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ANONYMOUS WITNESS STATEMENTS IN THE EUROPEAN COURT OF HUMAN RIGHTS – IS IT POSSIBLE TO ACHIEVE THE RIGHT TO A FAIR TRIAL?

ABSTRACT: The purpose of this paper is to stimulate reflection on the use and significance of anonymous witness statements in the practice of the European Court of Human Rights. The analysis of selected leading cases in this area will provide an overview of the development of European judicial practice regarding the fact that the right of the defense is seriously compromised when such statements are accepted in criminal proceedings. A significant number of judgments represent a setback, particularly concerning the realization of the right to confrontation, which is characteristic of cases involving statements from anonymous witnesses. In such cases, the question arises as to what counterbalancing mechanisms could compensate for the denial of the accused's rights when the identity of the individual providing incriminating statements is concealed. The statements of anonymous witnesses have, in a way, influenced the practice of the European Court of Human Rights regarding the establishment of a legal standard that has gradually taken on the role of a corrective mechanism, maintaining the balance between opposing parties. The question is whether such a corrective mechanism for the procedural protection of anonymous witnesses can preserve the interests of both sides.

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1. Introduction

The issue of acceptance the anonymous witness statement in the European court of human rights has always caused concern in the regard of the fact that anonymity by itself or hiding of identity of person who gives the statement, appears to be deprivation of the rights of the accusant, which cannot be justified. This is the main reason why one should start from the beginning, while analyzing the judgment of the European court of human rights, more correctly from the judgement which could be in a way considered the precedent, when it comes to the question of exposing the facts that could be represented as the factors of balance. Anonymous witnessing was thought to be an extraordinary measure, which was to be applied restrictively for many years. Likewise, anonymous witnessing was considered to be violation of human rights, i.e. defence rights, particularly in regard of his confrontation with anonymous who give incriminating statements.

The precedent like that, can be recognized in the decision of the European court of human rights in the case *of Doorson v. Netherland,*[1] whereas anonymous witnessing wasn't regarded as the violation of defence rights, because of impossibility of confronting anonymous witness and the accusant. In this decision, European court of human rights stands by the attitude that in the cases when some disadvantages which were the base that the defence functioned are compensated, so the decision cannot be solely or to the significant extent based on the anonymous witness statement. However, this is not case here, because in regard of the fact that the national court hasn't reached his decision solely or in significant extent on the basis of anonymous witness statement. Furthermore, European court of human rights quoted, that the statement gathered by witnesses under the conditions in which the defence rights cannot be provided to the extent, regulated by European Convention, are to be treated with extraordinary attention (*Doorson v. The Netherlands*, § 76). Moreover, to what extent the European court of human rights takes into account the balance of interest of the opposing sides, can be seen on the basis of the attitude in the quoted judgement or that there are wasn't violation of article 6 of the Convention, in regard of the fact that the judgement was not

[1] *Doorson v. The Netherlands*, app. no. 20524/92, 26.03.1996. ECHR.

solely or to the significant extent, based on anonymous witness statement, and on other supportive evidences (*Doorson v. The Netherlands*, § 34).

On the basis of already exposed, one can conclude, that the quoted decision of European court of human right, was the pioneer when it comes to the protection of anonymous witnesses, but with fulfilment of certain conditions, which stood up as the factors of balance, i.e. preservation of the right to fair trial. Protection and development of human rights have become main characteristics of the practise of the European court, which has led to the adaptation of human rights provisions to social changes (Ilić, 2012, p. 136). This decision was not exclusively the basis for the strengthening of the position of anonymous witnesses in the criminal procedure, and it can be also considered to be basis for Recommendation No. R (97) 13 of the Committee of Ministers to member states concerning intimidation of witnesses and the rights of the defence. Bases on the fact, that the recommendation was brought only one year after the judgement in the case of Doorson v. Netherland, it can be concluded that it was necessary to define and explain, in which cases anonymous witness statement would be accepted as evidence. Although does not have obligatory character, they are very important when analyzing this delicate question, like for example the complication of the statement of anonymous witness. The Recommendation itself is designed in the way it doesn't support disruption the factors of balance as that the article 10 defines that anonymous witnessing is considered to be an extraordinary measure.

In the theory and in practice, they are theories that the judgement cannot solely or to significant extent based on the statements of anonymous witnesses, but also that the determing facts which the result of the procedure depends on must be proved, by other proofing means. This attitude of European court of human rights is a legal standard, which was later applied in other judgments in which the statements of anonymous witness were used as the evidence in the criminal procedure. It is not precised or explained what is implied by the determing part of the judgement of European court of human rights, but it should mean that besides anonymous witness statement, there must be enough evidence, which by themselves were on the level reasonable doubt, i.e. the standards of probability for the opening the criminal procedure, hence the case when the statement of the anonymous witness rises the level of probability from reasonable doubt, to the level of complete certainty, which is enough for the judgement of conviction (Lazarov, 2018, p. 91).

The anonymity of witness should be allowed, with some other conditions, only when the identity of the witness is unknown to the accusant, while the way of interrogation when the identity of the witness is familiar

and important to the accusant would have adverse effect on fairness (Pajčić, 2005, p. 55). Anonymity of the witnesses according to the accusant does not imply anonymity of the judges, although that type of practice is not unfamiliar in specific countries. That type of practice is allowed in Peru and Columbia in the cases of criminal offenses related to drug trafficking and terrorism. In this countries we have judges who used numbers rather than their names, and on court documents the they are known as faceless judges (Brkić, 2006, p. 294). The use of evidence gained by the statement of anonymous witness is allowed under the conditions: 1) that the defence didn't submit the request for the cross – examination; 2) that it obviously comes out from the other evidence, that the same judgement would be reached; 3) that the trial court when judging shows cautiousness and criticism (Vasiljević & Grubač, 2011, p. 1016).

Although this decision is not the oldest one which refers to the question of the statement of anonymous witness and evidence credibility, we still can say with the certainty that after this decision the European court has established the minimum of the conditions necessary for the establishment of balance of rights of the opposing sides. After reaching this judgement, as three factors of balance i.e. as three level test, the court separated allowance the possibility to the defence that in adequate and appropriate way deny the statements of the opposite sides, and the judgement of conviction cannot solely or to the significant extent based on the statements of anonymous witnesses, as if there were justified reasons which justify protection of the identity of the witness. We can freely say that the decision in the case of *Doorson v. Netherland* was considered to be precedent, when it comes to the question of testing the violation of human rights based on article 6 of Convention I n all next cases where the statements of anonymous witnesses and their acceptability were looked through.

2. Anonymous witness and difficulties in balancing right to fair trial and defence

After defining the term witness, we can freely say that the European court paid special attention to the anonymous witness statement, a priori from the reason of existence of great prejudice which caused lot of difficulties in defence right (Balsamo, 2006, p. 3008). Otherwise, the European court stands by the attitude where are the guaranty of anonymity is a kind of necessary measure in specific situation, mostly justified by the needs of protection and avoidance of intimidation. Although it is considered to be the civil duty of any citizen, the testifying does not imply that his own safety could be jeopardized

or exposed to the risks, for the sake of fulfilment of the obligations quoted (Lonati, 2018, p. 122).

Although, the interest of the anonymous witness is not clearly approved by the article 6 of the European Convention, they are protected by other provisions, and that cannot be neglected in reaching the decision. Furthermore, European court stands by the attitude that article 6 explicitly does not taking into consideration the interest of the witness in generally, and particularly the victims called to testify. However, in the cases like that, their lives, freedom, or safety can be jeopardized, as well as the interest which generally come into the range of the article 8 of the Convention.[2] For this reason, European court has taken the stand that it would be incompatible with the rights of the victims and witnesses to allow the accused to benefit from the fear they have caused (Turanjanin, 2021, p. 286). Due to the aim of protecting the rights of the injured party in criminal proceedings, judicial practice through the application of the Convention as a live instrument has increased the scope of article 6 of the Convention to the injured party as well (Ilić & Knezević, 2020, p. 39.). The significance of implementation the principles of the right to fair trial demands that any measure which could endanger defence right is applied, only when it is necessary, and the advantage of less restrictive measure is always preferable. The protection of the anonymous witness and their statements from intimidation and pressure, can get to the digress from usual methods during a presentation of evidence.

Besides, the measuring of defence rights in relation to the right of the witness is found appropriate in order for the best possible balance to be found. It is correct that the defence can propose questions in oral and written way for the interrogated person as the range and the nature of the questions proposed are certainly limited. Thus, without acknowledging the identity of interrogated person, it is impossible to prove, if the witness was unbiased, hostile, irreliable. Considering the fact, that the face of witness is hidden during giving the statement, neither defence, nor judge can observe his posture, or facial expression, which could help the forming of opinion, about the credibility of the statement.[3]

[2] *Van Mechelen and others v. The Netherlands*, application no. 21363/93, judgement 23 April 1997, § 54 ECHR.

[3] *Van Mechelen and others v. The Netherlands* § 59 ECHR; Windisch v. Austria, Application no. 12489/86, Judgement 27 September 1990, § 28–29 ECHR; *Kostovski v. The Netherlands* (fn. 5), § 42–43 ECHR.

In order for the witness to be anonymous, it is necessary to fulfil two conditions: the life or the freedom of the witness must be seriously jeopardized, and also the guaranties, which will confirm the credibility and reliability of the witness. In relation to that, Court must implement the investigation, in order to see if there are objective circumstances for the existence of witnesses fear.[4] The balance of interest is even more specific when it is necessary to provide anonymity of the police officers, and members of their family, while on the other hand the interest which are accomplished by this activities need to be protected.[5] However, the most important fact is that in all quoted cases, no matter who takes the role of the anonymous witness, police officer or anyone else, European court established as a legal standard the fact that the judgement of conviction cannot be based solely or in significant extent on statement of anonymous witness.[6]

3. Kostovski v. The Netherlands

In this case, the applicant has appealed that his conviction was based only on two witnesses statements, whose identity he was unfamiliar with, but it was known to the police. In the quoted decision, the European court concluded that the circumstances of the case and limitation of the defence right was on the level that one cannot call it fair trial for the Kostovski.[7] In relation to this case, European court stands by the attitude, that the Convention itself does not forbid the possibility of using the informant in the phase of investigation, but further use of anonymous witnesses statement as the base for the foundation of judgement of conviction, gives way for another question. It is necessary for the accused to get adequate and appropriate opportunity to deny any statement given by the opposing sides as well as to interrogate witnesses during giving statement (Lonati, 2018, p. 125). We can freely say, that in the quoted case, there weren't any mechanism, which could establish the balance

[4] See*: Al-Khawaja and Tahery v. The United Kingdom*, applications no 26766/05 and 22228/06, judgement 15 December 2011, p. 124, ECHR. In this sense, see *Krasniki v. The Czech Republic*, application. no. 51277/99, judgement 28 February 2006, p. 80–83, ECHR.

[5] See: Lüdi v. Switzerland, application no. 12433/86, judgement 15 June 1992, *Van Mechelen and others* v. The Netherlands (fn. 20), margin no 57; *Calabrò v. Italy*, application no 59895/00, judgement 21 March 2002.

[6] *Teixeira de Castro v. Portugal*, app. no. 25829/94, judgement 9 June 1998, § 38–39, ECHR.

[7] *Kostovski v. The Netherlands*, app. 11454/85, judgement 12 May 1985, § 45, ECHR.

of the rights among two opposing sides. On one side, there are serious limitations of the right to confrontation, which is deducted from the fact that the witnesses must be provided, while on the other side accused didn't get adequate and appropriate opportunity to deny anonymous witness statement. The violation of right to fair trial certainly confirms the fact that the defends in quoted case could propose questions only in written form, which excludes the possibility of observing the reactions and posture of the witnesses while giving statement, and which could influence on the expression of the attitude on his credibility and reliability.

4. Van Mechelen and others v. The Netherlands

In the cases of giving statement by the anonymous witness certain specific situation could appear, especially when the police officers are in the role of the anonymous witnesses. On one side, the preservation of their interest must be taken into account, while on the other side, their position is still a bit different from the position of witnesses and victims which do not have status of the police officers. There are the main reasons for the restrictive use of police officers as anonymous witnesses. To secure the anonymity of their identity is important for the reason of their safety, the safety of their families, but also to guard the anonymity during participation in secret operations. It should be outlined that in these cases, investigating judge had already known the identity of the witnesses, and had already made the list about the statement, which could be the base for the establishment of reliability and credibility for the witness. Nevertheless, the fact that the police officers, interrogated in the investigation by the judge who had already been familiar with their identity, wasn't good enough reason for the establishment of the factor of balance, taking into account that the statement of anonymous witnesses, police officers in this case are the only proof for reaching the judgement of conviction. The use of undercover investigators as a method of infiltration into the criminal environment over the time became an unavoidable criminal strategic institute (Filipović & Koprivica, 2022, p. 110).

When it comes to the cases like this, it is of the crucial importance, that the test of equivalency, that is known in the practice of the European court in only few cases. Related to that, it is considered, that there wasn't any breaking of the procedure if the information gathered by the help of concealed form of communication, are used as proofs, but under the conditions that this kind of communication cannot be equal to the interrogation of the accusant in formal sense (Karas, 2012, p. 129). The test of equivalency means that any

communication with the undercover agent, cannot be identified to the process of interrogation of accusant (Karas, 2012, p. 129).

As the best example of check out the equivalency, the case *Allen v. United Kingdom*[8] stands out. In the quoted case, the suspect killed the merchant during the criminal act of robbery. The suspicious defended himself by silence, and after being deprived of freedom, he was sentenced to jail, whereas the room where he was kept in was wired. In the same room with him, there was secret informer, which acted by the instructions of police officers. In this case, European court was by the attitude that secret informer here is the same as undercover agent. Likewise, European court was also by the attitude that the police in this way instructed the secret informant, who was working on the weakening of the resistance of the suspect in order to gather information through long – term acting.

Although, there wasn't any physical pressure, the psychological was present in this part. In this case, there was testing if the right of the protection from self-accusation was harmed, i.e. if the suspect was exposed to certain pressure or gave the statement to the undercover agent willingly (*Allan v. United Kingdom*, § 44). It is of the crucial importance to affirm the way the accusant gave the statement and wasn't encouraged to admit criminal act, because it could lead to the harm of the procedure (*Allan v. United Kingdom*, § 43). Admission which the accusant, later guilty of charge gave in this way in the main trial, was used as the main evidence, although they weren't the result of spontaneous and unencouraged interrogation (*Allan v. United Kingdom*, § 53). For the stated causes, the European court has established that this led to the violation of article 6 of the Convention. Unlike this case, the European court stands by the attitude in case Khan v. United Kingdom[9], that there was not violation of fairness of trial, considering the fact that the suspects were exchanging the information about the trafficking of the narcotics in mutual conversations, without any pressure or interfering undercover agent.

5. Lüdi v. Switzerland

In criminal proceedings, undercover investigators, also familiar as undercover agents occupy special position when they act as witnesses, and there are different opinions in practice about evaluation of their statements (Golubović, 2021. p. 86). The mode of operation of the undercover agent

[8] *Allan v. United Kingdom*, app. no. 48539/99, judgement 05 November 2003.
[9] *Khan v. United Kingdom*, app. no 35394/97, judgement 04 October 2000, ECHR.

incorporates elements of intelligence work in some way (Škulić, 2005, p. 374). The most important decision reached by European court in the cases like this is Lüdi v. Switzerland.[10] The judgement of conviction of the applicant based on transcript of telephone conversations, between him and undercover agent who was never interrogated in the trial. Although it could be freely said that the impossibility of the applicant to interrogated the anonymous witness in quoted case represent violation of defence right, the judges of European court established that there was not violation of article 6 of the Convention, while using the factors of the balancing.

That is why one should go back to the legal standard of European court, which enables the determing if the statement of the witness solely or to the significant extent influenced reaching of the judgement of conviction. In the quoted decision, European court refused to give the statement of undercover agent decisive role in the range of the evidences that the judging court is based one. On the opposite, European court gave the statement of anonymous witness of that kind more rhetorical importance, when it comes to the reconstruction of the facts. In quoted case, European court has reached the judgement of conviction, based on the admission of the applicant, and his co-accused, hence, the anonymous witness statement is not solely or to the significant extent influence on reaching decision like that, but more like supportive role. In the quoted case, it is affirmed that there was not the violation of article 6 of the Convention. Certainly, in the end, we should mention that in the quoted case European court established that legal interest of the authorities is the preservation of anonymity of undercover agents, in order to re-engage them in future operations (*Lüdi v. Switzerland*, § 49). Additionally, defense rigft must be preserved, ensuring the principle of equality of arms, particularly when the undercover agent becomes anonymous witness (Delibasić, 2016, p. 83).

6. Acceptability of statements of anonymous witnesses

After exposing the most important decisions of European court, in the regard of the anonymous witnesses and their statements, one should make short outline and analyze the connection or better to say mutual common thread. The identification of this criteria considers to be defined by praetor's edict abortus acceptability and use of such evidences (Vogliotti, 1998, p. 859).

As it logical, after reaching numerous decisions when it comes to the question of certain complex question, as the anonymous witness statement,

[10] *Lüdi v. Switzerland*, app. no 12433/86, 15 June 1992, ECHR.

and the question of their credibility of proof and significance, the practice of European court has in time lavished its mechanism tending to satisfy the interest of both sides. In the beginning, European court was really restrictive in regard of acceptability and use of anonymous witness statement. Their use was mainly tied for the phase of investigation, which was justified, but the problem appears when the question of their reuse imposes itself correctly, when the judgement of conviction had to be reached by the first instance court. In the cases like these, European court has to take into account not only the rights of the defence, but also the interest of person asked to testify.

It is correctly that article 6 explicitly does not demand that the interest of witnesses has to be taken into account, especially victims ask to testify. However. their lives, freedom, or safety, could be jeopardized, as well as the interest that generally fall into the range of the area of article 8 of the Convention. In accordance to that, state members of the Convention would surely need to organize their criminal procedures, so that the interest couldn't be unjustifiably jeopardized. In this context, the principles of the fair trial impose the need of balance between the interest of the defence, to the interest of the victims and witnesses ask to testify (*Doorson v. The Netherlands*, § 70).

In the quoted cases, certainly the big problem is the way of taking statements of anonymous witness. In the aim of the respect the right to the fair trial, unfavorable position of the defence, has to be balanced by the certain approach, whereas the hearing of the anonymous witness was managed without the accusant, but with active participation of the judge and attorney. On the other side, while the judge in previous years had to be informed about the identity in order to confirm his credibility (*Van Mechelen and others v. The Netherlands*, § 50), nowadays it is considered to be enough that the judge and the attorney gets the possibility of observation, and hearing of the witness while giving statement in the court (Lonati, 2018, pp. 134–135).

7. Conclusion

The jurisprudence of the European court is turning to the accusant, when the witness does not give the statement in the main trial, and in the way violates one of the elementary rights of the accusant, and that is the right of the defence. However, observing from the legal perspective, one of the very important postulates is to be obeyed and that is auditor et altera pars. Based on these facts, it is of great importance to mention that the Convention is a live instrument, subjective to adjustment of newly created circumstances, and

related to it, more extensive interpretation, in order to preserve the interest of the opposing sides, and secure the right to fair trial and its basic principle.

Although, the article 6 of the Convention brought out firstly for one side, which was considered endangered, accomplish its right, analyzing the decisions of European court, we conclude that in certain cases it has extended effect, which enables thorough effectiveness, and application of article 6 which guarantees the right to fair trial in the right way. By the interpretation of the Convention in this way one can see that her extended or hidden effects, is only the protection of the accusant, but also the protection of the witness in the criminal procedure. That is exactly why in order to protect the interest of one and another side, from the jurisprudence arose the factors of balance, i.e. three level test, and the test of the equivalency, which appear to be the quadrant of providing the right to fair trial in these specific situations, when it seems impossible to satisfy the interest of both sides.

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ISKAZI ANONIMNIH SVEDOKA PRED EVROPSKIM SUDOM ZA LJUDSKA PRAVA – DA LI JE MOGUĆE OSTVARITI PRAVO NA PRAVIČNO SUĐENJE?

APSTRAKT: Svrha ovog rada je da se podstakne razmišljanje o upotrebi i značaju koji imaju iskazi anonimnih svedoka u praksi Evropskog suda za ljudska prava. Analiza odabranih, vodećih slučajeva u ovoj oblasti omogućiće nam pregled razvoja evropske sudske prakse u ovoj oblasti, kao i određenih specifičnosti s obzirom na činjenicu da je pravo na odbranu ozbiljno narušeno kada dođe do prihvatanja ovakvih iskaza u krivičnom postupku. Veliki deo presuda predstavlja korak unazad, naročito kada je u pitanju ostvarivanje prava na konfrontaciju, što je karakteristično u slučajevima davanja iskaza od strane anonimnih svedoka. U takvim slučajevima postavlja se pitanje koji bi mehanizmi ravnoteže mogli da nadoknade uskraćivanje prava optuženom kada se prikrije identitet lica koje daje inkriminišuće izjave. Iskazi anonimnih svedoka su na neki način

izvršili uticaj na praksu Evropskog suda u pogledu utemeljenja pravnog standarda, koji je s vremenom dobio ulogu korektivnog mehanizma koji održava ravnotežu suprotstavljenih strana. Postavlja se pitanje da li takav korektivni mehanizam procesne zaštite anonimnih svedoka može očuvati interes obeju strana.

Ključne reči: *anonimni svedoci*, *Evropski sud za ljudska prava*, *pravo na pravično suđenje*, *iskazi anonimnih svedoka*, *mehanizam ravnoteže*.

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