

# Witness Protection and Judicial System of Pakistan in The Light of International Legislations and Best Practices

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## **Abstract**

*Effective criminal justice system is based on victim and witness cooperation with the judicial process. Many a times a witness is scared to testify against the criminals due to the fact that he/she is either actually threatened or feels threatened or intimidated. This is more likely in organized crimes or in the case where criminal party is strong and is in a position to influence the witness. In recent past there were many cases of witness killing in high profile cases in Pakistan. In these cases key witness was murdered even in the premises of courts thus rendering the justice at stake. In the light of these circumstances it becomes necessary to have a witness protection program in place. This article is basically an attempt to see if such program is in place and if not then to propose recommendations in the light of International Standards and model best practices.*

**Key words:** witness, intimidation, protection, legislation, international standards, judicial system.

## **1. Introduction**

Witnesses are an important part of the judicial system. Imparting justice is impossible without their help. Their contribution in restoring the rights is vital. No matter how strong the law is and how effective is criminal justice system it all becomes null and void when the witnesses are vulnerable and can easily be intimidated. Witness's lack of protection can render the whole justice system at halt. To the dismay of society the witnesses when left unprotected, the justice fails. Pakistani society has seen a

number of such instances where many high profile cases involving heinous crimes committed even against the powerful people such as philanthropists, political leaders and public figures remained unresolved because their witnesses were eliminated or removed from the scene. This has caused a stigma to the criminal justice system in the country. This situation is a cause of mistrust of people and lack of confidence in the judiciary. This is high time that the “witness Protection” should be seriously considered and practical measures be provided. To uphold the justice and vindication of rights depends upon the witnesses and testimony. It is duty of prosecution to bring up credible witnesses and trustworthy evidence. Moreover it is also important that all the stake holders have un-shattered confidence in the judicial system this can partly be provided by securing and safeguarding the witnesses of a trial. Pakistan has provided legislation in this regard. Despite having these legislations the system could not curb the threat of potential and actual harm to the witnesses of a criminal trial. There is dire need to make the law and practice more effective especially in the light of international standards.

Significance of a witness’s role in vindication of rights demands for a fear-free environment during the judicial process. This can be achieved to some extent when the protective measures are in place. In the following pages an analysis of situation in Pakistani judicial system is presented. While the research aims at finding out International Standards’ approach in this regard and proposing an effective program of witness protection to improve the system in Pakistan, this may be done in consideration of best practices adopted by certain countries.

## 2. “Witness” and “Threatened Witness”

Witness for the purpose of Protection Law ( according to Sindh Protection Act 2013) includes “every person who has given or agreed to give, or may be required to give evidence in relation to the commission or possible commission of serious offence, or a person related to such witness may require protection or a person who either possesses or provides an information to an officer of law enforcing agency and has agreed to give evidence or requires protection or assistance under the law for any other reason.”<sup>1</sup>This includes not only witnesses but also officials of judiciary, judges, lawyers, prosecutors who are either threatened or intimidated, however it is not clear whether whistle-blowers<sup>2</sup> and informers of the police are included in the category of protected persons under this Act?

“ A ‘threatened’ witness means a person who has agreed to give or is required to give evidence regarding serious offence and whose life and/or property or that of his close relatives is endangered.”<sup>3</sup> Since “witness” is a person who gives evidence therefore victims and experts are included in witnesses. Laws of some states include judges, police officers, prosecutors and even journalists among those entitled to the protection. These are sometimes given protection under witness protection program but they simply need protection of the police along with other steps taken to ensure their safety.<sup>4</sup>

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<sup>1</sup> Sec. 2 (n) , Sindh Witness Protection Act, 2013.

<sup>2</sup> Persons who inform the law authorities or disclose about an illegal activity of a person or in an organization in the public interest and not for their private gains.

<sup>3</sup> *Ibid*, Sec. 2 (o).

<sup>4</sup> Karen Kramer, *Witness Protection as a Key Tool in Addressing Serious and Organized Crime*, [www.unafei.or.jp/english/pdf/PDF\\_GG4\\_Seminar/Fourth\\_GG4Seminar\\_P3-19.pdf](http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GG4Seminar_P3-19.pdf) , 8.

### 3. Witness Protection Program

Witness Protection Program is “a formally established covert program subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities.”<sup>5</sup>

### 4. Witness Protection and Pakistani Judicial System

A very disappointing situation exists in criminal justice process. Over the past few years horrible incidents of witness killing have been reported in high profile cases. These incidents are so frequent that it shows inclination towards more deploring situation in future if not taken into consideration and curbed with implementation of legislative and procedural measures. Legislations have been introduced in this regard for instance Anti-Terrorism Act 1997 (sec.21) and the Protection of Pakistan Act 2014 (Sections 9, 10 and 13) the Anti-Terrorism Act 1997 was further strengthened by a number of amendments introduced in 2013 from witness and other judicial staff security, use of shields during trial ensuring anonymity to the transfer of trial from one place to another. Sindh government has introduced Sindh Witness Protection Act 2013. The Balochistan Provincial Assembly passed ‘The Balochistan Witness Protection Act IV of 2016’. According to its preamble the objective of the Act is; “to provide for protection of witnesses to enable them to give evidence in criminal proceedings ...” The law provides for “witness protection program”. The witness protection under this law includes; “reallocation” or “change of identity” or any other suitable help or service provided to the protected witness or any person related to him or part of his family (or house hold). However, Sindh Assembly was the first to pass this type of law; “Sindh Witness Protection Act 2013” which was passed on Sep. 18, 2013. The law still awaits effective implementation. By virtue of this law ‘a Witness Protection Advisory Board’ comprising of; “The Secretary Home Department (as Chairman of the Board), The Law Secretary, The Finance Secretary, The Inspector General Police, The Inspector General Prison, The Prosecutor General, The Additional Inspector General, CID (as Secretary of the Board) and Representatives of Provincial Human Rights Commission”. A Witness Protection Unit established under the Act will work to run the program with the advice of the Board. Under the Act, the Chief Protection Officer will be responsible to decide about the admission (or otherwise) of a witness to the protection program after careful consideration of all the facts, nature of risk, seriousness of threat or intimidation to the witness or any other related person. Except for very minor changes The Balochistan Witness Protection Act 2016 is replica of Sindh Act. One wonders if the Balochistan Assembly has considered the specific circumstances of its province?

Once it is decided by ‘the Witness Protection Unit’ to include a person to the protection Program under both Acts the following actions may be taken to protect the witness; to allow new identity, relocation, concealing the appearance and voice, pre-trial statement, use of video conferencing to obtain the statement of protected witness, providing necessary security to the witness and his family or any member of his family, providing accommodation, in case of death or permanent incapacity of the protected witness during his participation in the Program, providing free education to his/her children. A careful study of these Acts reveal that these have been over ambitiously drafted without giving any budgetary provision for the establishment of the ‘Protection Unit’. Sometimes drafting has been done in vague terms, such as; “the above mentioned protection and facilities will also be provided to the

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<sup>5</sup>UNODC (Vienna) *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, (United Nations, New York, 2008), 5.

family members of the witness if he or she demanded.”<sup>6</sup> Similarly relocation of the witness (and his family in certain cases, providing free education to his children in case of death or permanent incapacity have been vowed without any realistic framework or provision of budget). Moreover the protection unit will be run by the police department unless close scrutiny mechanism is adopted by an independent body the program is feared to get politicized.

The more recent legislation on witness protection is Punjab Witness Protection Act of 2018. The proposed federal bill on Witness Protection of 2015 seeks amendment in Criminal Procedure Code to the effect that identity and address of the witness may be substituted by allotment of numbers wherever required.

Witness Protection or Witness Security has its own drawbacks identified in the studies conducted.<sup>7</sup> Most of these problems are either of social or psychological nature, which might demand another research in the future. Right now, the task at hand is to see whether these legislations can provide protection and security to the threatened witness?

### **5. Historical Background of Witness Protection**

Investigating terrorism and organized crimes such as mafia, gangs, drug and human trafficking is sometimes very difficult for the law enforcement agencies unless a member of such gang agrees to break the famous “silence rule” and is ready to cooperate with the law authorities.<sup>8</sup> In which case the gang tries to intimidate, threaten and scare such witness for silencing the witness or tempering the evidence thus causing threat to the life of witness or a member of witness family. Such witnesses were given protection by the law enforcing authorities for their cooperation and assistance to the justice system. Gradually states started developing their “Witness Protection Programs” as integral part of the criminal justice system. Due to the rise in organized crime and terrorism across the globe more and more states have either established or are establishing protection programs for witnesses.

### **6. Some Important Features of a Witness Protection Program**

The participating witness must volunteer to the program,

Admission of the participant must be governed by an agreement between the witness and overseeing authority,

Since program requires heavy funding and it involves emotional difficulties to the participating member and his family relocation or assigning new identity must be adopted as last resort,

The program should be of “covert nature” and should maintain high level of secrecy and store information in separate database, and

Protection must not be considered by either party or the witness himself as reward of collaborating with the justice system as this might tend the witness to testify in order to please the prosecutor or police. Therefore the only criteria of admission must be predetermined and the decision of admission must be made independent of investigating authority and prosecutor once it is ascertained that the evidence of the witness is very important for the case.<sup>9</sup>

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<sup>6</sup> Sec.4, iv (h), Sindh Witness Protection Act 2013 & Sec. 4, iv (h), The Balochistan Witness Protection Act 2016.

<sup>7</sup> See for example; Jake Rossen, 12 Secrets of the Witness Protection Program, <http://mentalfloss.com/article/77695/12-secrets-witness-protection-program>, March 29, 2016. ( Accessed on: 03/09/2019.)

<sup>8</sup> Karen Kramer, *Witness Protection as a Key Tool in Addressing Serious and Organized Crimes*, 10.

<sup>9</sup> *Ibid*, 14.

The criteria of admission to the protection program must be based on the nature of risk to the witness or his family, fitness of the participant, detailed information about his family members and importance of the information he possesses as unattainable from any other source than this witness.<sup>10</sup>

### 7. Witness Protection in International Tribunals (Case of ICC)

International Criminal Court (ICC) was established under Rome Statute. The Rome Statute has also provided for the protection and well-being of the witnesses and victims. Despite some administrative overlapping noticed due to the conflicting provisions in the Statute ICC managed to establish its own effective system of protection.<sup>11</sup> The International Tribunals and ICC may face a number of difficulties while providing protection to the witnesses. First, because the Court deals with the war crimes and witnesses come from war-torn areas with no or limited infra-structure and perhaps hostile or at least indifferent forces. Second, due to having no territorial jurisdiction relocation of threatened witnesses can be done only with the help of state parties. These countries may be reluctant to accommodate victims and witnesses to relocate due to their own reasons mostly for “cultural differences.” Moreover the court does not possess its own police etc.<sup>12</sup> The ICC’s “Witness Protection Program” (ICCP) is administered by the Registrar of the Court under Rule 16 (4) of the Court’s Rule of Procedure and Evidence. Under the Rule the relocation of witnesses (and victims) is procured by a confidential agreement between the Registrar (acting on behalf of the Court) and the State Party agreed to take such witnesses.<sup>13</sup> The ‘States Parties’ cooperation is sought in two ways either the state donates in the Registrar’s “Special Fund Mode” created since 2009, without taking the witness for relocation, or practically taking the witness for that purpose. However as relocation is a costly measure and should be resolved only as a last resort, the court has adopted other local measures too such as; “safe houses”, “neighborhood watch”, “increased police patrolling”, “surveillance of the witnesses’ homes.”<sup>14</sup> The Courts two wings; The Office of the Prosecutor (OTP) and the Victim Witness Unit (VWU) also work towards assisting a witness for a limited period who is not exposed to life threat as yet to settle with his family in a new country until they achieve self-sustainability.<sup>15</sup>

### 8. International Best Practices

The UN Convention against Transnational Organized Crimes of November 2000 under its article 26 the states parties are urged to encourage the persons who have participated in an organized crime to furnish the relevant information to curb such crimes. The Convention and its Protocols demand from the states parties to introduce effective measures to stop witness intimidation, threat and injury and to strengthen transnational cooperation in this regard. The United Nations Office on Drugs and Crime (Vienna) has published in January 2008, “Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crimes” to help the states parties to design their protection programs. It has provided for the purpose of protection definition of “witness” as “any person, irrespective of his/her legal status (informant, witness, judicial official, undercover agent or other),

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<sup>10</sup> *Ibid*, 15.

<sup>11</sup> See Markus Eikel, “Witness Protection Measures at The International Criminal Court Legal Framework and Emerging Practice”, in *Criminal Law Forum* (2012) 23:97-133. DOI: 10.1007/s10609-012-9173-5

<sup>12</sup> Karen Kramer, *Witness Protection as a Key Tool in Addressing Serious and Organized Crime*, 12.

<sup>13</sup> See Rule 16 (Responsibilities of the Registrar Relating to Victims and Witnesses) *Rules of Procedure and Evidence*, (International Criminal Court, 2013).

<sup>14</sup> Markus Eikel, “Witness Protection Measures at the International Criminal Court Legal Framework and Emerging Practice”, 127-128.

<sup>15</sup> *Ibid*, 128.

who is eligible, under the legislation or the policy of the country involved, to be considered for admission to a witness protection program.”<sup>16</sup> Prior to the establishment of “protection programs” the witnesses were offered “protective custody.”<sup>17</sup> Gradually more and more states set up “Witness Protection Program” as integral part of their criminal justice system. The states have sometimes shaped these programs according to their own legal and cultural circumstances. Some of the countries having ‘Protection Program’ are; UK, USA, Australia, Hong Kong, Germany, South Africa, Italy and Colombia.

USA provided a “witness security program” in 1970 to provide protection for the witnesses involved in organized crimes and breaking the famous rule of ‘silence’ against their mafia. Later the weaknesses of this program were addressed through enactment of ‘The Witness Security Reform Act’ in 1984. The main features of the law were; strict criteria of admission, MOU between the admitting witness and program authorities, creation of a fund for the protection of victims suffering at the hands of admitted witnesses and protection of the rights of a third party such as satisfying debts of witnesses and visitation of non-relocated parent of admitted participant. This program is considered to be the basis of all later programs.<sup>18</sup> Germany has harmonized its protection laws for the Federal State. Colombian Model of ‘protection law’ seems quite practical. It has three types of programs monitored and supervised by the Office of Attorney General. It starts with simple solutions like giving tips for personal safety to the witnesses, close monitoring and then resolves to the final stage of ‘relocation’ and ‘change of identity’. The Colombian Law provides for removal of a participant from the program in case of non-cooperation with the judicial process, refusing to accept re-settlement plan, committing an act which harms the protection procedure and when a witness voluntarily withdraws from the protection program. Italian legislation in 1930 provided either partial or full immunity to those cooperated with the law authorities. However, later such measures were criticized for “witness credibility.” During 70s the rise of terrorist groups such as ‘Red Brigades’ gave rise to legislations to encourage dissociation from these gangs which successfully dismantle them. However formal ‘witness protection’ could be materialized in 1984.<sup>19</sup>

### 9. Right of Fair and Public Trial and ‘Witness Protection’

It is constitutional right of an accused to have a fair and open trial. In the Constitution of Pakistan 1973 by 18<sup>th</sup> amendment right to “fair trial and due process” has been guaranteed both in criminal and civil proceedings. The right of fair trial was incorporated in the Constitution of USA in 1791 by adopting 6<sup>th</sup> Amendment.<sup>20</sup> International and Regional Human Rights Instruments provide this right and it has been accepted *as jus cogens*. However as judge Muhammad Shahabuddeen in *Prosecutor v. Solobodan Mellošovec* (ICTY, Sep. 2003) wrote in his ‘separate opinion’ that fairness does not necessarily mean ‘perfection’ in all respects rather it means that an “accused had a fair chance of dealing with the allegations against him.”<sup>21</sup> As some aspects of ‘witness protection programs’ may not

<sup>16</sup> UNODC (Vienna), *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime*, (New York, 2008), 4.

<sup>17</sup> First such example was a member of Italian-American Mafia (Joseph Valachi) who broke *Omerta* (Code of Silence) and testified against his organization in 1963, since then he remained in ‘protective custody’ until died in 1971 of a heart attack. He was guarded by 200 US Marshals during appearance before US congressional Committee.’

<sup>18</sup> UNODC, *Good Practices*, 8.

<sup>19</sup> UNODC, 8-16.

<sup>20</sup> Judge Patrick Robinson, *The Right of Fair Trial in International Law, with Specific Reference to the Work of ICTY*, 3. (bjil.typepad.com/Robinson\_macro.pdf 2009), accessed on 20.05.2017.

<sup>21</sup> *Ibid*, 5.

*prima facie* seem coherent with the idea of ‘fair trial’ such as shielding the witness from accused, admitting pre-trial statement, testimony via video link or other forms of long term protections and support to the witness and his family which is (or might be) feared to be taken by the witness as a reward for testifying. The right of ‘fair trial and public hearing’ is not absolute rather international and state laws have provided for exclusion of people in the interest of justice, morality, security, preservation of private lives etc.<sup>22</sup> Right of ‘open trial’ of an accused has been subject to some exception. Different legislations have provided ‘anonymity or identity protection of a witness’, use of closed circuit TV or video conferencing or putting questions of the accused (to witness) through presiding officer of the court when the accused liked to cross examine the witness to avoid direct contact specially in the cases of sexual assault or child abuse.<sup>23</sup>

### 10. Analysis and Conclusion

Witness protection legislations mentioned earlier are insufficient in present context. The provincial legislations (i.e. Sindh and Balochistan) could not be turned to practice for a number of reasons. As for as Witness Protection Act, 2016 of Balochistan is concerned it is a new legislation and a replica of Sindh Witness Protection Act of 2013. One does not see any consideration to specific conditions of the province while drafting the law. Sindh Act, despite the fact that five years have passed, could not be practiced. The law provides for an Advisory Board as an overseeing authority which is to make budget demand for the setting up of the Protection Unit responsible for protection program. It seems that no such steps have been taken so far. Moreover under the law, Sindh government is to make rules for facilitating the implementation of the Act which the government could not despite the fact that the much awaited protection program is extremely vital in the light of current depleting condition of criminal justice system as far as vulnerability of witnesses is concerned. Though the extreme measures such as “relocation of witnesses” and “assigning new identity” may not be viable initially as these involve heavy cost but the program may be set up as soon as possible at least to start with lesser protective measures. The only barrier seems lack of political will and budgetary and financial constraints.<sup>24</sup>

Witnesses have been given high place in the judicial process. Their assistance to the judicial system makes vindication of rights possible. Witness cooperation and collaboration with the justice system plays vital role in the dissemination of justice. Sometimes witnesses in the criminal judicial process are vulnerable and suffer intimidation, coercion, risk of their life and their families’ lives. It is duty of the state to protect such witnesses or collaborators. The threat becomes more serious when the testimony is against a criminal group or a gang. Organized crimes such as; smuggling, trafficking of drugs, firearms and humans, money laundering etc. are the crimes require cross border cooperation. In certain cases as part of ‘witness protection program’ the participant witness may be relocated or assigned new identity, in such cases the transnational cooperation is needed.

Pakistan has recently placed witness protection by legislating in three provinces and via scattered provisions in the national legislation. This was done mainly to curb the wide spread terrorism in the country and encourage the witnesses to testify against terrorist organizations. On seeing carefully the international legislation, different states’ experience and model good practices there is need to align and conform the present legislation to the International Standards. This can be done by capacity

<sup>22</sup> See ICCPR, art. 14.

<sup>23</sup> 198<sup>th</sup> Report of the Law Commission of India on ‘Witness Identity Protection and Witness Protection Programmes’ August 2006, (Law Commission of India, Shastri Bhawan New Delhi, 2006).

<sup>24</sup> PILDAT (Pakistan Institute of Legislative Development and Transparency), Legislative Brief, December 2015.

building and allocation of sufficient budget. Moreover a separate unit, independent of political influence, must be in place to run the program.

### **11. Recommendations**

I would recommend that witness protection law and rules must be applied in letter and spirit in accordance with the International Standards.

The witness protection Program must not be reduced to serve only elite or privileged but the program must admit real vulnerable and prone to high risk witnesses having threats to their life or their family's life without class discrimination.

Moreover, the law colleges and Universities offering law degrees must start teaching Witness Protection as an integral part of criminal procedure.

By including almost every possibly related person in the case such as; judges, lawyers, prosecutors etc. in the protection program for witnesses may encumber the program financially and impair the very spirit of protection of witnesses (and victims). Therefore I would recommend that there should be separate budgetary allocations for these categories.

Unless the protection program is saved from being politicized by establishing close monitoring mechanism and careful scrutiny it may not serve the purpose fully.

Some countries started their protection programs much earlier than others and have achieved a good deal of expertise. The selected functionaries and officials of the Witness Protection Units, established under these Acts, may be sent for training to those countries.

Sometimes nature of risk is so high that a witness is admitted to the Protection Program for almost life time and is practically imprisoned, this can be emotionally upsetting and a very draining experience, the psychological and emotional help must be provided to the participant.

The confidentiality and secrecy required for the participants of the protection program demands that the Protection Program must be run by a separate body, independent of Police and the prosecutor's office, while maintaining its separate data base.

The Program must have realistic and affordable approach.

The protection process may have different provisions such as starting from the minimum and gradually shifting towards more serious measures as per demand of the risk to life, coercion and nature of offence involved.

The Witness Protection may be equally available to prosecution and defense witnesses.

The program must not jeopardize the guarantee of free and fair trial of the accused.

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