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## **Witness Immunity in Criminal Procedure**

*The paper focus on a topical issue - witness immunity. The key element of the democratization and humanization of criminal procedure is the introduction of the institute of witness immunity into Georgian legislation. Provision for witness immunity at the legislative level and its further improvement is a guarantee for the provision for the rights of the parties to criminal trial.*

*The paper is based on the analysis of the doctrine and judicial practice, also on conceptual approaches envisaged by the legislation of Roman-German and common law countries with regard to witness immunity. The paper describes and discussed historical aspects of witness immunity and modern trends in this field. General methodological basis of the research is comprised of historical, logical, comparative and empirical-analytical methods.*

*The research aims at the analysis of witness immunity-related issues of theoretical and practical importance in legal light, sharing foreign experience and development of recommendations with regard to discussed question.*

**Key words:** *Witness, witness immunity, objective and subjective understanding of witness immunity, types of witness immunity.*

### **1. Introduction**

On the whole, the question of witness immunity is not yet duly examined and studied in Georgian criminal procedure. As defined by Part 20 of Article 3 of the Code of Criminal Procedure of Georgia (hereafter – CCPG), a witness is a person who may know the facts required for the establishment of circumstance in a criminal case. A person should dispose of the necessary for the case fact on the basis of own perception and should be able to convey them. However, only the knowledge of the necessary for the case facts, is not sufficient to participate in criminal trial in the capacity of a witness.<sup>1</sup> As an additional precondition the CCPG prescribes that a person acquires the status of a witness after being warned with respect to criminal liability and after taking an oath.<sup>2</sup>

The research focuses on comprehensive and systemic analysis of the institute of witness immunity and development of the recommendations on the basis of the foregoing for the perfection of legal regulation of this institute in criminal procedure. To this end, the paper will focus on the following aspects: 1. Historical development of the institute of witness immunity; 2. Concept and essence of witness immunity; 3. Classification of the types of immunity, also the mechanism of regulation and perfection of witness immunity-related issues of theoretical and practical importance; 4. Analysis of judicial practice of the European Court of Human Rights (ECHR) with regard to witness immunity.

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<sup>1</sup> Akubardia I., Criminal Procedure, General Part (co-author), Tbilisi, 2008, 41 (in Georgian).

<sup>2</sup> Laliashvili T., Criminal Procedure of Georgiam General Part, Tbilisi, 2015, 293 (in Georgian).

## 2. Historical Overview of the Concept of Witness Immunity

Semantically the word “immunity” (*Immunitas* – in Latin) means “exemption from something”, “avoiding something”, “benefit”. “Immunity” as a legal term means exemption of a certain group of persons from the application of general legal rules. International law is aware of state immunity, warship immunity, diplomatic immunity, immunity of state merchant vessels. Constitutional law recognised the immunity of the President, a Member of the Parliament and a judge.<sup>3</sup>

Historically the institute of immunity was formed back in Roman Law.<sup>4</sup> Pursuant to common rule, a witness was obliged to testify,<sup>5</sup> however Digest of Justinian provides for the list of persons, who were entitled to witness immunity.<sup>6</sup> In medieval Europe immunity was associated with certain privileges enjoyed only by a certain part of feudal society.<sup>7</sup> Definition of this term implied the right of a feudal to hold hearings without a special authorization of the central government or to collect taxes. Later immunity was called the right of a foreign national or organization to be free from the jurisdiction of a foreign country when on the territory of the country concerned.<sup>8</sup>

In contemporary law immunity with regard to natural persons is understood as a privilege (security) of citizens (natural persons), who require additional guarantees for the discharge of their official or professional duties.<sup>9</sup> Immunity is also an important institute of international law<sup>10</sup> — applied as a guarantee of personal security of the members of the supreme representative political body — Parliament,<sup>11</sup> except cases, when caught in the act. Furthermore, a member of the Parliament<sup>12</sup> cannot be detained and brought before the court of law<sup>13</sup> without a consent of the Parliament.<sup>14</sup> Immunity is also a privilege of the diplomatic corps, what is manifested in their inviolability.<sup>15</sup> It can be said, that witness immunity is an exemption from the principle of everyone's equality before law, guaranteed by the Constitution.<sup>16</sup>

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<sup>3</sup> Big Law Dictionary, Infarma, Moscow, 1997, 239 (in Russian).

<sup>4</sup> *Garishvili M.*, Specificities of Criminal Procedure of Ancient Rome, Law Journal, № 1, 2012, 18.

<sup>5</sup> *Zagurski L.*, Principles of Roman Civil and Criminal Procedure, Kharkov, 1874, 376 (in Russian).

<sup>6</sup> Digest of Justinian, *Peretorski I. S.* (trans.), Moscow, 1984, 365 (in Russian).

<sup>7</sup> *Esmein A.*, History of Continental Criminal Procedure, London, 1914, 572.

<sup>8</sup> *Velsh I.*, Witness Immunity in Criminal Procedure, Moscow, 2000, 12 (in Russian).

<sup>9</sup> *Bosch J.*, Immunität und internationale Verbrechen, Dusseldorfer Rechtswissenschaftliche Schriften, Band 27, Baden-Baden, 2004, 64

<sup>10</sup> *Sakvarelidze P.*, Human Rights Dictionary, Tbilisi, 1999, 128 (in Georgian).

<sup>11</sup> *Kodua E.* (ed.), Dictionary-Directory of Social and Political Terms, Tbilisi, 2004, 351 (in Georgian).

<sup>12</sup> *Pfeiffer G.*, StPO Strafprozessordnung, Kommentar, 5 Aufl., München, 2004, 430, Rn. 2.

<sup>13</sup> *Jendral H.*, Immunität – noch zeitgemäss: Kritische Untersuchung eines immerwährenden Privilegs des Parlaments, Haag, Herchen, 1993, 38.

<sup>14</sup> *Kostkiewicz J. K.*, Staatenimmunität im Erkenntnis – und im Vollstreckungsverfahren nach schweizerischen Recht, Bern, 1998, 71.

<sup>15</sup> *Gornig G.*, Immunität von Staatsoberhäupten, Festschrift für Dietrich Rausching, Köln, Berlin, Bonn, München, 2001, 457-485.

<sup>16</sup> *Kimmich O.*, Das Staatsoberhaupt im Völkerrecht, Staatsoberhaupt und Völkerrecht, 26 Band, № 2, 1988, 129-168.

### 3. Concept and Essence of Witness Immunity

In general, it can be said, that immunity is an exceptional right, enjoyed in a state by a group of persons with special status. Witness immunity, as an institute of criminal procedure, is a set of legal (exceptional) norms, providing for the right of witnesses of certain category to refuse to testify. Such persons are divided into three groups: 1. Persons, who generally cannot be questioned as witnesses in a criminal trial (CCPG, Article 50, Part 2); 2. Persons, who generally can be questioned as witnesses, but have the right to refuse to testify (CCPG, Article 49, Part 1(d)); 3. Persons, who may be exempted from the performance of the duty of a witness by the court of law (CCPG, Article 50, Part 3).

Granting immunity to a witness or the right of a citizen not to testify against himself, his spouse or next to kin<sup>17</sup> is nothing else than the aspiration of the State not to allow the disruption of kindred, family ties<sup>18</sup>, also to ensure the protection of justice against giving knowingly - to a certain extent - false testimonies.<sup>19</sup> Objective and subjective understanding of witness immunity should be strictly delimited. From objective point of view, witness immunity is a set of legal (exceptional) norms regulating legal relations arising in the course of realization of this institute. From subjective point of view, witness immunity is a set of legal (exceptional) norms exempting specific citizens (natural persons) from the obligation to testify in a criminal trial, also guaranteeing right of the citizens not to testify against themselves or their next to kin. German law provides for two main types of immunity: functional (*Immunität ratione materie*) and personal (*Immunität ratione personae*) immunity. Functional immunity is mainly associated with the activities of state authorities. As regards personal immunity, the persons enjoying it are exempted from testifying in a criminal trial due to their official duties or to keep confidential some trade secrecy.<sup>20</sup>

The essence of witness immunity is the right of a witness to refuse the performance of statutory duty — to testify in a criminal trial, also the obligation of state authorities and officials administering criminal procedure to explain their procedural rights to witnesses and to ensure their practical exercise.

As per Part 11 of Article 31 of the Constitution of Georgia nobody is obliged to testify against himself/herself or his/her relatives, as defined by law. Similar stipulation is contained in Article 49(d) of the CCPG. Specifically, about witness immunity — a witness can refuse to testify if his/her testimony might tend to incriminate him/her or his/her next to kin. A person who is summoned as a witness and refuses to testify, is required to present sound evidences, that he/she is in kindred relationship with an accused in criminal trial.

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<sup>17</sup> Tumanishvili G., Commentary on Code of Criminal Procedure of Georgia (co-author), Tbilisi, 2015, 209 (in Georgian).

<sup>18</sup> Tumanishvili G., Criminal Procedure, Overview of General Part, Tbilisi, 2014, 158 (in Georgian).

<sup>19</sup> Petukhovskii A., Witness Immunity: Challenge of Development of Procedural Institute, "Russian Justice", № 9, 2003, 16 (in Russian).

<sup>20</sup> Zehnder B., Immunität von Staatsoberhäuptern und der Schutz elementarer Menschenrechte-der Fall Pinochet, 1 Aufl., Baden-Baden, 2003, 34.

Granting immunity to a specific witness affects only the essence of his/her testimony and does not constitute grounds for avoiding the appearance before a law-enforcement authority or the court of law. Consequently, if a person with witness status avoids the performance of the duty to make appearance in a criminal trial, the measures of forced escorting, envisaged by the CCPG, can be undertaken. In their return, relevant officials (investigator, prosecutor, court of law) are required to explain the essence of the right to refuse to testify to a person with witness status.<sup>21</sup> If, despite this explanation, the person refuses to enjoy the immunity, he/she should be warned about the imposition of legal liability for false testimony.

Witness immunity is an exemption from the principle of everybody's equality before the law, prescribed by the Constitution.

#### **4. Types of Witness Immunity**

Witness immunity, prescribed by Article 49(d) of the CCPG can be divided into two groups: a) right against self-incrimination; b) right not to testify against next to kin. Generally, the right to refuse to testify is one of the crucial rights of a witness and grants certain privilege (immunity) to him/her.<sup>22</sup> Some scholars believe, that the right to refuse to testify against oneself or next to kin in a criminal trial promotes the establishment of truth, as had the law required to testify in such cases, there would have been the jeopardy for these persons to give false testimonies and obstruct the establishment of truth in the case.<sup>23</sup> However, the other scholars are of the opinion that witness's obligation to make true statements promotes the establishment of truth.<sup>24</sup>

Contemporary law of common law countries is aware of two types of witness immunity: 1. use immunity — enjoyed by persons prescribed by law — next to kin of an accused, or persons aware of certain classified information (lawyers, doctors, clergymen); 2. transactional immunity — granted to a witness by a prosecutor in exchange for a testimony. In the United States of America, the legal basis of the existence of immunity in criminal lawsuit is the US Constitution, according to Fifth Amendment of which no person shall be compelled in any criminal case to be a witness against himself. This requirement was reflected in the decision made by the US Supreme Court in its judgment in the case.<sup>25</sup>

In Continental law countries the extent of witness immunity and the group of persons, enjoying such immunity, is prescribed by criminal law (Criminal Code of Germany, Articles 139, 258; Criminal Code of France, Article 434; Criminal Code of Spain, Articles 454, 466).

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<sup>21</sup> *Shengelia I.*, Interrogation of a Witness (Comparative Legal Analysis), “Legal Journal”, № 3, 2014, 153 (in Georgian).

<sup>22</sup> *Konev V., Gromov N., Nikolaichenko V.*, Witness Immunity in Criminal Procedure, Moscow, 1997, 19 (in Russian).

<sup>23</sup> *Roxin C., Schönemann B.*, Strafverfahrensrecht, 27 Aufl., München, 2012, Para. 26, Rn. 14. *Kühne H. H.*, Ein Lehrbuch zum Deutschen und europäischen Strafverfahrensrecht, 8 Aufl., Heidelberg, 2010, 496.

<sup>24</sup> *Hinterhofer H.*, Zeugenschutz und Zeugnisverweigerungsrechte: im österreichischen Strafprozess, 1 Aufl., Wien, 2004, 182.

<sup>25</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966), <[www.supreme.justia.com/us/384/436/case.html](http://www.supreme.justia.com/us/384/436/case.html)>, [13.11.2019].

According to right against self-incrimination, witness immunity can be classified as absolute (imperative) and relative (dispositional) immunity.

#### **4.1. Absolute (Imperative) Immunity of a Witness**

Absolute (imperative) immunity of a witness is in play, when a witness is entitled by law to refuse to testify. Part 1 of Article 50 of the CCPG lists the persons, who are not obliged to be witnesses. Specifically the following persons are not obliged to be examined or to transfer an item, document, substance or other object containing information essential to the case: a) a defence counsel – with regard to circumstances he/she came to know when acting as a defence counsel in the case concerned; b) a defence counsel providing legal aid to person concerned before the receipt of legal defence – with regard to circumstances that became known to him/her in connection with the provision of legal aid; c) a clergyman – with regard to circumstances that became known to him/her as a result of a confession or other act of confiding; d) next to kin of the accused; e) Public Defender or a person duly authorized thereby – with regard to the fact that was confided to him/her in the capacity of the Public Defender; e<sup>1</sup>) State Inspector – with regard to the fact, that was disclosed to him/her in the capacity of the State Inspector when controlling the legality of personal data procession and covert investigational activities and activities conducted in the central database of electronic communication identification data; f) a Member of the Parliament of Georgia — with regard to the fact, that was confided thereto in the capacity of a member of the representative body;

g) a judge – with regard to circumstances that constitute the classified part of judicial deliberations;

h) a journalist – with regard to information obtained within the scope of professional activities; i) a victim of human trafficking – during the reflection period; j) a member of the Supreme Council of an Autonomous Republic – with regard to the fact, confided thereto in the capacity of a member of the representative body. A person who, due to his/her physical or mental disability, is not able to duly comprehend, memorise and recollect essential for the case circumstances, and communicate information or give testimony cannot be interviewed or interrogated as a witness (CCPG, Article 50, Part 2).

According to general rule, witness immunity does not apply to persons who deal with classified information, however, under Part 3 of Article 50 of the CCPG the court is authorized to exempt the following persons from the obligation to testify as a witness: a) a healthcare professional, if the latter is obliged to keep confidential medical information owing to his/her profession; b) a notary, civil servant, public official, military man and equalized thereto persons, if they are committed to keeping confidential the source and content of received information; c) a person, who was employed on condition of non-disclosure of commercial or bank secrecy; d) a person participating in counter-terrorism or/and special operation (with regard to his/her professional duties), whose activities are classified and the documents, materials and other data about these activities constitute state secrecy. Part 4 of Article 50 of CCPG also provides for an exceptional right according to which testifying as a witness will not be regarded as a breach of confidentiality obligation when a crime envisaged by Article 137(3)(d) or Article 137(4)(c),

Article 138(3)(d) or Article 138(4)(c), Article 139(2), Articles 140 or 141, Article 171(3), Article 253(2), Articles 255(2) or (3), Articles 2551 or 2552 of CCPG is committed against a minor.

#### **4.2. Relative (Dispositional) Immunity of a Witness**

Relative (dispositional) immunity is in play, when a witness has an option to enjoy the right to refuse to testify while case-reviewing authority or official is in the position to question the witness, if the latter is ready to testify. This type of immunity extends to an accused, next to kin of the latter (while Article 49(d) of the CCPG provides for witness immunity, specifically a witness may not give a testimony, which may incriminate him/her or his/her next to kin), also a member of Special Preventive Group subordinated to Public Defender — with regard to the fact, that was disclosed to him/her while discharging duties of national prevention mechanism, if the latter agrees to testify (Part 1 of Article 50 of the EEPG).

Unlimited right of a witness to refuse to testify exempts him/her from the obligation to give out any information in a criminal trial, while limited right of a witness to refuse to testify exempts him/her from the obligation to give out only the information that became known to him/her in the course of discharge of professional duties and is obliged to keep confidential because of his/her official position.<sup>26</sup> No person is obliged to testify against his own self — this is the essence of the immunity, which is also fully compatible with the International Covenant on Civil and Political Rights, under Article 14(3)(g) of which “do not compel anyone to testify against himself or to confess guilt”. As regards the right to refuse to testify against next to kin or because of the trade pursued — this right stem from close kindred relationship of an accused with a witness, when the legislator takes account of legal interest of a person not to testify against his/her next to kin.<sup>27</sup> For uniform understanding, it will be desirable for criminal procedure law of Georgia to specify, whether who is next to kin of a witness prescribed by Article 49 (d) of the CCPG and also family members, envisaged by Article 3 (2), (3) and (4) of the CCPG; furthermore it will be reasonable for Georgian criminal procedure law to include the definition of a relative, envisaged by Article 31 (11) of the Constitution of Georgia. Even if an accused (culprit) has an appointed legal representative (guardian) in cases envisaged by Article 1275 of the Civil Code of Georgia, when this person is not next to kin to the person under trusteeship, it is desirable for criminal procedure law to delegate the legal representative as well with the right to refuse to testify (witness immunity) in a criminal case involving the person under trusteeship. Furthermore, it is desirable for criminal procedure law to specify, that witness immunity is also enjoyed by foster parents, prescribed by Article 71 of the Law of Georgia on Adoption and Foster Case, in criminal cases, involving their foster children, as well as by foster children in criminal cases, involving their foster parents. As all the rights and obligations of a witness are also enjoyed by a victim under Article 56(1)(l)(m) of the CCPG, the latter is also entitled to immunity, prescribed by Article 49(d) of the CCPG.

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<sup>26</sup> *Laliashvili T.*, Criminal Procedure of Georgia, General Part, Tbilisi, 2015, 337-338 (in Georgian).

<sup>27</sup> *Tumanishvili G.*, Criminal Procedure, Overview of General Part, Tbilisi, 2014, 158 (in Georgian).



In conclusion it can be said, that witness immunity is a legal privilege, legal security of a witness, guaranteeing the protection of rights of a witness in a criminal case.<sup>28</sup> This guarantee is contained in the Note to Article 371 of the Criminal Code of Georgia. Specifically, a person who refused to testify against himself/herself or against his/her next to kin, and also a victim of human trafficking is exempted from criminal liability – for the term of the reflection period. Witness immunity is an exception from general rule and not a categorical prohibition to testify. Consequently, if a witness, enjoying immunity, still agrees to testify or waives his immunity, giving knowingly false testimony by the witness concerned will result in the imposition of criminal liability thereon under Article 370 of the Criminal Code of Georgia.<sup>29</sup> “An accused – witness will not be charged for false testimony. Criminal liability can be imposed thereon only for false denunciation”<sup>30</sup>.

## 5. Analysis of ECHR Practice with regard to Witness Immunity; Autonomous Interpretation of the Term “Witness”

As per Article 6(3)(d) of the European Convention on Human Rights (hereafter – Convention): “Everyone charged with a criminal offence has the following minimum rights: d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” The term “witness” has an autonomous meaning within Convention system and it differs from the definition, prescribed by national legislation.<sup>31</sup> In cases, when persons were accused on the basis of sworn oath, it constitutes the evidence of prosecution, that is subject to requirements envisaged by Article 6 §§ 1 and 3(d).<sup>32</sup> The term also includes co-accused (see, e.g. Trofimov v. Russia)<sup>33</sup>, victims (Vladimir Romanov v. Russia)<sup>34</sup> and expert witnesses (Doorson v. the Netherlands)<sup>35</sup>. Article 6 § 3(d) may also apply to documentary evidence.<sup>36</sup>

### 5.1. Right of a Person to Examine or Have Examined Witnesses

Article 6(3)(d) of the Convention provides for the principle, according to which principle all the evidence against an accused, must be produced at a public hearing, in the presence of the accused,

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<sup>28</sup> Tumanishvili G., Commentary on Code of Criminal Procedure of Georgia (co-author), Tbilisi, 2015, 209 (in Georgian).

<sup>29</sup> Chomakhashvili K., Osepashvili S., Crimes Against Justice, Open Society – Georgia Foundation, Tbilisi, 2017, 12 (in Georgian).

<sup>30</sup> Tumanishvili G., Criminal Procedure, Overview of General Part, Tbilisi, 2014, 206-208 (in Georgian).

<sup>31</sup> Damir Sibgatullin v. Russia, [2012] ECHR, № 1413/05, § 45; S. N. v. Sweden, № 34209/96, [2002] ECHR, § 45.

<sup>32</sup> Kaste and Mathisen v. Norway, [2006] ECHR, № 18885/04 and № 21166/04, § 53; Lucà v. Italy, [2001] ECHR, № 33354/96, § 41.

<sup>33</sup> Trofimov v. Russia, [2008] ECHR, № 1111/02, § 37.

<sup>34</sup> Vladimir Romanov v. Russia, [2008] ECHR, № 41461/02, § 97.

<sup>35</sup> Doorson v. the Netherlands, [1996] ECHR, §§ 81-82, Report 1996-II.

<sup>36</sup> Mirilashvili v. Russia, [2008] ECHR, № 6293/04, §§ 158-159.

with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence and this, as a general rule, requires that the defendant be given an adequate and proper opportunity to challenge and question a witness against him. either when he makes his statement or at a later stage.<sup>37</sup>

There are two requirements which follow from the above general principle. Firstly: there must be a good reason for the non-attendance of a witness. Secondly: when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called “sole or decisive rule”).<sup>38</sup>

Having regard to 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.<sup>39</sup> Important element of fair trial is provision for the option of the defendant to rebut the examination of a witness and his evidences.<sup>40</sup>

## **5.2. Obligation to Make Reasonable Effort to Secure Witness's Presence**

The requirement that there be a good reason for admitting the evidence of an absent witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. When a witness does not attend trial to give live evidence, there is a duty to enquire whether that absence is justified.<sup>41</sup>

Paragraphs 1 and 3 of Article 6, taken together, require the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him.<sup>42</sup> In the event the impossibility to examine the witnesses or have them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence.<sup>43</sup>

When the state cannot be held liable that it has not undertaken sufficient efforts for the defendant to have possibility to examine or have examined the witness, non-attendance of the witness is not sufficient ground for termination proceedings against him.<sup>44</sup>

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<sup>37</sup> Hümmel v. Germany, [2012] ECHR, № 26171/07, § 38; Lucà v. Italy, [2001] ECHR, № 33354/96, § 39; Solakov v. the Former Yugoslav Republic of Macedonia, [2001] ECHR, № 47023/99, § 57.

<sup>38</sup> Al-Khawaja and Tahery v. the United Kingdom [GC], [2009] ECHR, № 26766/05 and № 22228/06, § 119.

<sup>39</sup> Van Mechelen and Others v. the Netherlands, [1997] ECHR, § 58, Report 1997-III.

<sup>40</sup> Tarău v. Romania, [2009] ECHR, № 3584/02, § 74; Graviano v. Italy, [2005] ECHR, № 10075/02, § 38.

<sup>41</sup> Al-Khawaja and Tahery v. the United Kingdom [GC], [2009] ECHR, № 26766/05 and № 22228/06, § 120; Gabrielyan v. Armenia, [2012] ECHR, № 8088/05, §§ 78, 81-84.

<sup>42</sup> Trofimov v. Russia, [2008] ECHR, №11111/02, § 33; Sadak and Others v. Turkey (no. 1), [2001] ECHR, № 29900/96 and 3 others, § 67.

<sup>43</sup> Karpenko v. Russia, [2012] ECHR, № 5605/04, § 62; Damir Sibgatullin v. Russia, [2012] ECHR, № 1413/05, § 51. Pello v. Estonia, [2007] ECHR, № 11423/03, § 35; Bonev v. Bulgaria, [2006] ECHR, № 60018/00, § 43.

<sup>44</sup> Gossa v. Poland, [2007] ECHR, № 47986/99, § 55; Calabrò v. Italy and Germany (dec.), [2002] ECHR, № 59895/00; Ubach Mortes v. Andorra (dec.), [2000] ECHR, № 46253/99 (excerpts).

### **5.3. Reasoning of Refusal to Hear a Witness**

Although provision of its opinion about relevance of presented evidences is not a duty of the ECHR, refusal to summoning a witness or examination thereof can be presumed as violation of the rights of defence, what is incompatible with the requirement of fair trial (see *Popov v. Russia*<sup>45</sup>; *Bocos-Cuesta v. the Netherlands*<sup>46</sup>; *Wierzbicki v. Poland*<sup>47</sup> and *Vidal v. Belgium*<sup>48</sup>).

It may prove necessary in certain circumstances to refer to depositions made during the investigative stage<sup>49</sup>, e.g. if witness died<sup>50</sup> pleaded his/her right to remain silent<sup>51</sup> or when witness did not appear before the court irrespective of reasonable efforts of the authorities to secure his/her presence.<sup>52</sup> Given the extent to which the absence of a witness adversely affects the rights of the defence, when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort.<sup>53</sup> Evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care.<sup>54</sup> If a witness did not make appearance at adversarial proceedings for an excusable reason, the national court is entitled to decide whether to take account of depositions made by the witness concerned during pre-trial phase, if these depositions are supported by other evidences as well.<sup>55</sup> Article 6 § 3(d) requires cross-questioning of only those witnesses who have not testified before the court, if their depositions have played decisive or important role in the conviction of the individual (see *Kok v. the Netherlands (dec.)*<sup>56</sup>; *Krasniki v. the Czech Republic*<sup>57</sup>).

Where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, it would constitute a very important factor to balance in the scales, and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are

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<sup>45</sup> *Popov v. Russia*, [2006] ECHR, № 26853/04, § 188.

<sup>46</sup> *Bocos-Cuesta v. the Netherlands*, [2005] ECHR, № 54789/00, § 72.

<sup>47</sup> *Wierzbicki v. Poland*, [2002] ECHR, № 24541/94, § 45.

<sup>48</sup> *Vidal v. Belgium*, [1992] ECHR, § 34, Series A no. 235-B.

<sup>49</sup> *Lucà v. Italy*, [2001] ECHR, № 33354/96, § 40.

<sup>50</sup> *Ferrantelli and Santangelo v. Italy*, [1996] ECHR, § 52, Report 1996-III.

<sup>51</sup> *Vidgen v. the Netherlands*, [2012] ECHR, № 29353/06, § 47; *Sofri and Others v. Italy (dec.)*, [2003] ECHR, № 37235/97; *Craxi v. Italy (no. 1)*, [2002] ECHR, № 34896/97, § 86.

<sup>52</sup> *Mirilashvili v. Russia*, [2008] ECHR, № 6293/04, § 217.

<sup>53</sup> *Al-Khawaja and Tahery v. the United Kingdom [GC]*, [2009] ECHR, №26766/05 and №22228/06, §125.

<sup>54</sup> *S. N. v. Sweden*, [2002] ECHR, № 34209/96, § 53; *Doorson v. the Netherlands*, [1996] ECHR, § 76, Report 1996-II.

<sup>55</sup> *Mirilashvili v. Russia*, [2008] ECHR, № 6293/04, § 217; *Calabrò v. Italy and Germany (dec.)*, [2002] ECHR, № 59895/00; *Ferrantelli and Santangelo v. Italy*, [1996] ECHR, § 52, Report 1996-III.

<sup>56</sup> *Kok v. the Netherlands (dec.)*, [2000] ECHR, № 43149/98.

<sup>57</sup> *Krasniki v. the Czech Republic*, [2006] ECHR, № 51277/99.

sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.<sup>58</sup>

While the problems raised by anonymous and absent witnesses are not identical, the two situations are not different in principle, since, as was acknowledged by the Supreme Court, each result in a potential disadvantage for the defendant. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him.<sup>59</sup>

The use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention.<sup>60</sup> Although Article 6 (art. 6) does not explicitly require the interests of witnesses to be taken into consideration, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of 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.<sup>61</sup> National authorities should present sufficient and sound reasons for maintaining the anonymity of some witnesses.<sup>62</sup>

However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. In such cases such difficulties should be sufficiently counterbalanced by the procedures followed by the judicial authorities.<sup>63</sup> Specifically, an applicant should not be prevented from testing the anonymous witness's reliability.<sup>64</sup>

Furthermore, when assessing that procedures of questioning an anonymous witness counterbalances difficulty faced by the defence, adequately importance should be the fact, how decisive was this evidence in conviction of the claimant. If such evidence was not of decisive importance, the rights of the defence will be restricted to a much lesser extent.<sup>65</sup>

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<sup>58</sup> Al-Khawaja and Tahery v. the United Kingdom [GC], [2009] ECHR, № 26766/05 and № 22228/06, § 147.

<sup>59</sup> Ibid, § 127.

<sup>60</sup> Doorson v. the Netherlands, [1996] ECHR, § 69, Report 1996-II; Van Mechelen and Others v. the Netherlands, [1997], § 52, Report 1997-III; Krasniki v. the Czech Republic, [2006] ECHR, № 51277/99, §76.

<sup>61</sup> Doorson v. the Netherlands, [1996] ECHR, § 70, Report 1996-II; Van Mechelen and Others v. the Netherlands, [1997] ECHR, § 53, Report 1997-III.

<sup>62</sup> Doorson v. the Netherlands, [1996] ECHR, § 71, Report 1996-II; Visser v. the Netherlands, [2002] ECHR, № 26668/95, § 47; Dzelili v. Germany (dec.), [2005] ECHR, № 65745/01.

<sup>63</sup> Doorson v. the Netherlands, [1996] ECHR, § 71, Report 1996-II; Van Mechelen and Others v. the Netherlands, [1997] ECHR, § 54, Report 1997-III.

<sup>64</sup> Birutis and Others v. Lithuania, [2002] ECHR, № 47698/99 and № 48115/99, § 29; Kostovski v. the Netherlands, [1989] ECHR, § 42, Series A no. 166.

<sup>65</sup> Kok v. the Netherlands (dec.), [2000] ECHR, № 43149/98; Krasniki v. the Czech Republic, [2006] ECHR, № 51277/99, §76.

#### **5.4. Right to Call a Witness**

As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses. It “does not require the attendance and examination of every witness on the accused’s behalf: its essential aim, as is indicated by the words ‘under the same conditions’, is a full ‘equality of arms’ in the matter”. (see *Perna v. Italy* [Great Chamber]<sup>66</sup>; *Solakov v. the Former Yugoslav Republic of Macedonia*).<sup>67</sup>

It is accordingly not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth and protection of the rights of the defence.<sup>68</sup> When the applicant has made a request to hear witnesses which is not vexatious, and which is sufficiently reasoned, relevant to the subject matter of the accusation and could arguably have strengthened position of the defence or even led to the applicant’s acquittal, the domestic authorities must provide relevant reasons for dismissing such request.<sup>69</sup>

Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to call and hear a witness (see. e.g. *S. N. v. Sweden*<sup>70</sup>; *Accardi and Others v. Italy* (dec.)<sup>71</sup>). There can be exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with the requirements of Article 6 of the Convention.<sup>72</sup>

#### **5.5. Refusal of Witness to Testify (Witness Immunity – “Privilege”)**

European Court of Human Rights (Grand Chamber) in the Case of *Van der Heijden v. the Netherlands* held, that domestic courts correctly rejected applicant's testimonial privilege in criminal trial opened against her partner.

It was established, that applicant was summoned as a witness in the criminal investigation, related to fatal shootings, however, she refused to testify before the investigating judge as the main suspect was her partner with whom she had two children. The applicant argued that she should be regarded as entitled to the testimonial privilege (immunity) afforded to suspects’ spouses and registered

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<sup>66</sup> *Perna v. Italy* [GC], [2003] ECHR, № 48898/99, § 29.

<sup>67</sup> *Solakov v. the Former Yugoslav Republic of Macedonia*, [2001] ECHR, № 47023/99, § 57.

<sup>68</sup> *Perna v. Italy* [GC], [2003] ECHR, № 48898/99, § 29; *Băcanu and SC «R» S. A. v. Romania*, [2009] ECHR, № 4411/04, § 75.

<sup>69</sup> *Topić v. Croatia*, [2013] ECHR, № 51355/10, § 42; *Polyakov v. Russia*, [2009] ECHR, № 77018/01, §§ 34-35.

<sup>70</sup> *S.N. v. Sweden*, [2002] ECHR, № 34209/96, § 44.

<sup>71</sup> *Accardi and Others v. Italy* (dec.), [2005] ECHR, № 30598/02.

<sup>72</sup> *Dorokhov v. Russia*, [2008] ECHR, № 66802/01, § 65; *Popov v. Russia*, [2006] ECHR, № 26853/04, § 188; *Bricmont v. Belgium*, [1989] ECHR, § 89, Series A no. 158.

partners under the Code of Criminal Procedure. Later she was detained for thirty day for failure to comply with a judicial order on giving testimony.

The applicant filed an appeal with the Supreme Court. The latter found, that the testimonial privilege (immunity) envisaged by domestic legislation, protected “family life” between spouses, registered partners, however it did not encompass the other partners irrespective of long-terms cohabitation. This difference in treatment was reasonable and objective, as it served the purposes of establishment of truth and legal certainty. The attempt made to compel her to give evidence against her partner was an interference in the right to respect for family life. The interference was “in accordance with the law” and served the legitimate purpose of prevention of crime (Convention, Article 8).

As regards the question – whether the interference was necessary in a democratic society, Convention Member States had different practice, which opted more for granting wider discretion to the state when two public interest were competing: prosecution of grave crime and protection of family life from State interference. The Netherlands was one of the first countries to create legislative regulation and grant privilege (immunity) to certain category of witnesses. As far as non-giving testimony was an exception to civic duty, it could have been subjected to certain conditions and formalities to be defined by law. The law of the Netherlands exempted next to kin, spouses, former spouses and registered partners and former registered partners of the accused from the obligation to testify. This list limited the application of this exception to persons whose ties were objectively certifiable. Member States were authorized to set certain limit for testimonial privilege and delimit between marriage and registered partners.

The ECHR did not uphold the applicant's argument, that she should have been entitled to the testimonial privilege (immunity) afforded to suspects' spouses and registered partners under the Code of Criminal Procedure. Decisive factor was not the length or type of relationship, but rather the responsibility, combined of contractual rights and obligations. The absence of comparable legally binding agreement made partner's relationship with the applicant fundamentally different from that of married couple and registered partners. Had domestic court decided otherwise, it would have become necessary to assess the nature of marital relationships or establish conditions, when informal relationship would have been equalised to formal one on a case-by-case basis. The applicant remained “protected” beyond family relationships, which were subject to “testimonial privilege”. In the opinion of the ECHR the appealed intervention was not disproportional and unjustified and was not restricting applicants' interests. Applicant's detention for thirty days was not found disproportional either as domestic legislation provided for sufficient guarantees.<sup>73</sup>

## **6. Conclusion**

Witness immunity, as an institute of criminal procedure, is a set of legal (exceptional) norms, providing for the right of witnesses of certain category to refuse to testify. Such persons are divided into three groups: 1. Persons, who generally cannot be questioned as witnesses in a criminal trial; 2.

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<sup>73</sup> The Van der Heijden v. Netherlands, [2012] ECHR, № 42857/05.

Persons, who generally can be questioned as witnesses, but have the right to refuse to testify; 3. Persons, who may be exempted from the performance of the duty of a witness by the court of law. Objective and subjective understanding of witness immunity are delimited. Essentially witness immunity can be divided into two groups: a) the right against self-incrimination; b) right to refuse to testify against next to kin. According to right against self-incrimination, witness immunity can be classified as absolute (imperative) and relative (dispositional) immunity. Absolute immunity of a witness is in play, when a witness is entitled by law to refuse to testify. A person who, due to his/her physical or mental disability, is not able to duly comprehend, memorise and recollect essential to the case circumstances, and give information or testimony cannot be interviewed or interrogated as a witness (CCPG, Article 50, Part 2). Relative (dispositional) immunity is in play, when a witness has an option to enjoy the right to refuse to testify while case-reviewing authority or official is in the position to question the witness, if the latter is ready to testify. This type of immunity extends to an accused, next to kin of an accused (witness immunity envisaged by Article 49(d) of the CCPG, specifically a witness may not give a testimony, which may incriminate him/her or his/her next to kin).

As a general rule, witness immunity does not apply to persons who deal with classified information, however, under Part 3 of Article 50 of the CCPG the court is authorized to exempt persons, listed in Part 3 of Article 50 of the CCPG from the obligation to testify. For uniform understanding, it will be desirable for criminal procedure law of Georgia to specify, whether who is next to kin of a witness prescribed by Article 49 (d) of the CCPG and also family members, envisaged by Article 3 (2), (3) and (4) of the CCPG; furthermore it will be reasonable for Georgian criminal procedure law to include the definition of a relative, envisaged by Article 31 (11) of the Constitution of Georgia.

It is desirable for criminal procedure law to specify, that witness immunity is also enjoyed by foster parents, prescribed by Article 71 of the Law of Georgia on Adoption and Foster Case, in criminal cases, involving their foster children, as well as by foster children in criminal cases, involving their foster parents.

As all the rights and obligations of a witness are also enjoyed by a victim under Article 57(1)(m)(n) of the CCPG, the latter is also entitled to immunity, prescribed by Article 49(d) of the CCPG.

Witness immunity is a legal privilege, legal security of a witness, guaranteeing the protection of rights of a witness in a criminal case.

This guarantee is contained in comment to Article 371 of the Criminal Code of Georgia. Specifically, a person who refused to testify against himself/herself or against his/her next to kin is exempted from criminal liability.

Witness immunity is an exception from general rule and not a categorical prohibition to testify. Consequently, if a witness, enjoying immunity, still agrees to testify or waives his immunity, giving knowingly false testimony by the witness concerned will result in the imposition of criminal liability thereon under Article 370 of the Criminal Code of Georgia. “An accused — witness will not be charged for false testimony. Criminal liability can be imposed thereon only for false denunciation”.

**Bibliography:**

1. Constitution of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995.
2. Criminal Code of Georgia, LHG, 41(48), 22/06/1999.
3. Code of Criminal Procedure of Georgia, LHG, 31, 09/10/2009.
4. *Akubardia I.*, Criminal Procedure, General Part (co-author), Tbilisi, 2008, 41 (in Georgian).
5. Big Law Dictionary, Infarma, Moscow, 1997, 239 (in Russian).
6. *Bosch J.*, Immunität und internationale Verbrechen, Dusseldorfer Rechtswissenschaftliche Schriften, Band 27, Baden-Baden, 2004, 64.
7. *Chomakhashvili K., Osepashvili S.*, Crimes Against Justice, Open Society — Georgia Foundation, Tbilisi, 2017, 12 (in Georgian).
8. Digest of Justinian, *Peretorski I. S.* (trans.), Moscow, 1984, 365 (in Russian).
9. *Esmein A.*, History of Continental Criminal Procedure, London, 1914, 572.
10. *Garishvili M.*, Specificities of Criminal Procedure of Ancient Rome, Journal of Law, № 1, 2012, 18.
11. *Gorning G.*, Immunität von Staatsoberhäupten, Festschrift für Dietrich Rausching, Köln, Berlin, Bonn, München, 2001, 457-485.
12. *Hinterhofer H.*, Zeugenschutz und Zeugnisverweigerungsrechte: im österreichischen Strafprozess, 1 Aufl., Wien, 2004, 182.
13. *Jendral H.*, Immunität – noch zeitgemäss: Kritische Untersuchung eines immerwährenden Privilegs des Parlaments, Haag, Herchen, 1993, 38.
14. *Kimmnich O.*, Das Staatsoberhaupt im Völkerrecht, Staatsoberhaupt und Völkerrecht, Band 26, № 2, 1988, 129-168.
15. *Kühne H. H.*, Ein Lehrbuch zum Deutschen und europäischen Strafverfahrensrecht, 8 Aufl., Heidelberg, 2010, 496.
16. *Kostkiewicz J. K.*, Staatenimmunität im Erkenntnis – und im Vollstreckungsverfahren nach schweizerischen Recht, Bern, 1998, 71.
17. *Kodua E.* (ed.), Dictionary-Directory of Social and Political Terms, Tbilisi, 2004, 351 (in Georgian).
18. *Konev V., Gromov N., Nikolaichenko V.*, Witness Immunity in Criminal Procedure, Moscow, 1997, 19 (in Russian).
19. *Laliashvili T.*, Criminal Procedure of Georgian General Part, Tbilisi, 2015, 293 (in Georgian).
20. *Lord V. B., Cowan A. D.*, Interviewing in Criminal Justice, Victims, Witnesses, Client and Suspects, Canada, 2011, 10.
21. *Petukhovski A.*, Witness Immunity: Challenge of Development of Procedural Institute, “Russian Justice”, № 9, 2003, 1 (in Russian).
22. *Phaphiashvili L.*, Criminal Procedure Law, General Part (co-author), Tbilisi, 2008, 284 (in Georgian).
23. *Pfeiffer G.*, StPO Strafprozessordnung, Kommentar, 5 Aufl., München, 2004, 430, Rn. 2.
24. *Roxin C., Schünemann B.*, Strafverfahrensrecht, 27 Aufl., München, 2012, Para. 26, Rn. 14.
25. *Sakvarelidze P.*, Human Rights Dictionary, Tbilisi, 1999, 128 (in Georgian).
26. *Shengelia I.*, Interrogation of a Witness (Comparative Legal analysis), “Legal Journal”, № 3, 2014, 153 (in Georgian).
27. *Tumanishvili G.*, Commentary on Code of Criminal Procedure of Georgia (co-author), Tbilisi, 2015, 209 (in Georgian).



28. *Tumanishvili G.*, Criminal Procedure, Overview of General Part, Tbilisi, 2014, 158, 206-205 (in Georgian).
29. *Velsh I.*, Witness Immunity in Criminal Procedure, Moscow, 2000, 12 (in Russian).
30. *Zagurski L.*, Principles of Roman Civil and Criminal Procedure, Kharkov, 1874, 376 (in Russian).
31. *Zehnder B.*, Immunität von Staatsoberhäuptern und der Schutz elementarer Menschenrechte - der Fall Pinochet, 1 Aufl., Baden-Baden, 2003, 34.
32. *Al-Khawaja and Tahery v. the United Kingdom* [GC], [2009] ECHR, № 26766/05, № 22228/06, §119.
33. *Accardi and Others v. Italy* (dec.), [2005] ECHR, № 30598/02.
34. *Bonev v. Bulgaria*, [2006] ECHR, № 60018/00, §43.
35. *Bocos-Cuesta v. the Netherlands*, [2005] ECHR, № 54789/00, §72.
36. *Birutis and Others v. Lithuania*, [2002] ECHR, № 47698/99, № 48115/99, § 29.
37. *Băcanu and SC « R » S.A. v. Romania*, [2009] ECHR, № 4411/04, § 75.
38. *Bricmont v. Belgium*, [1989] ECHR, § 89, Series A no. 158.
39. *Calabrò v. Italy and Germany* (dec.), [2002] ECHR, № 59895/00., ECHR 2002-V.
40. *Craxi v. Italy*, [2002] ECHR, № 34896/97, § 86., ECHR 2002.
41. *Doorson v. the Netherlands*, [1996] ECHR, §§81-82, Report 1996-II.
42. *Dzelili v. Germany* (dec), [2005] ECHR, № 65745/01.
43. *Ferrantelli and Santangelo v. Italy*, [1996] ECHR, § 52, Report 1996-III.
44. *Graviano v. Italy*, [2005] ECHR, №10075/02, §38.
45. *Gabrielyan v. Armenia*, [2012] ECHR, № 8088/05, §§78, 81-84.
46. *Gossa v. Poland*, [2007] ECHR, № 47986/99, §55.
47. *Hümmer v. Germany*, [2012] ECHR, № 26171/07, § 38.
48. *Kaste and Mathisen v. Norway*, [2006] ECHR, № 18885/04, №21166/04, § 53.
49. *Karpenko v. Russia*, [2012] ECHR, № 5605/04, § 62., ECHR 2012.
50. *Kok v. the Netherlands* (dec.), [2000] ECHR, № 43149/98., ECHR 2000-VI.
51. *Krasniki v. the Czech Republic*, [2006] ECHR, № 51277/99., ECHR 2006.
52. *Kostovski v. the Netherlands*, [1989] ECHR, § 42, Series A no. 166.
53. *Lucà v. Italy*, [2001] ECHR, № 33354/96, § 41.
54. *Mirilashvili v. Russia*, [2008] ECHR, № 6293/04, §§158-159.
55. *Pello v. Estonia*, [2007] ECHR, № 11423/03, § 35., ECHR 2007.
56. *Popov v. Russia*, [2006] ECHR, № 26853/04, § 188., ECHR 2006.
57. *Perna v. Italy* [GC], [2003] ECHR, № 48898/99, § 29., ECHR 2003-V.
58. *Polyakov v. Russia*, [2009] ECHR, № 77018/01, §§ 34-35., ECHR 2009.
59. *Romanov v. Russia*, [2008] ECHR, № 41461/02, §97.
60. *S. N. v. Sweden*, [2002] ECHR, № 34209/96, § 45.
61. *Sibgatullin v. Russia*, [2012] ECHR, № 1413/05, § 45.
62. *Solakov v. the Former Yugoslav Republic of Macedonia*, [2001] ECHR, № 47023/99, §57.
63. *Sadak and Others v. Turkey* (no. 1), [2001] ECHR, № 29900/96 and 3 others, § 67.
64. *Sofri and Others v. Italy* (dec.), [2003] ECHR, № 37235/97.
65. *Trofimov v. Russia*, [2008] ECHR, № 1111/02, § 37.
66. *Tarău v. Romania*, [2009] ECHR, № 3584/02, § 74.
67. *The Van der Heijden v. Netherlands*, [2012] ECHR, № 42857/05.

68. Topić v. Croatia, [2013] ECHR, № 51355/10, § 42.
69. Ubach Mertes v. Andora, [2000] ECHR, № 46253/99.
70. Van Mechelen and Others v. the Netherlands, [1997] ECHR, § 58, Report 1997-III.
71. Vidal v. Belgium, [1992] ECHR, § 34, Series A no. 235-B.
72. Vidgen v. the Netherlands, [2012] ECHR, № 29353/06, § 47.
73. Visser v. the Netherlands, [2002] ECHR, № 26668/95, §47.
74. Wierzbicki v. Poland, [2002] ECHR, № 24541/94, § 45.
75. <[www.supreme.justia.com/us/384/436/case.html](http://www.supreme.justia.com/us/384/436/case.html)>.