and fundamental institutions of Law. Thus, we find it evoked in the so called „The book of Dead" (XVI century B.C.) under the form of „negative confessions". Here, we find that the deceased, entering in the great Chamber of Maat, where Osiris and the other 42 will weight his heart on the scale of truth, after previously enchanting an

introductive sacred formula, then continues with a statement of the offences he did not commit – the mentioned negative confession[1].

In a drawing of maximum generality, we consider that the confession may be defined as: **the statement through which an individual admits the truthfulness of a fact**. Indeed, the given definition lacks the degree of strictness and technicism specific to a legal definition, still, we believe that it manages to fully catch the essence of the discussed notion.

The particularity of each procedure (criminal and civil) inevitably implies the tones related to the definition of confession – but, as it may be noticed, the essence of confession stays the same, either we are taking about a confession made within a criminal or within a civil trial.

Even though more a task of the specialty doctrine (and despite the threatening saying *omnis definitio in iure civili periculosa est*), we still find a legal definition of the confession in the NCPC (New Civil Procedure Code)[2]. It can't be said the same for the case of the NCPP (New Criminal Procedure Code). Furthermore, in the criminal trial matter, the legislator does not use the notion of confession, but rather an **equivalent** one, we reckon, the one of acknowledgment[3] respectively (but without giving it a definition).

The authors of criminal procedure around the world and from all times have given similar definitions to the institution discussed

---

[1] In this respect, see Norman C. Habel, *The Book of Jo*b, Westminster Press, Philadelphia, 1985, p. 428.; All these confession start in this manner „I haven't (...)", and, further reproducing some of them: „I haven't murdered anyone." ; „I haven't given order so that anyone is killed" ; „I haven't committed evil instead of truth."; I did not have anything to do with pederasts."; „I haven't defraud in grains weight."; „I did not take the milk out of the babies' mouth."; „I did not catch any fish with bait made out of their bodies."; „I did not damp a flame when I should have left it burn".

[2] And, practically, given in the article 348 paragraph (1) NCPC which holds: „It represents confession the acknowledgement, by one party, out of own initiative, or within the questioning proceeding, of a fact on which the other party grounds its claim or, according to the case, the defence."

[3] When, for example, remembers about „the acknowledgement of the civil claims" in the article 23 NCPP, or about the „admission of guilt" or the „the acknowledgement of the charges", în art. 108 alin. (4), art. 375, art. 434 NCPP.

here. For instance: **a)** "the statements through which the concerned individual totally or partially acknowledges the ground (*le bien-fondé*) of the accusations against him."; **b)** "the confession is a statement through which an individual admits, in full or in part, that he/she has committed a reprehensible fact."; **c)** "the confession is the statement through which the presumed author of an offence admits, in part or in full, the truthfulness of the facts imputed to him/her."; **d)** "the confession is a statement made by an individual that says that he/she committed an offence."; **e)** "the confession is the admission, by the suspected individual, of his culpability towards the facts that are reproached t him/her."; **f)** "the confession (Civil, criminal @ feudal law) is the confession or the acknowledgement regarding what he/she said, did or promised [4]".

Continuing the proceeding on the same ideational line of criminal – civil parallelism, we initially evince that under the aspect of the **evidence value (importance)** of the judicial confession in a civil matter, it ***„fully constitutes proof against the one making it"***– in this regard expressing itself in definite terms the article 349 paragraph (1) NCPC. Practically, it may be said that the civil legislator has *ab initio* set which is the evidential force of the judicial confession. We are basically talking about an extraordinary, absolute force, which "binds" the judge to the said confession, regardless of his intimate belief[5].

Even more technically expressed, in the case of judicial confession, we find ourselves in an **exception** situation, on the level of evidence assessment, situation evoked in the final thesis of the

---

[4] a) M. Franchimont, A. Jacobs, A. Masset, *Manuel de procédure penal*, 2nd edition, Larcier, Bruxelles, 2006, p. 1039.; b) G. Vogel, *Lexique de procédure pénale de droit luxembourgeois*, 3rd edition, Larcier, Bruxelles, 2009, p. 38.; c) P. Keubou, *Précis de procédure pénale camerounaise*, Presses Universitaires d'Afrique, 2010, p. 115.; d) Daniel E. Hall, *Criminal Law and Procedure*, 7th edition, printed in the United States of America, 2015, p. 470.; e) G. Cornu, *Vocabulaire juridique*, 2nd edition, Presses Universitaires de France, Paris, 2001, p. 95; f) *Encyclopédie Métodique. Jurisprudence,* t. 1,Paris, 1782, p. 589.;

[5] In similar meaning, see L. Kezerman, *Le point sur l'aveu en matière civile*, in the paper F. Kuty, D. Mougenot (dir.) *La preuve-Questions spéciales,* Anthemis, Liège, 2008. p. 172.

article 264 NCPC. **The rule** indeed is constituted by the free assessment of evidence, according to the judge's belief, „**except for the cases when the law sets their evidential power.**" As already shown, the legislator has set *expressis verbis* the evidential power of the confession within the article 349 paragraph (1) NCPC, namely this: „*it is full evidence against the one making it*", imperative text, which compels the judge to act accordingly. We see how expressive are (in the civil matter), even nowadays, the sayings of the old doctors in Law: *confessio est probatio omnibus melior, confessio est regina probationum, maxima omnium probationum,* sau *probatio probatissima.*

It is not the case for the **modern**[6]criminal trial law**.** In this case, the confession/acknowledgement **does not** have an evidential value, let's call it pre-set. Thus, in the modern criminal trial law, the confession/acknowledgement **is an evidence as any other is**, not having a previously set value by law and being submitted to the free assessment of the judicial bodies, following the assessment of all the evidence administered in the cause – for this, are to be viewed the dispositions of the article 103 paragraph (1) NCPP. But the reasoning

[6] We have all read (also existing irrefutable evidence) about the abominable tortures of the inquisition, used to take, by all cost (out of the lips of the accused individuals, sometimes from the most absurd facts) an acknowledgement/ confession of the offences „committed".; In a very exact essentiality of those times, the Constitutional Court of Columbia, in its sentence nr. C-102/05 expressed itself so: "What is sometimes called right to non-incrimination, meaning the right to keep silence and not state against yourself and against your closed ones...represents the most important civil warrantees in the criminal trial and are directly connected to the interdiction of torture. The immediate origin of this interdiction is found in the reaction of the liberal world towards the inquisitor practices of the Court of the Holy Inquisition, which operated in various regions of the world. As we remember, the Court evoked considered that it has a mission to conduct investigations against the accused individuals, to pull out confessions from them, and to „save their souls". The confessions therefore represented the supreme proof –*probatio probatissima*– and, in order to obtain them, judges could recall any mean: torture, threats, all to elude the obligation to bring evidence for the charges, the confession being enough. We must also consider that this was realized within some obscure and secret trials, that the judges did not inform the accused individuals about the reason of their detention, but they were, nevertheless, forced to answer certain questions which not only incriminated themselves, but could represent clues for other charges than those that reasoned their detention, thus being started other trials, as obscure and secretive."

of the highlighted differentiations does not only consist in the existence of an express text in the civil matter and in the absence of a similar one in the criminal matter. The issued here are even deeper and we will try (within the limit of the article format) to evoke them in the following paragraphs.

Despite the fact they were written almost a century and a half ago, some legal opinions have stayed equally current and powerful: The term confession is applied to an admission made by a party against his own interest (…) As the consequences are more serious, so is the reception of confession in criminal cases still more stringently watched than that of admissions in Civil suits ; there is greater danger too by far in the former than in the latter of such admissions not being voluntary. All men are in general anxious to detect and prevent crime. The lower orders of officials in the administrations of criminal justice are perhaps but little to be trusted themselves ; are open to corrupt influences, and have the desire to raise their own characters, and increase their chances of promotion by the display of their own activity and astuteness. All experience proves how anxious and unscrupulous this class is to obtain confessions from their prisoners, sometimes by actual violence, sometimes by trickery, sometimes by holding out hopes of pardon or benefit: sometimes by intimidation of threats of punishment (…) maxima *Optimus habemus testem confitentem reum*. The very best of witnesses is an accused person who confesses his guilt. Hence the extreme desire on all ages to obtain from the lips of the accused an admission of his crime. (…) But under this maxim lurks the cruelest fallacy: a fallacy which has exhibited itself practically in the form of torture, judicially administered under the sanction of the law itself. Nor is the maxim by any means of universal truth. Even where a confession is voluntary, that is to say, where it has not been wrung out of the prisoner by the instrumentality of his fellowman, how often has experience proved that a party has accused himself through motives of fear, of hope, of vanity, or even under the influence of insanity or hallucination. [7].”

[7] John Bruce Norton, *The Law of Evidence. Applicable to the Courts of the Late East India Company*, ed. 7, Madras, 1869, pp. 123-124.

Excellent in completion comes here Bonnier: "In all matters, the confession has a great importance. But this importance is greater in civil than in criminal. Where it only concerns pecuniary issues, generally the confession has an absolute force (...); society does not offer protection to private interests (...). On the contrary, in front of the criminal jurisdictions, the belief of confession is not as complete; it does not suffice that an accused individual agrees to be convicted in order for his conviction is legit, his culpability must also be as verisimilar. Here, the principle shown above is applied, to the different spirit that leads the evidence in civil matter and in criminal matter (N°99)[8]. And we conclude this point with the words of the first honorary president of the Court of Cassation of France, Mister Maurice Aydalot, which, in his work entitled „*Magistrate*" wrote: "Throughout my long carrier, I haven't ceased to remember everybody, policemen or training judges, that it's wrong to make the seeking of confession their first concern. Confession is nothing but a mean of evidence among the others and is the most fragile of all. They should never be happy with a confession, as the confession is always retractable. The judicial history is full of cases when an individual confessed facts toward which the events succession has proved that he/she was totally far from. The confession in pure state, meaning the confession that is not justified by other conviction elements, bears the origins of judicial error."

Prior to approaching the last issue of this article, we wish to briefly underline several other differences of confession existent in the two procedures. Thus, if in principle the judicial confession in civil matter cannot be revoked [see article 349 paragraph (3) NCPC[9]],

---

[8] In this regard, see E. Bonnier, *Traité théorique et pratique des preuves en droit civil et en droit criminel*, 5th edition, Paris, 1888, pp. 309-310. ; Going back to nr. 99 of the paper, to which the author refers to in his final thesis, we find, *inter alia* that: In a civil trial, the confession finishes any contestation, and we will be able to say, together with Paul (L. 1, D., *De confess*.) : *Confessuspro judicato est, qui quodam modo sua sententia damnatur*. In a criminal trial, the sole confession of the accused, if not supported by any probability, does not imply his conviction: *Confessiones reorum pro exploratis facinoribus haberi non oportere, si nulla probatio religionem cognoscentis instruat* (...).

[9] It would be truly illogical from a legal point of view to initially grant to the legal confession such an evidential force (a full/absolute one respectively), so that later you

we think that **in the criminal matter, the revocation/retraction is always possible**. So, it was stated that the "retraction does not affect, *a priori*, the culpability of the concerned individual. Therefore, the starting point of self-accusation does not represent the truth, or necessarily the queen of evidence, but more one of the possible conditions of the judicial truth; not an irrefutable evidence[10]."

A consistent and very technical grounding of the reasoning of retraction of the confession in criminal matter we may indeed allow ourselves to complete it with a little simpler argumentation. We indisputably believe that no criminal court may legally convict an individual solely/ strictly based on his/her confession. The confession, in the criminal matter, is not able, *per se* (itself; itself solely) to lead to a conviction solution. In order to pronounce a criminal sanction, it is mandatory that there are **other evidence** as well, which should support the said confession beyond any reasonable doubt. Regarded individually, not accompanied by other evidence which should support its truthfulness, confession can't reach the evidence standard recalled[11]. Finally, is the confession, in the criminal matter, should receive a greater evidential value, we could get to situations (fully plausible) in which extremely dangerous offenders remain free following the confessions of other individuals, which from various reasons may admit offences that they did not commit, thus „saving" the real guilty ones.

---

would allow its revocation according to good plan, unconditionally.

[10] In this respect, see G. Pandelon, *La question de l'aveu en métier penale* (doctorate thesis), 2012, p. 2.

[11] *Beyond a reasonable doubt* is the highest standard of proof that must be met in any trial. In civil litigation, the standard proof is either proof by a *Preponderance of the Evidence* or proof by *Clear and Convincing Evidence.* These are lower burdens of proof. A preponderance of the evidence simply means that one side has more evidence in its favor than the other, even by the smallest degree. Clear and Convincing Proof is evidence that establishes a high probability that the fact sought to be proved is true. The main reason that the high proof standard of reasonable doubt is used in criminal trials is that such proceedings can result in the deprivation of a defendant's liberty or even in his or her death. – in this respect, see S. Johnston, *Beyond Reasonable Doubt*, Lit, Belfast, 2014, p. 63.

We also show that it is so obvious, logical and natural that the rule of indivisibility of confession, from the civil matter should not be „exported" in the criminal matter, so an author expressed himself as follows: "Needless to say that the rule of civil law, according to which the confession is indivisible, cannot be invoked in the criminal matter[12]."

We conclude the article without underlining once more that in the criminal matter: "for silence and refuse to answer, the accused offender or defendant must not be constrained or sanctioned in any way, this being a right of his/her (...). **The right to remain silent** (of not answering questions, in full or in part) also has a natural corollary, which is the obligation imposed to the judicial bodies to not refer to physical or mental constraint means in order to determine the defendant to make statements[13]. In other terms, the statements of the defendant must be the expression of a free will, not of a constraint will. In the virtue of this principle, all detriments made against the physical integrity, moral pressures and any proceeding susceptible to reduce free will of the heard individuals, which have the purpose of determining the individual to make statements[14]."

In the purely civil litigations, things are completely different, in this case, when the one called to questioning **won't be able to prevail himself/herself of his/her right to silence**, and where the absence to questioning as well as the presence, followed by the refuse to answer,

---

[12] In this respect, see M. Rauter, *Traité Théorique et Pratique du Droit Criminel Français*, t. 1, Paris, 1836, pp. 344-345.; We also state here that in a decision of the Franch Cassation, from February 5 1825, it was regulated, simply and firmly: "The principles of the civil law over the divisibility or the indivisibility of confession do not apply in the criminal matter. "

[13] And Implicitly of the acknowledgement/confession.

[14] In this respect, see M. Neculcea, *Considerations regarding the tactic of hearing the accused individual or the defendant*, Concordia publishing house, Arad, 2004, pp. 121-136.; In completion: "The defendant can't (from a legal point of view) be compelled to confess the offence he committed, and if the offence he denied is then proved against him/her, he can't be convicted for that lie. Furthermore, we won't punish the obstinate silence of the accused individual as a violation of justice or of the magistrate. For these reasons, he/she can't be the subject of torture, with the purpose of getting his/her confession." – M. Rauter, *quoted work.*, pp. 344-345.

laic expressed, can be even „sanctioned" with the loss of the trial. The inadmissibility of this extrapolation/analogy, we think is justified by the major differences existent between the civil and the criminal trial.

Conclusions

Far from the thought of a wide analysis on this issue, we only underline that the civil trial is, foremost, distinguished throughout his private feature, through the individual interests found at stake. The criminal trial has a profound public feature, protecting the general interest. If in the civil trial, one of its cardinal principles is the one of availability, completely opposite, the criminal trial is based on the principle of formality. We believe these simple ideas are more than enough for rejecting since the beginning some potential thesis in the defence of the one called to questioning in a civil trial, thesis grounded on the right to be silent.

Bibliography

1. E. Bonnier, *Traité théorique et pratique des preuves en droit civil et en droit criminel*, ed. a 5-a, Paris, 1888.
2. G. Cornu, *Vocabulaire juridique*, ed. 2, Presses Universitaires de France, Paris, 2001.
3. Encyclopédie Métodique. Jurisprudence, t. 1, Paris, 1782/ M. Franchimont, A. Jacobs, A. Masset, Manuel de procédure penal, ed. 2, Larcier, Bruxelles, 2006.
4. Norman C. Habel, *The Book of Job*, Westminster Press, Philadelphia, 1985.
5. Daniel E. Hall, *Criminal Law and Procedure*, ed. 7, printed in the United States of America, 2015.
6. S. Johnston, *Beyond Reasonable Doubt*, Lit, Belfast, 2014.
7. P. Keubou, *Précis de procédure pénale camerounaise*, Presses Universitaires d'Afrique, 2010.
8. L. Kezerman, *Le point sur l'aveu en matière civile*, în F. Kuty, D. Mougenot (dir.) *La preuve-Questions spéciale*s, Anthemis, Liège, 2008. p. 172.
9. M. Neculcea, *Consideraţii privind tactica ascultării învinuitului sau inculpatului*, Concordia publishing house, Arad, 2004.

10. John Bruce Norton, *The Law of Evidence. Applicable to the Courts of the Late East India Company*, ed. 7, Madras, 1869.
11. G. Pandelon, *La question de l'aveu en métier penale* (doctorate thesis), 2012.
12. M. Rauter, *Traité Théorique et Pratique du Droit Criminel Français*, t. 1, Paris, 1836.
13. G. Vogel, *Lexique de procédure pénale de droit luxembourgeois*, ed. 3, Larcier, Bruxelles, 2009