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The Anonymity of Witnesses—a Danish Development

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In legal systems of Western cultural tradition it is an established idea that the defendant in a criminal trial shall not be compelled to testify against himself. Moulded by long experience of inquisitorial methods of extracting the truth from reluctant suspects, the principle against self-incrimination has become a cornerstone of modern criminal procedure. And admittedly, though logic cannot solve legal issues, it would seem somewhat paradoxical to make the silence of the accused punishable in order to force him to speak the truth in order to be able to punish him.

In some countries the principle against self-incrimination is considered of constitutional dimension; in others it is viewed as an unwritten, fundamental rule of justice and fair trial.

Close, though not apparently related, to the principle are the various requirements prescribing the defendant to be furnished with proper information of the evidence that the prosecution intends to produce against him. As to witnesses this implies that the defendant should be informed of the identity of the witnesses in order to be able to challenge their credibility and contest their statements. Even more vital to the interests of the defendant is his free and unrestrained access to any evidence against him presented in court. Court proceedings *in camera* with unnamed witnesses speaking from behind the scenes belong undeniably to the world of Franz Kafka, and their adoption can only be justified under circumstances of an utterly extreme nature.

In Danish law the set of rules governing the legal position of the defendant is contained in a special part of the Act on Court Procedure.[1] As often with ideas of wide ethical approval the code contains no specific rule to ensure the defendant a right to be apprised of the identity of the prosecution's witnesses. There are rules, worded with precision and detail, describing how the prosecution is to design its list of evidence intended to be produced in court—§ 834. There are rules requiring the counsel for the defence to be duly informed of the list of evidence—§ 835. There are rules stating that the defendant has a right—except for specific legal warrant to the contrary—to be present in court throughout his trial—§846. A legal warrant to exclude the defendant temporarily while a witness is being examined is found in § 848,1. In order to avoid painful confrontation and spare the victim from recurring fear and humiliation this rule applies when a raped woman is to testify against her attacker and there are reasons to believe that the testimony will

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[1] *Lov om Rettens Pleje (Act on Court Procedure),* 4th book on criminal procedure.

be substantially affected if the defendant is present at the examination. If absent, however, the defendant has a right, stated in § 848,2, to be informed of the testimony thus given or at least be told of its principal contents.

Clearly the rationale of these rules is to furnish the defendant with effective means for his defence. Without exact knowledge of the witnesses and their evidence the defendant's chances to spot weak points and challenge the validity of the prosecution's assertions would be significantly diminished.

The seriousness of modern crime, however, gives rise to situations where the witnesses are most unwilling to give even crucial evidence if they are to accept that their identity will be revealed to the defendant. Their reluctance is based on fear of reprisals from the defendant himself or from his associates. As experience shows these fears are to be taken seriously. The activities within areas of drug crime and the mixed criminality arising out of rivalry between youth gangs reflect patterns of behaviour that are anything but encouraging to a witness considering telling the truth. The code of omertá, silence, is not only a Mafia invention, but exists in most criminal circles of some organisation and with established modes of conduct. The fear of retaliatory measures against willing witnesses has become a serious obstacle to the machinery of justice in cases involving grave criminality such as drug crime and organised gang crime. It reveals the fundamental conflict between the legal position of the defendant and society's claim for law enforcement and punishment of those offending its laws.

Until recently the issue of granting a witness full anonymity, thereby obtaining the necessary evidence and at the same time protecting the witness against reprisals, was considered a question of mainly academic interest in Danish jurisprudence. The prevailing view was that the relevant rules in the Act on Court Procedure did not allow such radical measures in disfavour of the defendant.[2] The protective aims behind these rules, including the rule in § 870,2 granting the defendant a right to immediate reply during the examination of a witness, strongly suggest that the defendant as part of his legal position has a right to know who the witnesses are.

In the last two years things have changed drastically. One High Court decision and two Supreme Court decisions have now settled the matter.[3]

In the High Court case[4] four persons were indicted for serious drug crimes—Danish Penal Code § 191. The prosecution wanted to produce two witnesses on the condition that their identity was not disclosed to the defendants. The reason for this was that the witnesses were police agents, members of an undercover investigation group under the Dutch police authorities. Disclosure of the agents' identity would most likely damage the work of the group. It is clear that this case does not concern the conflict

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[2] *Cf. e.g.* Bernhard Gomard, *Studier i den danske straffeproces* (1976), p.140 (Studies in Danish Criminal Procedure).

[3] The court system of Denmark is three-tiered: the City Court (Byret), the High Court (Landsret) and the Supreme Court (Højesteret). In general a defendant is only entitled to have his case considered twice. If the case opens in the City Court and ends in the High Court it is possible, however, to apply to the Ministry of Justice for a special permission (tredieinstansbevilling) to have the case, if of principled nature, considered also by the Supreme Court.

[4] The case is published in *Ugeskrift for Retsvæsen* 1983, p.653 (The Weekly Law Reports).

between a timid witness and the defendant's access to all evidence against him. This, however, is immaterial to the issue whether anonymous witnesses in principle are possible in criminal procedure.

The three judges agreed on the result that the prosecution's claim for anonymity of the two witnesses could not be met, but they divided over the issue of the juristic basis of the result. Two judges found that the principles of criminal procedure in Danish law do not preclude the possibility of granting anonymity to witnesses under exceptional circumstances where their life and safety would be endangered if their identity were revealed to the defendant. Other relevant factors such as the gravity of the crime involved and the enforcement of the law also had to be taken into consideration before granting anonymity. These judges, however, found that the present case did not justify a grant of anonymity to the two witnesses. They recognised the principle of anonymity, but did not find it applicable.

The third judge ruled that there is no legal basis whatsoever to employ a device such as anonymity of witnesses in a criminal trial. He referred to the rules concerning the list of evidence and its demand for an identifying description of the witnesses to be produced. The Act on Court Procedure, he said, did not warrant the use of secret evidence in the trial. The rule granting an absent defendant the right to be informed of the evidence given in his absence displayed a presumption against anonymous witnesses.

On December 2, in the same year the issue was decided again—this time by the Supreme Court.[5] A person was charged with serious drug crime—sale of 1 kilogram of heroin—and various other crimes. Both the City court and the High Court accepted that the testimony of two witnesses was properly given anonymously. Their life and safety would be endangered if they openly were to give evidence against the defendant, a hardened criminal.

The Supreme Court analysed the facts of the case and a majority of five judges reached the conclusion that the grant of anonymity to these witnesses was consistent with the rules of Danish criminal procedure. The reasoning behind this result was as follows. A witness whose life and safety will be endangered by giving evidence is not obliged to give evidence. If, however, the witness chooses to do so or by special decision of the court is required to do so, the court has a duty to be considerate to the witness in order to alleviate the witness's delicate situation, *e.g.* by excluding the public from court. All this is elementary law set out in Chapter 18 on witnesses in the Act on Court Procedure. Without claiming this special protective duty of the court to be a direct juristic basis, the majority concluded that if the facts of the case indicate that a witness—giving evidence without initially being obliged to—will be exposed to clear danger then as a sole exception anonymity may be granted if the crime involved is grave and the enforcement of law is urgent. The same holds if the danger directs itself towards persons closely related to the witness.

A minority of two judges dissented. In analogy with the dissenting judge in the High Court case they found that the Act on Court Procedure did not

[5] *Ugeskrift for Retsvæsen* 1984, p.81, commented on in 1984B, p.289 by Palle Kiil, one of the Supreme Court judges deciding the case.

warrant the use of anonymous witnesses in the criminal procedure. There were no provisions in the law to justify the anonymity, but several provisions to reflect the idea that the defendant is entitled to know about all evidence against him and also the identity of the witnesses produced against him.

In a recent murder case arising from a brutal vendetta between motorcycle gangs, the majority view was adopted by the judges who had hitherto been in the minority—now signifying that the legal issue is settled. The introduction of anonymous witnesses in the criminal procedure raises several difficult problems.

To ensure anonymity the defendant cannot be present during the examination of the exposed witnesses. Only his counsel is present to defend his interests. Entering the court again the defendant will not receive a full and detailed account of the evidence given in his absence. The account will be adjusted to avoid indirect identification of the witnesses. This restriction also covers counsel. He is debarred from discussing the evidence in full detail with his client.

This implication is open to even more criticism than the mere fact of anonymity of the witnesses. It amounts to a sort of secret or at least blurred evidence in the trial. It seems, however, inevitable. If the anonymity of the witnesses is to be effective, some "dressing up" of the evidence is necessary to conceal its identifying elements. In this light it is not surprising that anonymity of witnesses has not been welcomed by defence counsel. They argue, rightly, that quite apart from the gloomy perspectives the acceptance of anonymity is incompatible with the principle of equality between the prosecution and the counsel for the defence—a principle normally upheld in Danish law. The procedural recognition of anonymity increases the risk of wrong convictions because the defendant's possibilities of contradicting untenable evidence are weakened to a considerable degree when he is deprived of exact knowledge of its contents and its source.

The prosecuting authorities have not been blind to these problems. They point out, however, that the alternative should not be disregarded, namely that some cases of dangerous and outrageous crime might go unpunished because the accused is capable of terrorising the witnesses to remain silent—an alternative of low ethical acceptability. Moreover, the device of anonymity is not to be applied in every case of grave crime and whenever the witnesses are merely reluctant to give evidence. The narrow formulation adopted by the Supreme Court clearly shows that anonymity should be restricted to cases with a manifest aspect of necessity.

The issue of anonymous witnesses has given rise to vehement debate.[6] Questions concerning the issue have been put in the Parliament and the Minister of Justice has responded that he sees no reason to introduce new legislation on the matter.[7] Thus, anonymous witnesses—an expression of the persistent conflict between traditional concepts of justice and the terms of modern law enforcement—remain part of Danish law.

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[6] Articles in *Ugeskrift for Retsvæsen*: Jens Gabe "Vidnebeskyttelse" 1983B, p.295; Elsebeth Rasmussen "Om plea-bargaining og andre studehandler inden for strafferetsplejen" 1983B, p.315; Peter Blume "Anonyme Vidner" 1983B, p.399; Thorkild Høyer "Hemmelig Retspleje—i 1984" 1984B, p.44; Arnold Rothenborg "Anonyme Vidnesbyrd" in *Advokaten* nr. 5, 1984; Per Lindegaard, Attorney General. "Vidner i narkosager" in *Anklagemyndighedens Årsberetning* 1983, p.94.

[7] Folketingstidende F, 1984, sp.5962, spørgsmål nr.452.