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## VICTIM PROTECTION AND THE ADMISSIBILITY OF EVIDENCE IN CRIMINAL PROCEEDINGS: A ROMANO-GERMAN (CONTINENTAL) LAW PERSPECTIVE

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### Abstract

This article analyses the admissibility of evidence obtained in criminal proceedings where special procedural measures are applied to protect victims in Romano-German (continental) legal systems. Drawing on the experience of Germany, France and Italy, and on the jurisprudence of the European Court of Human Rights, it examines the structural tension between protecting victims from secondary victimisation and preserving the accused's right to a fair trial. It argues that, in continental criminal procedure, admissibility cannot be reduced to formal legality and must instead be assessed through a principled evaluation of proportionality, equality of arms and the overall fairness of the proceedings, with particular attention to judicial responsibility for fact-finding, the principles of orality and immediacy, and the availability of counterbalancing safeguards.

**Keywords:** Witness protection; admissibility of evidence; criminal proceedings; fair trial; confrontation rights; protected witnesses; common law; evidentiary safeguards; Article 6 ECHR; cross-examination.

### Introduction

In modern continental criminal justice systems, the role of the victim has undergone a profound transformation. Victims are no longer perceived merely as passive sources of information, but as procedural subjects whose dignity,



security and psychological integrity require legal protection<sup>1</sup>. This development is particularly visible in cases involving sexual violence, domestic abuse, human trafficking and serious violent crime, where participation in criminal proceedings may expose victims to secondary victimisation, intimidation or long-term trauma.

In response to these risks, Romano-German legal systems have introduced a wide range of protective measures, including special rules on the manner of questioning, the use of audiovisual technology, limits on direct confrontation with the accused, and procedural support mechanisms<sup>2</sup>. While these measures serve an important protective function and may enhance the willingness of victims to cooperate with criminal justice authorities, they inevitably raise complex questions concerning the admissibility and reliability of the evidence obtained under such conditions.

The central legal tension lies between two competing imperatives. On the one hand, the state has a legitimate interest in protecting victims and ensuring their effective participation in criminal proceedings. On the other hand, the accused is entitled to a fair trial, including the right to challenge the prosecution's evidence effectively and to test the credibility of adverse testimony<sup>3</sup>. In continental systems, this tension is further complicated by the court's active role in fact-finding and the traditional emphasis on material truth.

Against this background, this article explores how Romano-German legal systems attempt to reconcile victim protection with the requirements of evidentiary fairness. It focuses on the admissibility of evidence obtained under protective regimes and argues that the decisive criterion should be the overall integrity of the proceedings rather than mere procedural compliance.

Romano-German criminal procedure is traditionally characterised by a strong emphasis on legality, judicial responsibility for fact-finding and the principle of material truth<sup>4</sup>. Unlike adversarial systems, where party-driven confrontation plays a central role, continental models assign the court an active duty to

<sup>1</sup> Delmas-Marty M and Spencer JR (eds), *European Criminal Procedures* (CUP 2002) 311.

<sup>2</sup> German Code of Criminal Procedure (StPO) ss 58a, 247.

<sup>3</sup> European Convention on Human Rights, art 6.

<sup>4</sup> Roxin C and Schünemann B, *Strafverfahrensrecht* (29. Aufl, Beck 2017) 52.



establish the facts ex officio. Within this framework, the law of evidence is closely connected to the principles of legality, proportionality and procedural equality.

Admissibility rules in continental systems do not merely determine what information may be used by the court; they also serve to protect fundamental rights and to preserve the integrity of the criminal process. The exclusion of unlawfully or unfairly obtained evidence is therefore increasingly understood as an expression of constitutional and human rights guarantees, rather than as a purely technical matter.<sup>7</sup>

The growing recognition of victims' rights has added a further dimension to this framework. Modern criminal procedure increasingly acknowledges that the manner in which evidence is obtained and presented may have a profound impact on victims, particularly vulnerable ones. At the same time, this recognition cannot justify a departure from the core guarantees of a fair trial. The challenge is therefore to integrate victim protection into evidentiary law without undermining the essential role of judicial scrutiny and procedural balance<sup>5</sup>.

From a doctrinal perspective, this requires a careful articulation of the relationship between three sets of principles: the pursuit of material truth, the protection of fundamental rights, and the maintenance of procedural equality between prosecution and defence. Admissibility becomes the key site where these principles intersect and, at times, collide.

Continental legal systems have developed a variety of instruments aimed at reducing the risk of secondary victimisation. In Germany, the Code of Criminal Procedure allows for special forms of examination of vulnerable victims, including the use of video-recorded testimony and, in certain circumstances, the temporary exclusion of the accused from the courtroom during questioning<sup>6</sup>. French and Italian criminal procedure similarly provide for protective arrangements, particularly in cases involving sexual offences, crimes against minors and domestic violence<sup>7</sup>.

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<sup>5</sup> Jackson JD and Summers SJ, *The Internationalisation of Criminal Evidence* (CUP 2012) 88.

<sup>6</sup> StPO ss 58a, 247.

<sup>7</sup> French Code de procédure pénale arts 706-52-1; Italian Code of Criminal Procedure arts 498, 512-bis.



These measures are generally justified by reference to the protection of human dignity and the effectiveness of criminal justice. Legislators and courts increasingly recognise that victims who are exposed to fear, shame or psychological pressure may be unable or unwilling to provide reliable testimony. Protective measures are therefore seen not only as instruments of compassion, but also as tools for improving the quality of evidence.

At the same time, these measures modify the traditional dynamics of oral and public examination of evidence. Restrictions on direct confrontation, the use of intermediaries or the reliance on pre-recorded testimony may limit the immediacy of judicial assessment and the defence's ability to challenge credibility. As a result, the question arises whether, and under what conditions, evidence obtained under such protective regimes should be regarded as fully admissible.

In continental doctrine, this question is typically addressed through the lenses of proportionality and necessity. Courts are required to assess whether the interference with defence rights is justified by the legitimate aim of victim protection and whether less restrictive alternatives are available<sup>8</sup>. This approach reflects a broader commitment to balancing competing interests within a structured constitutional framework.

The jurisprudence of the European Court of Human Rights plays a decisive role in shaping continental approaches to victim protection and evidentiary admissibility. The Court has repeatedly emphasised that criminal proceedings must strike a fair balance between the interests of victims and the rights of the defence under Article 6 of the Convention.

Although many of the Court's leading cases concern anonymous or absent witnesses, the underlying principles are equally relevant to situations in which victims give evidence under special protective conditions. In cases such as *Al-Khawaja and Tahery v United Kingdom* and *Schatschaschwili v Germany*, the Court developed a functional and holistic approach, focusing on whether the proceedings as a whole were fair and whether sufficient counterbalancing safeguards existed.

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<sup>8</sup> Trechsel and Summers (n 1) 98.



This case law has had a profound impact on continental courts. It has encouraged them to move beyond formal legality and to engage in a substantive assessment of procedural fairness. Restrictions on defence rights are not prohibited per se, but they must be justified by compelling reasons and accompanied by safeguards capable of preserving the overall balance of the proceedings.

A brief comparison of Germany, France and Italy reveals both common trends and important doctrinal nuances. German criminal procedure places strong emphasis on judicial responsibility for the taking and evaluation of evidence, which allows courts a considerable degree of flexibility in organising protective measures while maintaining control over fairness<sup>9</sup>. The court's active role in fact-finding is often presented as a safeguard against the risks associated with mediated or pre-recorded testimony.

French procedure, with its mixed inquisitorial and adversarial elements, likewise seeks to accommodate victim protection within a framework of judicially supervised fact-finding. Protective measures are increasingly used in sensitive cases, but their application remains subject to judicial assessment of necessity and proportionality.

Italian criminal procedure, influenced by both continental and adversarial traditions, places particular importance on the oral nature of the trial and the principle of contradiction. This makes the use of pre-recorded or mediated testimony especially sensitive from the perspective of defence rights. Italian doctrine and practice therefore tend to emphasise the need for strong compensatory safeguards whenever direct confrontation is restricted<sup>10</sup>.

Despite these differences, all three systems increasingly rely on a proportionality-based assessment when dealing with evidence obtained under protective regimes. This assessment focuses not only on the legality of the measure, but also on its impact on the equality of arms and the overall fairness of the proceedings.

Two principles play a particularly important role in continental evidentiary theory: orality and immediacy. Orality requires that evidence be presented and

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<sup>9</sup> Roxin and Schünemann (n 6) 415.

<sup>10</sup> Delmas-Marty and Spencer (n 2) 354



examined in open court, while immediacy emphasises the direct perception of evidence by the trial judge. These principles are closely linked to the idea that judicial conviction should be formed on the basis of first-hand impressions rather than mediated accounts.

Victim protection measures inevitably place pressure on these principles. The use of video-recorded testimony or the absence of direct confrontation may weaken the immediacy of judicial assessment. However, continental systems do not treat these principles as absolute. Instead, they are balanced against other constitutional values, including human dignity and the protection of vulnerable persons.

The key question is therefore not whether these principles are formally respected, but whether their functional objectives—reliable fact-finding and fair evaluation of evidence—are sufficiently preserved through alternative means. This again points towards a substantive, rather than formalistic, conception of admissibility.

From a theoretical standpoint, the admissibility of evidence obtained under victim protection measures in continental systems cannot be reduced to formal compliance with procedural rules. Instead, it must be evaluated in light of broader constitutional and human rights principles, in particular proportionality and the right to a fair trial.

Proportionality requires courts to weigh the legitimate aim of protecting victims against the extent of the interference with defence rights. Where protective measures significantly restrict the ability of the defence to challenge the evidence, their use must be justified by particularly strong reasons and accompanied by compensatory safeguards. These may include enhanced judicial scrutiny, corroboration requirements, or procedural opportunities to contest the reliability of the testimony by other means.

In this sense, admissibility becomes a question of structural fairness rather than a purely technical issue. The focus shifts from the formal legality of the measure to its concrete impact on the quality of fact-finding and the fairness of the proceedings.

The admissibility of evidence obtained in the context of victim protection represents a central challenge for Romano-German criminal procedure.



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Continental legal systems have responded to this challenge through a combination of statutory regulation, judicial discretion and the growing influence of European human rights standards. The analysis shows that victim protection and fair trial guarantees are not mutually exclusive. However, their reconciliation requires a careful, case-by-case assessment grounded in proportionality, equality of arms and the overall integrity of the proceedings. Only through such a principled approach can criminal justice systems ensure both the effective protection of victims and the preservation of procedural fairness, thereby maintaining public confidence in the legitimacy of criminal adjudication.

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