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Normative regulation of witness immunity in international law

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Abstract

Through materialist dialectics, the article is dedicated to the study and solution of theoretical and practical questions related to the right of a person not to declare or give explanations about himself, his relatives, or close relatives. Interested here was the thorough review of the doctrinal sources of this right, the meaning and methodology of its research, the concept and content of the right of a person not to testify, the peculiarities of this right in Ukraine and in the world, its legislation, as well as its guarantee of implementation. In addition, based on the analysis of the legislation of each country, the authors identify the characteristics of the guarantee, analyze the theoretical aspects and the practical problems of granting the police and judicial authorities the right not to declare or give explanations about themselves. It is concluded that the immunity of witnesses means a set of rules that exempts certain groups of witnesses from the obligation to testify in criminal proceedings, as well as from the obligation of the witness to testify against himself. In this sense, immunity for a witness is divided into two types of imperatives: (absolute, unconditional) and device (relative, conditional).

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Regulación normativa de la inmunidad de testigos en la legislación internacional

Resumen

Mediante la dialéctica materialista el artículo está dedicado al estudio y solución de cuestiones teóricas y prácticas relacionadas con el derecho de una persona a no declarar ni dar explicaciones sobre sí misma, sus familiares o parientes cercanos. Interesó aquí la revisión minuciosa de las fuentes doctrinales de este derecho, el significado y metodología de su investigación, el concepto y contenido del derecho de una persona a no testificar, las peculiaridades de este derecho en Ucrania y en el mundo, su legislación, así como su garantía de implementación. Además, con base en el análisis de la legislación de cada país, los autores identifican las características de la garantía, analizan los aspectos teóricos y los problemas prácticos de otorgar a las autoridades policiales y judiciales el derecho a no declarar o dar explicaciones sobre sí mismos. Se concluye que, la inmunidad de los testigos significa un conjunto de normas que exime a ciertos grupos de testigos de la obligación de declarar en los procesos penales, así como de la obligación del testigo de declarar contra sí mismo. En este sentido, la inmunidad para un testigo se divide en dos tipos de imperativos: (absoluto, incondicional) y dispositivo (relativo, condicional).

Palabras clave: proceso penal; testigo; inmunidad de testigos; testimonio; garantías.

Introduction

Ensuring the possibility of democracy in the modern sense applies to all spheres of the state and society, including criminal justice, which involves a wide range of participants. Accordingly, state protection of rights and freedoms is needed by all participants of criminal proceedings without exception, regardless of the procedural status, position, interest in the results of criminal proceedings (Kharitonova, 2019).

Many countries around the world are currently undergoing reforms and changes, are in the process of finding the optimal political and legal model of state building that would meet European standards and a universally

recognized system of democratic values. Namely, building a system of effective state mechanism in the person, first, of qualified officials of relevant public authorities, which would ensure human and civil rights, is one of the main tasks provided by the Association Agreement between Ukraine and the European Union.

Legislators of such states often refer to the positive practical experience of foreign countries in various fields, including the right to ensure the right of a person not to testify or explain about himself, family members or close relatives. The implementation of this right in practice is sometimes inconsistent and ambiguous, both at the regulatory level and at the institutional and organizational level (Berezhanskaya, 2019). The above encourages the analysis of ensuring the right not to testify or explain about oneself, family members or close relatives in foreign countries in order to study their experience and its further use in Ukrainian realities.

The purpose of the article is to consider the current problems that arise in connection with the reform of criminal procedure legislation, which has created certain difficulties in law enforcement practice, including the implementation of the rules governing the institution of witness immunity. In addition, a detailed analysis requires regulatory regulation of witness immunity in the legislation of foreign countries.

1. Methodology of the study

The methodological basis for writing this scientific article was the dialectical-materialist method of cognition of social and legal phenomena, as well as a set of general and special methods and techniques of scientific cognition, which currently used in legal literature, which made it possible to study the problems forms. In the study of doctrinal and normative sources of the right of a person not to testify or explain about himself, family members or close relatives, such general scientific methods as observation, description, comparison were used to determine certain legal categories that characterize the essence and content of this right.

Special methods were also used, in particular: systematic analysis, as well as formally logical and system-structural methods, which helped to clarify the legal nature and essence of the right not to testify or explain to law enforcement and judicial authorities about themselves, family members or close relatives; using the formal legal method to study the provisions of the Constitutions and Criminal Procedure Codes and other legal sources of Ukraine and other countries, clarified the content and meaning of the concepts and terms used, substantiated conclusions and proposals for their interpretation in certain proceedings; thanks to the comparative-legal and structural-functional method, the scientific positions on the procedural

guarantees of ensuring and implementing this right were analyzed; the statistical method contributed to the generalization of the results of the study of the materials of criminal proceedings; due to of modeling and forecasting, specific proposals were formulated for the exercise of the person's right not to testify or explain about himself, family members or close relatives.

2. Analysis of recent research

In scientific circles, fundamental work is devoted to ensuring the right of a person not to testify or explain about himself, family members or close relatives L. Mises (Mises, 1997), V. Makhov, M. Peshkov (Makhov and Peshkov, 1998), K. Gutsenko, L. Golovko, B. Filimonov (Gutsenko *et al*., 2002), W. Bryson, (Bryson, 1992), N. Volosova, O. Fedorova (Volosova and Fedorova, 2008), K. Kalinovsky, (Kalinovsky, 2000), T. Loskutova (Loskutova, 2005), T. Aparova (Aparova, 1996), S. Volkotrub (Volkotrub, 2005), O. Galagan (Galagan *et al*., 2011), L. Udalova (Udalova, 2004), O. Belkova (Belkova, 2004).

The scientific achievements of these scientists are beyond doubt, and some inferences formed the basis of the author's conclusions and contributed to the disclosure of problematic issues and develop ways to solve them. At the same time, certain issues related to the implementation of the privileges and immunities of the participants in the criminal proceedings remain unresolved. Today there is a need taking into account current trends in the development of criminal procedure, a new theoretical understanding of the legal nature and the concept of witness immunity in modern conditions; elucidation of the peculiarities of the legal regulation of criminal proceedings against persons with privileges and immunities in the post-Soviet countries; determining the features of legal regulation under the criminal procedure legislation of Ukraine and ensuring the right of a person not to testify or explain about himself, family members or close relatives and its compliance with international standards, etc.

3. Results and discussion

3.1. Ensuring the right of a person not to testify about himself, family members or close relatives in foreign legal systems

Any criminal proceedings cannot be imagined without the participation of a witness. This is because the witness is an indispensable source of information that is important for establishing the presence or absence of circumstances to be proved in criminal proceedings, as well as other

circumstances that are important for the proper resolution of criminal proceedings. Witness testimony is the most common type of evidence.

Ensuring the realization of the right of a person not to testify or explain about himself, family members or close relatives as a constitutional guarantee against self–blame first established in the late seventeenth century in the constitutional law of England. This norm later implemented in the constitutional law of the United States of America. In the V amendment to the Constitution of the United States of America and is considered the basic principle of interrogation of the person both in police, and in particular in court. The content of the Fifth Amendment to the Constitution of the United States of America states: "No person shall be compelled to testify against himself in any criminal case" (Code of criminal procedure of the republic of belarus, 1999: p. 46).

The rules governing the institution of witness immunity are divided into separate rules, chapters and sections of most legislative provisions of the United States, France, the Federal Republic of Germany and the United Kingdom, as well as a number of other countries. The essence of witness immunity based on explaining the right of the accused or detainee to remain silent and to refuse to testify. Meanwhile, the laws of some countries use concepts such as "witness immunity" and "witness testimony privilege".

For example, United States legislation contains both the notion of "witness immunity" and the notion of "witness testimony privilege", using the term "privilege" and treating this right as immunity (Maklakov, 1997). Theoretical approaches of foreign scholars consider privilege as a privilege (Maklakov, 1997). For example, L. Mises position based on the identity of such concepts as privileges and privileges (Mises, 1997). The laws of Great Britain, the United States, Canada, and other countries speak of privileges.

The legislation of the United States of America considers immunity for a witness and the privileges of witnesses as independent legal categories and defines them as: 1) the privilege against self–incrimination (or the right to silence); 2) the privilege of witness testimony; 3) immunity of witnesses. Privileges are provided for the testimony of witnesses, for example, for the accused it is a privilege of self–blame.

The privilege of self–incrimination in the criminal proceedings and judicial practice of the United States of America and the United Kingdom is expressed in three basic rules, which explain to the detainee that he has the right to remain silent; everything he says can be used as evidence against him; he has the right to be present during the interrogation of a lawyer (Makhov and Peshkov, 1998). It should be noted that this rule applies only to suspects who are under arrest, as far as persons who are not under arrest are concerned, this rule does not apply to them (Bryson, 1992).

The provisions of the immunity of witnesses are set out in Art. 6001–6005, placed in Chapter 18 of the Code of Laws of the United States of America and contain only the general rules of this institution. K. Gutsenko aptly stated that, many of its details are specified in the norms of unwritten law and approved by the courts in the relevant rules. You can also get an idea of them under the Unified Rules of Criminal Procedure and borrowed almost entirely from many states of the State Model Law on Witness Immunity (Gutsenko *et al*., 2002).

Legislation on witness immunity differs significantly from state to state and differs from that in federal law, so it should be noted that United States law does not contain uniform provisions governing the institution of witness immunity.

The provisions on witness immunity were established by the Fifth Amendment to the Constitution of the United States of America and stated that no one should be coerced in a criminal case, to be a witness against himself. In addition, part of this provision is the XIV Amendment to the Constitution of the United States of America, which prohibits involuntary admission of guilt. The considered provisions began to have a significant impact on law enforcement practice only after the decision in the Miranda case on June 13, 1966. Prior to this decision, police officers applied such measures of influence to detainees that would allow them to obtain a confession.

An important component of witness immunity is the voluntary testimony given by the detainee. This has been repeatedly pointed out by the Supreme Court of the United States of America. Considering Miranda's case, he noted "the need to create conditions for the application of the Fifth Amendment to the Constitution of the United States not only in the courtroom, but also in any other place where a person may be in danger of restricting his rights and freedoms. Compliance with the rules of voluntary testimony of the United States Supreme Court proposes to support the relevant guarantees", which are reflected in the law.

These include the responsibilities of persons conducting criminal proceedings. E. Warren clarifies the procedure, stating: "prior to the interrogation, the person must be warned of his or her right to remain silent, and any statement made by him or her may be used as evidence against him or her. She has the right to have a lawyer. The accused may waive these rights, but in this case, it is necessary to check the voluntariness and awareness of his decision. If the accused later in any stage of the criminal case shows a desire to have a lawyer, questions in this case he cannot be asked (Israel *et al.,* 1989).

US law pays special attention to the admissibility of evidence in connection with the application of the provisions of witness immunity and

the admission of guilt by the accused. Violation of the criminal procedure is grounds for declaring the evidence inadmissible. These provisions are set out in IV, V, VI, XIV amendments to the US Constitution. When the evidence is declared inadmissible, the principle of "fruits of a poisoned tree" applies. According to him, all data, information, and information that became known through the use of inadmissible evidence are excluded from the evidence base in a criminal case.

The prohibition on the use of physical and mental coercion in the investigation process is linked in US law to the question of the admissibility of such recognition. It is the duty of the court to carefully consider such complaints. Any person shall, after such circumstances have been established, be released from any persecution (Volosova and Fedorova, 2008).

The implementation of witness immunity is impossible without explaining to the accused the consequences of his consent to testify. At the same time, the legislator provided a number of guarantees for the voluntary nature of such recognition, placing the burden of proving this fact on the prosecutor. Both federal and state law provides for these responsibilities.

In many legal provisions of foreign law, the provisions of witness immunity are considered as part of the right to protection. For example, in United States law, before any interrogation, a person should not only be warned in clear and unambiguous terms that he or she has the right to remain silent, that anything he or she says may be turned against him or her, but that she has the right to have a lawyer present.

The presence of a lawyer during interrogation is one of the guarantees of the voluntary confession made by the accused (Kalinovsky, 2000). The United States Criminal Procedure also establishes a rule that a detainee may refuse to testify at any time during questioning or answer certain questions, indicating the need to consult with his or her lawyer. In this case, the interrogation must be terminated (Volosova and Fedorova, 2008).

According to the analysis of foreign constitutional and other sectorial legislation, today such a rule is reflected in most constitutions of the world.

The Constitution of the Kingdom of Spain (Article 24) guarantees everyone the right to effective protection by a judge and a court in the exercise of their legitimate rights and interests, and in no case is such protection denied. According to part 2 of the mentioned article, everyone also has the right to: – consideration of his case by the judge to whose jurisdiction it is assigned by law, – protection and assistance of a lawyer, – information on the accusation, observance of all guarantees, – to use all means of evidence provided for protection, – not to testify against oneself, – not to plead guilty, – to the right of presumption of innocence. The law defines the cases when due to family ties or professional secrecy, a person

is not obliged to testify about actions that may previously be considered illegal" (Constitutions of the EU, 2021).

Thus, we see the similarity of the investigated law only in the part not to testify about oneself. Family members and close relatives are not mentioned in the article of the Spanish Constitution, which, in fact, is the right to differ from the constitutional and other sectorial legislation of Ukraine.

A comprehensive analysis of the right of a person not to testify or explain about himself, family members or close relatives forces us to pay attention to the legislation and practice of its implementation in other countries. In contrast to the legislation of unitary states, the national legislation of federal states provides for slightly different constitutional provisions, as well as the relevant provisions, detailed at the level of other sectorial legislation.

Thus, the Constitution of the Federative Republic of Brazil (Article 5, paragraph LXIII) requires that every detainee be informed of his rights, including the right not to answer questions, namely: "The detainee must be informed of his rights, including the right to remain silent, a guarantee for help from family and a lawyer" An analogy is seen, in fact, as in the above states.

The right of a person not to testify or explain about himself, family members or close relatives is also reflected in German law. According to the Constitution and the German Code of Criminal Procedure, testifying is a right, not an obligation, of the accused. Therefore, the representative of the body conducting the criminal proceedings should be explained that he may refuse to testify in the case. The defendant's admission of guilt in committing a criminal offense, in contrast to French law, is conclusive evidence.

It is interesting that the refusal to plead guilty entails an increase in punishment. In turn, the Constitution of France enshrines that everyone has the right not to testify against himself enshrined in sectorial law. It can be concluded that in France the right of a person not to testify or explain about himself, family members or close relatives has a double meaning, namely: it is a means of proof that is necessary to establish in the case; is considered as one of the means of exercising the right to protection (Constitutions of the EU).

There are several prohibitions on evidence in the German Code of Criminal Procedure, which are divided into two groups. The first of these is the prohibition of establishing certain factual circumstances (related, for example, to a state secret) and the use of certain sources of evidence (for example, immunity for a witness). The second group of circumstances includes evidence that significantly violates the legal sphere of the accused (Filimonov, 1994). Thus, foreign law is usually quite meticulous about compliance with the rules of witness immunity as a condition for the admissibility of evidence.

The second important privilege is the privilege that exempts relatives from testifying as well as others. It should be noted here that in some legislative acts this list contains a certain list, in others this list may vary. Yes, Art. 335 of the Criminal Procedure Code of France in the circle of such persons, in addition to relatives, includes a former spouse; a person engaged to the accused.

The peculiarity of the criminal proceedings of the United States of America is the lack of a single unified national list of persons who have the privilege of a witness. For example, the law of the United States of America pays great attention to the protection of the interests of the accused and his defense counsel (Volosova and Fedorova, 2008).

As noted by T. Loskutova, these privileges are derived from the main privilege of the witness – the privilege against self-blame, and are designed to protect relationships that are trusting, confidential. In granting these privileges, the court may prohibit the disclosure of certain types of information without the consent of the person, but does not prohibit witnessing in court (Loskutova, 2005).

The legislation of other countries has additional guarantees for the protection of various types of secrets. For example, Art. 60 of the Criminal Procedure Code of the Republic of Belarus provides for the possibility to request permission to disclose the circumstances that are the subject of medical secrecy from a person who has applied for medical care, and the position of interrogation of a doctor depends on his position (Code of criminal procedure of the republic of belarus, 1999).

The legislation of foreign states reflects the tendency of the ratio of private and public principles. The privilege of self–incrimination in the law of Great Britain traces the protection of public interests. The interrogation of the suspect and accused under British law is preceded by a warning in the following statements:

> You are accused of committing the following crime. You don't have to say anything. But it can complicate your defense if you don't mention something you expect to refer to later in court. Everything you say can be evidence in the case" (Aparova, 1996: 32).

Meanwhile, a police officer in criminal proceedings in the United Kingdom is allowed, with an appropriate warning about the accused's right to remain silent, to ask clarifying questions or questions aimed at preventing or reducing harm to others (Aparova, 1996). In the United Kingdom, with the consent of the defendant to testify, he is subject to the procedure of questioning a witness. In this case, he is criminally liable for refusing to testify and for giving knowingly false testimony. It should also be noted

here that for refusing to testify, the accused is liable for contempt of court (Kalinovsky, 2000).

As for the police instructions, they clearly stated that the interrogation should be conducted based on a person's guilt, indicating to him that silence may be used against him (Israel *et al.*, 1989). According to Rule 11 of the Federal Criminal Procedure Code of the United States, "if he agrees to testify before a grand jury under oath, the accused must be aware that he may be prosecuted for false testimony". The American legislator proceeds from the fact that "in the course of the trial there is no need to lie in order to protect oneself". In this regard, the state criminal procedure codes provide for liability for false testimony of suspects and accused, while retaining their right to remain silent (Volosova and Fedorova, 2008).

Another position is taken, for example, by the Supreme Court of the Federal Republic of Germany, which points to the possibility of increasing the punishment when the defendant denies guilt, does not want to repent, and realize what he has done, testifies to the hardened criminal, the possibility of future crimes (Gutsenko *et al.*, 2002).

The existing democratic and humanistic principles of protection of human and civil rights and freedoms in the legislation of the United States of America are closely interrelated with the priority of state interests in the fight against crime. A witness who is granted the right to witness immunity may be summoned to court under United States law, but the legislature prohibits his or her from being prosecuted, even if the information provided to him or her contains information about his or her unlawful conduct. According to Art. 6003 of the Federal Rules of Judicial Procedure (Interim and final relief immediately following the commencement of the case), such a person may be summoned for questioning by an attorney representing the state. However, he must obtain the consent of the Minister of Justice and the Attorney General and justify that the information provided by the witness protects the interests of society and the state.

Article 52.05 of the legislation of the state of Texas establishes the bases of the compelled testimony – immunity of witnesses. A person may be required to testify when it is legally recognized that this is necessary for the Commission of Inquiry in the interests of justice. However, a person may refuse to testify on the grounds that he or she is afraid of being prosecuted. In this case, the judge may oblige the person to testify, but by providing a guarantee against criminal prosecution, this reflects the legal nature of the immunity of witnesses.

Witness immunity rules apply to administrative cases and any hearings in the United States Congress. The Congress of the United States of America has the right to apply to the district court for such permission if a person is to be questioned at a congressional hearing. At the same time, the majority of members of Congress must vote in favor.

By providing for a special procedure for the implementation of the provisions of witness immunity, the legislature obliges a person to testify in court, at hearings in Congress and in other cases if the information provided is relevant to society. According to the legal provisions, a person can be obliged to testify only against himself, these rules do not apply to information about relatives. Despite the importance of the precepts of the right not to testify against oneself, there is no unanimity among practitioners and researchers about the appropriateness of the Miranda rules.

These statements are based on a study of public opinion, which in recent years tends to consider the effectiveness of the fight against crime, rather than the question of the development of witness immunity under the rules of Miranda. The problem of expediency of their preservation and application in criminal proceedings remains relevant and open. "Arguments against these provisions are based on two postulates.

The first of them based on the need to protect, first, the interests of justice and citizens. The basis of the second is the need to combat rising crime. These arguments allowed their supporters to persuade the legislator to adopt in 1968 the "Joint Law on Crime Control and Security on the Streets". This is a convincing example of protecting the public interest and creating conditions for it. The Supreme Court of the United States of America joined the solution of this problem, formulating an exception to the rules of Miranda. They are due to the need to protect society from crime and delinquency.

The effectiveness of measures aimed at combating domestic violence is also developed in the criminal procedure legislation of the United States of America. The prohibition on the use of witness privileges makes it possible to combat crimes committed by the accused against members of his family, including minors and minor children. In particular, Art. 38.10 Texas procedural law prohibits a person who has committed a crime against a husband (wife), child or other family member from exercising the privilege of silence (refusal to testify).

The criminal procedure legislation of a number of countries provides for the possibility for the legal representative of a minor to decide whether to testify or to refuse to testify against close relatives and the opportunity to exercise the right to witness immunity. § 52 of the Criminal Procedure Code of Germany provides for the possibility of refusing to testify if minors due to intellectual immaturity or infancy, or persons in custody due to mental illness or mental retardation, do not sufficiently represent the right to refuse to testify. They may be questioned only if they are ready to testify and their legal representative has consented to the questioning. In that case, if the legal representative himself is the accused, he cannot decide on the exercise of the right to refuse to testify. If both parents have the right to legal representation, one of the parents cannot resolve this issue without the consent of the other parent.

It is necessary to note a number of positive factors in the implementation of witness immunity in foreign law: 1) immunity for a witness is an effective mechanism for combating violations of the rights of the accused; 2) immunity for a witness allows to exclude inadmissible evidence in the course of proceedings in a criminal case; 3) immunity for a witness, establishing exceptions in the exercise of the right not to testify against oneself, is an important tool of law enforcement agencies aimed at combating crime.

The study of foreign legislation, law enforcement experience of foreign countries will avoid mistakes in the process of regulation and in the process of law enforcement of witness immunity in Ukraine.

3.2. Features of legal regulation of criminal proceedings against persons with privileges and immunities in the post-Soviet countries

Analyzing the legislation of Georgia, it can be argued that compared to other countries, they have the most severe system of prosecution for violation of any right and evasion of responsibility, as well as "failure to report" or "concealment" of the crime. In Georgia, it can be noted that a person's right not to testify or explain about himself, family members or close relatives is almost non–existent, as "failure to report" or "concealment" of a crime entails criminal liability of 2 to 4 years in prison (Criminal Procedure Code of Georgia, 1999).

In our opinion, this is a violation of a person's right not only to testify or explain about himself or herself, but also about family members or close relatives. After all, if a person refuses to give an explanation or testimony, it may already be grounds for criminal or other liability. Georgian police argue that this makes it possible to solve crimes faster and better.

After all, people who have committed a crime, as a rule, have the right not to testify against themselves, family members or close relatives, which does not allow to quickly solve crimes. In turn, the Constitution of the Republic of Lithuania also provides for the possibility of not giving testimony or explanations about oneself, family members or close relatives. Thus, in Art. 31 of the Constitution stipulates: "it is prohibited to force to testify against oneself, members of one's family or close relatives" (Constitution of the Republic of Lithuania, 1999).

Armenia's criminal procedure law contains a large list of provisions relating to the institution of witness immunity. They are located in various sections, chapters and norms of criminal procedure legislation. A characteristic feature of the criminal procedure legislation of the Republic of Armenia is that the provision of witness immunity is an integral part of the two main principles contained in Art. 19 and 20 of the Code of Criminal Procedure of Armenia – the right of the suspect and accused to protection

and his provision and freedom from testifying, respectively (Criminal Procedure Code of the Republic of Armenia, 1998).

Part 5 of Art. 19 of the Criminal Procedure Code of Armenia prohibits forcing the suspect and accused to testify, present materials to the body conducting the criminal proceedings, or provide him with any assistance. Art. 20 exempts from testifying against oneself, husband (wife) and close relatives. Part 2 of this rule indicates that a person to whom the body conducting the criminal proceedings offers to provide information or provide materials substantiating his guilt, the guilt of his husband (wife) or close relatives in the commission of a crime, has the right to refuse to report bird information and provide materials (Criminal Procedure Code of the Republic of Armenia, 1998).

The legislator notes the special importance of the provisions of witness immunity and therefore considers them not only an integral part of the principle of the right of the suspect and accused to protection and provision, but also an independent principle of criminal procedure law of Armenia.

The right to witness immunity may be exercised by any participant in criminal proceedings. The right not to testify against oneself belongs to the victim, suspect, accused, witness, civil plaintiff and defendant. This conclusion follows from the analysis of the provisions contained in Art. 59, 61, 63, 65, 66 of the Criminal Procedure Code of Armenia and other provisions of the law governing the participation of these persons in criminal proceedings. These rules provide an opportunity to refuse to testify against your husband (wife), as well as to testify against their close relatives. The list of close relatives in the legislation of Armenia is quite large. Close relatives in accordance with paragraph 40 of Art. 6 of the Criminal Procedure Code of Armenia are parents, children, adoptive parents, adopted children, full and half-brothers and sisters, grandfather, grandmother, grandchildren, as well as husband (wife) and parents of husband (wife) (Criminal Procedure Code of the Republic of Armenia, 1998).

The legislator also provided for the category of persons obliged to remain silent. Cannot be called and questioned as witnesses on the basis of Art. 86 of the Criminal Procedure Code of Armenia are the following persons: who due to physical or mental disabilities are not able to correctly perceive and reproduce the circumstances to be established in a criminal case; lawyers to identify information that may be known to them in connection with seeking legal assistance or providing such assistance; who became aware of the information relating to this criminal case, in connection with the participation as a defense counsel, representative of the victim, civil plaintiff, civil defendant in the criminal case; a judge, prosecutor, investigator, investigator and court clerk in connection with a criminal case in which they exercised their procedural powers, except in cases of investigation of errors and abuses committed in the proceedings, reopening of the case

under newly discovered circumstances or restoration of lost proceedings; ordained priest–confessor about the circumstances that became known to him from confession.

Armenian law provides for another type of witness immunity – the privilege of testifying under Art. 448 of the Criminal Procedure Code of Armenia. This privilege extends to diplomatic and consular representatives. These persons are given the privilege not to be interrogated as witnesses and victims, to enjoy the privilege of providing correspondence or other documents related to the performance of their official duties. In addition, the Code of Criminal Procedure of the Republic of Armenia on the basis of and taking into account the rules of international law placed in a separate chapter of the proceedings in the cases of persons enjoying privileges and immunities established by international law and international treaties (Criminal procedure code of the republic of Armenia, 1998).

Analys of the norms of the criminal procedure legislation of the Republic of Armenia allows us to conclude that immunity for a witness extends to the range of persons defined by law, whom the legislator divides into several categories. Immunity for a witness as a privilege extends to participants in the process, as well as their close relatives. The second category consists of persons who are obliged to keep confidential information due to official duty or a special mission assigned to a person (for example, a clergyman). The third group consists of persons enjoying diplomatic immunity and immunities.

The regulation of witness immunity in other countries and in the countries of the former Soviet Union was considered in more detail in the monograph "Regulations on Witness Immunity in Criminal Proceedings in Russia and Foreign Countries" (Volosova, 2011: 39).

Analyzing foreign experience in ensuring the right of a person not to testify against himself, family members and close relatives, it is possible to state a variety of ways to consolidate and implement this right. In almost all countries, it is possible for a person not to testify or explain himself or herself, family members or close relatives. Such an opportunity is provided to a person both in the context of a clearly defined constitutional right and in the context of the relevant guarantees, and in some cases even in the context of an obligation.

The latest legislation in European countries clearly outlines two prospects for the development of the constitutional right of a person not to testify or explain about himself, family members or close relatives. The first is to expand the range of persons endowed with this right. The second trend is to extend the right of a person not to testify or explain about himself, family members or close relatives to other crimes against justice. In particular, the legislation of Lithuania and Poland abolishes criminal

liability for giving false testimony to victims or witnesses if they do so in order to avoid liability of their family members or close relatives.

3.3. Legal regulation of witness immunity in Ukraine and its compliance with international standards

In the theory of criminal procedure law of Ukraine, it is accepted to consider immunity for a witness as a legal institution (Volkotrub, 2005). Thus, in Part 2, Article 4. 65 of the Criminal Procedure Code of Ukraine states which categories of witnesses are endowed with immunity, i.e., are released by law from the obligation to testify. In particular, the following may not be questioned as witnesses: defense counsel, representative of the victim, civil plaintiff, civil defendant, legal entity subject to the proceedings, legal representative of the victim, civil plaintiff in criminal proceedings – the circumstances that became known to them in connection with performing the functions of a representative or defender; lawyers – about information that is a lawyer's secret; notaries – about information that constitutes a notarial secret; medical workers and other persons who, in connection with the performance of professional or official duties, became aware of the disease, medical examination, examination and their results, intimate and family aspects of a person's life – information that is a medical secret; clergy – about the information they received at the confession of the faithful; journalists – about information that contains confidential information of a professional nature, provided that the authorship or source of information is not disclosed; judges and jurors – on the circumstances of discussion in the deliberation room of issues that arose during the court decision, except in cases of criminal proceedings for the adoption of a judge (judges) knowingly unjust sentence, decision; persons who participated in the conclusion and execution of the conciliation agreement in criminal proceedings – on the circumstances that became known to them in connection with the participation in the conclusion and execution of the conciliation agreement; persons to whom security measures have been applied – regarding valid data about their persons; persons who have information about valid data about persons to whom security measures have been applied – regarding these data.

Nor may persons with the right of diplomatic immunity, as well as employees of diplomatic missions, be questioned as witnesses without their consent, without the consent of a representative of the diplomatic mission (Criminal Procedure Code of Ukraine, 2012).

As already mentioned, the Criminal Procedure Code of Ukraine defines the immunity of a witness as the right to refuse to testify in certain cases by law. Such an interpretation could be considered controversial, as the term "witness immunity" has a completely different meaning. Foreign criminal procedure doctrine, considering the experience practiced in the United

States, interprets the institution of witness immunity as exemption from criminal liability and punishment of persons who, under the circumstances specified by law, may be obliged to give so–called self–incriminating testimony (Belkova, 2004). In our opinion, the interpretation of witness immunity as an opportunity to "refuse to testify against oneself" is also controversial from the point of view of the etymology of the word "immunity".

The question of whether the provision on witness immunity extends to the former spouse is relevant for consideration. This issue has been resolved by the legislator in some Western European countries. For example, § 52 of the Criminal Procedure Code of the Federal Republic of Germany stipulates that the right to refuse to testify has the husband (wife) of the accused, even after the divorce (Galagan, 2011). This article also stipulates that a person engaged to an accused has the right to refuse to testify.

We believe that the lack of provisions of paragraph 1 of Part 2 of Art. 65 of the Criminal Procedure Code of Ukraine is that in it the legislator ignored the prohibition of interrogation as a witness of a representative of a third party, whose property is being resolved for arrest.

In accordance with Part 4 of Art. 64-2 of this Code, such a representative may be: a person who has the right to be a defense counsel in criminal proceedings; manager or other person authorized by law or constituent documents, employee of a legal entity by power of attorney – if the owner of the property under arrest is a legal entity. The third person, whose property is being seized, appeals to these persons with a request to ensure the realization of his rights, to take measures aimed at denying or refuting the grounds for the application of special confiscation of property.

The said person must be sure that the information communicated to him will not be used against him. In our opinion, it is necessary to supplement item 1 of h. 2 Art. 65 of the Criminal Procedure Code of Ukraine, a provision that is not subject to interrogation as a witness by a representative of a third party in respect of whose property the issue of arrest is being resolved – the circumstances that became known to him in connection with the function of representative.

Conclusions

1. Thus, witness immunity is a set of rules that exempts certain groups of witnesses from the obligation to testify in criminal proceedings, as well as from the witness's obligation to testify against himself. In this regard, immunity for a witness is divided into two types of imperatives (absolute, unconditional) and dispositive (relative,

conditional). Witness immunity is an important institution that ensures principles such as the presumption of innocence and the protection of human and civil rights and freedoms in criminal proceedings, so it is necessary to eliminate problems, gaps and improve existing legislation governing this institution.

2. Ensuring the constitutional right of a person not to testify or explain about himself, family members or close relatives is a specific socially necessary and legally regulated activity of public authorities and their officials, aimed at creating appropriate conditions for implementation, protection, defense and restoration of this right of persons who are in the status of a victim, suspect, accused, defendant, plaintiff, defendant, applicant, debtor, witness or other subjects of procedural relations.
3. The system of normativelegal sources of the right of a person not to give testimony or explanations about himself, family members or close relatives consists of: international legal acts, the Constitution of Ukraine; sectoral legislation, case law in this area.
4. The study of foreign legislation revealed the following patterns in the development of the institution of witness immunity in the Anglo-Saxon and Romano-Germanic legislation:
    a) AngloSaxon law proposed the division of witness immunity into two independent institutions – the immunity of witnesses and witnesses of privileges. Under most law, witness privileges extend to the accused and his or her relatives. With regard to witness immunity, its provisions apply to other persons involved in criminal proceedings.
    b) RomanoGermanic law (legislation of Germany, France, Belarus, Armenia, Georgia) is characterized by a clear definition of the category of persons entitled to witness immunity, which distinguishes these provisions from the provisions of US law, in which the list of such persons is the prerogative of only federal law, but more the prerogative of state law.
    c) under the legislation of the studied countries, the violation of the right not to testify related to the voluntary testimony, which in turn is correlated with the admissibility of evidence.
5. In order to properly resolve the issue of problematic aspects of the institution of witness immunity, it is reasonable to supplement paragraph 1, part 2 of Art. 65 of the Criminal Procedure Code of Ukraine, a provision that is not subject to interrogation as a witness by a representative of a third party in respect of whose property the issue of arrest is being resolved – the circumstances that became known to him in connection with the function of representative.

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