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IMMUNITIES OF THE WITNESS AND WITNESSING IN THE CRIMINAL PROCEDURE: THE PROBLEM OF IDENTITY AND RELATION

Raimundas Jurka

Mykolas Romeris University, Faculty of Law,
Department of Criminal Procedure
Ateities 20, LT-08303 Vilnius, Lithuania
Phone (+370 5) 2714 639
E-mail bpk@mruni.eu

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Abstract. *The article deals with the discussion of the concept and implementation of immunities of the witness in the criminal proceedings in abstracto. The problem is whether the additional guarantee of protection of the witness' procedural interests, which is fixed in the Law of the Criminal Procedure, is appropriately methodologically regulated, or whether certain immunities of the witness are appropriately perceived and applied in practice, is raised in the present article. Through this reason, the author, searching for the answers to these questions—how is all this and how must all this be?—singles out, in abstracto, two elements of immunities of the witness, in concreto—the immunities of the witness and witnessing. It would seem that these protective guarantees are similar in principle. The analysis of this article allows for the answer that they are analogous from the point of view of their value. However, they differ by the mechanisms of implementation. According to the author, the immunity of the witness protects the person from becoming a witness, whereas the immunity of witnessing secures protection from witnessing, which may cause harm to the witness himself/herself. Accordingly, it also determines the need not only to analyze these two elements, but their interrelation and interrelations as well.*

Keywords: *witness, witnessing, immunity, criminal procedure, identity, relation, protection of interests.*

Introduction

Immunity, as an additional instrument of protection of a person's interests, which is embedded in the Code of the Criminal Procedure of the Republic of Lithuania¹ (CCP), is often related with the following question—what does it protect from? Really, from the point of view of its essence, immunity, i.e. the prohibition to question certain persons as witnesses or the permission to question them as witnesses on a certain condition, is inseparably related with protection of the person, as a possible or existing witness, from a certain threat. It is the threat to his/her personal (family) or professional (occupational) interests. Thus, seeking protection for these interests, the Lithuanian criminal procedure foresees additional guarantees of protection of procedural interests of the witness, i.e. immunities of the witness, which, *in abstracto*, in the most general (wide) sense, cover the cases which are foreseen in the Articles 80, 80¹ and 82 of the CCP.

Immunities of the witness, as additional guarantees, are assigned for the protection of a person from the impermissible attempt on his/her personal (family) or professional secrets under protection. It may seem that this item is clear and that it is hardly worthy to discuss it in detail as this item has already been discussed in a number of works, etc.² Nevertheless, it is worthy to discuss—the author's insights on the structure of immunities of the witness, in the wide sense, as well as their compositional elements and content *in concreto*, in the narrow sense, attach acceleration to it. Thus, it must be revealed and analyzed on a wider scale because otherwise, sharing the opinion expressed by the Roman poet Persius, *scire tuum nihil est, nisi te scire hoc sciat alter*³. Thus, the item about immunities is not revealed to an imaginable extent, but also is not revealed to the extent which could be imagined by us. In analyzing the theme, it is important to be aware not only of the regulation of criminal procedure, but also of the principal legal nature of its separate provisions, of their essence and significance for social relations as well—ultimately, the methodology of legal regulation is programmed in them. To say it otherwise, the author is concerned with the answers to the following questions—why is it like this and how can all this be? Herein, the insight of the interwar author M. Kavolis, who had been interpreting the Law of the Criminal Procedure of Lithuania, deserves attention. According to him “[...] all of us agree in principle that the procedural norms are not the rules of the game, but they are the absolutely precise rules of the common sense”⁴. It also

1 Code of the Criminal Procedure of the Republic of Lithuania. *Official Gazette*. 2002, No. 37-1341.

2 See: Jurka, R. Draudimas versti duoti parodymus prieš save kaip asmens konstitucinių teisių baudžiamajame procese garantas [Prohibition to Compell the Persons to Give Evidence against Themselves as the Constitutional Guarantee in the Criminal Procedure]. *Jurisprudencija*. 2006, 1(79); Jurka, R. *Liudytojas ir jo procesiniai interesai baudžiamajame procese* [Witness and His Procedural Interests in Criminal Procedure]. Monografija. Vilnius: VĮ „Registrų centras“, 2009; Jurka, R. Žurnalistų imuniteto samprata baudžiamajame procese [The Concept of Journalists' Immunity in the Criminal Procedure]. *Teisės problemos*. 2005, 1(47) and etc.

3 Eng. – no worth it has, what I know, if any other does not know, what I know.

4 Kavolis, M. *Baudžiamojo proceso įstatymas su komentarais* [Criminal Procedure Law and its Commentary]. Kaunas: „Literatūros“ knygyno leidimas, 1933, p. XVI.

pertains to the immunities of the witness and of witnessing, as well as to their relation in the criminal procedure.

The research subject of this article: the provisions of criminal procedure laws and doctrine, is related to the topic under analysis and gives the possibility to argue the author's insights.

The purpose of the article may be defined both simply and intricately, but the most important thing is that it must be defined clearly: it is an attempt to reveal the structure of immunities of the witness (in the wide sense)—their compositional elements, namely—the essence and relation of immunities of the witness and of those witnessing (in the narrow sense) in the criminal procedure.

Seeking achievement of the goal, the author invokes the teleological and systemic methods, the methods of documentary analysis, criticism, abstraction, induction and deduction, as well as the other not less important methods, which permit the author not only to concretize and to reveal explicitly the author's thoughts, but also to give to them the peculiar "lemmas", which enable them to substantiate the author's propositions.

1. General Opinion about Immunities of the Witness: Prohibitions and Permissions

Generally speaking about immunities of the witness, it is important to perceive that the guarantees fixed in Articles 80, 80¹ and 82 of the CCP, state that the witness can be questioned not at any price in the criminal procedure, but only after having evaluated both his/her personal possibilities and his/her will to behave so. Thus, the Law of the Criminal Procedure is applied in cases where the witness cannot be compelled to give evidence through his/her personal or professional (occupational) ties (commitments) or cannot be questioned altogether about certain circumstances in the criminal case. In other words, the legislator restricts total freedom of the officials and institutions, which/who pursue the criminal procedure, seeking ascertainment of the truth even in the criminal case—it can be done only on condition that certain limits of the foreseen prohibitions or permission, which serve as conformity with the immunities, prohibiting to ascertain the truth by any means and methods, are observed.

The immunity in the law (Lat.—*immunitās*) is perceived as exemption from all the liabilities, concessions⁵, and non-application of certain general laws towards the appropriate persons⁶, immunity⁷, or exemption from liability, which the people must normally fulfill as per the general laws⁸. Its essence, as per the Constitutional Court of the Repu-

5 *Lotynų-lietuvių kalbų žodynas* [Latin-Lithuanian Dictionary]. A-Z / sud. Kuzavinis, K. Vilnius: Mokslo ir enciklopedijų leidykla, 1996, p. 395.

6 Vaitkevičiūtė, V. *Tarptautinių žodžių žodynas* [International Words Dictionary]. II pat. ir papild. leidimas. Vilnius: Žodynas, 2001, p. 402.

7 *Dabartinės lietuvių kalbos žodynas* [Contemporary Lithuanian Dictionary]. Keinys, S., et al (eds.). 4-asis leidimas. Vilnius: Mokslo ir enciklopedijų leidybos institutas, 2000, p. 212.

8 *Black's Law Dictionary*. 7th ed. Garner, B. A. (ed.). Saint Paul: West Group, 1999, p. 752; also see: *Black's Law Dictionary with Pronunciations*. Abridged 6th ed. Campbell, H.; Black, M. A. (eds.). Saint Paul: West Publishing Co., 1991, p. 515.

blic of Lithuania (the rule of the 8th of May of the year 2000⁹)—additional guarantees for the person’s immunity, which are necessary and compulsory for the definite person so as to fulfill his/her obligations appropriately, is related with the person’s right to immunity, and the prohibition to “intercept” the person from his/her personal (the family relations, marriage bonds, etc.) or professional ties, which are beyond the limits of the procedure. *In abstracto*, the immunity of the witness is perceived as the person’s right to choose whether to give evidence, and as a prohibition for the officials of the state-managed institutions to question the person about certain circumstances through the position held by them. Thus, the immunity of the witness is important for the criminal procedure in the following aspect—it protects from ascertaining the truth at any price; it reminds those in power that the historically formed legal traditions and the socially important focuses (the family relations, inadmissibility to compel the person to give evidence against himself/herself, etc.) must be observed while searching for the truth with the help of the criminal procedural measures. It can be stated that the immunities, which are being considered from a certain aspect, presuppose appearance of the procedural form while executing certain deeds of the procedural investigation, while gathering data in a criminal case. Eventually, its non-observance or inappropriate observance, unconsciously negates legitimacy of the investigative deed itself (not to mention the results, obtained in the course of it), pursuit of its conformity with fair process.

It was mentioned that the procedural guarantees of protection of the witness, foreseen in the Articles 80, 80¹ and 82 of the CCP—immunities of the witness, in the most general sense—serve as the legal safety devices, which work out in detail, the state’s positive responsibility arising from the Constitution of the Republic of Lithuania, to protect a person and his/her secrets. These safety devices, protecting from the obligation to be questioned, are not identical in the methodological sense. Though, as it was already mentioned, they are named as immunities of the witness¹⁰ in their most general sense. To say it otherwise, these safety devices are like two different sides of the same coin, which are kindred due to the fact that their value levers are equal. However, it must be noticed that the construct of these safety devices—the procedural guarantees, in the narrow sense, is not similar and their structure is complex. It is determined by the methodology of legal provisions, based on two integrate elements— *prohibition* and *relative permission*—whether to question the person as a witness. Thus, the conception of immunities of the witness, in the most general sense, is based on the methodological grounds of legal regulation—the procedural guarantees, fixed in Articles 80, 80¹ and 82 of the CCP,—immunities of the witness are implemented by prohibiting the questioning of certain persons as witnesses or by permitting the questioning of them as witnesses, only if the appropriate conditions, foreseen in the laws, are observed. Thus, their value

9 The Constitutional Court of the Republic of Lithuania ruling of 2000 of May, 8 “On the compliance of Part 12 of Article 2, Item 3 of Part 2 of Article 7, Part 1 of Article 11 of the Republic of Lithuania Law on Operational Activities and Parts 1 and 2 of Article 1981 of the Republic of Lithuania Code of Criminal Procedure with the Constitution of the Republic of Lithuania”. *Official Gazette*. 2000, No. 39-1105.

10 Jurka, R. *Liudytojas ir jo procesiniai interesai baudžiamajame procese* [Witness and His Procedural Interests in Criminal Procedure], *supra* note 2, p. 185–190.

assignment is identical from the point of view of aspiration. Only the ways of their implementation (implementation of immunities) differ.

The prohibition to question persons as witnesses is based on the provision that it is impermissible in a civilized society to compel a person to give evidence, which can cause harm to the person himself/herself or to his/her professional interests (seeking appropriate execution of the professional or occupational obligations while keeping the secret, trusted to him/her). Being led by this thought, the legislator defined the cases in Articles 80, 80¹ and 82 of the CCP when it is prohibited to question certain persons about the circumstances which compose his/her personal or professional (occupational) secrets. To say the truth, attention must be drawn to the fact that the right of the subjects, who execute the criminal procedure, to question such persons is not altogether restricted in the mentioned provisions of the CCP, except, as was mentioned, about certain circumstances. To say it otherwise, prohibition—immunity, protects the person against becoming a witness to the extent to which it is related with his/her demand (interest) to keep his/her personal or professional (occupational) secret, or the secret which he/she disposes of. Thus, Article 80 of the CCP protects the person, who has possibly committed a criminal deed, against becoming a witness, who usually is obliged to reveal all of the circumstances of their crime, which are known to him/her. The immunity also protects the judge (it is a matter of secret in the judicial council room; of the defender of the suspected, defendant or convicted; or of the representatives of the victim, civil plaintiff or civil defendant) through the circumstances, which became known to them in the course of execution of the defender's or representative's duties; the clergymen—though the things which were trusted to them during confession; and finally, the organizers of public information, the owners of the organizer and (or) the spreader of public information. Including journalists—who, according to the Law on the Provision of Information to the Public of the Republic of Lithuania, make secret their sources of information).

Referring to the construction of the provisions, fixed in Article 80 of the CCP, one could think that, according to this article, it is generally prohibited to question the appropriate persons as witnesses about certain circumstances, which could be significant for a case. It would seem at the first glance that this provision, which is named “the circumstances, through which the persons cannot be questioned as witnesses”, would mean that not the person's “quality”—his/her will—but the content of the information, which he/she knows or manages, determines the impossibility to question them. Partially it is true, but attention must be drawn to the fact that the impossibility to strive for the goals of a criminal procedure by trampling on the other constitutionally equal values, such as independence of the judge (court); freedom of the mass media; absoluteness of the rights towards defense and representation; freedom of belief (religion); etc., forms the foundation for prohibition itself. It is true that Paragraphs 1 and 5 of Article 80 of the CCP mention the cases when the free self-determination of the person, of the subject, who manages the appropriate information (except the case, foreseen in the Article 80¹ of the CCP) to reveal the circumstances, through which usually they cannot be questioned without their consent, negates absoluteness of the above-mentioned prohibition. Here, the person's

will¹¹ is the foundation of the right not to give evidence against himself/herself, which, according to the Constitution, is the permission without compulsion (with the person's consent) to question the person about the deed possibly committed by him/her. Whereas, according to the CCP, it is prohibited in spite of the person's will. There it is, while talking about the so-called immunity of journalists, it must be noted that the dispositional method of legal regulation, which provides the journalists with freedom of choice—to give evidence or withhold it¹², is fixed in Paragraph 5 of Article 80 of the CCP. To tell the truth, according to the author, this freedom is relative—one can make use of it only, if it does not impair the legal interests of the person, as the source, from which certain information was obtained, when determining the constitutionally grounded information self-determination. Thus, the legislator differentiates the prohibitions, foreseen in the mentioned provisions, into unconditional prohibitions, to which the cases, foreseen in the Paragraphs 2, 3 and 4 of Article 80 of the CCP are attributed; and into conditional prohibitions, to which the cases, foreseen in the Paragraphs 1 and 5 of Article 80 of the CCP are attributed. All of these prohibitions *in corpore* are *immunities of the witness* in the narrow sense, which means that they protect the person from becoming a witness through certain definite circumstances, known to him/her. However, one of them—the one which is foreseen in the Paragraph 1 of Article 80 of the CCP, causes plentiful discussions as it is questionable as to whether it is identical with the other immunities of the witness, foreseen in Paragraphs 2–5 of Article 80 of the CCP, according to its nature. Taking into consideration to its essence, it must be related not with the immunities of the witness, but with the immunities of witnessing as it exceptionally depends upon the person's will? This item will be more widely discussed further on because it will hardly be possible to perceive the essence of the immunity of witnessing and its relation with the immunities of the witness without having revealed the other integral element—the relative permission to question persons as witnesses.

The permission to question persons as witnesses by observing the appropriate conditions, foreseen in the law, is based on the provision that it is not prohibited to question the person as a witness about the circumstances, which make his/her personal or professional secret, if such person gives his/her clear and substantive consent to it. As distinct from the case of the above-discussed prohibitions, when it is prohibited to question the person as a witness despite the availability or absence of his/her consent, except in the cases, foreseen in Paragraphs 1 and 5 of Article 80 of the CCP, the relative permission is of a dispositional nature. It does not prohibit the holding of an inquest, if the person under questioning does not object to it. In other words, this immunity protects the person not from becoming a witness, but from compulsory being forced to give evidence, which may be harmful for him/her. Thus, the immunity, which is discussed from the methodological point of view, is directed not towards the person, but towards gathering data—towards the process of giving evidence. As regards this aspect, the thought, expressed by a philosopher of the XIX century, A. Schopenhauer, which illustrates the immunity which is being discussed, deserves attention. According to him, this immunity

11 See: Jurka, R. *Jurisprudencija*. 2006, 1(79), *supra* note 2.

12 Jurka, R. *Teisės problemos*. 2005, 1(47): 67, *supra* note 2.

is the legal right to conceal the things, which, if made public, would make us weaker or would turn us into the objects of encroachment from the perspective of others¹³.

The legislator, having solidified the immunity which is being discussed, indicates that it is allowed to question the person as a witness, if the later does not object to it. With taking into consideration the construction of Part 2 of Article 82 of the CCP, the algorithm of this immunity, as the legal safety device, is ambivalent. There, firstly, it is allowed to question the suspected or accused person's family members as witnesses, only if they do not object to it (i.e. absence of prohibition is clearly expressed). Secondly, these persons are allowed to choose and to answer only such questions, submitted to them, if the replies to which, in their opinion, would not harm them. Thus, as distinct from the case of prohibitions, the permission to question the person as a witness by observing the conditions, foreseen in the law, allows, essentially, to consider (to name) the person as a witness, but the later, making use of his/her right to keep silent—not being committed to utter a word and to tell the truth, disposes of the immunity of witnessing—of such legal safety device, which protects the person under inquest from the disadvantageous or “undesirable” inquest altogether or from the “undesirable” questions, to which the other witnesses, who fall out of the contingent, foreseen in Part 2 of Article 82 of the CCP, anyhow have to reply. The truth is that, while talking about the Lithuanian Republic's President's immunity of witnessing, foreseen in Part 1 of Article 82 of the CCP, it must be noted that this witness can refuse to give evidence without the right of choice to which questions will be answered and to which questions will not be answered. In spite of this, a safety device is foreseen in this part as well—the permission to question the President, if the later does not object to it, to say nothing about the status of the subject, enables an inquest to be held. The place of the inquest, etc., is considered to be the peculiarity of witnessing, the essence of which lies not in the self-determination of whether to be or not to be a witness, but the decision of whether to give or not to give evidence.

Thus, returning to the question of whether the immunity of the witness, foreseen in Paragraph 1 of Article 80 of the CCP (as at present it is fixed in the existing law, according to its legal nature), it is identical with the other immunities of the witness, foreseen in Paragraphs 2–5 of Article 80 of the CCP, or its valuable roots are somehow related with the immunity of witnessing, fixed in Part 2 of Article 82 of the CCP. It is important to state that we shall find the answer to this question only via revealing the relation between the immunities of the witness and of witnessing.

2. The Relation of Immunities of the Witness and of Witnessing: the Dominant of the Person's Will

The perception of the relation of the immunities which are being analyzed is important because it helps to answer the questions, how is it and how must it be? The analysis of the content of immunities, which was done previously, provides the possibility to un-

13 Shopengauer, A. *Izbrannye proizvedeniya* [Selected Works]. Moskva: Prosveschenie, 1993, s. 179.

derstand how, at present, the immunities of the witness and of witnessing are regulated in the CCP, by which methods it is grounded, etc. However, the doubt, which was brought forward by the author, about the nature and interface of one of the immunities—of the one, which is foreseen in the Paragraph 1 of Article 80 of the CCP, conditions going deep into another question—how, all together, must the item, regarding the immunities of the witness, be regulated in the law so that it meets the constitutional provision (Article 31 of the Constitution), according to which it is prohibited to compel the person to give evidence against himself/herself, against his/her family members, or close relatives. Drinking in these words of the Constitution allows one to understand that, on the one hand, it must be actually allowed to give evidence in spite of its nature—against oneself, family members, or relatives. It is important that the person, who perceives his/her deeds, who is conscious and who is not compelled by anybody to behave so, gives evidence. On the other hand, the requirement to prohibit any coercion regarding the person, seeking that he/she gives evidence against himself/herself or against his/her close person, is derived from this permission and it seems to be diametrical. Anyhow, these “antipodes”—the permission and prohibition attract each other as, according to the author, they are related with the same value constant—self-determination to give evidence against oneself or close person is exceptionally derived from the person himself/herself and only from his/her free will to behave so. The state must not prohibit the questioning of the person about the deed committed by him/her, if he/she agrees and wishes to behave so. The state must not compel such a person to give evidence against himself/herself or his/her close person, if he/she does not wish to behave so. Thus, the person’s will and his/her self-determination are the centre of all this. Thus, interference of the state into the cycle of the person’s exceptionally private self-determination to tell or not to tell the truth about himself/herself would be unjustifiable neither from the moral, nor, the more so, from the constitutional point of view. Thus, generally speaking about the structural elements of immunities of the witness—of the above-discussed immunities of the witness and of witnessing—the first one is based on the principle of “prohibition to speak”—on the impossibility to question the person about the data which he/she disposes of, which is related with his/her occupational liabilities (and correspondingly—with the guarantees) and which make up the professional secret. The second element is based on the principle of “the permission to keep silent”. It provides the person, who may possibly be questioned as a witness, with the possibility to decide whether to give evidence (to answer only certain submitted questions) or not to give evidence about the data, which make his/her personal or family secret—whether to give or not to give evidence about the data, which make up the professional (businesslike) secret (in case of interrogation of the President of the Republic).

It is exactly the second element, in the definite case—the protection against the obligation to give evidence about oneself or close person—“the permission to keep silent”, impels to search for the answer to the question—how must it be? But we can clearly see how it is, judging from Paragraph 1 of Article 80 of the existing CCP. Thus, herein it can be stated that the evaluation of the corresponding legal provisions depends

not upon the fact that they are solidified in the legal act, but depends upon our perception of these provisions.

It was mentioned that, while analyzing this immunity, which releases the witness from the obligation to give evidence against himself/herself, first of all, attention must be focused on the provisions of the Constitution. The provisions of Parts 1 and 3 of Article 31 of the Fundamental law (the Constitution) about the presumption of the person's innocence and the prohibition to compel the person to give evidence against himself/herself construct the state's, its institutions' and their officials' standpoint about the person, which must be also observed in legal reality—in the practice of the law enforcement institutions and courts—nobody, none of the officials or institutions has the right to compel the other person to give evidence against himself/herself or close person, unless the person himself/herself agrees voluntarily to behave so. This principle, from which the analyzed immunity is derived, testifies to the person's right to self-determination and to behave in one way or another in the course of the legal procedure, if it is related with the possibility (probability) to accuse him/her or to prosecute him/her. Such freedom of the person's self-determination determines *dispositio* of his/her (as the subject of the procedure) deeds, seeking for the preservation of the personal or family secret, his/her constitutional right to his/her self-determination of whether to reveal or not to reveal the information. Thus, according to the Constitution, the state has committed itself to create the medium for the person, in which the later would be provided with the unrestricted possibility to decide what is better—to give or not to give evidence. Otherwise, the person's deed, executed against his/her will, would not be his/her deed—*actus me invito factus, non est meus actus*. Several factors form the conception of the prohibition to compel the person to give evidence against himself/herself. *Firstly*, each person has the right to decide freely and independently whether to give evidence against himself/herself or to reject behaving so or to give evidence only about certain circumstances. According to the author who is investigating the immunity which is being discussed, J. Lau, the things, which were told or done by the person, who had been behaving so under coercion—being not free—are the deeds done not out of his/her will, but they are the result of the will of the person who had been compelling the person to behave so¹⁴. Thus, it is obvious that, if there is no identity between the person, who gave evidence, and his/her will, as the result of which the mentioned evidence was obtained, there is no evidence itself, as the data does not meet legitimacy in the criminal case. While talking about the identity of the person and his/her will, A. Schopenhauer states that the place where it—what the person is for himself/herself—works, is his/her consciousness and will, whereas the place, where it—what the person is for the others—is the alien consciousness and will¹⁵. *Secondly*, the right of choice provides the person with the possibility not only to refuse from giving evidence, but also to choose the questions to be answered. Thus, this constitutional value allows the person to be questioned not only to give or not to give his/her consent to answering the questions, but also, having

14 Lau, J. Witness Immunity? *New Law Journal*. 2009, 159: 89.

15 Schopenhauer, A. *Gyvenimo išminties aforizmai* [Sententious Sayings of Life's Wisdom]. Vilnius: Tyto alba, 2007, p. 66.

agreed to answer them, to choose which questions he/she wishes to answer and which questions are unacceptable. The right of choice is based on the person's will, which, as such, is determined by the fountainhead of the person's egoism—as M. Laitman¹⁶ would express himself, the person perceives the freedom of choice as the subject, which purely depends upon his/her will and only upon his/her self-determination. *Thirdly*, the law enforcement institutions, their officials and courts are prohibited to compel the person in any form to cause harm to himself/herself (to give evidence against himself/herself) at any time of the procedural activity, even if the person does not perceive it. Seeking avoidance of the case, when the person gives evidence without perceiving that while behaving so, he/she causes harm to himself/herself, the thought about the representation of the witness deserves attention (rendering of the legal assistance in the course of procedural actions). Certain literary sources¹⁷ reveal this thought in more detail. *Fourthly*, the evidence, which was obtained from the person by coercive method—by infringing the person's right to decide whether to give or not to give evidence, are considered in the criminal case as evidence which does not meet the requirements raised towards the content of the data (evidence)—it does not meet the requirements of legitimacy, admissibility, reliability, etc. *Fifthly*, the person's refusal to give evidence to the officials, who hold the inquest, may be equated according to its essence (from the material legal point of view) with the ahead non-promised concealment of the criminal deed or of the person, who has committed such deed. To tell the truth, criminal responsibility cannot emerge through it, if the family members or close relatives of the suspected or of the accused behave so. Thus, while generalizing these factors, it can be stated that the person who can give evidence about the criminal deed committed by himself/herself is the person who has the procedural capacity of the witness, but the person cannot be legally compelled to give evidence against himself/herself or against his/her close person. The conclusion is to be drawn that the prohibition to compel the person to give evidence against himself/herself, out of which the idea of immunity not of the witness, but of witnessing is derived, is oriented towards the person's will and simultaneously is stipulated by his/her will. Surely, the will is a reflection of the person's interest. The attitude of the author S. Jankauskas, who had been investigating Dekart's works, on this item, which, *inter alia*, is suitable for the topic which is being investigated in this article, deserves attention. The author notes that the will's "[...] essence is as follows: we may do or not do the same thing, i.e. we may state or may deny, we may aspire or elude from the same thing [...]" and "[...] by stating or denying, by seeking or eluding from any things, imposed by the mind, we act as if we do not experience any external coercive force"¹⁸. Apparently, the will, performing the determining impact upon the self-determination to act in one way or another, from the point of view of its essence, is to be considered as the

16 Laitmanas, M. *Iš chaoso į harmoniją* [From Chaos to Harmony]. Vilnius: VšĮ „Kabalos studijų centras“, 2007, p. 67.

17 See: Jurka, R. *Liudytojas ir jo procesiniai interesai baudžiamajame procese* [Witness and His Procedural Interests in Criminal Procedure], *supra* note 2, p. 156–165.

18 Jankauskas, S. *Dekartiškasis Dievo įrodymas: prielaidos ir intencijos* [Descartes' Proof for the Existence of God: Premises and Intentions]. *Problemos*. 2004, 65: 61–85.

core or foundation of the immunity of witnessing. Judging from it, everything depends from the voluntary self-determination of the person—of the witness, as the constitutionally grounded and methodologically substantiated permission to question him/her as a witness about the criminal deed, committed by himself/herself, if the person agrees to behave so. It may be said that the legislator, while solidifying the provision in the way as it is stated at present in Paragraph 1 of Article 80 of the CCP did not see into the nature of the legal idea which serves as the foundation for the current regulation—the person, being free to decide, realizes his/her will, whereas the prohibition to act or to behave in any way with the person himself/herself, in spite of his possibly opposite will, presupposes “captivity” of the person’s will—its disregard.

While evaluating the provisions, stated in Paragraph 1 of Article 80 and Part 3 of Article 82 of the CCP, about the prohibition to question the person about the criminal deed which was possibly committed by himself/herself, except the case when he/she agrees to give evidence as the result of which the provisions of Part 2 of Article 82 of the CCP are applied, and with taking into consideration the above-specified constitutional principles on impossibility to compel the person to give evidence against himself/herself, the following conclusion is to be drawn—it must not be prohibited to question the person, foreseen in Paragraph 1 of Article 80 of the CCP, but it must be allowed to question if the person agrees to give evidence. However, if the person agrees to give evidence, then, by keeping to the same logic as it is in Part 2 of Article 82 of the CCP, such person is obliged to give the *proper* evidence. The person’s consent to give evidence does not release him/her from the obligation to behave properly. Otherwise, the legal responsibility, foreseen in Article 83 of the CCP, is to be applied according to the general order. The successive systemic and theological analysis as well as the analysis of the content of the provisions, stated in Article 18, Part 4 of Article 22, Part 1 of Article 25, Part 1 of Article 26, Part 3 of Article 31 and Part 1 of Article 38 of the Constitution, the conclusions of investigation of the doctrines of the constitutional and criminal process law induce the author to formulate this conclusion.

With taking into consideration the above-submitted analysis, the legal nature of the immunity, which secures protection of the person from the obligation to give evidence about himself/herself or his/her close person, is identical to the immunities of witnessing, solidified in Part 2 of Article 82 of the CCP. Contrariwise to the immunities of the witness, they are derived from the person’s free will and choice to preserve or to reveal the secret about himself/herself or about the other—his/her close person. The prohibition of the state for the person to self-decide, as at present it is foreseen in Paragraph 1 of Article 80 of the CCP, together with the reservation, solidified in Part 3 of Article 82 of the CCP, is identical to the fragility of the criminal procedural environment as, in this way, according to J. Rawls (2003), the symbiosis of justice and morals are being demolished in the state¹⁹.

19 Kačerauskas, T. Piliėtinis nepaklusnumas: individų laisvė ir visuomeninė tvarka [Civil Disobedience: Freedom of Individuals and Social Order]. *Problemos*. 2009, 76: 29.

Conclusions

1. Immunity of the witness, which in the most general sense protect the witness from ascertainment of the truth by any means or methods, serve as one of the guarantees (foreseen in the CCP) of protection of the witness' procedural interests.

2. Immunities of the witness—as the additional guarantee of protection of the witness *in abstracto* include two elements *in concreto*—immunities of the witness and of witnessing. The first one is the prohibition to question the persons as a witnesses, which is based on the provision that it is impermissible to compel the person to give evidence which may cause harm to himself/herself or to his/her professional interests. The second one—the immunity of witnessing is the permission to question the persons as witnesses only if the corresponding conditions, foreseen in the law, are observed. It is based on the provision that it is allowed to question the person as a witness about the circumstances which make his/her personal or professional secret only if such persons gives their clear and independent consent to behave so.

3. The immunity of the witness *in abstracto*, which is foreseen in Paragraph 1 of Article 80 of the CCP, is to be attributed to the immunities of witnessing according to its essence and legal nature—contrariwise than it is foreseen in the existing law. The explanation is as follows: the state must not prohibit the questioning of the person about the criminal deed committed by him/her if the later agrees and wishes to behave so; the state must not compel such a person to give evidence against himself/herself or his/her close person if the person does not wish to behave so. The person's will and his/her free self-determination are the centre of all of this.

4. The legal nature of the immunity, which secures protection of the person from the obligation to give evidence against himself/herself is identical with the immunities of witnessing, fixed in Part 2 of Article 82 of the CCP. Contrariwise from the immunities of the witness, they are derived from the person's free will and choice of whether to keep or to reveal the secret about himself/herself or about the other—his/her close person.

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LIUDYTOJO IR LIUDIJIMO IMUNITETAU BAUDŽIAMAJAME PROCESU: TAPATUMO IR SANTYKIO PROBLEMA

Raimundas Jurka

Mykolo Romerio universitetas, Lietuva

Santrauka. *Moksliniame straipsnyje analizuojama liudytojo imunitetų in abstracto baudžiamajame procese sampratos problema. Straipsnyje autorius kelia klausimą, ar ši baudžiamojo proceso įstatyme įtvirtinta papildoma liudytojo procesinių interesų apsaugos garantija metodologiškai reglamentuojama tinkamai, ar tam tikri liudytojo imunitetai yra tinkamai suvokiami ir taikomi praktikoje. Kitaip sakant, autorius siekia analizuoti ir ieškoti atsakymų į klausimus – kaip yra ir kaip turėtų būti. Dėl šios priežasties autorius nustato du liudytojo imunitetų in abstracto elementus in concreto – liudytojo ir liudijimo imunitetus. Atrodytų, jog šios apsaugos garantijos iš esmės panašios. Iš tiesų straipsnyje atliekama analizė leidžia atsakyti, kad vertybiniu požiūriu jos yra analogiškos. Tačiau jos skiriasi įgyvendinimo mechanizmais. Autoriaus nuomone, liudytojo imunitetai saugo nuo tapimo liudytoju, o liudijimo imunitetai užtikrina apsaugą nuo liudijimo, kuris gali pakenkti pa-*

čiam liudijančiajam. Atitinkamai tai lemia ir poreikį ne tik analizuoti šiuos du elementus, bet ir jų tarpusavio santykį, turinio sąsajas.

Straiptuose pabrėžiama, kad liudytojo imunitetai in concreto siejami su apsauga nuo pareigos atskleisti dalykinę (profesinę) paslaptį, todėl teisinga manyti, kad šie imunitetai mažai tepriklauso nuo paties asmens – galimo liudytojo valios. Šių imunitetų pagrindas – valstybės priedermė neleisti net ir baudžiamojo proceso metu pakenkti kitoms konstituciškai svarbioms bei lygiavertėms vertybėms, tokioms kaip teismo nepriklausomumas, teisė į gynybą, tinkamą atstovavimą, tikėjimo laisvė, teisė būti informuotam ir kitoms. Kitaip sakant, šiais imunitetais sudaromos prielaidos išlaikyti vertybinę Konstitucijos ginamų teisinių gėrių pusiausvyrą.

Liudijimo imunitetų pagrindas – liudytojo kaip asmens valia, mat tik nuo jos priklauso, ar apklausa kaip procesinis veiksmas apskritai gali būti atlikta su pačiu liudytoju. Asmens valios dominavimas čia reiškia, kad dėl liudijimo imuniteto taikymo apsispręsti gali tik pats apklausiamasis liudytojas – sutikti duoti parodymus ar ne, o jeigu taip – tai į kuriuos klausimus atsakyti, o į kuriuos ne. Vadinasi, liudijimo imunitetų skirtingumą nuo liudytojo imunitetų lemia vienintelis faktorius – asmens valia. Jos faktas ir raiška atitinkamai diferencijuoja valstybės nustatytus draudimus apskritai apklausti asmenis kaip liudytojus bei sąlyginius leidimus apklausti asmenis kaip liudytojus, tik jeigu šie duoda aiškų sutikimą tai daryti.

Reikšminiai žodžiai: liudytojas, liudijimas, imunitetas, baudžiamasis procesas, tapatumas, santykis, interesų apsauga.

Raimundas Jurka, Mykolo Romerio universiteto Teisės fakulteto Baudžiamojo proceso katedros docentas. Mokslinių tyrimų kryptys: asmens interesai baudžiamajame procese, teisė į tinkamą procesą, nusikalstama veika padarytos žalos atlyginimas proceso metu, tarptautinis bendradarbiavimas baudžiamajame procese.

Raimundas Jurka, Mykolas Romeris University, Faculty of Law, Department of Criminal Procedure, associated professor. Research interests: criminal procedure, right to a fair trial, compensation of damage in criminal procedure, international cooperation in criminal proceedings.