

Protection and Restriction of the Confrontation Right

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Abstract

In a criminal procedure, the right to confront a hostile witness is essential to a defendant. However, it is sometimes inevitable to restrict this right or the way to exercise it when a witness or victim should be kept anonymous or when a witness is in fact unavailable. Therefore, how to find a balance between the means and the end is a cardinal issue of domestic and international human rights law. This article firstly analyzes the case law of the ECHR and points out that the restriction and the protection of right to confront should be proportional. In addition, the author would like to suggest that there should be sufficient and substantial reasons in specific cases to justify the restriction. Furthermore, a court should choose a better defense method in each case.

Generally speaking, as far as our statutes, judicial interpretations, and precedents are concerned, they entrench and conform to the principle of priority of taking the better defense for the accused. By disguise, video-conferencing, and other statutory options, the precedents repeatedly declare that a court should not rashly deprive a defendant of the right to confront a witness. Nevertheless, there is much room to improve, especially the overuse of the second best defense method. To name a few, face-to-face confrontation, the best defense method for a defendant, is often replaced by video-conferencing without sufficient reason. In addition, given that the protection of witnesses or victims may serve as justifiable reasons to restrict the right to confront, it is required to thoroughly and clearly articulate these reasons in concrete cases. Last but not the least, the related statute which lists various quarantine measures in the same provision is not clear enough. A court should review in each case the proportionality between

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the means and the end to find out the least restrictive measure. Only by doing so can we implement the priority of taking the better defense for the accused

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