



Third Study Commission
Criminal law and procedure

Meeting in Berlin (Germany), 22-24 August 1988

Conclusions

THE PROTECTION OF THE WITNESS BEFORE, DURING AND AFTER THE TRIAL

Delegates of 20 member countries as well as observers from the United States of America and Canada took part in the deliberations.

The discussions were based on written reports from Austria, Belgium, Brazil, Denmark, the Federal Republic of Germany, Finland, France, Ireland, Israel, Japan, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Tunisia and from the observer of the United States of America as well as on a general report, drafted by the president of the Commission.

The following resolutions and conclusions were adopted.

The rules in the various national legislations which define and fix the position of the witness, strive by means which are very often similar to ensure that the evidence of the witness is as relevant and objective as possible. A further harmonization in this field where the procedural rules often stem from national tradition does not prove to be necessary for the protection of the witness.

Generally the witness does not enjoy any other protection than the protection which is guaranteed to all citizens - even when the penalty for those who threaten a witness is sometimes increased - and which proves to be sufficient in the majority of the cases.

A special protection however is obviously necessary for witnesses under strong pressure as the stakes of the case are very high, because of its nature or the international character of the offences, especially in the field of internationally organized crime, drug trafficking and terrorism.

The fact that the trial is open to the public, in accordance with the guarantees upholding the human rights including the rights of the defense, leaves the witness, who normally would want to hide his identity, at the mercy of pressure and reprisals.

Under these circumstances it is necessary to consider as a useful measure of protection for the witness and his private life the ordering of a closed court session in such cases, as article 6 of the Convention on Human Rights and Fundamental Freedoms foresees the protection of the private life of the parties at the trial. In the same way it could be possible in certain cases to forbid the media to disclose the identity of the witnesses.

It seems for the same reasons desirable to permit the judge, in case he deems this necessary for the protection of the witness, to prevent anybody, including the suspect, from finding out about the place of private residence of the witness. In order to make this measure effective the judge should be allowed to intervene at any stage in this sense in those countries where the suspect has the right to see the file during the pre-trial investigatory phase.

In the resolution accepted by the majority of this commission in July 1987 it was considered that, in order to adapt the existing means of proof and methods of investigation to internationally organized crime, within a strict system of boundaries set by national legislations and in respect of the Human Rights powers should be available to enable the admission of evidence given by anonymous witnesses. This anonymity as well as the possibility for police officers to withhold the identity of persons who supplied them with information, carry the character of measures meant to protect these categories against reprisals. To reconcile this confidentiality with the rights of the defense it is necessary that the judge shall only keep these statements from the defense when they are supported by other facts.

The witness must be adequately compensated for travelling expenses and other financial losses, such as loss of salary etc., which have been caused by his duty to appear at any stage of the procedure.

Active protective measures such as the change of identity, placing the witness in a special residence, protective intervention by the police, could be taken eventually in exceptional cases. But their specific character, as well as their high cost and their duration and especially interventions by authorities of police which are hard to accept, tend not to promote their generalization. This situation however might improve in view of the successful results obtained by certain countries, especially the United States of America, and in view of the increasing cooperation in this field between the various countries.