

SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS

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I. INTRODUCTION

Ensuring the safety and cooperation of witnesses and other persons disclosing the offence, named whistleblowers, has always been considered as one of the most decisive factors for the success of the investigation, prosecution, and adjudication of criminal cases. Therefore, many countries in the world, including Vietnam, have issued many legal documents and practical measures to create favorable conditions for the participation of witnesses and whistleblowers. In respect of international laws, the protection for and the cooperation with the witnesses and whistle-blowers has been increasingly of importance. Some international legal documents, such as United Nations Convention on Transnational Organized Crimes or United Nations Convention against Corruption, have already had some binding provisions toward its member to effectively protect witnesses and persons disclosing crimes.

This presentation will briefly introduce policies and specific legal provisions of Vietnam to protect witnesses and whistleblowers. Also, the effectiveness of the implementation of these policies and legal provisions in the context of Vietnam shall be thoroughly discussed. Finally, some recommendations on practical measures to enhance the effectiveness of the protection for the witnesses and whistleblowers in the times coming shall be presented.

II. DOMESTIC AND INTERNATIONAL LAWS ON PROTECTION OF WITNESSES AND WHISTLE-BLOWERS

According to the defining provision of the Criminal Procedure Code 2003 of Vietnam (CPC 2003), the witnesses is the persons knowing some details, which are meaningful for the investigation and adjudication of a criminal case, and he/ she has been summoned by bodies conducting criminal proceedings to participate in the case to present his/her statements (Article 55 CPC2003). The witnesses' participation in the case, which is their legal responsibility, is under the decision to summon of the body conducting legal proceedings (Article 133 CPC 2003). So far, Vietnam has acceded, and being the state member of United Nations Convention on Transnational Organized Crimes or United Nations Convention against Corruption, it has full obligations and responsibilities to ensure the safety and cooperation of the witnesses and whistleblowers.

In conjunction with the process of expanding the guarantee of human rights in legal proceedings, the provisions on witnesses has been changed in the direction of humanizing the relationship between the state and witnesses, expanding rights of witnesses and legal undertakings for such rights. The demand on combating corruption and organized crimes effectively is the main momentum for such a process. The legal provisions on protecting witnesses is one of the main factors to enhance the truth and values in terms of proofing for the witnesses' statements because that can exclude the main reasons for the false statements, disclaim the initial statements of the witnesses – the fear for being revenged. At the same time, it might actively affect the enforcing authorities' activities in legal proceedings. In the context of combating organized crimes in Vietnam, this struggle can only gain success if legal bases on protecting the witnesses are established and fully implemented.

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The legal provisions relating to witnesses are legalized and provided in the first Criminal Procedure Code of Vietnam 1988. However, these provisions only concern on responsibilities of the witnesses without ensuring their legitimate rights and interests. If the witness does not come under summon, he/she can be legally subjected for the production, or even be prosecuted if he/ she refuses or hides from taking the testimonies. In order to address the demands from the struggle against crimes, some extra rights of the witnesses have been supplemented to the current CPC 2003 as compared to the CPC 1988. Accordingly, CPC 2003 provides some new rights of the witnesses such as the right to request the body which has summoned them to protect their life, health, honor, dignity, property and other legitimate rights, the right to make complaints on the decision or actions of bodies, or persons conducting legal proceedings, and the right to get the refund for transportation expenses and other costs as provided by legal provisions (Article 55 CPC 2003).

To adapt more effectively to the context of the struggle against drug offence, Article 14 in the Law on Preventing and Combating drug 2000 of Vietnam has provided that the persons who disclose crimes, the witnesses, the victim, and their family members are all protected. In fact, not only the people who disclose crimes, witnesses, the victims, but also their parents, husband/wife, children are also subject to the threat of being attacked by drug criminals. The reality shows the activeness and the necessity of these provisions, to create an effective and obvious change in the struggle against drug offence over the past years.

However, the reality of the activities in criminal proceedings in Vietnam shows that the ensuring for the safety and cooperation of the witnesses and whistleblowers still has some shortcomings: some social surveys in Vietnam show that the witnesses, the victim, and the relatives are still afraid of being face to face toward the accused, their friends and relatives in the adjudication process at trial. These face to face occasions might be out of control of the body conducting legal proceedings, such as outside the Court, in the corridor of the Court room when waiting for the trial commencing. Some kinds of forcing the witnesses not to cooperate with the body conducting legal proceedings via giving false statement or disclaiming previous statement have been found in some localities and become more popular and sophisticated. These factors are rooted in some grounds, both subjective and objective ones.

A. In Terms of Legal Provisions

In spite of playing a very important role, the obligations of witnesses and whistleblowers are heavier and many more than the legitimate rights and interests offered. The witnesses can be produced in case of absence without legitimate grounds or causing difficulties for the investigation and adjudication. In case of refusing to give statement without legitimate reasons, they might be subjected to criminal prosecution under Article 308 of the Penal Code 1999; in case of giving false statement, they might be subjected to criminal prosecution under Article 307 of the Penal Code 1999. The CPC 2003 has not created legal grounds to encourage the witness to actively implement their citizenship – to cooperate with the State in the struggle to prevent and combat crimes and clarify the truth of the case.

As compared to legislation on criminal procedure of many countries in the world, the CPC 2003 of Vietnam has no provisions on the relation based on the spirit of cooperation between witnesses and body conducting criminal proceedings. For example, the CPC 2003 provides many obligations and responsibilities, but not a single provision on bonus for the witnesses in case of good cooperation with body conducting legal proceedings. This legislation has no organic relationship between them and bodies conducting legal proceedings.

Consequently, the trials in Vietnam can still take place without the participation of the witnesses. In practice, there are some cases that the witness cannot attend the trial for some causes: when the trial takes place, the witness has died, or suffered from such serious sickness that he/ she cannot move, but these are very rare, just simply because the witness does not want to attend the trial because of several reasons. Although the law provides that the collegiate bench might decide to defer or continue the trial in case of absence of the witness (Article 192 CPC 2003), this provision does not give an explanation in which circumstance that the trial can be deferred or continued. This general provision has led to unsystematic behavior that the trial can still be taken place without the participation of the witness, even in some case there is a unique witness.

The CPC 2003 of Vietnam has just realized the right of the witness to request the authority to protect their life, health, honor, dignity, property and other legitimate rights and interests in criminal proceedings.

However, the CPC 2003 has not provided in details the specific methods, procedures applicable, and the corresponding guarantees, so that it turns to be general and has not taken into its full play in adjudication. For instance, Article 211 CPC 2003 provides that “in case of necessity to protect the witnesses and their relatives, the collegiate bench must decide on measures to protect them according to legal provisions”. This is very formal and general, since it is not clear about which measures and legal provisions are. In other words, there have not been specific legal provisions and policies to protect witnesses and whistleblowers.

The researching provisions of CPC 2003 show that the status of the witness is much lower than that of the defendant or the accused. In spite of implementing legal obligations for public interests, the witnesses and their relatives might face disadvantages in the future; even being subjected to criminal prosecution based on their statements that they must not refuse. In some criminal cases, the witness has become the defendant.

This can be explained that a Vietnamese legal proceeding is a process. At first, since there is not enough information, the witness can be summoned, but when there is enough information about his/her connection to the offence, he/she can be subjected to the prosecution. As compared to many countries in the world, this is quite different. These foreign laws provide that the exemption can be applicable for the victim, civil plaintiff, civil defendant, the suspect, the defendant and the witness. Even, it is not allowed to take testimony from: the judges, priests, the defense counsel, the accused, Members of Parliament.

Apart from these issues, there has not been synchronization with other legislations (such as Labor Law, Law on Public servants, Law on anti corruption, Civil Code, Law on protecting and fostering for children, Law on denunciation) in ensuring the safety and cooperation with the witnesses and whistleblowers.

B. From the Body, Person conducting Criminal Proceedings

The criminal procedure law provides the task, power of body conducting criminal proceedings in collecting, analyzing evidence to construct grounds for convicting of a person. The person conducting legal proceedings can summon person knowing about the offence and listen to their presentation about the relating issues. However, it is not always that the role and status of witnesses in the inquisitorial model of Vietnam is properly appreciated because the laws provide that the truth on crime can be determined from different sources. In the CPC 2003, there are no provisions on responsibility of authorized persons in criminal proceedings in ensuring the witness’ rights; thus, in practice, the violation of their rights still takes place sometimes.

C. From the Witnesses

The witnesses cannot often be aware of their role in the struggle on preventing and combating crimes. Many Vietnamese witnesses think it is a waste of time, income and only leads to troubles. In reality, it is very rare that the witnesses make complaints about the behavior of the investigator, prosecutor, or the judge, who have forgotten to explain their legitimate rights and interests, or just about inadequate and incorrect explanations. If any, these complaints also fall into the situation of being very long processed or of no response.

III. SOME RECOMMENDATIONS TO ENHANCE PROTECTION FOR WITNESSES AND WHISTLE-BLOWERS IN VIETNAM

- Amending, supplementing the CPC 2003 in the direction that:
- + Providing specific measures to ensure the witnesses’ rights;
- + Synchronizing with other legislation (such as Labor Law, Law on Public servant, Law on anti corruption, Civil Code, Law on protecting and fostering for children, Law on denunciation);
- + Providing the bonus for the witnesses since many current provisions are formal only;
- + Providing the sanction on giving unsuitable statements in the direction on limiting criminal prosecution, and providing more on administrative sanctions;

- + Providing the mechanism to effectively protect the witnesses since the application of current measures to protect the witnesses has not been regulated consistently, thus leading to unsystematical application. At the same time, it is necessary to provide protections for witnesses' relatives.
- + Providing the classification of the witnesses and whistleblowers, so that they can benefit from their rights as legally provided (the juvenile, ethnic people or foreigners).
- Carrying out the propaganda within enforcing authorities and the public about the content of the protection for witnesses and other persons disclosing offence in criminal proceedings.

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