The Topic of the Issue: WITNESS PROTECTION

ELEMENTS FOR CONTINUATION OF PROFESSIONAL DISCUSSION

THE CROWN WITNESS

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This discussion shall not be about formal legal requirements for obtaining the status of witness collaborator, about comparative legal analysis, nor even about the regulations of our Criminal Procedural Code (CPC), the protection of witness collaborator and procedural legal nature of this institute in general, nor about numerous other problems and dilemmas. The focus of this analysis is on the essential, material legal aspects of this issue.

As its own sui generis institute of criminal procedure, witness collaborator ("crown" witness, "pentiti" witness, etc) is not a novelty in the legal framework of some countries. Namely, historically this institute originates back to medieval times, beginning in England, where prosecuting authorities gave monetary awards to those individuals who would testify as witnesses against potential defendants. Soon thereafter, competent authorities of this country gave numerous advantages, namely in a form of more lenient punishment, to those co-guilty persons who agreed to testify against other co-guilty persons. These types of co-defendants were called crown witnesses.

Since then, and until today, in all of the justice systems of the countries that have this institute, the reasons for its establishment are the same or at least similar, as well as the material legal requirements that a person needs to meet in order to be awarded this status.

Above all, the overall accepted opinion is that the crime, especially the most severe crime, "developed" at least one step faster from the legal and political instruments used by the States for combat against it. The most severe crimes, above of all referring to the organized crime, was becoming more and more sophisticated and more cruel (both according to the inner organizational structure of the criminal groups, as well as according to the method and the tools used to commit criminal offenses) and was not limited neither by in-country nor by outside boundaries, nor did it have any national characteristics.

For the purpose of precision, one has to add an exception to this last statement, as war crimes committed on the territory of the former Yugoslavia unfortunately had, in addition, the national characteristics.

How can one then confront this type of crime, when it is difficult or almost impossible, to get "crown" evidence?

Both historical and present day experience indicates that many countries concluded and later decided that the most efficient method to obtain this evidence is to penetrate the "side of the adversary". In order to penetrate the "other" side, one has to use the "insiders", i.e. persons who are members of certain criminal groups (organized crime) or members of some armed formations in the case of war conflicts (soldier of military, police, paramilitary and similar). It is obvious that ratio legis is logical, but the open questions remains whether it is justified.

In legal frameworks of all of the countries the so called insider, regardless of the legal terminology (witness collaborator, crown witness, pentiti witness), is, without exception, a person who as a member of a certain criminal group or armed formation, participated or co-participated in any manner in committing a specific criminal offense proscribed by the law. This is the first and the most essential material requirement set forth in the legislation of all of the countries that have this institute, that is needed for obtaining the status of witness collaborator.

Therefore, this status cannot be awarded to a "regular" witness or to a victim witness (injured party). These witnesses, as well as the witness collaborator, can get the status of a protected witness, which indicates that protected witness is a broader term, also capable of including the witness collaborator, which in reality is the most frequent scenario.

The other material requirements for obtaining the status of witness collaborator are very similar in every legislation, including our CPC, and can be summarized to: significant and important contribution of testimony of such witness for discovering and proving the specific criminal offenses, as well as for

prevention of potential future criminal offenses, and also that such contribution is more important than the harmful consequences of the criminal offenses committed by such witness.

From the above, one can conclude that the witness collaborator is a special type of witness, with procedural characteristics of a regular witness, but also with certain procedural characteristic of a defendant (as procedurally defined in legal theory). Previously he is a potential defendant, then a potential witness, depending on the requirements set forth by the law for the both roles. Basically, awarding potential perpetrator of a criminal offense a status of witness collaborator means awarding a specific privilege that, depending on legislation of respective countries, ranges from the absence of criminal prosecution, abandonment of already instigated criminal prosecution, or more lenient punishment, or relinquishment from the punishment or part of the punishment, which represents a specific form of conditioned opportunism of criminal prosecution.

It is these privileges awarded to a witness collaborator, otherwise atypical for general rules of criminal procedure, that represent the basic reason for conflict between those "pro" (in favor) and "contra" (against) the establishment of this institute in the procedural legislation, between the relevant actors both from the field of science and from legal practitioners.

Pro et Contra

Arguments "against" the introduction of this institute in the criminal justice systems could be summarized to:

• Negation of one of the basic principles of criminal procedural system- the principle of legal certainty and equality between the same type of participants in the criminal procedure- More precisely it means that, regardless of the type, nature and forms of perpetrating criminal offenses, in laymen's words "rules of the game" for determining relevant facts for criminal responsibility and punishment must be the same for everyone. In the contrary, the participants of the criminal proceedings, above all of the same type of proceedings, are not in equal position, which means that some of the defendants can be placed in a more disadvantaged procedural position.

That is, all of the countries that have established this institute in its criminal justice systems, limit the application of this institute only to the proceedings related to specific crimes, i.e. listing specific criminal offenses or types of criminal offenses. For example, pursuant to our CPC this institute is applicable only in the proceedings for criminal offenses with characteristics of organized crime and for criminal offenses against humanity and international law (Chapter XVI of the Basic Criminal Code), from which one can conclude that the "rules of the game" during the establishment of the relevant facts in respect to the existence or non existence of the elements of the criminal offense, criminal responsibility and punishment, are not the same for the potential perpetrators of every criminal offense, which negates the principle of equality in legal positions of the same type of the parties, and of all of the participants in the criminal proceedings.

The aforementioned dilemmas are less present in theory, legislation and judicial practitioners of Anglo-Saxon countries (USA, England), some European countries (Italy), than in the classic European countries such as Germany. Learning from its tragic experience from the 70-ties of the last century, the famous terrorist organization "Bader Meinhof", and out of the fear from further terrorists' activities, with dramatic increase of different types of crime, corruption, money laundering, trafficking in person and in drugs, Germany started passing special laws for each of these topics, in the 90-ties of the last century, and these laws that included provisions referring to the "Crown" witnesses, stipulated an expiration date of these provisions, which has been extended on several occasions, resulting in final elimination of this institute from the German legislation by the end of 1999.

• Deprivation of the rights of the victims (injured parties) - It is well known that for the types of crime where the witness collaborator exists as one of the evidentiary tools, the proceeding is always conducted against multiple defendants. When one (or more) of the defendants transforms to a witness collaborator, with all the enclosed privileges, then the injured party in the broadest sense of this term, is deprived of not only the right to seek material, financial and moral satisfaction, but also of the right to fulfillment of justice, and usually we are talking about the most severe consequences for the victim (injured party). If one adds to it the legal impossibility of the subsidiary prosecution (e.g. such as under our CPC, Article 504.3.Z), then this reflects another argument in support of the hereby stated opinion.

• Compromising the evidentiary value of the testimony of a witness collaborator - In theory, but in practice as well, it is well known that witnesses, in the overall procedural definition of such term, because of the objective and subjective circumstances, are not an absolutely reliable evidence, even when it is an objective and non-interested party, which always directs the Court to exercise necessary caution in ascertaining the truthfulness of the testimony.

It is undisputed, from the onset, that a witness collaborator has a great interest in testifying in a certain way, in order to obtain a privilege that was set forth by the law. Regardless of the evidentiary limitation prescribed by the law (e.g. that the Court can not base its decision exclusively on such evidence, or that the witness collaborator cannot refuse to answer certain questions) it remains questionable whether the Court can in all cases, regardless of the special attention given, objectively evaluate the degree of the evidentiary value and veracity of the testimony of a witness collaborator.

The arguments of the supporters of this institute in the criminal justice systems (and more of them are practitioners than academics) is mainly based on the realistic assessment of the actual criminal political condition in a particular environment, and the necessity of rational and efficient approach in combating the most grave types of crimes, and can generally be summarized to:

• Proving this type of crime, mainly Organized Crime (and in the territory of the former Yugoslavia and War Crimes) is extremely complex, difficult, and sometimes impossible to do by using classical procedural tools, which would have as an end result prevention of responsible prosecution of actually perpetrated criminal offenses.

• From the position of the objective social interest it is better to intentionally give amnesty to a certain number of "less guilty" perpetrators, or less dangerous perpetrators of criminal offenses (partially or completely) from criminal repercussions, of course under the condition that they, with their cooperativeness (terms often used in the ICTY proceedings) in criminal proceedings against other, much more "dangerous" perpetrators of criminal offenses, crucially contribute to successful proving of the case. This position was pictorially and metaphorically described as "better let the small fish through the fishnet so you can capture the bigger fish".

By analyzing the aforementioned pro et contra argumentation one can conclude:

In all fairness, the objections of the opponents of this institute are all generally acceptable, judging them from the position of abstract formal legal reasons, and in that sense one can talk about the weaknesses of the criminal justice systems in combating the gravest forms of criminality.

However, from the position of social reality- the graveness, complexity, numerousness and danger of this type of criminality, the lack of possibility to responsibly prosecute it, as well as certain consequences for the society as a whole, even if we have to qualify this institute as a "necessary evil", it realistically has to be treated as useful and necessary. Is the small and beforehand prescribed correction of the "rules of the game" a graver consequence than surviving in the company of the unpunished perpetrators of the gravest criminal offenses, which in certain moment could realistically take control of the economic, financial and political system?

The victims (injured parties) of this type of criminal offenses by lack of prosecution or lack of punishment of less dangers perpetrators, are minimally prevented from satisfying their interests, because, first of all, they can get material, financial and moral satisfaction from other defendants, namely from the main and the bigger ones, who planned, organized, ordered and executed these criminal offenses, and second of all, but not less important, by doing this these criminals are eliminated from the society for a longer period of time and consequently prevented to engage in future criminal activity which, in lack of this intervention, is a certainty.

It is certain that the evidentiary value of the testimony of the witness collaborator is compromised "from the onset", but the Court can, and after all is legally required to, apply good faith and comprehensive analysis of any and all admissible evidence and based on this evaluation properly determine their evidentiary value.

Being more inclined to the followers of the "pro" witness collaborator (crown witness, pentiti witness) institute in the criminal justice systems, for all the aforementioned reasons I believe that this institute, even though it may be a "necessary evil", is still an efficient evidentiary tool in combating the most grave forms of criminality (organized crimes and war crimes).

As we know, the institute of the witness collaborator has been established in our procedural legislation (CPC, Chapter XXIX) at the end of 2002. Not wanting to use this opportunity to criticize some of its inconsistencies and imprecision, I believe that its establishment was both necessary and useful and hence justified. It would have been better had it occurred long before that, having in mind the time when our society was suddenly faced with the criminalization of the whole society, with all the consequences we already know.

Besides the necessary legal and technical amendments and the potential amendments of some CPC provisions from this chapter, which is necessary to do as soon as possible, I am of the opinion that in the near future, when political and economical stability is reached and the overall security improves, the

current privileges of the witness collaborator (absence of criminal prosecution, abandonment of already instigated criminal prosecution) can be thoughtfully and gradually reduced to relinquishment from the punishment or part of the punishment, and at the end to reduction in sentencing.