

LEGISLATION RELATING TO PROTECTION AND COOPERATION OF WITNESSES IN THE UNION OF MYANMAR

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I. INTRODUCTION

Since a criminal case is built upon the evidence provided by witnesses, each and every statement of witnesses is very important as it can change the course of the whole case. Witnesses play a crucial role in law enforcement efforts to bring the perpetrators to justice. Often, however, witnesses are intimidated, threatened, harmed and harassed to prevent them from speaking out. On the other hand, witnesses deviate from telling truth because of being influenced by corruption and bribery. So that the need of witnesses protection can be classified in two categories. The first one is to protect the physical and mental security of the witnesses from being threatened, intimidated, harassed and harmed before, during and after investigation, inquiry and trial. The second one is to prevent the witnesses from giving false statement and evidence to the responsible officials, police officers and the court during investigation, inquiry and trial. The role of witnesses is very important in a trial and in the criminal justice system of every country. Witnesses are required, and secure protection and cooperation of witnesses is essential to maintain the rule of law. Likewise, the whistleblowers who disclose improper conducts, malpractices and wrongdoings of lawbreakers are also required for the public interest. Legislation relating to establishment of witnesses and whistleblowers protection programme is required.

II. THE LEGISLATION RELATING TO PROTECTION AND COOPERATION OF WITNESSES IN GENERAL

Though the particular law relating to protection and cooperation of witnesses has not been enacted in Myanmar, there are some existing laws containing the provisions which have the nature and characteristics of protection and cooperation of witnesses.

A. Protection of Witnesses

To protect witnesses from being asked indecent, scandalous, vexatious, offensive questions, and questions intended to annoy or insult them, Sections 151 and 152 of the Evidence Act provide as follows:

Section 151. The Court may forbid any questions or inquires which it regards as indecent or scandalous, although such questions or inquires may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Section 152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

In preventing and suppressing trafficking in persons, to pay particular attention of women, children and youth, preventive measures for women, children and youth is widely provided in the Anti Trafficking in Persons Law enacted in 2005. Under that law, the Deputy Attorney General is the head of Working Group on Legal Framework and Prosecution Measures. One of the functions and duties of the Working Group is to lay down and carry out necessary arrangements for the effective protection of trafficked victims and witnesses in prosecuting cases under that law.

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In respect of safeguarding the rights of trafficked victims, preventive measures are provided in that law as follows:

Section 11. In order not to adversely affect the dignity of trafficked victims:

- (a) if the trafficked victims are women, children and youth, the relevant Court shall, in conducting the trial of offences of trafficking in persons, do so not in open court, but in camera for the preservation of their dignity, physical and mental security.
- (b) with respect to trafficking in persons, the publication of news at any stage of investigation, prosecution, adjudication shall be made only after obtaining the permission of the relevant Body for the Suppression of Trafficking in Persons.
- (c) person not involved in this case shall not be allowed to pursue or make copies of documents contained in the proceedings.

Section 12. The Central Body shall, if the trafficked victims are women, children and youth, make necessary arrangements for the preservation of dignity, physical and mental security.

Section 14. The Central Body shall arrange and carry out for the security of life of trafficked victims and repatriation and resettlement as much as possible.

Under section 16 of that law, with respect to the trafficked victims who are women, children and youth, the Central Body and relevant Working Groups are responsible to give special protection of their dignity and identification and necessary security and assistance, and to give protection by keeping confidential the information relating to them.

Under section 19(e) of that law, the Central Body is responsible to lay down the security programmes and to make arrangements for other rights entitled while the trafficked victims are giving testimony or contesting a case.

Regarding hearing in camera, similar provision is provided in section 352 of the Code of Criminal Procedure as follows:

Section 352. The place in which any criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

Under section 16 of the Brothel Suppression Act, 1949, if a person who is found having sexual intercourse or who is found in the circumstances visible for having sexual intercourse is produced as a witness he shall be tried in camera.

Under section 66(e) of the Child Law, any person who commits the offence relating to inserting and announcing information revealing the identity of a child who is accused of having committed an offence or who is participating as a witness in any case, in the radio, cinema, television, newspapers, magazines, journals or publications and displaying or making use of the photograph of the child without the prior consent of the relevant juvenile court shall, on conviction, be punished with imprisonment for a term which may extend to 2 years or with fine which may extend to kyats 10,000 or with both.

B. Protection and Cooperation of Informers

In uncovering criminals and suppression of offences, getting information is crucial. However, if the informer is to be identified in serious crimes, the person who knows the commission of an offence will not give information relating to the offence as he is afraid of facing the danger made by the offenders as retaliatory action.

To protect the safety of informers, section 125 of the Evidence Act provides that no Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence, and no revenue officer shall be compelled to say whence he got any information of any offence against the public revenue.

Similar provisions are inserted in some other laws to preserve the safety of informers and to get their cooperation in uncovering the commission of serious crimes.

Under section 8(j) of the Control of Money Laundering Law enacted in 2002, the Central Control

Board formed by the Government has the power to give necessary protection and giving reward to an informer in respect of money and property obtained by illegal means.

As gambling leads malpractices, corrupt practices and commission of other offences, suppression of gambling is crucial for community peace and law and order. To uncover and suppress gambling, cooperation of informers is essential. For this matter, section 20 of the Gambling Law empowers the Magistrate who tries the case to pass order to give at least five hundred kyats, the money gained from forfeiture, or confiscation, or the money gained from selling properties passed order to be confiscated under that law as reward to the informer.

To impose more effective penalties on offenders in respect of offences relating to narcotic drugs and psychotropic substances, and to cooperate with the States Parties to the United Nations Convention, international and regional organizations in respect of the prevention of the danger of narcotic drugs and psychotropic substances, the Narcotic Drugs and Psychotropic Substances Law was enacted in 1993.

Under Rule 65 of the Rules Relating to Narcotic Drugs and Psychotropic Substances, the Central Body may make such measures as may be necessary for giving reward to the following persons in respect of an offence which action has been taken under the Narcotic Drugs and Psychotropic Substances Law, with the approval of the Government:

- (i) a person who gives an information relating to a commission of an offence contained in the said law;
- (ii) undercover informer;
- (iii) the persons who outstandingly make investigation, search and seizure to be able to seize the drugs, materials and offenders involving in the offence.

C. Prevention of Corruption

Corruption diverts witnesses from telling truth and ruins fair administration, justice and the rule of law. To prevent corruption, the penalties are provided in sections 161 and 162 of the Penal Code.

Under Section 161 of the Penal Code, any public servant who takes gratification other than legal remuneration in respect of an official act shall, on conviction, be punished with either description for a term which may extend to 3 years, or with fine, or with both.

Any person who takes gratification in order to influence public servant by corrupt or illegal means shall, on conviction, incur the similar punishment under Section 162 of the said Penal Code.

To provide more effective penalties for corruption, the Suppression of Corruption Act, 1948 was enacted.

If any public servant by corrupt or illegal means or by abuse of his office as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage, he is said to commit the offence of criminal misconduct in the discharge of his duty under section 4(1)(c), 4(2) of the said Act, and he shall be punished with imprisonment for a term which may extend to 7 years and all the gains found to have been derived by him, by the commission of that offence shall be liable to be forfeited to the State.

Regarding suppression of corruption, more severe punishments are provided in later laws.

Under section 46 of the Forest Law enacted in 1992, any forest staff who, by reason of his power accepts from any person cash or kind in a corrupt manner or in contravention of the law and participates and conspires in extracting, moving or unlawfully having in possession forest produce in a wrongful manner shall be punished with imprisonment which may extend from a minimum of 1 year to a maximum of 7 years.

Under section 25(a) of the Control of Money Laundering Law, any member of the Investigation Body who demands or accepts money or property either for himself or for any other person as a gratification in investigating money laundering offence shall, on conviction, be punished with imprisonment for a term which may extend from a minimum of 3 years to a maximum of 7 years and may also be liable to a fine.

Similar punishment is provided in section 30 of the Anti Trafficking in Persons Law for any public official who demands or accepts money and property as gratification either for himself or for another person in carrying out investigation, prosecution and adjudication in respect of any offence under that law.

More severe punishment is provided in section 18 of the Narcotic Drugs and Psychotropic Substances Law. Under section 18 of the said law, any person who is authorized to search, arrest, seize exhibits and investigate in respect of any offence under that law, and guilty of asking and accepting any money and

property as gratification either for himself or for another person shall, on conviction, be punished with imprisonment for a term which may extend from a minimum of 5 years to a maximum of 10 years and may also be liable to a fine:

D. Tender of Pardon to Accomplice for Making Approver or State Witness

In serious crimes involving more than one offender where there is no reliable evidence or witness, making an accomplice approver or State witness is helpful to enable effective conviction of principal offenders. For this matter, section 337(1) of the Code of Criminal Procedure empowers the Magistrate not lower than the Magistrate of first class to tender a pardon to a person supposed to have been directly or indirectly concerned in or privy to the offence on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

Rule 66 of the Attorney General Rules made under the Attorney General Law, 2001 empowers Law Officers to tender conditional pardon to the accused for making him State witness in accordance with the provisions contained in section 337 of the Code of Criminal Procedure.

Section 19 of the Gambling Law empowers the Magistrate to make a person involving in the offence contained in that law prosecution witness and tender him a pardon in accordance with the procedures.

Section 14 of the Brothel Suppression Act, 1949 empowers the Magistrate to examine a person who is not a principal offender among the persons prosecuted under that law as a witness relating to the offence. The person who is involved in the offence under that Act and he has made a full and true disclosure of the whole of the circumstances relating to the offence within his knowledge to the satisfaction of the Magistrate shall be entitled to receive an acknowledgement certificate from the Magistrate under section 15 of that Act. So receiving, he shall be exempted from being punished under that Act.

E. Immunity from Prosecution

To enable effective prevention and suppression of serious crimes including terrorism, financing of terrorism, transnational organized crimes and crimes related to money laundering and to enable rendering of assistance in criminal matters in accordance with international conventions, regional and multilateral agreements the Mutual Assistance in Criminal Matters Law was enacted in 2005. Under that law, immunity for witness from prosecution is provided as follows:

Section 31. The Central Authority shall, if the person who is to give testimony, statement or expert opinion in any foreign State has committed any offence previously in the Requested State, within 15 days or if it exceeds 15 days from the date of arrival at the said State and making report thereof, raise the issue to get prior agreement with the said State so as not to prosecute, detain, punish or restrict personal liberty in the said State with respect to the previous offence, during the period agreed upon by the two States.

Section 35. The relevant government department and organization shall not prosecute, detain, punish or restrict personal liberty of a person sent by a foreign State with respect to any offence committed by him previously in the Union of Myanmar within 15 days or if it exceeds 15 days from the date of arrival and making report thereof, during the period agreed upon between the two States while he is in the Union of Myanmar to give testimony, statement, expert opinion or in person, in accordance with this law.

Under section 13 (a) of the Anti Trafficking in Persons Law, the trafficked victims are exempted from being taken action for any offence under that law.

F. Prevention of Witness from Turning Hostile

In many cases, it is on the basis of the evidence given by witnesses that the State initiates the prosecution process. Because of inadequate protection given to witnesses, they are influenced to change their earlier statements. To prevent witnesses from turning hostile by telling lie, police officers making an investigation into an offence, as the statement made to the police officer is an inadmissible evidence, forward the crucial witnesses to the Magistrate for recording the statements of the witnesses before commencement of the trial. If the earlier statement to the Magistrate and the later statement made to the Magistrate during the trial contradict each other, action can be taken to the witness for giving false evidence.

Punishment for giving false evidence is provided in section 193 of the Penal Code as follows:

Section 193. Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to 7 years, and shall also be liable to fine: and whoever intentionally gives or fabricates false evidence in any other case shall be punished with imprisonment of either description for a term which may extend to 3 years, and shall also be liable to fine.

G. Obstruction of Justice

The legislation addressing the use of physical force, threats or intimidation or promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence can be found in the Penal Code.

Under section 352 of the said Penal Code, whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person shall be punished with imprisonment of either description for a term which may extend to 3 months or with fine or with both.

Under section 506, whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to 2 years, or with fine, or with both; and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or transportation or with imprisonment for a term which may extend to 7 years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to 7 years, or with fine, or with both.

Under section 507, whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution, to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to 2 years in addition to the punishment provided for the offence by the above mentioned section.

The penal provisions relating to the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official are provided in the Penal Code as follows:

Section 186. Whoever voluntarily obstructs any public servant in the discharge of his public functions shall be punished with imprisonment of either description for a term which may extend to 3 months, or with fine or with both.

Section 189. Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to 2 years, or with fine, or with both.

Section 228. Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any state of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to 6 months, or with fine which may extend to one thousand kyats, or with both.

The punishment for assault or criminal force to deter public servant from discharge of his duty is an imprisonment for a term which may extend to 2 years or with fine, or with both under section 353 of the Penal Code.

III. CONCLUSION

Nowadays, many developed countries all over the world have developed their legislation by promulgating protection and cooperation of witnesses laws containing the provisions relating to various preventive measures and necessary arrangements for the witnesses who are under threat, intimidation and in danger. In Myanmar, since occurrence of offences harmful to the physical and mental security of witnesses retaliated by offenders is rare, so far, the particular law relating to protection of witnesses has not been still promulgated. But, when the situation requires, Myanmar may consider to promulgate the special law relating to protection of witnesses.