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Admissibility of Anonymous Witness Testimony in Evidence: Foreign Experience

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Abstract

This article examines the admissibility of anonymous witness testimony in criminal proceedings on the basis of foreign legal experience and international judicial practice. It explores the reasons for introducing the institution of anonymous witnesses, its role in ensuring witness security, and its impact on the accused's right to defence and the principle of a fair trial. Drawing on the jurisprudence of the European Court of Human Rights, international criminal tribunals, and the laws of selected foreign jurisdictions, the study comparatively analyses the criteria for admitting anonymous witness testimony, the limits of its evidentiary value, and the procedural safeguards that must accompany its use. The article argues that it is inappropriate both to categorically prohibit anonymous witness testimony and to normalize it as an ordinary form of evidence. The findings demonstrate that such testimony may be considered admissible only in exceptional circumstances, where a real threat exists, where the requirements of necessity and proportionality are satisfied, and where adequate procedural mechanisms compensate for the limitations imposed on the defence.

Keywords: Anonymous witness, witness testimony, admissibility of evidence, criminal proceedings, fair trial, defence rights, witness protection, comparative legal analysis, foreign experience, procedural safeguards.

Introduction

The issue of anonymous witness testimony occupies a special place in contemporary criminal procedure. In modern criminal proceedings, particularly in cases involving organized crime, terrorism, trafficking, violent criminal networks, corruption, and other grave offences, the

protection of witnesses has become an increasingly important task of the state[1]. In such cases, witnesses may be exposed to intimidation, pressure, retaliation, or even threats to life and health. Under these conditions, legal systems have gradually developed procedural mechanisms aimed at securing witness participation in criminal proceedings while minimizing risks to their safety. One of the most controversial among such mechanisms is the use of anonymous witness testimony[2].

The controversy surrounding anonymous witnesses derives from the fact that this institution touches two equally important legal values[3]. On the one hand, the state has a duty to protect individuals who assist justice and to ensure the effective prosecution of serious crime. On the other hand, the accused has a fundamental right to a fair trial, including the right to know and challenge the evidence used against him or her[4]. The tension between witness protection and defence rights makes the admissibility of anonymous witness testimony one of the most difficult questions in evidence law and criminal procedure.

The relevance of this issue is particularly evident in the context of comparative criminal justice. Different legal systems have adopted different approaches to witness anonymity. Some jurisdictions permit it only in extremely limited situations, while others have developed more detailed statutory procedures allowing anonymous testimony subject to judicial authorization and counterbalancing safeguards. International courts and tribunals have also contributed significantly to this debate, especially when dealing with crimes committed in conflict zones or by highly organized criminal structures.

The purpose of this article is to analyse the admissibility of anonymous witness testimony in criminal proceedings through a comparative legal approach. The study aims to identify the principal legal problems connected with anonymous testimony, to examine how foreign jurisdictions and international courts address those problems, and to formulate conclusions relevant for the improvement of criminal procedural legislation and evidentiary standards.

The article argues that anonymous witness testimony should neither be absolutely prohibited nor treated as an ordinary and unrestricted evidentiary instrument. Its use may be justified only in exceptional cases, where there is a real and serious threat to the witness, and where the limitation imposed on the defence is offset by effective procedural guarantees.

This research is based on a comparative legal methodology. It examines legal doctrine, international judicial practice, and selected domestic approaches to the admissibility of anonymous witness testimony. The comparative method makes it possible to identify both common trends and significant differences in the treatment of anonymous witnesses across various legal systems.

The article primarily draws upon the jurisprudence of the European Court of Human Rights, which has developed one of the most influential and structured approaches to this issue under the right to a fair trial. It also refers to the practice of international criminal tribunals, including the ICTY, ICTR, and the International Criminal Court, whose experience is especially relevant due to the high-risk nature of witnesses participating in atrocity and mass violence cases.

[1] Kai Ambos, *Treatise on International Criminal Law: Volume III, International Criminal Procedure* (OUP 2016) 354.
[2] Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP 2005) 289.
[3] John D Jackson and Sarah J Summers, *The Internationalisation of Criminal Evidence* (CUP 2012) 198.
[4] European Convention on Human Rights, art 6.

In addition, the article analyses the laws and practice of selected foreign jurisdictions, including the United Kingdom, the Netherlands, Germany, and the United States. These jurisdictions were chosen because they represent distinct procedural traditions and differing levels of tolerance toward anonymity in criminal proceedings.

The research uses analysis, synthesis, formal legal interpretation, and comparative evaluation. Through these methods, the article identifies the main doctrinal criteria governing admissibility, such as necessity, proportionality, reliability, judicial control, corroboration, and the preservation of defence rights.

Anonymous witness testimony refers to testimony given by a witness whose identity is concealed from the accused, from the public, or from both. The exact legal meaning of anonymity varies across jurisdictions. In some systems, anonymity means only that the witness's personal data are withheld from the public, while the court and the defence know the witness's identity. In other models, the defence is also denied access to the identity of the witness, although the judge or another judicial authority may know it. The more extensive the concealment, the more serious its impact on fair trial rights.

Anonymous testimony must be distinguished from related witness protection measures. Courts may use pseudonyms, voice distortion, image shielding, closed hearings, remote video testimony, or limits on public disclosure without necessarily depriving the defence of the witness's identity. Full anonymity is more intrusive because it directly restricts the defence's ability to test credibility, investigate motive, and expose possible bias or hostility.

The main justification for anonymous testimony lies in witness security. In certain criminal cases, especially those involving organized criminal groups or violent networks, witnesses may refuse to testify openly unless their identity is protected. Without such protection, the administration of justice may be seriously impaired. However, the need to protect witnesses does not automatically validate every restriction on defence rights. The law must determine under what conditions secrecy remains compatible with a fair trial.

The admissibility of anonymous witness testimony is therefore not merely a matter of evidentiary convenience. It is a constitutional and human rights issue. It concerns whether the criminal process can remain balanced, adversarial, and just when the accused is denied full knowledge of the person making incriminating statements.

The central legal difficulty surrounding anonymous witness testimony is its relationship with fair trial guarantees. In criminal proceedings, the right to examine witnesses is one of the most important elements of defence rights. It allows the accused to challenge adverse testimony through questioning, contradiction, and credibility testing.

A witness's reliability often depends not only on the content of what is said, but also on who the witness is. The defence may need to know whether the witness has personal hostility toward the accused, whether the witness has a criminal background, whether he or she has received inducements from the prosecution, or whether other circumstances affect credibility. If the witness remains anonymous, the defence may be deprived of the possibility of conducting such inquiries effectively[5].

[5] *Kostovski v The Netherlands* (1989) 12 EHRR 434, para 42

Anonymous testimony also raises problems in relation to equality of arms. The prosecution may know the identity and background of the witness, while the defence does not. This creates an imbalance in access to information and may place the defence at a structural disadvantage[6]. The more central the anonymous witness is to the prosecution case, the more serious this imbalance becomes.

Another concern relates to the reliability of fact-finding. Judicial assessment of evidence is strongest when the court receives full information and when the defence can actively test the evidence. If anonymity is combined with indirect questioning, shielding, or technological distortion of the witness's appearance and voice, the quality of adversarial scrutiny may be reduced.

Nevertheless, fair trial rights are not absolute in the sense that they exclude every protective measure. The core legal issue is not whether witness protection may ever restrict defence rights, but whether such restriction remains proportionate and whether adequate compensatory safeguards exist.

The jurisprudence of the European Court of Human Rights provides one of the clearest frameworks for evaluating anonymous witness testimony. Under Article 6 of the European Convention on Human Rights, the accused has the right to a fair trial and the right to examine witnesses against him or her. The Court has repeatedly stated that the use of anonymous testimony is not automatically incompatible with the Convention, but it requires particularly careful scrutiny. In **Kostovski v. the Netherlands**, the Court found a violation of Article 6 where the conviction was based to a decisive extent on statements from anonymous witnesses whom the defence could not effectively examine. The Court emphasized that limitations on defence rights must not deprive the accused of a genuine opportunity to challenge incriminating evidence. In **Van Mechelen and Others v. the Netherlands**, the Court again stressed that where anonymity is granted, the handicaps under which the defence labours must be sufficiently counterbalanced by judicial procedures. The Court was particularly cautious where anonymous police officers provided important evidence against the accused[7]. These cases helped establish the principle that anonymous testimony requires strict necessity and strong safeguards.

International criminal tribunals have had to deal with witness protection in extremely difficult circumstances. Witnesses in cases of war crimes, genocide, and crimes against humanity may face severe danger, especially when testifying against powerful armed groups or political actors. For this reason, international criminal procedure has developed a range of protective measures.

The ICTY and ICTR frequently used pseudonyms, delayed disclosure, image and voice distortion, closed sessions, and sealed records. However, complete anonymity from the defence was treated with caution. In principle, these tribunals attempted to reconcile witness safety with the accused's right to prepare and present a defence. Their practice demonstrates that even in high-risk situations, anonymity is not an unrestricted procedural device[8].

The Rome Statute of the International Criminal Court similarly reflects a dual concern. Article 68 provides for the protection of victims and witnesses, while Article 67 guarantees the rights of the accused, including the right to examine witnesses. ICC practice generally favors less restrictive

[6] Trechsel (n 2) 291.
[7] *Van Mechelen and Others v The Netherlands* (1997) 25 EHRR 647, para 54.
[8] ICTY Rules of Procedure and Evidence, rules 69, 75; ICTR Rules of Procedure and Evidence, rules 69, 75.

protective measures over full anonymity from the defence. This indicates a preference for minimum impairment of defence rights.

International criminal justice thus supports a broader legal conclusion: witness protection is essential, but it must be structured in a manner that preserves the legitimacy of the proceedings. If anonymity is used too broadly, the fairness of trials may be called into question; if it is never used, witnesses may be silenced and justice may fail altogether.

The United Kingdom has developed one of the most detailed legislative approaches to witness anonymity. English law permits anonymity orders where necessary, but such orders are subject to strict judicial scrutiny. The court must be satisfied that anonymity is genuinely required, that the order remains compatible with a fair trial, and that the witness's evidence is important enough to justify the restriction[9]. The British approach is significant because it expressly balances witness protection against defence rights. Courts consider whether alternative protective measures could suffice, whether the anonymity would cause unfair prejudice, and whether the credibility of the witness can still be tested through other means. This model is pragmatic but heavily dependent on rigorous judicial control.

The Netherlands has played an important role in the development of European standards because several landmark ECtHR cases arose from Dutch criminal proceedings. Dutch law provides mechanisms for the use of threatened witnesses and relies substantially on judicial oversight[10]. In some situations, an investigating judge may know the identity of the witness while the defence does not.

This model attempts to preserve trust in the judicial process by ensuring that at least a judicial authority can verify the witness's existence and reliability. However, the ECtHR has made clear that judicial knowledge alone is not enough if the defence is denied a meaningful opportunity to challenge decisive evidence[11]. The Dutch experience therefore illustrates both the usefulness and the limits of intermediary judicial models.

German criminal procedure is generally more cautious and tends to prefer partial anonymity or controlled disclosure rather than full concealment from the defence. German law reflects a strong commitment to proportionality. Courts usually seek the least restrictive protective arrangement that can still address the danger faced by the witness.

The German model is valuable because it shows that anonymity need not be treated as an all-or-nothing concept. Legal systems may disclose part of the witness's background while protecting the most sensitive identifying details. Such graded solutions can better preserve procedural fairness.

The United States approach is shaped by the Sixth Amendment Confrontation Clause, which strongly protects the right of the accused to confront witnesses. As a result, American law is generally less receptive to full anonymous witness testimony at trial. Protective measures may exist, and confidential informants may remain undisclosed in limited contexts, but where a witness gives substantive inculpatory testimony, the defence's right to confrontation is ordinarily robust[12].

[9] Coroners and Justice Act 2009 (UK), ss 86–97.
[10] *Doorson v The Netherlands* (1996) 22 EHRR 330, paras 69–76.
[11] *Al-Khawaja and Tahery v The United Kingdom* (2011) 54 EHRR 23, paras 119–147.
[12] Richard D Friedman, 'Confrontation and the Definition of Chutzpa' (2008) 31 *Israel Law Review* 506, 514.

The U.S. experience demonstrates a more defence-centered constitutional culture. At the same time, it also reveals the practical difficulty of prosecuting dangerous criminal organizations without effective witness protection. This makes the American model both instructive and limited for comparative purposes.

Comparative legal analysis shows that anonymous witness testimony can be admissible only if a number of cumulative conditions are satisfied.

First, there must be a **real and serious threat** to the witness or closely connected persons. Mere subjective fear or general concern should not suffice. The risk must be individualized and objectively substantiated.

Second, anonymity must satisfy the requirement of **necessity**. If the witness can be protected through less restrictive measures, such as closed hearings, voice distortion, police protection, relocation, or limited public disclosure, full anonymity should not be granted.

Third, the measure must be **proportionate**. The greater the restriction on defence rights, the stronger the justification required. Courts must carefully weigh the seriousness of the threat against the prejudice caused to the accused.

Fourth, there must be **effective judicial control**. The decision to permit anonymous testimony should be made by a court through a reasoned ruling. The court must explain why anonymity is necessary and how fairness will be preserved.

Fifth, the defence must retain a **meaningful opportunity to challenge the witness**. Even if identity is concealed, questioning must remain real rather than purely formal. The defence should receive as much non-identifying information as possible about the witness's credibility, reliability, and possible motives.

Sixth, anonymous testimony should be supported by **independent corroboration**. The more limited the defence's ability to challenge the witness, the less appropriate it is to treat the testimony as sufficient on its own.

Seventh, a conviction should not, as a general rule, be based **solely or decisively** on anonymous witness testimony unless exceptionally strong safeguards exist. This principle is one of the most important protections against unfair conviction.

The comparative analysis demonstrates that the problem of anonymous witness testimony should not be framed as a simple choice between security and rights. A mature criminal justice system must protect both. Witness protection is necessary because without it, the prosecution of serious offences may become impossible. At the same time, criminal procedure cannot sacrifice fairness in the name of efficiency.

The most convincing legal models are those that insist on exceptional use, individualized assessment, and compensatory procedural mechanisms. Systems that treat anonymity as an ordinary investigative convenience risk undermining the adversarial structure of the trial. Systems that prohibit anonymity under all circumstances may fail to protect the administration of justice in dangerous cases.

In this respect, the jurisprudence of the European Court of Human Rights offers a particularly balanced model. It neither legitimizes secrecy uncritically nor rejects witness protection altogether. Instead, it asks whether the proceedings as a whole remained fair. This "overall fairness" analysis allows courts to consider context while preserving core principles.

For the development of national criminal procedure, several lessons may be drawn. Legislation should clearly define the grounds for granting anonymity, set a high threshold of proof regarding risk, require written and reasoned judicial orders, and specify the safeguards necessary to compensate the defence. Courts should also be trained to distinguish between full anonymity and less restrictive forms of witness protection.

Anonymous witness testimony remains one of the most sensitive institutions in criminal procedure. Its legal significance lies in the fact that it is designed to protect witnesses and ensure the effective administration of justice, but at the same time it directly affects the accused's right to a fair trial.

The study shows that foreign legal systems and international judicial practice do not support either absolute acceptance or absolute rejection of anonymous witness testimony. Instead, they favor a restrictive and carefully balanced approach. Anonymous testimony may be admissible only in exceptional cases where there is a real and serious threat to the witness, where less restrictive alternatives are insufficient, and where adequate procedural guarantees preserve the essence of defence rights.

The comparative experience also demonstrates that the admissibility of anonymous witness testimony depends not only on the existence of danger but on the quality of judicial oversight and the effectiveness of counterbalancing safeguards. In this sense, the problem is not anonymity itself, but whether the criminal process can remain fair under conditions of limited disclosure.

Therefore, in the context of improving criminal procedural legislation, anonymous witness testimony should be recognized as an exceptional evidentiary mechanism subject to strict legal criteria. Its use must be based on necessity, proportionality, corroboration, and meaningful defence participation. Only under such conditions can the institution serve the interests of justice without undermining the legitimacy of criminal adjudication.

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