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Problems Using the Anonymous Witness

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Abstract. The article examines the procedural issues of using anonymous witnesses in national legislation and international Law. The study aims to improve the scientific and practical foundations for using anonymous witnesses. The countries' legislation allows exceptions from the direct examination of evidence in court, and anonymous witnesses should also be attributed to these exceptions, fulfilling specific requirements defined in the case law of the ECHR.

The term "pseudonym" should be enshrined in the CPC governing the participation of an anonymous witness in criminal proceedings. A pseudonym must meet the requirements of anonymisation and exclusion of identification and be distinguished by reliability. There may be cases when a pseudonym is chosen by a witness who, when selecting, cannot subconsciously choose a surname and letters that he often used, which increases the risk of recognising the witness.

During the trial, anonymous witnesses are usually located in a particular room for witnesses under a pseudonym. They remain invisible to the participants in the process but also to the court. This circumstance deprives the court of verifying the voluntariness of testimony and the absence of pressure on the witness. Various ways induce a witness to perjury and give the necessary testimony. Anonymising a witness may also arise after they have given evidence in the usual manner. Laws that allow anonymous witnesses do not consider the court's right to verify the testimony's circumstances, the voluntariness of the testimony and the absence of pressure on the witness. Classifying witnesses is regulated mainly by subordinate acts for official use. The method of classifying witnesses should be held by a particular law or supplemented by the CCP governing the use of anonymous witnesses. The court should have the right to check the voluntariness of testimony and the absence of pressure on a witness to give false testimony.

Keywords: anonymous witnesses; pseudonym; testimony; classifying of witness; security; pressures witness statement.

INTRODUCTION

Applying various pressures to persons who assist in the implementation of justice in criminal cases, including witnesses, victims, accused persons, etc., in severe crimes is one of the most dangerous means aimed at the violation of the justice system. Confidential testimony is not a legal arrangement, even if there is an exception. As C. Beccaria said that "The uncertainty of crimes hath sacrificed more victims to secret tyranny than have ever suffered by public and solemn cruelty" [7, p. 25].

In some cases, the effectiveness of justice depends on eliminating these pressures and protecting the security of process participants, including witnesses.

One of the ways to ensure the security of witnesses' protection is by providing anonymity. The witness is one of the important participants in establishing truth in the case and elements of the crime by the absence of attitude to the investigation of crimes. Giving the witness testimony aggravating or facilitating the position of the accused or the victim, in some cases, puts him in a difficult place, puts him in a situation dangerous

to his life and health, and requires him to protect the security in the pre-and post-justice administration periods. Anonymous witnesses appear mostly in cases related to organised and violent crime.

The defendant presently faced with the prospect of anonymous testimony against him is dependent on prosecution disclosure for the formulation of his defence and subject to the undeniable prejudice he will suffer in the mind of jurors. In granting a witness anonymity, the court has decided that the defendant or his associates pose a threat before the jury can consider this prosecution assertion independently [1, p. 91].

Within the Council of Europe framework, the principle of anonymity is applied for the protection of freedom of communication on the Internet and for the administration of justice. The 2003 Council of Europe Committee of Ministers Declaration on freedom of communication on the Internet defines the anonymity principle as the will of users of the Internet not to disclose their identity to ensure protection against online surveillance and to enhance the free expression of information and ideas.

Rule 33 of the Rules of ECHR determines that public access to a document or to any part of it may be restricted in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties or any person concerned so require, or to the extent strictly necessary in the opinion of the President of the Chamber in particular circumstances where publicity would prejudice the interests of justice.

According to the Rome Statute of the International Criminal Court, a trial has to conduct with due regard for the protection of victims and witnesses (article 64), and the court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Grounds for such protection are age, gender as defined in article 7, paragraph 3, health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children (article 64).

Despite legislative bases for anonymous witnesses, specific issues remained outside the regulation, calling into question the testimonies received from anonymous witnesses. For example,

international instruments and national laws govern general questions regarding the use of anonymous witnesses, such as purposes, available measures, etc. Some requirements for anonymous witnesses are defined in the decisions of the ECHR. We believe that anonymous witnesses, as an exception to the direct examination of evidence, should find their detailed regulations at the national and international levels.

METHODS

The article uses general scientific and particular methods: analysis and synthesis, formal-legal, comparative-legal, objectivity, legal research, and "case study" of legal forecasting. The detachment helped analyse the formation and development of the institute of anonymous witnesses based on states' legislative and practical problems. The method of systematicity was used for the determination of goals and priorities based on an analysis of the theory and practice use of anonymous witnesses. The method of legal analysis was used in the research, with the help of which the works of scientists and provisions of national legislation and international acts on anonymous witnesses were analysed. The formal-legal method was used to study the elements of unnamed witnesses, definitions, etc. The comparative law method helped to compare the legislative regulation of anonymous witnesses in other states or international documents. The "case study" method was applied to study the European Court of Human Rights practice on the application of the institution of anonymous witnesses or its elements. The legal forecasting method was used to propose amendments to national legislation and international acts to improve the use of anonymous witnesses and to make scientifically grounded forecasts about the future development of the institution of anonymous witnesses.

RESULTS AND DISCUSSION

The Law on State Protection of Participants in Criminal Proceedings to the security measures applied to process participants include changing the documents and external appearance of the protected persons. These measures are used in exceptional cases based on their consent when it is impossible to ensure the safety of the protected persons by other criteria. The protected persons receive identity and other documents with changed questionnaire data, and their external

appearance is altered. The Law also stipulates that in the cases where the protected person is present, the trial will be held closed by the decision of the court (judge), interrogation of this person without the participation of the accused on the reasoned decision of the court (judge), one accused without the participation of another. Thus, the Law envisages interrogating witnesses and other participants without revealing accurate information about their identities but by announcing the changed, new information.

Article 51-2.1 of the CPM of the Republic of Azerbaijan provides the carrying out of criminal proceedings with security when there is a real threat to the life and health of process participants, using videoconference communication and preventing external influences on them.

Interrogation of process participants with ensuring the safety and use of anonymous witnesses are different. In interviewing anonymous witnesses' accurate information about identity, is not disclosed, and other trial participants do not see it.

The information about the identity of the witnesses is not known to the defence side when anonymous witnesses are used. The defence side needs an opportunity to verify the evidence of these witnesses, evaluate them, and doubt their truth. Since the information about the identity of the witness is hidden, it is impossible to assess the interest of the witness in the course of the case and the ability to correctly understand the circumstances in which the witness testified.

Using anonymous witnesses in the first approach leads to a violation of the principles adversarial of the court proceedings, ensuring the rights and liberties of a person and a citizen established by the Constitution, and assessing the evidence in criminal proceedings. According to para. II of Article 71 of the Constitution of the Republic of Azerbaijan, everyone's rights and freedoms have restricted the rights and freedoms of others. According to Article 19.4.5, the prosecuting authority shall secure the right of the suspect or accused to interrogate any witness against him.

According to the Article 125.1 of CPC Azerbaijan Republic, if there is no doubt as to the accuracy and source of the information, documents and other items and the circumstances in which they were obtained, they may be accepted as evidence. At first view, the interrogation of anonymous witnesses has violated the principle of the

immediacy of the trial, of the perception of evidence by the court. The proximity of the examination of evidence means that all evidence is obtained from the source without outside help. They are examined directly in the trial, including the testimony of witnesses. The legislation of states allows for exceptions to the principle of direct examination even if it is objectively impossible to examine specific material evidence directly. For example, according to Articles 327 and 329 of the CPC of the Republic of Azerbaijan, the testimony of the accused and the witness may be made public or shown (Article 353 of the CPC of the Republic of Kazakhstan - read out the testimony of the victim and witnesses; Article 371 of the CPC of the Republic of Moldova - reading of the witness's testimony). The participation of anonymous witnesses in legal proceedings is also an exception to the principle of direct examination if specific requirements are met, defined in the case law of the ECHR.

"Indeed, Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be considered. However, their life, liberty or security may be at stake, as interests generally come within the ambit of Article 8 (art. 8) of the Convention. Such interests of witnesses and victims are, in principle, protected by other substantive provisions of the Convention, which imply that the Contracting States should organise their criminal proceedings so that those interests are not unjustifiably imperilled. Against this background, principles of the fair trial also require that in appropriate cases, the interests of the defence are balanced against those of witnesses or victims called upon to testify" [18, par. 53; 10, par. 70].

The use of statements made by anonymous witnesses to find a conviction is not under all circumstances incompatible with the Convention [18, par. 52; 10, par. 69].

Regarding anonymous witnesses, the ECHR notes, "The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him" [2, par. 127].

The ECHR has defined the criteria that the use of anonymous witness statements does not constitute a violation of the Convention. That is, it is allowed in cases where the sole purpose of anonymising witnesses is to ensure the life, liberty or health of witnesses and their relatives [18,

par. 53]; finally, it should be recalled that a conviction should not be based solely or to a decisive extent on anonymous statements [18, par. 55]; regarding the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice, then that measure should be applied [18, par. 58]. Given the place held in a democratic society by the right to a fair trial, limitation of the rights of the protection must be strictly necessary. If less restrictive measures are effective, then these measures should be used instead of strict measures.

The ECtHR notes that the national authorities must have adduced relevant and sufficient reasons to keep secret the identity of certain witnesses [18, par. 71; 3, par. 47]. However, if the anonymity of prosecution witnesses is maintained, the defence will face difficulties that criminal proceedings should not typically involve [18, par. 54; 10, par. 72]. An applicant should not be prevented from testing the anonymous witness's reliability [4, para. 29; 5, par. 42].

The ECHR indicated that, when assessing whether the procedures followed in questioning an anonymous witness had been sufficient to counterbalance the difficulties caused to the defence, due weight had to be given to the extent to which the anonymous testimony had been decisive in convicting the applicant. If this testimony was not powerful, the defence was handicapped to a much lesser degree.

According to par. 9 of the Article 352 of the CP of Ukraine, in exceptional cases, to ensure the security of a witness to be examined, the court, proprio motu or upon the motion of parties to criminal proceedings or the witness himself, passes a reasoned ruling to explore the witness concerned with the use of technical means from another premise, including outside court's building, or in other way making his identification impossible, and ensures parties to criminal proceedings the possibility to ask questions and hear answers thereto. If there is a danger that the witness's voice can be identified, the examination may be accompanied by acoustic disturbance. Before such a ruling is made, the court shall be required to establish whether the parties to criminal proceedings have any objections to examining a witness in the conditions making his identification impossible and, if found founded, decline to have the witness reviewed under the rules of this par-

agraph. And this completely excludes the tag of witnesses and victims, and the interrogated person becomes anonymous for the participants in the trial. Considering and resolving the criminal case on its merits, the court must identify such a person. But for the rest of the participants in the problem, the interrogated person remains anonymous.

Article 58(3) of the Turkish Code of Criminal Procedure provides more detail for the hearing of anonymous witnesses. Hearing in the presence of those present will constitute a grave danger to the witness and if this danger could not be prevented otherwise or if it will include a threat of revealing the material truth. The judge may hear the witness without the presence of those with the right to be present. Audio and video calls are made during the hearing of the witness. The right to ask questions is reserved.

Erol Tatar, the procedure of hearing, explains so: "Before the hearing of the secret witness, his real identity information is determined and recorded. The witness is given a different name to be used in the investigation or trial. The witness is invited by the given code name and is heard under this name. If necessary, are taken appropriate protection measures against him. Detected identity information and pseudonyms are not included in the main file but are recorded in a different job number. This report is kept in a separate and secure section. The duty of protecting the witness's personal information belongs to the public prosecutor during the investigation phase and the court during the prosecution phase. This information is not included in the file and is kept in a separate safe until the serious dangers are eliminated. When the obstacle is removed, it is put in the file - disclosure of this information before it is lifted is subject to criminal sanction. The anonymous witness may be heard face to face as stated in the ordinary procedure or heard without the parties. But identity information will not be disclosed in all cases. Since personal information is not disclosed, they are called "anonymous witnesses" [11, p. 288].

Criminal Evidence (Witness Anonymity) Act 2008, the kinds of measures that may be required to be taken about a witness include 2 (c) that the witness is not asked questions of any specified description that might lead to the identification of the witness.

A pseudonym, as practice shows, consists of a fictitious surname, a letter designation, which is

indicated as one letter in quotation marks, two notes separated by a dot. We consider that for legal clarity term "pseudonym" has to be legally enshrined in the norms of the CPC governing the participation of an anonymous witness in criminal proceedings. A pseudonym must meet the requirements of anonymisation and exclusion of identification and be distinguished by reliability. An interesting fact is the choice of a pseudonym by the investigator or witness. There may be cases when a pseudonym is chosen by a witness who, when selecting, cannot subconsciously choose a surname and letters that he often used, which increases the risk of recognising the witness.

During the trial, anonymous witnesses are usually located in a particular room for witnesses under a pseudonym. They remain invisible to the participants in the process but also to the court. This circumstance deprives the court of verifying the voluntariness of testimony and the absence of pressure on the witness. There are various standard and non-standard ways of inducing a witness to perjury and giving the necessary evidence. Anonymous witnesses are liable for providing false testimonies and refusing to testify. Anonymising a witness may also arise after deposition in the usual manner. The above laws allowing the use of anonymous witnesses do not

consider the specified circumstances of the use of anonymous witnesses.

CONCLUSIONS

As seen from the analysis of international documents, they regulate the general framework for anonymous witnesses in legal proceedings. Detailing the use of anonymous witnesses' international records refers to national authorities' authority. The precedents of the ECHR clarify the principles, conditions and purpose of using anonymous witnesses. But, the goals and grounds for applying measures to ensure the security of witnesses are common and verified by practice. The security measures for anonymous witnesses differ in the dangers to life, freedom and human rights. Under current conditions, ensuring anonymity is only possible with technical means. Technical means can change individual characteristics, including voice, appearance, and speech features, which help to identify a person. Classifying witnesses is regulated mainly by subordinate acts for official use. A special law should control the process of categorising witnesses. The court should have the right to check the voluntariness of testimony and the absence of pressure on the witness to give false testimony.

REFERENCES

1. Alan Ward, G. (2012). The evidence of anonymous witnesses in criminal courts: now and into the future. *The Denning Law Journal*, 21(1), 67–92. doi: 10.5750/dlj.v21i1.342
2. Case of Al-Khawaja and Tahery v. the United Kingdom [GC] (Council of Europe), 15.12.2011. URL: Retrieved October 20, 2022 from [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22002-262%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-262%22]})
3. Case of Visser v. the Netherlands (Council of Europe), 14.02.2002. Retrieved October 20, 2022 from [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-60112%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-60112%22]})
4. Case of Birutis and others v. Lithuania (Council of Europe), 28.03.2002. Retrieved October 20, 2022 from <https://jurinfo.jep.gov.co/normograma/compilacion/docs/pdf/CASE%20OF%20BIRUTIS%20AND%20OTHERS%20v.%20LITHUANIA.pdf>
5. Case of Kostovski v. the Netherlands (Council of Europe), 20.11.1989. Retrieved October 20, 2022 from <https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-57615&filename=CASE%20OF%20KOSTOVSKI%20v.%20THE%20NETHERLANDS.docx&logEvent=False>
6. Ceza Muhakemesi Kanunu [Criminal Procedure Code] (Turkey), 17.12.2004, No 25673. Retrieved October 20, 2022 from <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.5271.pdf> (in Turkish).
7. Cesare Bonesana di Beccaria, & Voltaire (1764). *An Essay on Crimes and Punishments*. Retrieved from http://files.libertyfund.org/files/2193/Beccaria_1476_EBk_v6.0.pdf

8. Declaration on freedom of communication on the Internet (Council of Europe), 28.05.2003. Retrieved October 20, 2022 from <https://rm.coe.int/16805dfbd5>
9. Criminal Evidence (Witness Anonymity) (UK), 2008. Retrieved October 20, 2022 from <https://www.legislation.gov.uk/ukpga/2008/15/contents>
10. Case of Doorson v. the Netherlands (Council of Europe), 26.03.1996. Retrieved October 20, 2022 from https://www.hr-dp.org/files/2013/09/08/CASE_OF_DOORSON_V._THE_NETHERLANDS_.pdf
11. Tatar, E. (2013). Gizli Tank [Secret Witness]. *Ankara Barosu Dergisi*, 4, 284-296 (in Turkish).
12. Rules of Curt (ECHR), 03.10.2022. Retrieved October 20, 2022 from https://www.echr.coe.int/documents/rules_court_eng.pdf
13. Rome Statute of the International Criminal Court (International), 01.07.2002. Retrieved October 1, 2022 from <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>
14. The Code of Criminal Procedure of the Azerbaijan Republic (Azerbaijan). Retrieved October 1, 2022 from <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/64892/92594/F1457735324/AZE64892.pdf>
15. The Criminal Procedure Code of the Republic of Kazakhstan (Kazakhstan), 04.07.2014, No 231. Retrieved October 1, 2022 from <https://adilet.zan.kz/eng/docs/K1400000231>
16. The Criminal Procedural Code of the Republic of Moldova (Moldova), 14.03.2003, No 122-XV. Retrieved October 1, 2022 from https://cjad.nottingham.ac.uk/documents/implementations/pdf/criminal_procedure_code_moldova_en_2003_tb040712.pdf
17. The Criminal Procedure Code of Ukraine (Ukraine), 13.04.2012, No 4651-VI. Retrieved October 1, 2022 from <https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text>
18. Van Mechelen and Others v. The Netherlands (Council of Europe: European Court of Human Rights), 23 April 1997, No 55/1996/674/861-864. Retrieved October 1, 2022, from <https://www.refworld.org/cases,ECHR,3ae6b6778.html>