



PROCEDURAL STATUS OF CONFIDENTIAL WITNESS IN CRIMINAL PROCEEDINGS (ON THE EXAMPLE OF TURKISH CRIMINAL PROCEDURE LAW)

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Article history:	Abstract:
Received: November 10 th 2022 Accepted: December 6 th 2022 Published: January 6 th 2023	In this thesis, the importance of the witness's participation in criminal proceedings, ensuring the safety of the witness, not disclosing the identity of the witness. In particular, the procedural status of a confidential witness, the procedure for their participation in the proceedings, is important and the need to be questioned as an anonymous person was analyzed on the basis of the Turkish Criminal Procedure Law.
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Today, in criminal procedural law, the issue of safety of participants in the process is great importance. Among other things, the safety of witnesses is also relevant, because solving the crime, identifying the criminals and assigning them a suitable punishment is one of the most important issues. In particular, the procedural status of a confidential witness, the procedure for their participation in the proceedings, is important. We will analyze this issue on the basis of Turkish criminal procedural law.

What is a Confidential Witness?

If the accused learns who the witness heard in the criminal procedure is, it poses a "grave and serious danger" for the witness or their relatives; The witness may be heard as a "secret witness" during the investigation and prosecution phases.

The secret witness is heard personally by the prosecutor's office during the investigation phase and by the court during the prosecution phase. Law enforcement agencies (police, gendarmerie, etc.) do not have the authority to listen to secret witnesses. Whether or not a witness will be heard as a confidential witness is a decision that requires legal consideration. The decision of confidential testimony can also be taken by the prosecutor's office, which is the authorized legal subject at the investigation stage, and by the court that conducts the trial during the prosecution stage.

Persons who will testify for the following crimes can be heard as confidential witnesses in accordance with the Witness Protection Law and Article 58 of the CMK and the witness is taken under protection:

Offenses punishable by aggravated life imprisonment, life imprisonment and a lower limit of imprisonment of ten years or more.

Crimes committed within the framework of the activity of an organization established for the purpose of committing acts deemed as a crime by the law, requiring a prison sentence of two years or more with a lower limit, and crimes committed within the framework of the activities of a terrorist organization.

How to Hear a Secret Witness? How to Get Statement?

The secret witness is heard in a special way due to the possibility of being in grave and serious danger. The anonymous witness, the persons who have the right to be present in accordance with the principle of directness and face-to-face while the witness is heard (complainant, defendant, lawyers, etc.) are heard without being present (CMK art. 58/3). In practice, it is possible to say that there are several methods of listening to the secret witness.

At the investigation stage carried out by the Prosecutor's Office; In accordance with the principle of confidentiality of the investigation, no one is authorized to be present, except the prosecutor who listens to the witness and the clerk who will write the report. It is observed that secret witnesses are often listened to by the police and gendarmerie during the investigation phase. It is illegal to listen to the secret witness in this way, and the statement obtained is in the nature of unlawful evidence.

At the prosecution stage; As a rule, witnesses should be heard in the presence of persons entitled to be present at the hearing. The court can only base its decision on



the evidence of witness statements, which it has heard personally and where the parties have the opportunity to discuss (CMK art. 217/1). The right of the parties to ask questions, even if they are secret witnesses, is reserved (CMK art. 58/3). Regardless of how the secret witness is heard, the court conducting the trial must provide the parties with the opportunity to ask questions, to check the accuracy and reliability of the secret witness's statement, and to discuss the witness's statement, in accordance with the principle of adversarial trial and equality of arms.

Two systems are applied for hearing anonymous witnesses:

In the first method; The anonymous witness is kept present outside the courtroom while the trial is in progress. The identity of the secret witness is kept confidential, his image is hidden and his voice is changed and transferred to the courtroom. The parties and their lawyers may exercise their right to ask questions after the secret witness has been heard by the court. Disadvantages of the system; It is not known whether the secret witness is under the influence or not, and it cannot be checked whether he was directed or not while he was being heard.

In the second method; It is the hearing of the witness in the closed hearing in an environment where only the lawyers of the parties are present, without the presence of the complainant, participant or the accused who have the authority to be present at the hearing. In this method, the lawyers of the parties personally see the witness, have the opportunity to audit the witness statement and ask questions directly. This method has been used very little in recent years.

Confidential Evidence Legislation

In order to apply for witness protection measures in accordance with the Witness Protection Law No. 5726, there must be an investigation or prosecution against one of the crimes specified in the law, the person to whom the measure will be applied is a witness or one of their relatives, there is a serious and serious danger to the life, physical integrity and property of the person, the measure must be moderate, decision of the authorities must be found.

In accordance with Turkey's Criminal Procedure Law No. 5271 and Witness Protection Law No. 5726, an application to the confidential witnessing institution as an evidence tool can be made in the following cases:

1. Conditions Regarding the Crime: Article 58/2 of the CMK No. 5271 regulates the concept of confidential testimony. CMK art. According to 58/5, it is possible to conceal the identity of the witness only in organized crimes.

In practice, the witnesses who need to be protected in accordance with the Witness Protection Law due to the following crimes are secret witnesses (Article 3 of the Witness Protection Law):

Witnesses may be included in the scope of witness protection for crimes that require aggravated life imprisonment, life imprisonment and a lower limit of imprisonment of ten years or more, which are included in the Turkish Penal Code No. 5237 and special laws containing penal provisions.

Criterion for Ordinary Organizations (Organizations established to commit crimes within the framework of TCK 220): Witnesses can be included in the scope of witness protection measure for crimes that require a prison sentence of two years or more, which are committed within the framework of the activity of an organization established to commit acts deemed a crime by the law.

Criteria in Political Organizations (TCK 314): In crimes related to political organizations (organization membership crime, propaganda crime, etc.), every witness can be heard as a secret witness without any limitation on the amount of crime and punishment.

2. Conditions Regarding Witnesses (CMK 58/3-4): The identities of the persons who will be heard as witnesses may be kept confidential if the revealing of their identities would pose a grave danger to themselves or their relatives. The Witness Protection Law, on the other hand, stipulates the criteria of grave and serious danger for the witness to be included in the scope of protection measure.

Confidential Testimony in ECtHR and Constitutional Court Decisions

The ECtHR and the Constitutional Court accept the statement of an anonymous witness as evidence if certain conditions are met. The common criteria sought by both courts in order to evaluate the statement obtained as a result of hearing the anonymous witness as evidence are as follows:

There must be a reasonable reason to conceal the identity of the witness. The danger that requires the witness to be heard as a confidential witness should arise from the accused, the persons with whom the accused acted, or their relatives.

Confidential witness testimony should not be the "only piece of evidence" on which the verdict is based. The court should not base its judgment solely on the testimony of an anonymous witness.

Even if the secret witness statement is not shown as the "sole evidence" in the judgment, if it is the "main and decisive evidence" on which the judgment is based, among other evidence, assurance



mechanisms should be provided to the accused or his lawyer in order to determine the reliability and accuracy of the witness statement. The right to a fair trial is deemed to have been violated if the accused and his lawyer are deprived of the means to audit the testimony of anonymous witnesses.

Hearing of Confidential Witness and Value of Evidence Supreme Court Decision

As a rule, those who are parties in criminal proceedings should not be heard as witnesses. For this reason, the Criminal Procedure Code did not regulate the hearing of the accused and the suspect, who are the parties to the case, as witnesses, but allowed the witnesses of the partners.

According to the Code of Criminal Procedure, it is possible to be heard as a witness about the accomplice of the accused, who is on trial in the pending case. In Article 50 of the CMK, those who are suspected, accused or convicted of participating in the crimes subject to investigation or prosecution or favoring the criminal due to these crimes or destroying, hiding or changing the evidence of crime may be heard as witnesses, but these witnesses must be heard without taking an oath. If the statement of the accomplice will result in his being accused, he has the opportunity to abstain from testifying. (CMK article 48)

Article 48 of the CMK provides its basis in Article 38/5 of the Constitution. There is a regulation that takes the provision of the article and guarantees the right to a fair trial.

The answers obtained as a result of asking such questions to the witness without being reminded of the right to abstain are in the nature of unlawful evidence (CMK m.206/a and m.217/2), unlawful evidence cannot be taken as basis. (YCGK 12.11.2013 2013/1-251, 2013/454) The fact that the accused is not heard as a witness about the crimes in which he himself participated does not mean that the statements of the accused will not have the quality of evidence. For example, if one of the members of the organization sincerely tells how they committed the crime together and there is evidence to support it, although the other members of the organization do not accept it, this statement will of course be considered as evidence. In this respect, it does not matter much whether a statement is called "witness statement" or "defendant statement".

In summary, in the decision of the ECtHR on the conditions of confidential testimony (Ellis, Simms and Martin v. England, Chamber Decision),

There must be a justifiable reason for the witness's identity to be kept confidential;

It must be decided by the court whether the statement of the anonymous witness is the sole or essential element for the conviction;

If the sole or main basis of the conviction decision is the testimony of the anonymous witness, the proceedings should be subject to detailed examination. Under these circumstances, it was stated that there was a public interest in the secret listening of witnesses. In the same decision, it sought effective cross-examination and rejected the application, believing that the credibility of the anonymous witness' statement had been fairly and appropriately assessed. The same principles were repeated in the decision of the other chamber of the ECtHR dated 11.12.2011 (Application no: 26766/05).

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