Marine Kvachadze[*]

Natia Jugeli[*]

Elene Gvinjilia[*]

IMPORTANCE OF REFUSAL TO GIVE EVIDENCE AND OF INDIRECT EVIDENCE IN DOMESTIC VIOLENCE AND DOMESTIC CRIME CASES

ABSTRACT

Despite significant legislative and institutional changes in recent years, combating violence against women and domestic violence remains a challenge.

Given the increasing number of facts of domestic violence in the country, in some cases, perpetrators go unpunished, as domestic violence cases are generally characterised by a lack of evidence, and it is difficult to obtain direct evidence, especially where the victim uses the constitutional right and refuses to testify against the perpetrator who is their close relative.

Although the Supreme Court of Georgia has repeatedly noted in recent years that due to the specific nature of a domestic crime, even if no victim's testimony or document confirming the absence of claims of the victim against the accused is adduced to the case, the issue of liability of the accused must be decided based on other evidence, yet the practice of the common courts shows that special attention is paid to the victim's testimony in rendering judgments of conviction in such cases, especially where, by the judgment of the Constitutional Court of Georgia of 22 January 2015, it is inadmissible to render a judgment of conviction based on indirect testimony.

In addition, because it is usually difficult to obtain direct evidence in domestic violence and domestic crime cases, in practice a guilty verdict is to some extent prevented by the provision of the Criminal Procedure Code of Georgia being narrowly interpreted by the Supreme Court, according to which a judgment of conviction should only be based on a "body of consistent, clear and convincing evidence", which is interpreted by the court as requiring at least two pieces of direct evidence.

* Doctor of Law, Professor, Head of the Analytical Department of the Supreme Court of Georgia [marina.kvachadze@supremecourt.ge].

* Master of Law, Chief Consultant of the Analytical Department of the Supreme Court of Georgia [natia.jugheli@supremecourt.ge].

* Master of Law, Consultant at the Analytical Department of the Supreme Court of Georgia [elene.gvinjilia@supremecourt.ge].

To facilitate a better administration of justice, this Article will review the criminal law of common law countries in relation to victim testimonies. In addition, the decisions of the Supreme Court and the Constitutional Court will be analysed to illustrate existing jurisprudence in Georgia.

I. INTRODUCTION

Domestic violence is the most widespread category of crime in many countries of the world, and to combat it, states seek to develop, as a matter of priority, an appropriate legislative framework, harmonise their national laws with the provisions of the Istanbul Convention and take effective measures in this regard. However, despite the efforts made, domestic violence remains a major problem in modern society. The problem has become even more evident in the context of the pandemic. In particular, according to the World Health Organization,[1] during the current pandemic, cases of domestic violence in the world have increased by one third, as the triggering factors of violence, stress, dramatic economic deterioration, etc. have also increased. Unfortunately, Georgia stands out among other countries with alarming statistics of domestic violence. Therefore, it is obvious that improving the legislative framework alone is not sufficient to effectively combat this category of crime, and, based on the specific nature of the problem, a unified, complex and coherent policy based on the specific nature of the problem need to be implemented. In this regard, it is important to emphasise the responsible role of the judiciary.

Court decisions in domestic violence and domestic crime cases, as part of a strict national policy on such crimes, serve not only the purpose of identifying the offender and imposing on him or her adequate criminal responsibility, but also have the additional preventive function of not encouraging a "syndrome of impunity".

Domestic violence is a latent crime characterised by non-disclosure, concealment, misrepresentation, a narrow scope of persons to be interviewed, and a refusal to testify. In addition, judicial practice shows that victims, who during the investigation disclose much more information about the violence shortly after the occurrence thereof, adapt over time to the violence that has taken place and try to avoid responsibility for the accused in various ways (of their own free will or with the intervention of the accused).[2] Given the fact that this category of crime tends to be characterised by a lack of evidence, it is more difficult to obtain much direct evidence. Thus, the judgment

[1] World Health Organization Data <https://www.who.int/reproductivehealth/publications/emergencies/COVID-19-VAW-full-text.pdf> [last accessed on 2 February 2022].

[2] Ana Sigua, Peculiarities of Judicial Evaluation of Evidence in Domestic Violence Cases (Master's thesis, Tbilisi State University 2019), p. 16 <https://openscience.ge/bitstream/1/964/1/samagistro%20sigua.pdf> [last accessed on 18 April 2022].

of the Constitutional Court of Georgia concerning indirect testimony and the practice established by the common courts – the narrow interpretation of the "standard of a body of evidence" necessary for rendering a judgment of conviction (the need for the presence of at least two pieces of direct evidence) has created certain problems in terms of the administration of justice.

Proceeding from the above, the purpose of this Article is to analyse the said judgment of the Constitutional Court *vis-à-vis* the practice of the common courts. In addition, the reader will be introduced to the legislation of foreign countries and the case-law of the European Court of Human Rights concerning the question of admitting testimonies in domestic violence cases as direct evidence and the exceptional legislative regulations on the refusal of a witness to testify against a close relative.

II. IMPORTANCE OF DIRECT AND INDIRECT EVIDENCE

In general, it is difficult to obtain direct evidence in domestic violence and domestic crime cases, especially where the victim exercises the procedural right granted to him or her by the Constitution[3] and refuses to give evidence against an abusive relative. The scope of relatives is defined by law. In particular, the Criminal Procedure Code of Georgia allows a witness not to give evidence that discloses the commission of a crime by a close relative.[4] The scope of close relatives is defined by the same code[5] and includes a parent, an adoptive parent, a child, a foster child, a grandfather, a grandmother, a grandchild, a sister, a brother, a spouse, including a divorced spouse.

Proceeding from the above-mentioned motive, even if a comprehensive investigation is conducted, the prosecution is objectively deprived of the possibility to obtain and present to the court direct evidence confirming the criminal facts in the above-mentioned category of cases.[6] In practice, this circumstance becomes one of the grounds for the court to pass a judgment of acquittal. Accordingly, it is obvious that the victim's testimony is the most important evidence in such cases. However, it should be kept in mind that the victim may have many, including logical reasons, for refusing to testify: 1. The possibility of reconciliation, while giving evidence may put the marital relationship at risk; 2. Fear about financial security; 3. Concern for the welfare of

[3] Article 31, paragraph 11, Constitution of Georgia <https://matsne.gov.ge/ka/document/view/30346?publication=36> [last accessed on 18 April 2022].

[4] Article 49, paragraph 1, sub-paragraph (d), Criminal Procedure Code of Georgia (hereinafter referred to as "the Criminal Procedure Code") <https://matsne.gov.ge/ka/document/view/90034?publication=142> [last accessed on 18 April 2022].

[5] ibid, Article 3, paragraph 2.

[6] Goga Khatiashvili, Handbook on Violence against Women and Children, and Combating Domestic Violence (USAID 2021), p. 58.

the children; 4. Pressure emerging from family members not to testify; 5. Cultural or religious beliefs that would condemn her, resulting in alienation from the family for testifying against a spouse; 6. The problem of the witness victim's perception of himself or herself as a victim of violence because of the systemic nature of the violence; 7. Fear of being alone; 8. Feelings towards the abuser or, in some cases, fear of a trial, an information vacuum that can lead to secondary victimisation.[7]

Taking into account cases where the victim does not disclose the abuser, the court is frequently left to assess only a forensic examination report and direct evidence. Even in the absence of physical injuries on the victim's body, if there is no testimony from the victim and/or other witnesses, "an expert opinion cannot be regarded as credible evidence in the context of identifying the person who caused the injury, as a medical examination can determine the presence, quantity, severity and location of the injury, rather than that identity of the person causing it".[8] To reach a guilty verdict against a person, it must be established that the injuries were inflicted by a specific person on the victim and, therefore, the act was culpable.[9]

As regards the indirect testimony, according to the judgment of the Constitutional Court of Georgia,[10] recognising a person as an accused and reaching a verdict against him or her on the basis of indirect testimony was found unconstitutional. The court deliberated on the following circumstances: whether it was possible to bring charges or reach a verdict on the basis of unreliable evidence, whether the possibility of using indirect testimony posed a risk of violating constitutional law, whether there entailed a risk that a verdict would be reached on the basis of doubtful, false or inadequate evidence. Furthermore, the court had to examine whether the criminal procedure law contained sufficient safeguards to credibly prove that a person had committed an offence.[11] The court stated in connection with the above that recognising as admissible the evidence that was based on the statement made by another person or on information disseminated contained many risks. Among other things, it is difficult to assess whether such information is reliable or credible because the court is limited in its ability to verify the attitude of the person disseminating the information and his or her relation to the events surrounding the criminal case. It is also difficult to foresee how this person would testify if he or she were to appear in court.[12] Although the criminal procedure

[7] Application of International Standards in Domestic Violence Cases (Supreme Court of Georgia, 2017), p. 68 <https://www.supremecourt.ge/files/upload-file/pdf/kvleva-ojaxshi-zaladobaze.pdf> [last accessed on 18 April 2022].

[8] Judgment of Tbilisi City Court in Case No 1/1385-17, 7 July 2017.

[9] See supra note 7.

[10] Judgment of the Constitutional Court of Georgia No 1/1/548 in the case "Citizen of Georgia Zurab Mikadze v. the Parliament of Georgia", 22 January 2015.

[11] ibid, II-4.

[12] ibid, II-29.

legislation criminalises the giving of false testimony by a witness, the court explained: "In the case of indirect testimony, this mechanism would provide a less effective means of ensuring credibility because the person giving indirect testimony cannot confirm whether the information disseminated by another person was reliable".[13] The court considered that it was not justified to automatically admit indirect testimony as evidence in the criminal case and use it irrespective of in which conditions, in which form and by which means the person giving indirect testimony became aware of the information in question.[14] However, it should be noted that the Constitutional Court has not ruled out the appropriateness of the use of indirect testimony in exceptional cases. In particular, an exception may be justified "where there is an objective reason why it is not possible to interrogate the person on whose words the indirect testimony is based and where this is necessary in the interests of justice. For example, the court may consider admitting the indirect testimony where the witness or the victim has been intimidated or there is a need to ensure his or her safety as a witness. Unlawful acts of the accused – the intimidation of a witness – should not obstruct the administration of justice and therefore, in exceptional cases, the court should have the power to assess the necessity of justice and its administration".[15] However, "the question of finding the indirect testimony admissible and making use of it must be decided in the context of clearly formulated provisions and adequate procedural safeguards. In each particular case, the court must assess the circumstances which are named by the prosecuting body to justify the submission of indirect testimony".[16]

It should be noted that prior to the above-mentioned judgment of the Constitutional Court, the Supreme Court of Georgia adopted a decision of similar content based on the provisions of criminal procedure law.[17] In particular, the court referred to the provision of paragraph 1 of Article 76 of the Criminal Procedure Code, according to which "testimony cannot be considered as evidence if the witness does not refer to the source of the information provided...". Furthermore, Article 76 establishes that "testimony that is based on the information disseminated by any other person shall be considered indirect" (paragraph 1), and "indirect testimony shall be considered as admissible evidence only if the person giving indirect testimony refers to the source of information that can be identified and the real existence of which can be established" (paragraph 2). In the case before the court, the fact of the criminal act had been confirmed only by the indirect testimony of the police officer, who explained that he had learned about it from intelligence information. Based on the legislative regulations mentioned above,

[13] ibid, II-31.
[14] ibid, II-34.
[15] ibid, II-36.
[16] ibid, II-37.
[17] Judgment of the Supreme Court of Georgia in Case No 218ბ-14, 18 December 2014, Reasoning Part, para 4.1.12.

the Chamber of Cassation did not accept the testimony of the law enforcement officer because the source of the information provided was intelligence information that could not be verified against the initial source of information.

The judgment of the Constitutional Court has had a significant impact on the practice of the common courts in the use of indirect testimonies. When discussing indirect testimony, judges actively refer to this very judgment of the Constitutional Court and it is obvious that the standard of proof increased. However, in many cases, judges assess the evidentiary force of indirect testimony based on whether there is direct evidence corroborating the indirect testimony adduced to the case. For example, in the reasoning part of the judgment of 30 June 2015, the Supreme Court referred to the judgment of the Constitutional Court of 22 January 2015 and noted that the indirect testimony given by the witness did not meet the constitutional and legal standard of credibility, so the Chamber of Cassation, having regard to the fact that the witness's indirect testimony had not been corroborated by any other direct evidence, considered that the accused should be acquitted.[18] It may thus be said that in practice the evidentiary force of indirect testimony depends to a large extent on the evidence supporting its credibility. This should not be limited to direct evidence as it is possible to judge the evidentiary value of indirect testimony even if indirect evidence corroborating it is available in the case. In particular, "where there is more than one piece of indirect evidence, each may not independently prove the existence/absence of a fact beyond a reasonable doubt, but taken together it may naturally and reasonably enable us to reach that conclusion".[19]

In parallel to the 2015 judgment of the Constitutional Court, the Supreme Court developed a practice whereby the existence of at least two pieces of direct evidence was considered necessary for rendering a judgement of conviction. This high standard has created certain problems in terms of access to justice, especially in relation to crimes that are already characterised by a lack of evidence by virtue of their nature and specificity, including domestic violence and domestic crime cases.

However, it is possible that only evidence that does not, directly and indirectly, point to the circumstances of the subject of proof, but at least indirectly proves the involvement of the accused in the crime beyond a reasonable doubt, may be available in the case. The legislator did not establish criteria for separating direct and indirect evidence from each other and did not set out the required number of pieces of direct evidence. It avoided classifying evidence into separate types, rejected the principle of formal proof and defined that no evidence should have a pre-determined value, and entrusted the judge with reasoning about the reliability of evidence.[20]

[18] Judgment of the Supreme Court of Georgia in Case No 14ბ3.-15, 30 June 2015, Reasoning Part, para 23.
[19] Tornike Khidesheli, "Importance of Hearsay in Accordance with the Practice of the European Court of Human Rights" (2019) 1, Journal of Law, p. 256.
[20] Lavrenti Maglakelidze, Giorgi Tumanishvili, "Importance of Indirect Evidence in Accordance with the

At the same time, due to the specific nature of such cases of domestic violence and domestic crime, the requirement of two pieces of direct evidence means that even if the victim's testimony is compelling and reliable, unless it is supported by other evidence, a guilty verdict will not be reached. This issue becomes more problematic if in crimes of such category the victim exercises the right granted to him or her and does not give evidence that would disclose the commission of a crime by his or her close relative. Given the above, the prosecution is essentially deprived of the possibility to obtain and present to the court a sufficient amount of direct evidence proving the criminal fact. In some cases, problematic issues emerge in the process of rendering justice, such as the automatic equation of indirect testimony with indirect evidence. If the indirect evidence adduced to the case meets the standard of credibility and also corroborates the information conveyed in the indirect testimony, it is possible that the indirect testimony may be given evidentiary value and, in combination with other evidence, used in rendering a guilty verdict.[21] Therefore, given the high standard of proof, the prosecution should make a greater effort to obtain evidence that will corroborate the charges so that it is not dependent on the exercise of witness immunity by the victim.

The judicial practice has developed by following the problematic issues and we increasingly are seeing a modified approach in court decisions, the need for the existence of at least two pieces of direct evidence understood as the "body of evidence" for reaching a guilty verdict. In 2018, the Supreme Court clarified in a domestic violence case that "having the 'beyond reasonable doubt' standard does not imply an abundance of evidence in a criminal case, but there must be a combination of weighty and compelling evidence that, if combined and not assessed individually, would convince a reasonable and objective person of the culpability of the person".[22]

In recent years, the Court of Cassation has been actively referring in domestic violence cases to the state's positive obligation. In particular, the state has an obligation to prevent crime, protect the victim and hold the abuser responsible, regardless of whether the victim has withdrawn the complaint or has been reconciled with the abuser.[23]

However, it should be noted that "a victim's refusal to give incriminating testimony against a close relative during the trial on the merits does not constitute a denial of the factual circumstances presented by him or her in the information provided at the investigation stage, hence, due to the specific nature of domestic crime, even in the absence of a victim's testimony or a document confirming that the victim has no claims against the accused, available in the case file, the question of the liability

Georgian and International Criminal Procedure" (2017) 1(53), Justice and Law, p. 39.

[21] Khidesheli, supra note 19, 256.

[22] Decision of the Supreme Court of Georgia in Case No 394ას-17, 3 January 2018.

[23] Judgment of the Supreme Court of Georgia in Case No 443ას.-20, 29 October 2020, Reasoning Part, para 7.

for the accused must be decided on the basis of other evidence available in the case file".[24] In practice, we may encounter judgments where the court focuses on the victim's behaviour after the commission of the crime – whether the victim was motivated to support an objective investigation: to be interviewed voluntarily, to participate in investigative/procedural actions, including the examination of injuries on the body and an investigative experiment, to conduct a medical examination. It is important to analyse and assess the above because if the victim initially showed a strong will to cooperate with the investigative authority and then radically changed his or her position and did not even give incriminating testimony against the abuser in court, this indicates that we may be dealing with the classic behaviour of victims of domestic violence, where they continue to live in constant fear and tension after the violence. The frightened victim sees the possibility of survival in a changed lenient position towards the abuser.[25]

Therefore, taking into account the specific nature of this category of cases, it is necessary to thoroughly examine all the meaningful evidence. Among other things, it is important to interview neutral witnesses. These witnesses are often neighbours and relatives or persons with whom the victim has first communication shortly after the violence. These persons might not be direct witnesses of the fact, but might have information about the relationship between the alleged abuser and the victim, or might have had instantaneous contact with the alleged fact and can describe in detail the victim's psycho-emotional state. The witness testimony in such a case may be partly indirect and partly direct. For example, a woman told her friend how her husband had abused her. The testimony given by the friend from the woman's story would be indirect, but in the part describing the victim's emotional state, *inter alia*, indicating the signs of injuries on the woman's body, would be direct.[26]

Notably, the importance of indirect testimony is recognised in international practice and must be assessed by the court on a case-by-case basis: according to the International Criminal Court (ICC), indirect testimony does not automatically mean that it has no value for the case. As with any other type of evidence, although indirect testimony may have less weight, its assessment must ultimately depend on the various circumstances surrounding it.[27] Indirect testimony should be assessed at a trial and should not automatically be excluded from the case. Indirect testimonies are allowed in *ad hoc*

[24] Decision of the Supreme Court of Georgia in Case No 145ას.-19, 27 May 2020; Decision of the Supreme Court of Georgia in Case No 766ას.-19, 3 February 2020.

[25] Judgment of the Supreme Court of Georgia in Case No 118ას.-20, 28 July 2020, Reasoning Part, para 8.

[26] Khatiashvili, supra note 6, 60-61.

[27] Judgment of the International Criminal Court in Case No 01/04-02/06 "The Prosecutor v. Bosco Ntaganda", 8 July 2019, para 67; Decision of the International Criminal Tribunal for the Former Yugoslavia on the Prosecutor's Appeal on Admissibility of Evidence in Case No 95-14/1-AR73 "The Prosecutor v. Zlatko Aleksovski", 16 February 1999, para 15.

tribunals, provided that they are relevant and valuable to the case. Tribunals have the discretion to accept indirect testimonies and rely on them if they have been accepted.[28]

III. EVIDENTIARY VALUE OF INDIRECT TESTIMONY IN ACCORDANCE WITH THE LEGISLATION OF FOREIGN COUNTRIES AND THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

1. REVIEW OF THE LEGISLATION OF FOREIGN COUNTRIES

Evidence is the necessary basis for proof. Convincing people of the correctness or incorrectness of an issue is based on evidence because society does not believe in abstract or theoretical arguments.[29]

The rules and principles of admissibility of indirect testimonies in criminal procedure laws of common law and continental law countries differ insofar as their systems are different. At the same time, some continental European countries have established minimum principles of the admissibility of indirect testimonies (Spain, Italy). In Estonia, the criteria for the admissibility of indirect testimony are concretised in the Criminal Procedure Code. In common law countries, such concretisation is done in jurisprudence, but the situation is different in Canada where the rule of the admissibility of indirect testimony is general and the court is allowed to admit a certain testimony as evidence based on general principles. In the federal rules of the USA, unlike in other common law countries, there is a very broad list of exceptions to the rule prohibiting indirect testimonies. In some countries, where court proceedings are based on inquisitorial principles (e.g., France, Belgium, Germany), indirect testimonies are allowed and the judge decides on the value of such testimony.[30]

According to Article 195 of the Criminal Procedure Code of Italy, if there is indirect testimony, the judge shall summon the direct witness to court based on a party's request or of his or her own volition. Indirect testimony is allowed only if the direct witness has died, has mental problems or cannot be found. According to paragraph 4 of the same article, criminal police officers do not have the right to give evidence on the basis of an interrogation of witnesses that has been conducted in accordance with the procedure provided for in that code.[31]

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[28] ibid, para 67.

[29] Deborah Merritt Jones and Ric Simmons, Learning Evidence From The Federal Rules to The Courtroom (American Casebook Series 2009); Khidesheli, supra note 19, 251.

[30] "Indirect Testimonies, Legislation and Practice of Foreign Countries" (Supreme Court of Georgia, 2016) <https://www.supremecourt.ge/files/upload-file/pdf/iribi-chvenebebi1.pdf> [last accessed on 25 November 2021].

[31] Criminal Procedure Code of the Republic of Italy <https://www.legislationline.org/documents/section/

The Criminal Procedure Code of Estonia considers indirect testimony inadmissible, except where there is any case prescribed by law. In particular, under Article 66, the testimony of a witness in relation to facts that are connected to the subject of proof, of which the witness became aware from another person, shall not become evidence, except in cases where: the direct source of the evidence cannot be interrogated for the reasons set out in sub-paragraph 291(1) of the Code; the content of a witness's testimony is what he or she heard from another person about circumstances that were directly perceived by him or her during the conversation, still under the influence of what had been disclosed to him or her, and provided that there are no grounds to believe that he or she distorts the truth; the content of a witness's testimony is what he or she has heard from another person and which contains an assumption about the commission of a criminal offence or which is in conflict of interest with the talker; the content of a witness's testimony contains circumstances related to a crime committed by more than one person.[32]

Under Article 291 of the Criminal Procedure Code of Estonia, indirect testimony is allowed if during the cross-examination the witness cannot be called for the following reasons: the witness has died; refuses to give evidence during the court hearing; cannot give evidence for health reasons; cannot be located despite taking reasonable measures; could not appear in court because of other obstacles that are long-term or removing those obstacles will involve a disproportionate amount of money, and the party who made the motion applied all reasonable measures to bring him or her to court.

The case-law established that the criteria will be met if indirect testimony is necessary to prove a concrete fact, provided that direct evidence is not available and evidence of the same quality cannot be obtained.[33]

To sum up, some Western European countries make specific exceptions by allowing indirect testimonies. The American model includes fairly broad exceptions, as does the Canadian model, although in this case it is up to the judge to assess the fact. The rules established by case-law in Ireland and the UK are ambiguous, striking a balance between the judge's discretion and the determination of specific exceptions. The Estonian model is best suited to Georgian procedural law where specific exceptions are listed at the legislative level.[34]

criminal-codes/country/22/Italy/show> [last accessed on 25 November 2021].

[32] Penal Code of the Republic of Estonia <https://www.legislationline.org/documents/section/criminal-codes/country/33/Estonia/show> [last accessed on 25 November 2021]; supra note 30.

[33] Consultation Paper, "Hearsay in Civil and Criminal Cases" (Law Reform Commission, 2010) <https://www.lawreform.ie/_fileupload/consultation%20papers/cp60.htm#_Toc256423784> [last accessed on 25 November 2021].

[34] See supra note 30.

2. PRACTICE ESTABLISHED BY THE EUROPEAN COURT OF HUMAN RIGHTS REGARDING THE ADMISSIBILITY OF INDIRECT TESTIMONY

The European Convention on Human Rights does not limit the use of indirect testimony in criminal proceedings. Moreover, the Strasbourg Court has entrusted the regulation of issues related to evidence to the Contracting States.[35] However, as the Court pointed out, before national courts discuss the use of such evidence, the issue must be examined in detail, given that the indirect testimony has less evidentiary value than the direct testimony of a witness.[36] In addition, a judgment of conviction cannot be based solely on indirect testimony.[37]

According to the case-law of the European Court of Human Rights, there will be no violation of the right to a fair trial if, for good reason, the deposited testimony of a witness was published at the trial and the defence had an opportunity to ask him or her questions at earlier stages of the proceedings.[38]

It is important to highlight the case *Al-Khawaja and Tahery v. The United Kingdom*[39] in the case-law of the European Court of Human Rights, in which the Court has clearly established a three-step standard for the use of indirect testimonies. In particular, taking into account the requirements of the right to a fair trial, indirect testimony is admissible in the following circumstances: there must be a substantial reason for the witness not to appear in court; indirect testimony must not be a substantial or sole basis for the verdict; and negative factors that emerged for the defence with the admissibility of the indirect testimony must be properly balanced out.

Based on the above, the European Court is guided by the al-Khawaja test when assessing the fairness of the entire trial, but it should also be noted that the absence of a substantive reason for the non-appearance of a witness does not mean *a priori* that it prevents from assessing the entire proceedings as fair.[40] For example, in *Schatschashvili v. Germany*[41] the

[35] Judgment of the European Court of Human Rights, Garcia Ruiz v. Spain, no. 30544/96, 21 January 1999, para 28 <https://hudoc.echr.coe.int/tur#{"itemid":["001-58907"]}> [last accessed on 18 April 2022].
[36] Judgment of the European Court of Human Rights, Pichugin v. Russia, no. 38623/03, 23 October 2012, para 198 <https://hudoc.echr.coe.int/eng?i=001-114074> [last accessed on 18 April 2022].
[37] Khidesheli, supra note 19, 257.
[38] Judgment of the European Court of Human Rights, Mirilashvili v. Russia, no. 6293/04, 11 December 2008, para 217 <https://hudoc.echr.coe.int/eng?i=001-90099> [last accessed on 18 April 2022].
[39] Judgment of the European Court of Human Rights, Al-Khawaja and Tahery v. The United Kingdom, no. 26766/05, 15 December 2011, paras 119-125 <https://hudoc.echr.coe.int/fre#{"itemid":["001-108072"]}> [last accessed on 18 April 2022].
[40] Judgment of the European Court of Human Rights, Schatschashvili v. Germany, no. 9154/10, 15 December 2015 <https://hudoc.echr.coe.int/fre#{"itemid":["001-159566"]}> [last accessed on 18 April 2022]; Judgment of the European Court of Human Rights, Seton v. the United Kingdom, no. 55287/10, 31 March 2016 <https://www.bailii.org/eu/cases/ECHR/2016/318.html> [last accessed on 18 April 2022].
[41] Schatschashvili v. Germany, supra note 40, paras 113, 116.

Court once again emphasised the importance of balancing factors. They should be assessed not only where the witness's indirect testimony was essential or the only evidence for the conviction of the person, but also where such evidence had considerable weight and, by its being admitted, the defence came across obstacles during the trial. In particular, the greater the importance attached to so-called "unverified evidence", the more balancing factors are required. Thus, under this judgment, the Strasbourg Court considered it possible to use the Al-Khawaja test when assessing the fairness of a trial, regardless of whether the substantive reason for the non-appearance of the witness was satisfied.

The case-law of the European Court of Human Rights thus clearly defines the conditions that must be met for any trial to be considered fair. As regards indirect testimony, it is clear that it is not excluded from proceedings and is admissible evidence. However, particular care must be taken when assessing its credibility, and the more evidentiary value will be attached to the testimony of a witness who did not appear, the more balancing factors will be required during the proceedings.[42]

IV. PRACTICE OF GIVING EVIDENCE BY VICTIMS (WITNESSES) IN DOMESTIC VIOLENCE CASES IN ACCORDANCE WITH THE LEGISLATION OF FOREIGN COUNTRIES AND THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

In the practice on domestic violence cases, the refusal of a spouse witness to give evidence or the change of his or her testimony often poses problems, which for the most part becomes one of the grounds for terminating criminal prosecution by prosecutors or for passing a judgment of acquittal by the court.

It should be noted that in common law countries, criminal legislation mainly provides for a victim's obligation to give evidence where the case concerns a domestic crime.

Section 80(3) of the Police and Criminal Evidence Act 1984 of England defines the following specific categories of offences where a spouse or civil partner is required to give evidence: (a) if violence or a threat of violence is directed against the spouse or civil partner or a person who was at the material time under the age of 16; (b) if a sexual offence has been committed in respect of a person who was at the material time under the age of 16; (c) or if the act consists of attempting, aiding or abetting the commission of an offence falling within paragraph (a) or (b).[43]

A divorced spouse is also required to give evidence, and the failure of an accused's

[42] Khidesheli, supra note 19, 261.

[43] Police and Criminal Evidence Act 1984 <https://www.legislation.gov.uk/ukpga/1984/60/section/80> [last accessed on 18 April 2022].

spouse (wife or husband) to give evidence should not become the subject of additional actions for the prosecution. In England, there is no rule requiring the judge to warn the witness (spouse) of the compulsory testimony, but according to the established judicial practice it is advisable to give such a warning to the witness.[44]

The legislative regulation of the obligation for spouse witnesses to give evidence in domestic violence cases is unusual in European countries of continental law. For example, Article 52 of the German Code of Criminal Procedure broadly defines the scope of persons who have the right to refuse to give evidence. In particular, a spouse (wife or husband), fiancé or fiancée, or civil partner has the right not to give evidence.[45] Thus, German law explicitly excludes the possibility of forcibly interrogating a spouse witness, including in connection with a domestic crime.[46] Furthermore, it is important to note that according to Article 52(3) of the German Code of Criminal Procedure, a person who has the right to refuse to give evidence must be informed of this possibility prior to interrogation.

The criminal legislation of most member States of the Council of Europe generally provides for the right of the spouse of the accused or his/her registered partner (Austria, Belgium, the Czech Republic, Germany, the Netherlands, Hungary, Finland, Norway, Sweden, Switzerland) or a person who shares a household with the accused (Finland, Germany, Hungary, Lithuania, Norway, Turkey, Sweden, Ukraine, Poland, Slovakia, Andorra) to enjoy witness immunity and not to give evidence. The exceptions, in this case, are France and Luxembourg where there is no such privilege and giving evidence is compulsory for all, while in Belgium, Malta and Norway the testimony of the accused's spouse is automatically excluded.[47]

Under Article 6(3)(D) of the European Convention on Human Rights, everyone charged with a criminal offence has the right to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; It should be noted that none of the domestic violence cases examined by the Strasbourg Court so far have dealt with the issue of giving evidence by a spouse witness, whether by compulsory or voluntary means. The European Court's reasoning regarding witness immunity

[44] Wendy Harris, "Spousal Competence and Compellability in Criminal Trials in the 21st Century" (2003) 3(2), Queensland University of Technology Law and Justice Journal, p. 13.

[45] German Code of Criminal Procedure <https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html> [last accessed on 18 April 2022].

[46] Michael Wutz, "Evidentiary Barriers to Conviction in Cases of Domestic Violence: A Comperative Analysis of Scottish and German Criminal Procedure" (Aberdeen Student Law Review, 2011) 89 <https://cupdf.com/document/evidentiary-barriers-to-conviction-in-cases-of-domestic-evidentiary-barriers.html?page=1> [last accessed on 18 April 2022].

[47] Judgment of the European Court of Human Rights, Van Der Heijden v. The Netherlands, no. 42857/05, 3 April 2012, paras 32-35 <https://hudoc.echr.coe.int/eng?i=001-110188> [last accessed on 18 April 2022].

in general is well demonstrated in the judgment of the Grand Chamber in *Van Der Heijden v. The Netherlands.*[1] In that case, the applicant argued that the Kingdom of the Netherlands had violated the rights guaranteed to her by Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention because, despite her long-term cohabitation with the accused, she had not been granted the testimonial privilege and was required to compulsorily give evidence. In particular, the applicant's husband was charged with murder and the investigating judge required the applicant to give evidence, which she refused to do referring to the fact that she had lived with the defendant for 15 years and had children, so despite the absence of a registered relationship she should have been granted the possibility to refuse to give evidence, just as it would be done in the case of his spouse or registered partner.[2] It should be noted that 13 days' detention was imposed on the applicant for failing to comply with the court's order (for refusing to give evidence). In that case, the European Court pointed out that any right not to give evidence constituted an exemption from normal civic duty acknowledged to be in the public interest. Accordingly, such a right may be made subject to certain conditions and formalities, with the categories of its beneficiaries clearly set out.[3] The national court was to decide on a case-by-case basis whether there is a need to take evidence from a particular.[4] When examining the application, the Strasbourg Court also drew attention to the fact that the applicant had never attempted to register their relationship, whereby she would easily fall within the scope of persons enjoying an exception under Article 217 of the Dutch Code of Criminal Procedure, while registration in the respondent State was particularly important for various reasons, including social security and tax obligations. In addition, according to the European Court, even though giving evidence is a civic duty, the attempt to compel the witness to give evidence in the criminal proceedings constitutes an interference with her right to respect for her family life, while the legitimacy of the interference should be assessed using the following test: (1) whether the interference was in accordance with the law; (2) whether the interference pursued a legitimate aim; and (3) whether it was necessary in a democratic society. The Strasbourg Court made it clear in its judgment that domestic authorities enjoy a wide margin of appreciation and are in a better position to assess the lawfulness of an interference, taking into account the specific factual circumstances of each case.[5] Thus, the Court ruled that there had been no violation of the European Convention.

[1] ibid.

[2] Under Article 217 of the Criminal Procedure Code of the Kingdom of the Netherlands, an accused's spouse or registered partner enjoys immunity. Criminal Procedure Code of the Kingdom of the Netherlands <https://www.legislationline.org/documents/section/criminal-codes/country/12/Montenegro/show> [last accessed on 18 April 2022].

[3] Van Der Heijden v. The Netherlands, supra note 47, para 67.

[4] ibid, para 75.

[5] ibid, para 57.

V. CONCLUSION

This Article has analysed the problematic issues related to the administration of justice in domestic violence and domestic crime cases. Among such issues is the high standard of proof established in practice by the common courts (a combination of at least two pieces of direct evidence required to pass a judgment of conviction), which does not take into account the specificity and nature of such crimes. In addition, the importance of the evidentiary value of indirect testimonies in the context of the 2015 judgment of the Constitutional Court of Georgia has been studied. In the wake of the review of national legislation and jurisprudence, the Article presents relevant provisions from the current legislation of foreign countries and the approaches of the European Court of Human Rights.

In working on this issue, it was identified that the rules and principles of the admissibility of indirect testimonies in criminal procedure laws of common law and continental law countries differ insofar as their systems are different. In particular, some continental European countries have established minimum principles for the admissibility of indirect testimonies, while in common law countries such concretisation is done in jurisprudence, within the discretionary powers of judges. The Estonian model is best suited to Georgian procedural law where specific exceptions are listed at the legislative level. It is also worth noting that the European Convention on Human Rights does not limit the use of indirect testimony in criminal proceedings. Moreover, the Strasbourg Court has entrusted the regulation of issues related to evidence to the Contracting States. In addition, the case *Al-Khawaja and Tahery v. The United Kingdom* should be particularly highlighted in the case-law, in which the Court developed a three-step standard for the use of indirect testimonies.[6]

One of the grounds determining the passing of a judgment of conviction in domestic violence cases, as repeatedly mentioned, is the exercise by the victim of his or her constitutional right to refuse to give evidence against a close relative. Accordingly, in the authors' view, to present the issue comprehensively, it would be interesting to study the legislation of foreign countries to identify exceptional approaches and, in doing so, to analyse the case-law of the Strasbourg Court.

In common law countries, unlike in European countries of continental law, legislation provides for an obligation for a spouse witness to give evidence. In particular, in some countries (England, Scotland, a few states of Australia) the legislative provision imperatively imposes an obligation on a spouse witness to give evidence in relation to specific categories of crimes. Canadian law is relatively different in this respect. It is more general in content and imposes an obligation to give evidence in relation to any category of crime. It is also important to note that some states in Australia have

[6] Al-Khawaja and Tahery v. The United Kingdom, supra note 39, paras 119-125.

established a discretionary approach whereby a judge has the discretion to decide, by comparing public and private interests, on a case-by-case basis whether a spouse should give evidence or be exempted from this duty. It should be noted that none of the domestic violence cases examined by the Strasbourg Court so far have dealt with the issue of giving evidence by a spouse witness, whether by compulsory or voluntary means. The European Court's reasoning regarding the enjoyment of witness immunity in general is well demonstrated in the judgment of the Grand Chamber in *Van Der Heijden v. The Netherlands*.[7] According to the European Court, even though giving evidence is a civic duty, the attempt to compel the witness to give evidence in the criminal proceedings constitutes an interference with her right to respect for her family life, while the legitimacy of the interference should be assessed using the following test: (1) whether the interference was in accordance with the law; (2) whether the interference pursued a legitimate aim; and (3) whether it was necessary in a democratic society.

[7] Van Der Heijden v. The Netherlands, supra note 47, para 75.