

The Right not to Incriminate Oneself as an Essential Aspect of the Right to a Fair Trial in the Application of Simplified Forms of Criminal Procedure

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This paper analyses the right not to incriminate oneself as a constituent element of a fair trial in the application of simplified forms of criminal procedure. The right to a fair trial is not entirely ensured to persons against whom the simplified forms of criminal procedure which do not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing are applied. To prevent miscarriage of justice, i.e., that innocent persons are convicted as a result of the application of simplified forms of criminal procedure it is essential to ensure the right not to incriminate oneself, which, *inter alia*, includes the right not to be compelled to admit guilt. The author argues that to ensure the right not to incriminate oneself the prerequisite for the application of the simplified forms of criminal procedure should be their acceptance and the admission of guilt by a person. The author also explores whether the system of Latvian criminal procedure provides effective procedural safeguards to ensure that the attitude of the person is expressed knowingly and freely.

Keywords: Right to a fair trial, right not to incriminate oneself, admission of guilt, simplified forms of criminal procedure, simplification of criminal procedure, right to a defence.

Contents

<i>Introduction</i>	205
<i>Explanatory section</i>	207
<i>Summary</i>	212
<i>Sources</i>	213
<i>Bibliography</i>	213
<i>Informative literature</i>	214
<i>Normative acts</i>	214
<i>Case law</i>	214
<i>References</i>	215

Introduction

Simplification of criminal procedure has been one of the major trends in the development of criminal procedure in Latvia and other European countries. “The Criminal Procedure Law” (hereafter – the CPL)¹, which took effect in Latvia in 2005, substantially increased the importance of simplified forms of criminal procedure. When the CPL was being drafted, of key importance was Recommendation

No. R(87)18 adopted by the Committee of Ministers of Council of Europe on 17 September 1987 concerning the simplification of criminal justice, whose objective was to simplify the working of the criminal justice system, thus preventing problems which are caused by an increase in the number of criminal cases.² The most part of criminal procedures are terminated by application the simplified forms of criminal procedure. Statistics reveal that in Latvia in 2011 82% of criminal cases have been adjudicated in court without an examination of evidence.³

One of the most pressing problems which is related to the tendency to attach increasing role to the simplification of criminal procedure and to waive from the traditional principle of the adjudication of a matter in court is the risk of rising the number of wrongful convictions.⁴ Therefore when simplified forms of criminal procedure are applied it is important to observe person's right to a fair trial. As Andrew Ashworth and Mike Redmayne points out: *"In truth, this is one of the central problems in criminal procedure – the need to harmonise a process which brings a case to an effective ruling with the protection of human rights and the fundamental demand that the person's right to a fair trial be observed."*⁵

The right to a fair trial is a constitutionally and internationally guaranteed fundamental human right. The first sentence of Article 92 of the Constitution of the Republic of Latvia (hereafter – the Constitution) states that *"Everyone can protect his/her rights and legal interests in a fair court"*.⁶ The right to a fair trial is included in the most important international treaties on the protection of human rights – in Article 6 of the European Convention on Human Rights (hereafter – the ECHR)⁷ and in Article 14 of the United Nations International Pact on Civil and Political Rights (hereafter – the ICCPR)⁸.

The right to a fair trial is a general right which include a number of specific rights. Paragraph 1 of Article 6 of the ECHR enshrines the right to a fair trial as a general principle, while Paragraph 2 and 3 of Article 6 provide specific elements of the fair trial that apply in criminal cases.⁹ In addition, the European Court of Human Rights (hereafter – the ECtHR) has developed rights that emerge from the general right to fair trial such as the right to equality of arms, the right to a fair presentation of the evidence, the right to a reason justice, the right not to incriminate oneself.¹⁰

The right to a fair trial is not fully ensured in cases when simplified forms of criminal procedure which do not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing are applied. These simplified forms are termination of criminal proceedings, releasing a person from criminal liability (Article 379 of the CPL), termination of criminal proceedings, conditionally releasing from criminal liability (Article 379 (3) and Chapter 34 of the CPL), the injunction of a public prosecutor regarding a punishment (Article 420, Chapter 35 of the CPL), the process of agreement (Chapters 38, 49 and 50 of the CPL), adjudication of a matter in court without conducting examination of evidence (Article 499 of the CPL) (hereafter collectively called also – the simplified forms of criminal procedure).¹¹ Namely a person who agrees to these forms waives certain rights which emerge from the general principle of a fair trial – the adjudication of a case with direct and oral examination of evidence, the right to defend him or herself in this process.

By agreeing to the simplification of criminal procedure in principle a person agrees that he or she is guilty in the incriminating criminal offence. Therefore to prevent the miscarriage of justice when applying the simplified forms of criminal

procedure it is important to respect the right not to incriminate oneself, which *inter alia* include the right not to admit guilt. The article examines whether the CPL effectively ensures the right not to incriminate oneself, in particular, whether it clearly defines the prerequisites of the application of simplified forms of criminal procedure – the consent and admission of guilt.¹² Further the author examines the procedural safeguards which ensure that a person admits his or her guilt and agrees to the implementation of the simplified forms of criminal procedure knowingly and freely.

Explanatory section

The right not to incriminate oneself is internationally recognized specific aspect of the general right to fair trial applied to those who are charged with a criminal offence. Paragraph 2 (g) and 3 of Article 14 of the ICCPR sets out two main aspects of the right not to incriminate oneself – the right not to be compelled to testify against himself and the right not to confess guilt. Although the ECHR does not include the right not to incriminate oneself, 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 6.¹³

The Constitution does not expressly provide the right not to incriminate oneself nor its separate elements, however it derives from the “fair trial” concept provided in Article 92 of the Constitution, since the content of the article is determined in accordance with the interpretation in the practice of international norms on human rights.¹⁴ Although the CPL does not include the right not to incriminate oneself in the list of basic principles of criminal procedure, still the observance of that right is closely linked to other basic principles – the right to the adjudication of a matter in court (Article 15) guaranteeing of human rights (Article 12), the presumption of innocence (Article 19), and the right to a defence (Article 20).¹⁵ Several specific norms of the CPL ensure the right not to incriminate oneself. The CPL sets out the right to testify or refuse to provide testimony (Article 66 (1) 15, 63 (1) 6, 66 (1) 15, 70 (1)). According to Article 150 of the CPL at the beginning of the first interrogation of a person which has the right to defence – a person against whom the criminal proceedings have been commenced, a detained person, a suspect, or an accused – the rights not to testify shall be explained and such person shall be notified that everything that he or she says may be used against such person. A person which has the right to defence is not liable for knowingly giving false testimony. This ensures the right not to incriminate oneself as basic human right characteristic to the criminal justice system.

A person waives his or her right not to incriminate oneself when simplified forms of criminal procedure are applied. A person is held criminally liable and punished if simplified forms of criminal procedure are applied – the injunction of a public prosecutor regarding a punishment, the process of agreement, the adjudication of a matter in court non-conducting of an examination of evidence. Negative consequences are applied to a person also by termination of criminal proceedings releasing a person from criminal liability or conditionally releasing from criminal liability, because in such cases a person shall not be exonerated (Article 380 of the CPL). It means that by applying the mentioned simplified forms of criminal procedure a person is found guilty for committing a criminal offence.

It is important to ensure that when a decision is taken on a simplified form of criminal procedure, the attitude of a person should be taken into account. “*The most*

essential element of justice is the right to be heard (...). That means that no decision which is not fully unconditional in favour of the individual can be taken if the relevant person has not been given an opportunity to express his or her position vis-a-vis the relevant issue."¹⁶ Taking into account that by application of the simplified form of criminal procedure a person is found guilty, a person's attitude includes both consent and admission of guilt. Before analysing whether this condition is met in the norms of CPL, it is necessary to understand what is the admission of guilt.

The concept of admission of guilt has to be seen in conjunction with the concept of guilt in the criminal procedure. In criminal law "guilt" refers to the subjective aspects of a criminal offence, as related to the person's attitude toward the objective elements of the criminal offence (the criminal offence, its consequences and its causal link), whether deliberately (intentionally) or through negligence.¹⁷ In criminal procedure, by comparison, the concept of guilt has different meaning. Emphasis is placed on proving a person's guilt that covers not just proving the existence or non-existence of all the constituent elements of a criminal offence, but also a duty to prove other circumstances referred to in the Criminal Law¹⁸ and the CPL which are of importance in the fair regulation of criminal legal relations, for instance, whether there are circumstances which exclude criminal liability provided in the Criminal law (Article 124 (2) of the CPL). A person is innocent within the meaning of criminal procedure if he or she cannot be summoned to criminal liability even if the person's guilt could be proven as one of the constituent elements of a criminal offence.

Taking into account that the "admission of guilt" is the concept of the criminal procedure "guilt must be seen not only as an admission related to an element of the subjective aspects of the criminal offence, but also and more broadly, the individual's admission to all circumstances on the basis of which he or she is to be summoned to criminal liability. (...) Guilt (...) includes two essential and interlinked issues – actual activities and their legal classification."¹⁹ Consequently the admission of guilt means the admission of the actual activities which constitute conditions of the incriminated criminal offence that are to be proven and the legal qualification of these activities.

Admission of guilt has an important role as evidence however its use has to be restricted. The Chamber of Criminal Cases of the Supreme Court handed down a ruling in Case No. PAK-31 on June 20, 2006, ruling that "(...) a conviction can be based on the defendant's admission of guilt only if other evidence determined during the investigation confirms the verbal admission."²⁰ The admission of guilt should not be sufficient evidence to found a person's guilty.

An admission of guilt is not only one of evidence, but it is also of key importance when applying simplified forms of criminal procedure which do not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing. As noted previously, the application of these forms means that the individual waives some of the rights which are a part of the principle of a fair trial, and that means that the individual's attitude toward the application of the simplified forms is of key importance.

The next question is whether the admission of guilt has to be distinguished from the consent to the application of the simplified forms of criminal procedure. According to the CPL both admission of guilt and consent is mandatory prerequisites if a simplified form includes punishment of the individual – the injunction of a public prosecutor regarding a punishment (Article 420(5)), the process of agreement

(Article 433(1), Article 541(2), Article 544(2)), adjudication of a matter in court non-conducting of an examination of evidence (Article 499(1)).

The CPL does not require admission of guilt as mandatory prerequisite for application the simplified forms, which does not include the punishment of a person, i.e., termination of criminal proceedings, releasing a person from criminal liability or conditionally releasing from criminal liability. Article 415 (4) of the CPL states that the termination of criminal proceedings conditionally releasing from criminal liability shall be allowed only with the voluntarily and clearly expressed consent of the accused. Article 379 (5) provides: *“The termination of criminal proceedings, releasing a person from criminal liability, shall not be permitted, if the person who has committed the criminal offence, or the representative thereof, objects to such termination.”* The mentioned forms do not require that a person directing the proceedings has obligation to ascertain whether a person fully admit his or her guilt in the incriminating criminal offence. A question here is whether this is enough or an admission of guilt should also be declared as a prerequisite for applying them.

In Latvian legal theory it is pointed out correctly that although when a person is released from criminal liability or conditionally released from criminal liability there is no punishment, but still the person’s guilt is determined.²¹ Article 380 of the CPL states that a person who undergoes such a process is not exonerated. *“That means that this action relates to a determination of the person’s guilt, which is legally possible only on the basis of a legally appropriate set of evidence.”*²² In addition, the termination of criminal proceedings conditionally releasing from criminal liability involves not just the determination of the person’s guilt, but also a set of unfavourable legal consequences for the individual. The public prosecutor shall determine for the person a probationary period of not less than three and not exceeding eighteen months and may impose duties referred to in the Criminal Law (Article 415 (5) and 415 (6) of the CPL, Article 58 of the Criminal Law). The determination of a person’s guilt in criminal offence can cause adverse consequences also in the future, for example, by not allowing to hold certain positions in law enforcement agencies.²³

Contrary arguments can also be provided – if a prerequisite for applying the mentioned forms is only a consent, a person is given a wider choice, namely, a person has a choice to agree to the implementation of these forms but not required to express his or her attitude toward the prosecution. At the same time a person directing the proceedings has a duty to prove person’s guilt. However, this approach can not be regarded as proportionate to the possible infringement of person’s rights.

Also the legislature does not intend to divide the simplified forms of criminal procedure depending on the admission of guilt. This is confirmed by Article 417 (1), that states: *“A copy of a decision shall be issued to the person in relation to whom criminal proceedings are being terminated, conditionally releasing from criminal liability, and the consequences of such termination of criminal proceedings shall be explained to such person and he or she shall be notified regarding his or her rights to familiarise with the materials of the criminal case. The person shall certify with a signature thereof that he or she agrees to the qualification of the criminal offence (..)”* Thus the CPL provides, that a person conditionally released from criminal liability certify the qualification of the criminal offence, which, as mentioned above, include the admission of guilt. This shows that deficient framework setting the preconditions of the simplified forms of criminal proceedings is a result from inadequate harmonization and evaluation of the specific norms of the CPL.

It can be concluded that the CPL has to determine a duty of a person directing the proceedings to receive both consent and admission of guilt before taking a decision on the termination of criminal proceedings, releasing a person from criminal liability and conditionally releasing from criminal liability by amending Article 379 (5) and Article 415 (4).

The next question is whether there are effective procedural safeguards ensuring that a person admits guilt and agrees to the simplification of the criminal procedure knowingly and freely. The right not to incriminate oneself determines the right not to be compelled to give evidence against oneself. The ECtHR in the case *Saunders v. United Kingdom* revealed the justification of the right not to incriminate oneself: *“Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (...). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.”*²⁴

The innocent person can be compelled to admit his or her guilt and to agree to the application of the simplified forms of criminal procedure. Officials who perform criminal proceedings may be interested in admissions of guilt so that the procedure can be completed more quickly. Therefore it can not be excluded the possibility that the persons are compelled to admit guilt through various illegal methods.²⁵ Such methods are, for example, aggressive and psychologically violent interrogation or the presentation of false information about the evidence that is available in the case. One of the problems in EU member states, for instance, in Italy, Hungary, Belgium and Poland is that the decisions on pre-trial detention rely on the fact that a person has remained silent or has not confessed his or her guilt.²⁶ Also in Latvian practice there are cases when not admission of guilt or not testifying is evaluated as the resistance of a person to the reaching of the aim of criminal proceedings thus supporting the need for the application of arrest.²⁷ The use of such illegal methods creates a high risk that an innocent person confesses guilt.

There can be also other reasons why an innocent person can wrongly admit guilt and agree to the application of simplified forms of criminal procedure. A person can consider him or herself guilty even if not guilty of the incriminated criminal offence. As already noted, admission of guilt relates not just to actual activities, but also to the legal classification thereof. People without sufficient legal knowledge may agree to the classification of their activities without understanding the essence of the matter. *“Thus people may not understand that there are no causative links between their activities and the consequences (e.g., the individual has struck another person and does not deny it, the individual does not deny the relevant consequences, but does not have sufficient knowledge to make use of the fact that the consequences relate to the individual characteristics of the victim (an inborn defect, etc.). Such people may not understand circumstances which exclude criminal liability (self-defence, etc.), the relevant legal nuances etc.”*²⁸ It is also quite possible that people will admit guilt in the place of other close person, for example, a child.

Another essential issue is that a person may have an interest in such simplified forms. Fear of the legal system in and of itself lead persons to co-operate with prosecutors and to admit their guilt. The benefits of a simplified form of procedure include an avoidance of adjudication of a case in a court that is a long and difficult process.²⁹ A person can agree to the application of simplified forms, to avoid more

unfavourable consequences, for example, believing that he or she will receive a lesser punishment. Especially, it is related to the fear of a sentence of deprivation of liberty.³⁰ At the same time, these are only benefits for people who are guilty of a criminal offence, however *“there is no question that there are also innocent defendants who feel pressure to admit to their guilt, because they believe that there is the risk that they will not be exonerated, and so it would be better to admit to the crime in the hope of receiving a sentence that does not involve incarceration.”*³¹

In order to ensure that innocent persons are not forced to agree to simplified forms of criminal procedure and admit guilt, the CPL must provide effective procedural guarantees. *“The system must ensure that as far as is possible, the person’s decision on agreeing or disagreeing with a simplified criminal procedure is free and in cognisance of the relevant consequences and that where there are doubts about the person’s guilt, the right to a trial is ensured. The idea of a fully voluntary decision is illusory (..), but there are ways of expanding this freedom.”*³²

It is very important to observe the presumption of innocence whenever a decision on a simplified form of criminal procedure is taken. To ensure that admission of guilt and consent is legal and to avoid the innocent person found guilty incorrectly based on the false admission of guilt, it is necessary to observe the duty to prove a person’s guilt and provision that an admission of guilt is just one piece of evidence, and it is not sufficient to convict the individual.³³ As noted above, guilt must be proven whenever a simplified form of criminal procedure is implemented which do not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing. Therefore these forms can not be applied only on the bases that a person admits his or her guilt, if it is not approved by other evidence.

An important procedural safeguard is the right to information that requires a duty to explain to a person the legal consequences of the application of the specific simplified forms and to inform that he or she can choose whether to agree to them or not. At the beginning of negotiations regarding the simplified forms of criminal process it is also important to explain to a person that he can also not agree to these forms and not to confess guilt. If a person is not informed about these rights, the confession can not be considered lawful and simplified forms of criminal process can not be applied.

In each case, the CPL should oblige the duty of the prosecutor to explain the consequences. The duty is in place when the issue relates to the injunction of a public prosecutor regarding a punishment (Article 422(1)), the process of agreement (Article 434(1)1 and Article 545(2)), and adjudication of a matter in court non-conducting of an examination of evidence (Article 412(4) and Article 499 (2)). The same duty should also be applied to situations in which criminal procedure is terminated releasing a person from criminal liability, and that would require supplements to Article 379 of the CPL. When criminal procedures are terminated conditionally releasing from criminal liability, this duty is in place only after a copy of the relevant decision has been presented to the individual (Article 417.1). Article 415 of the CPL should also be supplemented stating that the prosecutor must explain the consequences of the procedure before the individual has agreed to it.

One of the significant procedural safeguards that helps to ensure that a person admits guilt and state their agreement freely and knowingly is state ensured legal assistance. Legal theory rightly points out that persons must have legal aid before deciding on the application of simplified forms of criminal procedure.³⁴ A defence counsel can make sure that prosecutors are not relying on illegal methods to force a

defendant into an admission of guilt, also helping the individual to take the relevant decision and to understand the relevant legal consequences.

The mandatory participation of a defence counsel would be desirable in all cases in which simplified forms of criminal procedure that do not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing. Article 83 (2) states that the participation of a defence counsel is mandatory in criminal proceedings that take place in accordance with the procedures of agreement proceedings from the moment when negotiations have begun with the accused regarding the entering into of an agreement. The mentioned article should be supplemented by providing mandatory participation of a defence counsel also when a criminal proceedings is terminate applying the injunction of a public prosecutor regarding a punishment, the process of agreement, releasing a person from criminal liability and conditionally releasing from criminal liability.

Another procedural safeguard which helps to ensure that the consent to the simplification of the criminal procedure and admission of guilt is obtained legally is recording procedural actions in a sound and image recording. Article 141 (2) of the CPL provides that the progress and results of an investigative action may be recorded in a sound and image recording. However in most cases they are recorded in minutes (Article 141 (1)), because the institutions are not provided with the appropriate technical equipment. An important step in improving the situation is equipping courts with video and audio recording equipment as a result of the project "Modernization of the Courts in Latvia" which ended 2012th June.³⁵ In the future it would be desirable that the investigation and prosecution institutions are also equipped with such technique. The recording of the investigative actions in a sound and image recordings is important taking into account that particularly in this stage there is a greater risk that improper compulsion could be used against a person.

The above mentioned procedural safeguards have important role for ensuring that persons agree to simplified forms of criminal procedure and admit their guilt freely and knowingly, thus reducing the risk of miscarriage of justice or that innocent persons are convicted for a committing of a criminal offence.

Summary

1. The right to a fair trial is not fully ensured when simplified forms of criminal procedure which do not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing are applied. To prevent conviction of innocent persons when applying the simplified forms of criminal procedure it is important to respect the right not to incriminate oneself which *inter alia* includes the right not to admit guilt.
2. A person by agreeing to the mentioned simplified forms waives his or her right not to incriminate oneself and agrees that he or she is guilty in the incriminating criminal offence. Therefore a prerequisite of the application of these forms is a person's consent and also admission of guilt. In CPL both prerequisites are required in case of application of those simplified forms which include a punishment, i.e., the injunction of a public prosecutor regarding a punishment, the process of agreement and adjudication of a matter in court without conducting the examination of evidence. The CPL should determine a prerequisite – admission of guilt – in case of applying the termination of criminal proceedings releasing a

person from criminal liability and conditionally releasing from criminal liability by Article 379 (5) and Article 415 (4).

3. The criminal justice system should provide effective procedural safeguards to ensure that a person to whom simplified forms of criminal procedure are applied agrees to them and admits his or her guilt knowingly and freely. It requires the observance of the presumption of innocence that includes a duty to prove a person's guilt and provision that an admission of guilt is just one piece of evidence not sufficient to convict a person. An important procedural safeguard is the right to information that requires a duty to explain to a person the legal consequences of the application of the specific simplified forms and that he or she has a right not to agree to these forms and not to confess guilt. The duty of a person directing the proceedings to explain the legal consequences should be included in Article 379 and Article 415, which regulates termination of criminal proceedings, releasing a person from criminal liability and conditionally releasing from criminal liability. One of the significant procedural safeguards that help to ensure that a person admits guilt and state their agreement freely and knowingly is state ensured legal assistance. The mandatory participation of a defence counsel would be desirable in all cases in which simplified forms of criminal procedure that does not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing take place. To ensure it amendments in Article 83 (2) of the CPL would be required. The sound and image records of the investigative actions in which the simplified forms are negotiated would significantly help to ensure that they are applied lawfully. These procedural safeguards would significantly reduce the risk of miscarriage of justice or that innocent persons by applying these forms are convicted for a committing of a criminal offence.



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- ⁹ Paragraph 2 of Article 6 of the ECHR provides the presumption of innocence, and paragraph 3 of this Article provides the following minimum rights: to be informed of the accusation; to have adequate time and the facilities for the preparation of his defence; to defend himself in person or through legal assistance; to examine or have examined witnesses; to have the free assistance of an interpreter.
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