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## **Odborný profil:**

JUDr. Renáta Dolanská je absolventkou Právnickej fakulty Univerzity Pavla Jozefa Šafárika v Košiciach. Pôsobí ako advokátka zapísaná v zozname advokátov Slovenskej republiky vedenom Slovenskou advokátskou komorou a ako mediátorka zapísaná v zozname mediátorov vedenom Ministerstvom spravodlivosti Slovenskej Republiky. Je zriaďovateľkou a riaditeľkou EDUKAČNÉHO CENTRA Mimosúdneho Riešenia Sporov a CENTRA Mediácie a Probácie a zároveň pôsobí ako predsedníčka mediačného centra ALTERNATÍVA Mediačné centrum mimosúdneho riešenia sporov. Je garantkou a lektorkou akreditovaných programov v oblasti mediácie a pôsobí aj ako vysokoškolský pedagóg na GTF Prešovská univerzita, študijný odbor: Probačná a mediačná práca. V súčasnosti je doktorandkou na Vysokej škole zdravotníctva a sociálnej práce sv. Alžbety v odbore sociálna práca.

**Bergner A.**

Judge Trial court of Petach Tikva, Israel

## **THE RIGHT TO REMAIN SILENT – POLICE MISCONDUCT**

**"Power tends to corrupt, and absolute power corrupts absolutely".**

**(Lord Acton 1887)**

This phrase written by Lord Acton at 1887 suggests and warns that when a person holds power over another person, there is a tendency that this powerful person will corrupt the use of this power.

At this short thesis I would like to write about the Right to Remain Silent of a suspect who is under arrest and subject to police powers and talk about a case involving a misconduct by the police.

*Executing this right arise a conflict of interests:* the police interest to investigate the crime and get a confession from the detainee and the detainee and

suspect interest to avoid Self-incrimination and by executing the fundamental right to remain silent.

"Law enforcement officers possess enormous amounts of power, which can be used against citizens to deprive them of their freedom, search them and their dwellings, seize their property, and use force against them. These powers are legally permitted under specific circumstances, and law enforcement officers are trained to know when these powers can be legally applied.

...

Power and authority are tools that law enforcement officers must use judiciously and ethically. Without an ethical life, this power will be misused, creating a power imbalance that is bad for the officer, the agency, and society".

(Ethics in Law Enforcement, Chapter 4: Key Ethical Issues within Law Enforcement – by Steve McCartney and Rick Parent).

In a case held in Netanya trial court (**C" C 14868-05-09 Tama Dvir and others V Erica Mizrachi and others**, published at [www.nevo.co.il](http://www.nevo.co.il)): the police arrested 4 men who put a bomb outside a girl's school in east Jerusalem. While these 4 men were under investigation (they were called the "Bat-Ayin underground"), the police decided to arrest and investigate one of the men's wife, Mrs. Etty Dvir.

Mrs. Dvir was a young lady holding in her hands an 8 months baby. Both of them were taken by the police to the police station.

When they arrived to the police station Mrs. Dvir announced that she hasn't committed any offense and that she is executing her right to remain silent.

The police investigator was not satisfied with Mrs. Dvir's announcement and tried to force her "to talk". The police investigators threatened her that if she remains silent, her baby will be taken from her to the welfare authorities. Later on they slapped her face, took her baby by force from her, cuffed her to the chair, took pictures of her in that position and send them to her husband's investigators and more....

All these acts occurred while Mrs. Dvir was executing her fundamental right to remain silent, for one purpose: to make her talk for investigation purposes and to push her husband to confess after seeing pictures of his wife cuffed.

Later on, Mrs. Dvir was released from police custody under no conditions and with no indictment against her.

The right to remain silent is part of what is called: "The Miranda Rights".

Miranda Rights were created in 1966 as a result of the United States Supreme Court case of *Miranda v. Arizona*. The Miranda warning is intended to protect the suspect's Fifth Amendment right to refuse to answer self-incriminating questions.

It is important to note that Miranda rights do not go into effect until after an arrest is made. The officer is free to ask questions before an arrest, but must inform the suspect that the questioning is voluntary and that he or she is free to leave at any time. The answers to these questions are admissible in court.

It was held by the US court at the Miranda case that the government needs to notify arrested individuals of their Fifth Amendment constitutional rights, specifically: their right to remain silent; an explanation that anything they say could be used against them in court; their right to counsel; and their right to have counsel appointed to represent them if necessary. Without this notification, anything admitted by an arrestee in an interrogation will not be admissible in court.

Section 47 (a) of the Evidence Ordinance [new version] 1971 (Israeli legislations) states:

**"A person does not have to give evidence if it includes confession in a fact which is fundamental to the foundations of the offense he is or might be accused of".**

Section 2(2) of the Criminal Procedure (Testimony) (Israeli legislations) states:

**"A person who is investigated as such, will have to answer correctly all the questions, presented to him at the investigation, by police officer or another authorized officer as mentioned, except questions which their answers will put him under criminal indictment".**

Suspect and detainee's right to remain silent is a fundamental and basic right and constitutes the heart of the criminal proceedings purity which prevents a person to be deprived of due process of law, as the US 5<sup>th</sup> Amendment states:

**"No person shall ... be deprived of life, liberty, or property, without due process of law ..."**

**"In principle – unlike litigant's confession in the civil level – "silent" of an accused cannot be used as evidence to his guilt, as this is a fundamental right of any person after all"** (Kedmi supreme court Judge, on the Evidence, part 1 2009 page 19).

**"The immunity from self-incrimination (or "right of silent"), expresses one of the fundamental rights under the law granted to any person in Israel and is: the right to say nothing – verbal or in writing – that might be used as evidence to his guilt in a criminal proceedings.**

...

**Apparently, it is about a right not to answer incriminating answer to a certain question. However, when it is about a "suspect" – the right expands and become a right to total silent"** (Kedmi Supreme Court Judge, on the Evidence, part 1 2009 page 27-28).

In Mrs. Dvir's case, she chose to execute her right to remain silent, but the police investigator breached her duty (her ethical and fundamental duty) to let her execute her rights by trying to make her change her will and force her to talk !!

The suspect and detainee right to remain silent is fundamental and comes to allow this person to give any announcement/testimony in free will.

"Section 7 of the Charter accords a detained person a pre-trial right to remain silent, and the scope of that right extends beyond the narrow formulation of the confessions rule. The rules relating to the right to remain silent adopted by our legal system, such as the common law confessions rule and the privilege against self-incrimination, suggest that the scope of the right in the pre-trial detention period must be based on the fundamental concept of the suspect's right to freely choose whether to speak to the authorities or remain silent. This concept, which is accompanied by a correlative concern with the repute and integrity of the judicial process, is consistent with the right to counsel and the right against self-incrimination affirmed by the Charter. ...

Under s. 7, the state is not entitled to use its superior power to override the suspect's will and negate his choice to speak to the authority or to remain silent. The courts, therefore, must adopt an approach to pre-trial interrogation which emphasizes the right of a detained person to make a meaningful choice and which permits the rejection of statements which have been obtained unfairly in circumstances that violate that right of choice.

...  
Once the right to remain silent attaches, any communication between an accused and an agent of the state (including a suborned informer) is subject to the right and may proceed only if the accused waives the right;" (R. v. Hebert [1990] 2 S.C.R. 151: Scope of right to silence, the court of Appeal for the Yukon territory, Canada).

According to this approach, when a suspect person expresses his will to remain silent, any communication between him and the police investigator is subject to this right and can exist only when the suspect waives his right.

At case P"H (Jerusalem) 5034/02 the state of Israel V Yarden Morag and others (published in [www.nevo.co.il](http://www.nevo.co.il)) it was held:

"Suspect being warned before giving his version or answers the investigators questions has a purpose which is the constitutional right granted to the suspect to be silent, facing a man of authority investigating him and that he does not have to fear him or be afraid of him and also he does not have to rely on his promises".

The police in this case breached their legal, ethical and moral duties which deprived Mrs. Dvir from due process of law.

Mrs. Dvir's case was a claim for damages for the police misconduct. The court ruled in her favor and granted her damages.

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## **ACCESS TO JUSTICE IN THE AREAS OUTSIDE THE CONTROL OF NATIONAL GOVERNMENT ON THE EXAMPLE OF EASTERN UKRAINE**

Human rights protection represents the top priority for the international community along with maintaining international peace and security and conflict resolution [1]. The instruments of international law are aimed to directly or indirectly increase the protection of human rights. However, the implementation of international instruments and international co-operation remains the biggest challenge and precludes the UN from becoming an effective tool "harmonizing the actions of nations in the attainment of common ends" [1]. Art. 1 of the UN Charter points out the importance of respect of the principle of self-determination. However the interpretation of the principle raises a whole range of issues which remain among the hardest and most sensitive to resolve.

The Luhansk and Donetsk Peoples Republics (LPR and DPR) represent the territorial scope of the study. It is relevant to start the analysis of human rights protection on the territories outside the control of national authorities by specifying the legal status of these territories. It is addressed on the basis of international law,