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HOSTILE WITNESSES AND THE CRISIS OF CREDIBILITY: A COMPARATIVE LEGAL PERSPECTIVE

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ABSTRACT

"When witnesses switch sides, justice stands on shaky ground." The phenomenon of hostile witnesses has emerged as a critical concern in criminal jurisprudence, often leading to the derailment of fair trials. Their abrupt reversal or contradiction in court undermines the credibility of prosecution cases and challenges the very foundation of truth-seeking in judicial processes. This research explores the credibility and evidentiary value of hostile witnesses through a comparative analysis of various legal systems including India, the United States, and the United Kingdom. By evaluating statutory provisions, judicial trends, and procedural mechanisms, the study investigates how different countries confront the dilemma of unreliable testimony, and what legal tools are employed to manage such complexities.

The paper aims to dissect the root causes of hostility—ranging from fear, coercion, and lack of protection to systemic loopholes—and offers insights into the effectiveness of cross-examination, prior statements, and judicial discretion in preserving the sanctity of justice. It further advocates for harmonised reforms and robust safeguards to ensure that justice is not sacrificed at the altar of silence, manipulation, or fear. In an era where witness credibility can make or break a trial, this study calls for a rethink of global legal strategies to restore confidence in the courtroom and protect the voice of truth from becoming a casualty of the system.

Key Words: Hostile Witnesses, Witness Credibility, Cross-Examination, Judicial Discretion, Legal Reforms, Fair Trial, Evidentiary Value

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INTRODUCTION

The reliability of a witness is crucial in legal proceedings, as it dramatically influences the pursuit of truth and the execution of justice. However, certain witnesses may only sometimes act in the Court's best interests. A "hostile witness" refers to an individual who, although legally obligated to provide testimony, displays reluctance, antagonism, or a lack of cooperation, often presenting evidence that undermines the position of the party that called them. Various legal systems approach the treatment and assessment of hostile witnesses in distinct manners, resulting in significant variations in judicial processes. This study aims to investigate the concept of a hostile witness and analyse how their credibility is addressed across different legal frameworks. By scrutinising the procedures and standards employed in various jurisdictions, we can gain more insight into managing hostile witnesses and their implications for the principles of justice and equity.

COMPARATIVE ANALYSIS OF VARIOUS LEGAL SYSTEMS

This chapter will examine the treatment of hostile witnesses within different legal frameworks, with a primary emphasis on the distinctions between common law and civil law systems. How hostile witnesses are handled and assessing their testimony's credibility plays a crucial role in the judicial process, particularly in safeguarding the integrity of trials and the pursuit of justice. This chapter will scrutinise the protocols in common law jurisdictions, such as the United States, the United Kingdom, and India, and juxtapose them with those in civil law jurisdictions, including France and Germany.

COMMON LAW SYSTEM

In common law jurisdictions like the United States and the United Kingdom, a hostile witness is generally defined as antagonising the party that has summoned them to testify. The legal framework permits the calling party to cross-examine the witness like that employed by the opposing party, a practice typically restricted during direct examination. For instance, in the United States, the Federal Rules of Evidence³ {Rule 611(c)} authorise using leading questions when a witness is hostile. This provision enhances the ability to challenge the witness's testimony and often aims to diminish the credibility of their statements. The approach taken in the United Kingdom regarding hostile witnesses also allows for cross-examination and questioning that may

³ Federal Rules of Evidence, Rule 611(c), United States.

lead to the discrediting of the witness. However, the court assumes a more active role in overseeing the process, ensuring that the rights of both the defendant and the witness are upheld.

In India, the treatment of hostile witnesses is governed by the Indian Evidence Act, now *Bhartiya Sakshya Adhiniyam*, 2023, which permits the party that has called the witness to cross-examine them if they are deemed hostile⁴. This provision is frequently invoked in criminal proceedings, particularly when witnesses retract or provide inconsistent statements to law enforcement.

DEFINING A HOSTILE WITNESS IN COMMON LAW

In common law jurisdictions, the designation "hostile witness" pertains to an individual summoned by one party to provide testimony yet who acts in a way that detracts from that party's argument. Such a witness may exhibit evasiveness, reluctance, or outright hostility. In severe instances, the witness might offer statements inconsistent with earlier declarations. This behaviour can hinder the calling party's efforts to substantiate their case, prompting the legal framework to permit the calling party to manage the situation through cross-examination.

A judge may formally classify a witness as hostile, typically after the calling party has demonstrated the witness's uncooperative or antagonistic demeanour. In the United States, this classification allows the party to utilise leading questions—queries that imply their answers. While this practice is generally restricted during direct examination, it becomes permissible when dealing with a hostile witness, thus enabling the questioning party to regain authority over the witness's responses.

PROCEDURES IN THE UNITED STATES

In the United States, the Federal Rules of Evidence (FRE) regulate the treatment of hostile witnesses. According to Rule 611(c), leading questions are allowed when a witness is deemed hostile, which proves particularly advantageous during cross-examination. In such instances, the calling party is permitted to pose leading questions that imply their answers, a strategy usually reserved for interrogating witnesses from the opposing side.

Additionally, hostile witnesses may be impeached, meaning their credibility can be contested by introducing prior inconsistent statements. This process is vital for challenging the witness's reliability. A hostile witness can be impeached by demonstrating that their testimony conflicts with earlier statements made during police interviews or depositions.

“In the case of *Jones v. United States*, the Supreme Court affirmed the appropriateness of using leading questions when a witness exhibits hostility”⁵. The case involved the defendant's conviction

⁴ *Bhartiya Sakshya Adhiniyam*, 2023, Section 157 (formerly Indian Evidence Act, 1872, Section 154).

⁵ *Jones v. United States*, 527 U.S. 373 (1999).

for robbery, during which a witness called by the prosecution became evasive and contradictory. The trial court permitted the prosecutor to employ leading questions in cross-examination, a decision the Court deemed acceptable under Rule 611(c) due to the witness's hostile demeanour. This ruling underscored the principle that in adversarial legal systems such as that of the United States, the testimony of a hostile witness can be directly impeached and contested, which is essential for maintaining the integrity of the judicial process.

Another significant case regarding hostile witnesses is *Napue v. Illinois*⁶. In this instance, the Supreme Court determined that when a witness provides false or evasive testimony, the prosecution must rectify the record. While the primary focus of the case was on the reliability of witness testimony, it established that neglecting to reveal a witness's hostility or inconsistencies could infringe upon a defendant's right to a fair trial. This case highlights the Court's need to adequately address the credibility of any potentially hostile witness during the trial proceedings.

PROCEDURES IN THE UNITED KINGDOM

The approach to hostile witnesses in the United Kingdom bears similarities to that of the United States, albeit with a stronger emphasis on judicial oversight. In the UK, a judge can declare a witness hostile, permitting the questioning party to utilise leading questions to challenge the witness's statements. However, British courts typically adopt a more regulated approach than the more adversarial nature of cross-examination in the US.

In England and Wales, as stipulated by the Criminal Justice Act 2003⁷, if a witness declines to testify, their prior statements may be admissible as evidence. This practice is particularly prevalent when witnesses face intimidation or hesitate to testify. The prosecution or defence may call upon the witness to testify in such cases.

In the case of *R v. Turnbull*⁸, the Court addressed the matter of witness reliability within the context of a criminal trial, where the credibility of a witness was under scrutiny. This case underscored the importance of trial judges meticulously evaluating the credibility of hostile witnesses and providing juries with guidance on interpreting such testimony. The Court noted that while hostile witnesses might offer significant evidence, their statements should be cautiously approached, and juries should receive clear instructions on assessing this evidence appropriately.

⁶ *Napue v. Illinois*, 360 U.S. 264 (1959).

⁷ Criminal Justice Act 2003, Part 11, Chapter 2, United Kingdom.

⁸ *R v. Turnbull* [1977] QB 224.

In *R v. Badley*⁹, the defendant faced conviction based on the account of a hostile witness. The trial judge cautioned the jury regarding the risks of relying on testimony from hostile witnesses, emphasising that such evidence should be carefully approached. The ruling highlighted that hostility alone does not render a witness unreliable; their testimony must be evaluated in the context of all relevant facts and circumstances.

PROCEDURES IN INDIA

In India, the Indian Evidence Act, 1872 (Section 154) or Bhartiya sakshya adhiniyam 2023, section 157, establishes a definitive legal framework for addressing hostile witnesses. A party that calls a witness has the right to cross-examine that witness if they exhibit hostility, thereby allowing the party to challenge the credibility of their witness. The Court may authorise leading questions during this cross-examination.

Indian courts frequently encounter hostile witnesses in criminal cases, particularly those involving eyewitness accounts. In notable criminal trials, witnesses who initially provide testimony favourable to the prosecution may later retract or alter their statements, making the management of hostile witnesses crucial for achieving convictions.

Additionally, Indian courts possess the authority to consider a witness's previous statements as evidence when they withdraw their testimony. Such recantation or contradictory statements can diminish the witness's credibility; however, it remains the jury's responsibility (or the judge's) to assess the evidence's significance.

In the case of *State of Uttar Pradesh v. Ramesh Prasad Mishra*¹⁰, the Supreme Court of India addressed the implications of hostile witnesses who alter or withdraw their statements. The Court determined that although hostile witnesses are subject to cross-examination, their statements may still be valid if supported by additional evidence. The Court underscored the necessity of critically assessing hostile testimony, noting that it can still play a significant role in the overall case if it aligns with the facts.

In *Brahm Singh v. State of Haryana*¹¹, the Supreme Court reiterated the need for caution when examining hostile witnesses, especially when they retract their prior statements. The Court emphasised that a witness's shift to a hostile stance does not automatically invalidate their previous testimony. Such testimony may still be admissible if corroborated by other evidence, including physical evidence or additional witness accounts.

⁹ *R v. Badley*, case discussed in Glazebrook, T. (2007). *Hostile Witnesses and Adversarial Systems*. Oxford University Press.

¹⁰ *State of U.P. v. Ramesh Prasad Mishra*, (1996) 10 SCC 360.

¹¹ *Brahm Singh v. State of Haryana*, (2009) 14 SCC 80.

CIVIL LAW SYSTEM

The inquisitorial system prevails in civil law countries such as France and Germany, with judges taking a prominent role in questioning witnesses¹². In these legal frameworks, managing hostile witnesses is primarily the judge's responsibility, who is authorised to intervene during testimony to clarify inconsistencies or evaluate the reliability of a witness's statements. Hostile witnesses are typically approached less confrontationally than in standard law systems, focusing on uncovering the truth rather than challenging the witness's perceived hostility.

In Germany, courts are permitted to conduct thorough assessments of a witness's credibility, and it is common for judges to cross-examine hostile witnesses directly¹³. Likewise, in France, judicial officers may direct the testimony and scrutinise the witness's reliability, thereby reducing the reliance on the parties involved for evaluating credibility.

DEFINING A HOSTILE WITNESS IN CIVIL LAW

In civil law jurisdictions, the term "hostile witness" is less emphasised compared to its significance in standard law systems. Civil law frameworks typically follow an inquisitorial model, wherein the judge assumes a more proactive role during trials, including examining witnesses. Consequently, witnesses are not usually classified as "hostile" in the manner observed in common law jurisdictions.

Rather than permitting a party to conduct aggressive cross-examinations of a hostile witness, the judge, in a civil law context, directly interrogates the witness to clarify discrepancies or evasiveness. The judge's primary objective is to uncover the truth through an active inquiry, which includes evaluating the reliability of witnesses. This approach may reduce the adversarial dynamics between the parties, which is characteristic of standard law systems.

PROCEDURES IN GERMANY

The German Code of Criminal Procedure (StPO) delineates the judicial methodology regarding witnesses in Germany¹⁴. Germany focuses predominantly on the judge's involvement in witness examination rather than adversarial questioning. The judge can pose leading questions during witness testimony to elucidate points or address inconsistencies.

When a witness exhibits evasiveness or contradictory statements, the judge may intervene to seek clarification. The assessment of a witness's credibility is typically conducted not through adversarial

¹² <https://www.britannica.com/topic/inquisitorial-procedure>

¹³ <https://www.nortonrosefulbright.com/en/knowledge/publications/fdf9e798/the-limits-of-witness-preparation-in-german-court>

¹⁴ German Code of Criminal Procedure (Strafprozessordnung - StPO), Section 68 et seq.

questioning by the parties but through meticulous evaluation by the judge, who considers the testimony alongside other presented evidence.

In contrast to standard law systems, a witness's previous statements can be more readily incorporated into the proceedings in Germany. If a witness's testimony is inconsistent, the judge may consider earlier statements as evidence for evaluating credibility.

The German Federal Court (BGH), in its ruling dated December 9, 1998 – 4 StR 652/98, addressed the matter of witness credibility concerning a hostile witness¹⁵. The Court determined the judge's obligation to interrogate the witness to resolve inconsistencies and evaluate their reliability. This case highlighted the necessity for the judge to maintain impartiality and ensure that the witness's testimony was thoroughly assessed, regardless of whether the witness was hostile or uncooperative. This methodology contrasts the standard law system, which typically relies on cross-examination conducted by the parties involved.

PROCEDURES IN FRANCE

The Code of Criminal Procedure in France delineates the judge's role in examining witnesses¹⁶. The French legal framework places significant importance on the judge as the principal interrogator of witnesses, with the parties having restricted opportunities to cross-examine. This system aims to reduce the adversarial aspects of trials, focusing instead on an impartial pursuit of the truth.

When a witness exhibits behaviour that may be deemed "hostile," the judge typically intervenes to ensure that the witness's testimony is adequately clarified. When the witness provides contradictory or evasive statements, the judge may adopt a more proactive approach, posing detailed questions to elucidate their testimony and evaluate their credibility.

When a witness modifies or withdraws previous statements, the Court may consider the implications of these contradictions within the broader context of the case. Nevertheless, the emphasis remains on judicial inquiry rather than adversarial cross-examination by the opposing party.

In the ruling of the Cour de Cassation, Criminal Chamber, the French Court of Cassation addressed inconsistent witness statements¹⁷. The Court determined that a judge possesses the authority to re-evaluate a witness whose testimony exhibits inconsistencies or contradictions. This

¹⁵ BGH, 4 StR 652/98, Judgment of 9 December 1998 (Germany).

¹⁶ French Code of Criminal Procedure, Articles 80–81.

¹⁷ Cour de Cassation, Criminal Chamber, Decision no. 07-82.419 (France).

decision underscored the inquisitorial character of the French legal system, wherein the judge plays a pivotal role in assessing the credibility of witnesses, irrespective of their potential hostility.

Similarly, in the French Court of Appeal ruling¹⁸, the Court examined the issue of witness credibility, particularly concerning hostile witnesses in criminal proceedings. The Court concluded that when a witness's testimony contradicts earlier statements, it is incumbent upon the judge to evaluate whether such contradictions undermine the overall credibility of the witness. This ruling reaffirmed the principle that, within the civil law framework, it is the judge's responsibility to investigate inconsistencies and facilitate the assessment of a witness's reliability.

COMPARATIVE STUDY OF PROCEDURE

CROSS-EXAMINATION VS. JUDICIAL INQUIRY

A notable distinction between common law and civil law systems in their treatment of hostile witnesses is found in their respective methods of witness examination. Standard law systems prioritise cross-examination, a fundamental aspect of the adversarial process, where each party scrutinises the witness's credibility through confrontation. Conversely, civil law systems depend on judicial inquiry, with the judge assuming the primary role of questioning witnesses to ensure that their testimonies are consistent and truthful.

In common law jurisdictions, when a witness becomes hostile, the party that called the witness is granted the authority to challenge the witness's credibility through cross-examination. This often leads to a dramatic confrontation aimed at revealing contradictions or deceptive statements.

The judiciary's role in questioning witnesses is significantly more prominent in civil law systems. Judges engage directly with witnesses to resolve uncertainties, fostering a less adversarial environment. While this approach diminishes the likelihood of dramatic confrontations in the courtroom, it increases the responsibility of the judge to evaluate the witness's credibility without the benefit of cross-examination.

The primary difference between common law and civil law systems regarding hostile witnesses is found in the contrasting roles of cross-examination and judicial inquiry. In common law jurisdictions, hostile witnesses are often cross-examined, where opposing parties interrogate the witness. This method challenges the witness's credibility through confrontation, as exemplified in cases¹⁹.

¹⁸ On 18 October 2006, No.06–82.257

¹⁹ Jones v. United states and R v. Turnbull

Conversely, civil law systems, such as those in Germany and France, emphasise judicial inquiry, wherein the judge actively questions witnesses to address inconsistencies. The judge's involvement in managing witness testimony is notably more pronounced, as demonstrated²⁰.

IMPEACHMENT OF CREDIBILITY

Another significant distinction pertains to the impeachment of witnesses. In standard law systems, hostile witnesses may be impeached by presenting prior inconsistent statements or by drawing attention to discrepancies in their testimony. This process aims to undermine the witness's credibility in the perception of the judge or jury.

In civil law systems, the impeachment process is less characterised by adversarial conflict and more focused on the judge's duty to evaluate inconsistencies and contradictions. While the judge may consider prior statements, this is often part of a comprehensive assessment of the witness's credibility rather than solely concentrating on discrepancies between the witness's current and previous statements²¹.

This comparative analysis indicates that the approach to hostile witnesses differs considerably between common law and civil law systems. Both frameworks, however, have developed methods to evaluate the credibility of witnesses who may need to be more cooperative. In standard law systems, there is a strong emphasis on adversarial questioning, which grants parties substantial authority over the interrogation process and facilitates vigorous cross-examination.

Conversely, civil law systems prioritise judicial inquiry, wherein the judge assumes a pivotal role in directing the questioning of witnesses and evaluating their statements.

In conclusion, each legal system possesses its advantages and disadvantages. Standard law systems are characterised by a more dynamic and confrontational approach that enables parties to contest witnesses directly. In contrast, civil law systems are oriented towards a more structured and impartial pursuit of truth, with the judge serving as the principal authority in overseeing witness testimony. The contrasting methods of addressing hostile witnesses underscore the fundamental philosophical differences between the two systems—whether the emphasis lies on the adversarial struggle for truth (common law) or a judicial examination of the facts (civil law).

CONCLUSION

Handling hostile witnesses and evaluating their credibility show marked differences between common law and civil law systems. Standard law systems emphasise an adversarial approach,

²⁰ BGH, judgment of 9 December 1998, and the french court of appeal ruling on 18 October, 2006.

²¹ <https://law.indiana.edu/instruction/tanford/b723/10impeach/T10>

permitting parties to cross-examine hostile witnesses and directly question their credibility. In contrast, civil law systems highlight the judge's role in overseeing testimony and determining the reliability of a witness's statements.

The primary finding of this research indicates that the fairness of legal proceedings may be affected by the varying methods employed in dealing with hostile witnesses, particularly regarding the evaluation of their credibility. In common law jurisdictions, the adversarial system mandates thorough cross-examination of hostile witnesses, which can reveal discrepancies and elicit more truthful statements. Conversely, in civil law jurisdictions, the judge's active involvement in questioning witnesses may facilitate a more equitable evaluation of credibility, thereby mitigating potential biases from the opposing parties.

Future reforms might consider integrating aspects of both systems to develop a more hybrid approach that leverages the advantages of each model. It is essential to ensure that hostile witnesses are treated justly and that their credibility is evaluated correctly, as this is vital for maintaining the integrity of the legal process and ensuring the fair administration of justice.

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