

## The Topic of the Issue: WITNESS PROTECTION

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WITNESS PROTECTION IN CRIMINAL PROCEDURE

### IN SUPPORT OF EFFICIENT JUDICIARY

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#### **In a large number of cases a statement of a witness is the only evidence that the court has at its disposal**

Article 96.1 of the Criminal Procedure Code (hereinafter CPC) envisages that persons who are likely to furnish information regarding the criminal offense (the perpetrator and other relevant circumstances) are being summoned as witnesses.

In other words this means that all persons except the defendant may be witnesses if they know anything about the fact that are being established in the criminal proceeding and unless they have been explicitly excluded from giving the testimony by the CPC. The witness' statement is of great importance in the criminal proceedings. The importance of such evidence does not lay in a more favorable treatment of such evidence by the law enforcement authorities over other types of evidence, but in the fact that in the large number of cases the statement of a witness represents the main evidence that the Court has at its disposal.

Without a doubt, a witness is the most frequent but also the most unreliable evidence, since the evaluation of witness' statement should include various criteria and circumstances relevant for bringing final conclusion on the validity of someone's statement. The issues that are being raised today, in theoretical discussions or in actual court decisions refer to the human capability to testify and to the related problems. The problems detected with witnesses are mistakes made by witnesses in their observation, memory failures, confabulations, changing or supplementing memory data, mistakes made in judgments and in data interpretation and mistakes made during interpretation.

#### **The risk of 'loosing a witness'**

In order to achieve undisturbed court proceedings, one of the important conditions is that a person summoned as a witness is provided with the opportunity to give his statement undisturbed and without any problems, while the obligation of the court and other relevant state authorities is to enable it. One of the greatest failures of law enforcement authorities is 'the loss of a witness', meaning of those witnesses that wanted to testify and honestly and truly say before the court what they saw and heard and not to withhold anything what they have knowledge of.

Due to the mentioned reasons, Article 109 of the CPC envisages that the court is bound to protect a witness and the injured person from an insult, threat or other assault. Upon a motion of the investigative judge or the president of the panel, the president of the court or the public prosecutor may request from police authorities to undertake special measures regarding a protection of a witness and/or of the injured person. Article 504 p of the CPC – a special chapter of the law referring to the Organized Crime - stipulates that public prosecutor may order a special protection for the certain witness and his family members.

Article 15m of the Law on the Organization and Competence of Government Authorities in the Fight against Organized Crime, stipulates that the court may decide on the protection of personal data of a witness or injured party following explained proposal by the interested party. The regulations on the proceedings for criminal offences of organized crime from the Chapter XXIX of the CPC are being implemented in accordance with the Article 13 of Law on the Organization and Competence of Government Authorities in the War Crimes proceedings. Based on Article 11 of the latter law a Special Department is being established in the District Court in Belgrade for administrative-technical tasks, tasks related to witness and victim protection and for providing conditions for the application of the procedural provisions of this Law. Aimed at implementation of the mentioned Law a Book of Regulations on Internal Organization of the Special Department – War Crimes Chamber of the District Court in Belgrade was passed. These regulations, in Article 6, stipulate that witness/victims service provides protection and implements and organizes all other assignments in relation to endangered persons, based on the law and other general acts.

Omitting to protect the witness that is to come to the court to testify in an efficient, qualitative and clear way may result in witness avoiding or refusing to come to the court which further may cause court

proceedings to be incomplete. The court personnel may recognize this situation in cases when a witness, who gave his statement during the investigation, suddenly fails to appear at the main hearing and by doing so creates a dilemma of what to do with such a witness and his previous statement. Criminal Procedural Code provides a solution in Article 337 which stipulates that records containing the statements of witnesses, the co-accused or of the already convicted defendants, may be read if the court orders is at the main hearing if the person who gave the statement has died, became afflicted with mental illness or cannot be found, or if his appearance before the court is impossible or involves considerable difficulties due to oldness, illness or other important reasons or if witnesses refuse to testify at the trial without legal cause.

Article 504 j of the CPC, a part of the law that refers to organized crime, stipulates that statements and information that the public prosecutor collected during the pre-criminal proceedings may be used as evidence in the criminal proceedings, but the verdict may not be based only on said evidence. This regulation, naturally, may also be applied in the war crimes proceedings. Additionally, Article 14 of the Law on Organization and Competence of Government Authorities in War Crimes Proceedings stipulates that "if it is not possible to ensure the presence of a witness or victim at the main hearing, their questioning may be conducted via video conference link. "Subsequently, it is also stipulated that questioning of a witness or a victim in this manner may be also b conducted through the international criminal legal assistance.

## TADIĆ CASE - TEST

The question is being raised which criteria is to be adopted and what circumstances should be fulfilled in order for the court to decide to question a witness or a victim via video conference link. For domestic proceedings a test acknowledged by the ICTY court panel in the 'Tadić' case is absolutely acceptable. In this case it was requested that following conditions be fulfilled for the video conference link:

- a) it is necessary to prove that witness statement was of such importance that it would be unjust to continue the proceedings without that statement
- b) witness must be prevented from coming or must have a good reason for not being ready to come to the court
- c) defendant must not suffer any damage in the exercising of his right to face the witness

### **A step forward**

It is important is to detect several facts in this provision. First, it is an exemption from the rule that witnesses need to be present in the courtroom in order to give their statement, after which the parties in the trial would be able to ask questions and object to witness's statement. Moreover, it represents exception to the principle of direct approach stipulated by the Article 352 of the CPC that envisages that all evidence is to be directly presented during the main hearing. Without a doubt, it was the intention of the legislator to make a step forward in modernizing procedural law not only in the part that refers to technical achievements, but also in a need to loosen up the presentation of evidence phase, to accelerate it and make it more efficient by way of implementation of such tools of the procedural technique. The statement of such a witness/injured party must be of importance, and in addition, it is necessary that the presence of such a witness/injured party at the trial is impossible to secure. The Court is the one to estimate, within its competence, which statement of which witness is to be considered important.

Also, it can happen that witness is prevented or that he has a 'good reason not to be ready to come to the court', if a witness or his family is being threatened or attacked in any other way. Described circumstance would be sufficient reason for the court to apply such way of interviewing witness during the presentation of evidence.

One should mention that some future legislative activities are partially aimed at a problem of the protection of witnesses and other participants of criminal proceedings. The law on protection of witnesses and other participants in criminal proceedings, sets forth conditions and procedure for providing protection and assistance to participants in the criminal proceedings and persons close to them, and that due to the fact of giving testimony or information for the purpose of bringing evidence during criminal proceedings, were exposed to severe danger to life, health, corporal inviolability, freedom or property of large scale. Protection program may be implemented before, during and after termination of the criminal proceedings for the following persons: suspects, defendants, witness collaborators, witnesses, injured parties, court experts, competent specialists and persons close to them. The Commission for the Application of the Protection Program and Protection unit within the Ministry of Interior will be in charge for the implementation of the protection program. Decisions on application, extension, termination and cessation of the Protection Program will be passed by the Commission for Application of the Witness Protection Program. The Commission shall consist of three members and they shall be as follows: a judge of the Supreme Court of the Republic of Serbia, Deputy Republic Prosecutor and Head of the Protection Unit. The Protection Unit is in charge for the implementation of the Protection Program. At present,

within the Security Directorate of the Ministry of Interior there is a Division for Security of other Republic Officials that currently provides protection to witnesses in the ongoing proceedings before the Belgrade District Court Special Department for Organized Crime and the War Crimes Chamber.

## MEASURES

Within the Protection Program the following measures are being implemented: physical protection of person and property, change of the place of residence or transfer to other institution, concealment of the identity and data of ownership and the change of the identity. The newly adopted law envisages international cooperation in the implementation of the Protection Program.

### **The anonymous witness**

The working group for drafting the Amendments of the CPC also submitted its proposal regarding the status of the protected witness in the criminal proceeding and the special method of interviewing a protected witness. It is stipulated that this special method of interviewing protected witness encompasses one or more special measures of protection: Closing the sessions for public, interrogation of a witness under a pseudonym, disguise of witness's appearance, voice distortion of a witness who is testifying from a separate room, using internal TV or the video link with a possibility of audio and video distortion. Also introduced are measures of temporary limitations of defense attorneys and the defendants to be informed about all or some of the data pertaining to the identity of the protected witness, which represents the introduction of the institute of the anonymous witness in the domestic criminal procedural law. The regulations on protected witness will analogously applied to a suspect, defendant, witness collaborator, defendant, court expert and competent expert.

With the aim of implementation of the Law on Organization and Competence of Government Authorities in War Crimes Proceedings, the initiative was launched for foundation of the Unit for providing assistance to victims/witnesses in the criminal proceedings before the District Court in Belgrade. The basic idea is the need to create conditions for institutionalization of an organizational unit of the District Court in Belgrade War Crime Chamber and Specialized Department for Organized Crime and Criminal Panels of the District Court in Belgrade working with defendants charged for committing severe criminal offences (terrorism, rape, banditry, severe cases of corruption...), that would work with victims/injured parties and witnesses in the aforementioned criminal proceedings. The basic goal of the project is for the victims/witnesses to get necessary financial, psychological, social, legal and other types of necessary support and for mentioned participants in the trial to be informed about the organization of the Court, court departments/chambers, the course of the criminal proceedings, their rights and obligations, and all in the service of achievement of greater efficiency in the work of judicial bodies and the promotion of the work of judicial bodies and its capacity-building in criminal proceedings which are of special interest for strengthening of the judicial function in the domestic society.

Perhaps it would be appropriate to quote the statement of former US State Attorney Janet Reno who said "...a crime represents a stressful experience... it can destroy one's security and stability. For the victims and witnesses of a crime of greatest importance is a way they are being treated by those employed in criminal judiciary, which should take care of their sufferings and should encourage their rights and strengthen their protection, give them support necessary for them to heal and hold the criminal responsible for the injury that he inflicted".

The message hidden in this statement fully corresponds to the present moment and to the contemporary needs of both the material and procedural criminal legislation and certainly represents one of the tasks which domestic judiciary should resolve in the forthcoming period.