

WITNESS TESTIMONY IN CRIMINAL TRIALS: RIGHTS AND GUARANTEES



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Introduction

Witness testimony stands as one of the most pivotal forms of evidence in criminal proceedings, serving as both a fundamental tool of proof and a cornerstone of the right to defense. Testimony originates from an individual's direct sensory perception of events that unfolded in their presence. In numerous cases, it serves as the sole instrument available to the defense in establishing the innocence of the defendant.

A defense attorney, entrusted with safeguarding the rights of the defendant, often faces a formidable adversary in the prosecutorial authorities, who wield both power and authority. The prosecution acts on behalf of the state, and in many instances may deviate from the principles of justice, leading to the fabrication of charges and the suppression of exculpatory evidence—placing an undue burden on the justice system. In such circumstances, witness testimony emerges as the most crucial, and at times, the only means by which the defense can challenge wrongful accusations and establish the truth.

The significance of witness testimony in criminal courts far exceeds its role in civil proceedings. Historically, testimony served as the primary means of proof until the emergence of written documentation, particularly following the enactment of the Code of Justinian in the 16th century, which elevated written evidence to paramount status in civil courts. However, in criminal trials, where offenses are typically committed in the heat of the moment without prior documentation, testimony remains the principal form of evidence. A witness who has observed the crime firsthand provides invaluable insights into the circumstances of the offense, its manner of execution, and the identity of the perpetrator. Hence, testimony frequently serves as the decisive factor in determining the guilt or innocence of the defendant.

The Criminal Procedures (CP) Law No. 150 of 1950 regulates the provisions governing witness testimony during both the investigation and trial stages. Over the past few years, the legislator has introduced numerous amendments to these provisions. A draft Criminal Procedures Law is expected in the near future, reorganizing witness hearings before both the Public Prosecution and the Criminal Court. The draft introduces a new procedural reality with implications for criminal justice and fair trial standards, especially regarding the right to defense, which remains an essential pillar of due process.

This paper seeks to examine the hearing of witnesses as a form of criminal evidence, analyzed through the lens of the right to a fair trial and the right to defense. The paper adopts a perspective that strongly favors criminal justice safeguards and fairness.

The analysis undertakes a comparative examination of the existing provisions on witness testimony in the current Criminal Procedures Law against those introduced in the new draft law, assessing them in relation to fair trial standards and what may be termed the right to hear witnesses.

The right to hear witnesses

Criminal jurisprudence largely concurs on the concept of testimony in the realm of criminal justice. As a legal construct, testimony is intrinsically tied to its purpose—proving or refuting the attribution of a crime to the defendant, based on the statements of individuals who were present at the scene of the crime.

While legal scholars agree on the substantive definition of testimony, their terminologies may differ. Some have defined testimony as:

"A person's statement before a judicial body regarding a right that concerns another individual. It constitutes an account of an incident based on direct observation rather than inference, speculation, or estimation. The essence of testimony lies in the witness narrating an event that they personally witnessed or perceived through one of their senses."

Others have defined witness testimony as the process of "proving a specific fact based on a person's account of what they have seen, heard, or perceived through their senses."

According to jurisprudential definitions and procedural laws, testimony must be direct, meaning that only witnesses who were present at the incident and personally observed it may provide testimony. The law strictly prohibits questioning a witness about their beliefs, opinions, or personal assessments, and any such statements are inadmissible during criminal proceedings.

Hearing witnesses and human rights

- Article 14 (3) (e) of the International Covenant on Civil and Political Rights (ICCPR): "To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".
- Article 6 (3) (d) of the European Convention on Human Rights (1950): "To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".
- Article 8 (2) (f) of the American Convention on Human Rights (1969): "The right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses".
- The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) extends the right to hear witnesses beyond the defendant, underscoring that victims also have a right to access justice, reinforcing the notion that witness testimony is a fundamental human right.

These provisions affirm that the right to hear witnesses is a core component of the right to a fair trial. The International Bill of Human Rights does not recognize partial rights, as one of the fundamental principles of human rights is their interdependence and indivisibility. No right stands in isolation, and the right to a fair trial cannot be realized without the right to hear witnesses, as explicitly affirmed in Article 14 of the ICCPR.

The legal framework for hearing witnesses in Egyptian law

The Criminal Procedure Law No. 150 of 1950 governs the provisions for witness testimony as criminal evidence during both the investigation phase (Articles 110–122) and the trial phase (Articles 277–290). Additionally, the legal framework has been expanded through amendments introduced by Law No. 145 of 2006 and Law No. 1 of 2024.

This analysis focuses on the substantive provisions that directly impact the right to defense, the hearing of testimony, and the fairness of trials, while also considering procedural provisions that have significant substantive implications.

Provisions for hearing witnesses during the investigation phase

The preliminary investigation constitutes a crucial stage of the criminal justice process, as it aims to uncover the truth by gathering and evaluating evidence with precision and integrity. Hearing witnesses during this phase can be decisive in establishing the innocence of the defendant at an early stage, potentially preventing unwarranted trials. The key substantive provisions governing testimony during the investigation phase include:

First: The investigating judge has the discretion to hear witnesses at his own assessment. He is not obligated to hear all witnesses requested by the parties, as he may determine that their testimony is unnecessary (Article 110 CP).

Second: Witnesses should appear before the Public Prosecution through bailiffs or public authority personnel (Article 111 CP).

Third: The investigator (investigating judge) may hear witnesses individually or conduct confrontations between witnesses or between them and the defendant (Article 112 CP).

Fourth: After a witness completes their testimony, the parties have the right to express observations and request that the investigator ask the witness additional questions. However, the investigator may reject any question deemed irrelevant to the case or harmful to others (Article 115 CP).

Fifth: In cases where the defendant faces mandatory imprisonment, the law prohibits hearing witness testimony without the presence of the defendant's lawyer, except in cases of

flagrante delicto or when urgency is required to prevent the loss of evidence (Article 124 of Law No. 145 of 2006).

Sixth: A witness may be heard at their place of residence if they present a valid excuse preventing their attendance. However, if the excuse is proven invalid, the witness is subject to a fine of EGP 200 (Article 121).

The provisions governing witness testimony during the investigation phase present significant challenges to the principles of a fair trial, as outlined in Article 14 of the ICCPR. They also undermine the right of the defense to establish the innocence of the defendant.

Under the law testimony remains discretionary for the investigator, who has the authority to refuse hearing some or all of the witnesses presented by the defense. Defense counsel's ability to question witnesses is also discretionary, as the investigator can deny requests for clarifications or additional questions if they are deemed irrelevant, harmful, or prejudicial. The investigator's assessment of what is permissible is subjective, yet they act as a representative of the state authority, which is the primary opponent in the case.

Limitations on the lawyer's right to question witnesses effectively strip the defense of a crucial tool in establishing the defendant's innocence. In many cases, witness testimony is the sole available evidence in favor of the defendant, and restricting cross-examination places the defense at a structural disadvantage.

The 2006 amendment requiring mandatory legal representation in cases involving compulsory imprisonment has been largely deprived of its intended protective effect, as exceptions remain at the sole discretion of the investigator.

Substantive provisions for witness testimony before the court in the current law

At the trial stage, witness testimony assumes heightened significance, as the mere progression of a case to this phase indicates the existence of substantial evidence against the defendant. Below is an analysis of the key substantive provisions governing witness testimony before the court:

- The judge may hear witnesses during the court session or, if they are unable to attend, at their place of residence (Article 281). In such cases, testimony must be taken in the presence of the prosecution and all parties to the case, who have the right to direct questions to the witness.
- Witnesses may be confronted with one another or with the defendant.
- Under Article 277, witnesses are summoned by bailiffs or law enforcement officers. In flagrante delicto cases, witnesses may be summoned at any time.

- The judge holds extensive discretionary power regarding witness testimony. The court may decide whether or not to hear a witness, provided that a reasoned decision is issued in cases where testimony is declined. The court may summon any individual for testimony and may even order their compulsory attendance.
- The law prohibits the rejection of witnesses under Article 285.
- A civil claimant may be heard as a witness in the proceedings (Article 288).
- Close relatives of the defendant (up to the second degree) and their spouse have the right to refuse to testify under Article 286 CP. However, this right does not apply if the witness is the victim, the one who reported the crime, or if no other evidence exists in the case.
- The court must review and read aloud the testimony given during the evidence-gathering and investigation stages or before an expert (Article 289).
- While the legislator has generally preserved the core provisions governing witness testimony, the law grants the judge broad discretionary authority in determining whether a witness should be heard. This discretion is theoretically subject to review by the Court of Cassation, but in practice, the majority of accepted criminal cassation appeals are based on not hearing witnesses or not allowing the defense to cross-examine them.

Procedural provisions for hearing witnesses

As a general principle, the Civil and Commercial Procedures Law applies with regard to a witness's right to refuse testimony or to be exempted from giving testimony, as stipulated in Article 287 of the Criminal Procedures Law. Additionally, the Legal Procedures Law outlines the specific procedural steps for hearing witnesses, which include the following:

- Witnesses are placed in a separate room before testifying and are summoned individually by name. After giving their testimony, they must remain in the courtroom according to Article 278 CP.
- A witness who fails to appear after being duly notified is subject to a fine under Article 279 CP. The witness may, however, appeal the fine, as per Article 282 CP.
- Witnesses over 14 years of age are required to swear an oath before testifying. Witnesses under 14 years of age may provide testimony as reason for consideration, but without taking an oath, in accordance with Article 284 CP.
- If a witness claims to no longer remember key facts or contradicts their prior statements given during the investigation or evidence-gathering phase, the court may read relevant excerpts from the previous testimony of the witness.

Witness testimony under the draft Criminal Procedure Law

The draft Criminal Procedure Law largely retains the fundamental rules for witness testimony established in the current law, while introducing new provisions aimed at modernizing notification methods. Below is an overview of the key provisions regarding witness testimony during both the investigation and trial stages.

Provisions for hearing witnesses during the investigation stage

- The Public Prosecution may hear witnesses, as stipulated in Article 86 of the draft law.
- Witnesses requested by the opposing parties are summoned via the mobile phone or email stated in their national ID records. The investigator may hear witnesses who appear voluntarily without prior summons (Article 87 of the draft law).
- Witnesses may be heard individually by the Public Prosecution, or they may be confronted with each other and with the defendant, as stipulated in Article 88 of the draft law.
- The Public Prosecution must document the witness's full name, surname, profession, age, phone number, as well as their relationship with the defendant, victim, or civil rights claimant (Article 89 of the draft law).
- Persons over 15 years of age must take an oath before testifying, stating: "I swear by God Almighty to testify to the truth." If the witness requests, the oath may be adapted in accordance with their religious beliefs. Witnesses under 15 years of age may testify without taking an oath, and their statements are admitted as reason for consideration, as per Article 90 of the draft law.
- The investigator and the court clerk must sign the witness's testimony. The witness must also sign after their statement is read to them and they confirm its accuracy. If the witness refuses to sign, the investigator must record the refusal in the official minutes, in accordance with Article 91 of the draft law.
- Opponents in the case shall have the right to express their observations on the witness's testimony and to request that the investigator hear the witness on additional relevant matters. The investigator retains the discretion to reject any question deemed unrelated to the case or prejudicial to others. Additionally, the investigator has the authority to prevent statements or gestures that may intimidate or confuse the witness, in accordance with Article 92 of the draft law.
- Witnesses are required to appear in response to a formal written request to be summoned. In the event of failure to appear, the prosecution may impose a fine not exceeding EGP 500 and may order the witness to appear again at their own expense. Furthermore, the prosecution may issue a reasoned order for the witness's arrest and compulsory appearance. However, the investigator may exempt the witness from the fine if they present a valid and acceptable excuse.

- The investigator is authorized to impose a fine not exceeding EGP 2,000 upon a witness who refuses to take the oath or provide testimony, in accordance with Article 95 of the draft law.
- In cases where the witness is unable to attend due to illness or other compelling circumstances, the prosecution may take their testimony at their place of residence. However, if the stated excuse is found to be unsubstantiated, the prosecution may petition the competent judge to impose a penalty of imprisonment for a period not exceeding one month or a fine not exceeding EGP 2,000.

These provisions do not align with the principles of criminal justice, the right to defense, and the right to hear witnesses, as enshrined in Article 14 of the ICCPR. The draft law transfers the authority over witness testimony from the investigating judge to the Public Prosecution, thereby granting the latter the discretion to determine the admissibility of testimony. Moreover, the draft law extends to the Public Prosecution an authority not expressly justified by law—namely, the power to impose fines on witnesses for non-compliance with attendance requirements. This shift disregards the fundamental distinction between the judiciary and the prosecutorial authority, as the power to impose criminal penalties, including fines, is traditionally reserved for judicial bodies.

Furthermore, the draft law unduly restricts the right of the defense to cross-examine witnesses, conferring upon the prosecution an overly broad discretionary power—one that lacks clear legal parameters—to deny defense counsel the opportunity to engage in the examination of witnesses. Article 92 stipulates that questions may be disallowed if deemed unrelated to the case or if they impact third parties. Additionally, the provision grants the investigator the authority to prevent witnesses from making statements or gestures that may confuse or intimidate them—a highly unusual and problematic measure that constitutes a flagrant violation of the right to defense and the principles of a fair trial. This is particularly concerning given that criminal investigations inherently involve a degree of tension and adversarial debate, which are essential for uncovering the truth and identifying inconsistencies.

Although the draft law provides for the possibility of hearing a witness at their place of residence in cases where attendance is impossible, it fails to establish clear procedural safeguards for ensuring the presence of all parties to the litigation in such instances.

Objective provisions for hearing witnesses before the court in the draft Criminal Procedures Law

- Witnesses may be notified through legally recognized means (bailiffs or the arresting officer), mobile phone, or registered email linked to their national ID, in accordance with Article 277. The provisions of the Civil and Commercial Procedures Law shall also apply, except in cases of flagrante delicto, where a witness may be summoned at any time.

- The draft law maintains the existing procedural framework for hearing witnesses, as set forth in the current legislation. These procedures include calling witnesses by name, ensuring their presence in a separate location before testimony, and requiring them to remain present after providing their statements, in accordance with Article 278. Additionally, the court retains the authority to confront witnesses with one another.
- If a witness fails to appear after being summoned, the court may impose a fine not exceeding EGP 500. However, if the court determines that the witness's testimony is essential to the case, it may issue an order for their arrest and compulsory appearance, as stipulated in Article 279. The witness may be exempted from the fine if they appear voluntarily or provide a legally acceptable excuse, pursuant to Article 280.
- In the event of repeated absence, the court may impose a fine of up to EGP 2,000 and may further order the witness's arrest and immediate appearance at the same session.
- If a witness is unable to attend due to a valid excuse, the court may conduct their testimony at their place of residence. In such cases, all parties shall be present and permitted to pose necessary questions. Should the witness be found to have provided false statements, the court may impose a penalty of imprisonment for a period not exceeding three months or a fine not exceeding EGP 2,000, in accordance with Article 281.
- Witnesses aged 15 years and above are required to take an oath before providing testimony, while those under this age may be heard as reason for consideration without being sworn in, pursuant to Article 283.
- A witness who unjustifiably refuses to testify or take an oath in circumstances not permitted by law shall be subject to a fine not exceeding EGP 2,000, in accordance with Article 284.
- No witness may be disqualified from testifying for any reason, as stipulated in Article 285.
- Relatives up to the second degree, as well as the spouse of the defendant—even after the dissolution of the marriage—may lawfully refuse to testify, except in cases where the witness is the victim or the one who reported the crime and no other evidence is available, pursuant to Article 286.
- The court shall hear the testimony of the civil rights claimant, who shall take an oath before providing their statement, in accordance with Article 288.

- If it is impossible to hear a witness in person, the court may read their testimony as recorded during the investigation phase, the evidence collection report, or before an expert. However, should the defense insist on examining the witness and the court deems such an examination unnecessary, it must provide a justification for its refusal.
- Where a witness claims to no longer remember certain facts or where their testimony contradicts prior statements, the court may read back their statements from the investigation and evidence collection stages, pursuant to Article 290.

The draft law preserves the judge's discretionary power in summoning and hearing witnesses while simultaneously imposing limitations on the right to defense. Additionally, it introduces new provisions, such as modernizing the procedures for summoning witnesses. However, despite substantial legal and constitutional objections raised by the Egyptian legal community before the House of Representatives—alongside numerous proposals, amendments, and alternative formulations—there remains an inexplicable insistence on provisions that undermine the principles of a fair trial.

Conclusion

The fundamental principle in criminal adjudication is that rulings must be based on oral proceedings conducted by the court during trial sessions, wherein witnesses are heard whenever possible. This principle has been consistently upheld by the rulings of the Egyptian Court of Cassation. Consequently, depriving the defendant of the right to present defense witnesses—who, in certain cases, may constitute the sole evidence of innocence—constitutes a violation of the right to defense and the principle of equality before the judiciary. Therefore, the court's discretionary authority to reject the hearing of defense witnesses should be confined to the narrowest circumstances, strictly limited to situations where summoning the witnesses is demonstrably not possible.

Any amendments to the legal provisions governing the hearing of witnesses under the draft Criminal Procedures Law that result in depriving the defendant of the ability to summon defense witnesses—especially when their testimony serves as the only exculpatory evidence—constitute a direct infringement upon the fundamental right to defense. Such restrictions undermine a critical safeguard of a fair and impartial trial, in clear contravention of international standards of justice.

Recommendations

- 1- The provisions governing witness testimony before the court should be amended to grant the defendant and their legal counsel the right to summon and examine any witnesses they deem necessary for the defense without infringing upon the judiciary's authority to assess witness testimony in accordance with judicial discretion and conscience.
- 2- If the defendant or their legal counsel insists on directly examining a witness whose prior testimony has been read in court, the judge must grant this request. A fundamental tenet of fair and impartial trials is the right of the defendant and their defense to cross-examine witnesses. Consequently, Article 389 of the draft Criminal Procedures Law must be amended to reflect this safeguard.
- 3- The legislator should establish parity between defense and prosecution witnesses regarding both their right to be heard and the imposition of fines prescribed by law. This is particularly crucial given that prosecution witnesses often consist of law enforcement officers responsible for drafting arrest reports or their confidential informants.
- 4- The provisions of Article 290 must be amended to address the reading of a witness's prior testimony when they claim to no longer remember the incident, especially if their testimony in the hearing is contradictory with Paragraph 2 stating "the previous as well." Established principles of criminal jurisprudence dictate that discrepancies and contradictions in a witness's testimony should be interpreted in favor of the defendant. Any attempt to rely on prior testimony from the investigative phase serves only to reinforce the prosecution's case and shield prosecution witnesses from the embarrassment of retracting or modifying their statements.
- 5- Article 288 must be amended to distinguish between the legal status of a civil rights plaintiff and that of a witness. Unlike a witness, a civil rights plaintiff is a party to the criminal proceedings and, as such, cannot be considered a witness in all cases.
- 6- Article 286 should be amended to eliminate the phrase "a witness may refrain from giving testimony if a crime has been committed against them." This wording is inherently flawed, as a person who has been the victim of a crime assumes a different legal status, transitioning from a witness to a principal party in the criminal dispute.