

An Analysis of Legal Journey towards Witness Protection Scheme in India

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Abstract

In recent years the organized crime has grown. Criminal organizations are becoming stronger and more diverse. They are engaging more and more frequently in systematic forms of cooperation designed to further their criminal activities. In the investigation and prosecution of crime, particularly the more serious and complex forms of organized crime, it is essential that witnesses, the cornerstones for successful investigation and prosecution, have trust in criminal justice systems. Witnesses need to have the confidence to come forward to assist law enforcement and prosecutorial authorities. They need to be assured that they will receive support and protection from intimidation and the harm that criminal groups may seek to inflict upon them in attempts to discourage or punish them from cooperating.

Witness protection is an important mechanism in criminal justice proceedings that can help the State to bring criminals to justice, especially in cases of organized crime and terrorism. In order to strengthen their capacity to more effectively prosecute the perpetrators of terrorist attacks, many countries have established and use witness protection measures in order to ensure that critical testimony is available as part of related criminal proceedings. Witness protection covers a range of possible measures, including the concealment of a witnesses' identity or those of his/her family, the use of video-conferencing during the trial, anonymous testimony, physical protection and others. Where necessary, full-fledged witness protection programmes may also include the physical relocation of a witness, the change of their identity as well as their socio- economic reintegration into a new life. There is dire need to introduce appropriate measures to prevent witness intimidation, coercion, corruption or bodily injury. Often though, even where such measures have been legislated, implementation remains less than satisfactory and further progress is needed particularly with regard to change of identity and relocation of at-risk witnesses. Experience has shown that in witness protection there are no easy solutions.

Keywords: *Witness protection, Witness identity, socio-economic reintegration, Law enforcement, prosecution.*

Introduction

Historically, we can say that, the Britishers enacted the criminal laws in India, not for the safety and protection of the Indian and bringing the criminals to justice, rather it was done with the sole purpose of facilitating the repression of the Indian revolutionaries and freedom fighters and producing fear in the mind of the natives to prevent them from revolting against their colonial masters. Within this scheme of things, a witness perspective would have been eccentric. Independent India inherited and continued to use the same substantial body of criminal law as was codified by the British Parliament. Therefore, rights of witnesses and provisions relating to their protection barely features under the existing criminal laws. Witness Protection is viewed as a crucial tool and indispensable provision in the fight against crime. The ability and willingness of a witness to co-operate with the authorities without fear of intimidation or reprisal is essential ingredients to establish the rule of law.² A number of foreign judicial decisions have established such specialized programmes or have established well developed legislations for this purpose. In this chapter an attempt has been made to review laws relating to witness protections at National Level.

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The Supreme Court of India gave various directions for the rehabilitation and other welfare of victims of such crimes in *Gaurav Jain v. Union of India*³, The Court said that three C's, viz. counselling, cajoling by persuasion and coercion as the last resort are necessary for effective enforcement of rescue and rehabilitation of the victims of such trafficking. The Immoral Traffic (Prevention) Act, 1956 and the Juvenile Justice (Care and Protection of Children) Act, 2000 deal with these aspects. In December 2018, the Supreme Court, while hearing a PIL filed by witnesses involved in the Asaram Babu rape case, approved a witness protection scheme floated by central agencies and directed the Centre and states to implement this. We are in August, and it is still unclear whether all states have done so; in all likelihood, they haven't. Even if that scheme is notified by all states, it suffers from the myopic vision of all top-down reform agendas, and reflects a surprising indifference to the social milieu within which it hopes to operate. Perhaps the most fatal flaw the programme suffers from is that it expects the same police forces, which we routinely criticise as being understaffed to handle investigative work, to devote adequate resources to offer round-the-clock protection required to ensure the safety of witnesses. Rather than create new schemes, which will be executed on the basis of imaginary resources, our ailing criminal justice system will benefit from processes that are in tune with our reality. This reality shows a system operating on shoestring budgets, with not enough police personnel to investigate or judges to hold trials, and where ordinary cases are plagued by delays, leading witnesses to forget what happened. Our poor statistics on convictions reflect this combination of factors, and not merely because witnesses turn hostile because of undue pressure. These problems have been a part of India's legal fabric since Independence, with the first witness protection programmes being mooted by the law commission in 1958. Perhaps, after trying for decades to make this system work, with the occasional tinkering (even if it might be in the guise of an entirely new criminal procedure code), maybe it is time to start reconsidering the first principles.

The Supreme Court had asked the Union government in *Mahender Chawla v. Union of India*,⁴ to present a draft witness protection scheme in recognition of the need for a witness protection regime in India. The ministry of home affairs promptly filed a scheme prepared by the National Legal Services Authority. It was later ordered to be enforced in its entirety throughout India by the Apex Court under Articles 141 and 142 of the Indian Constitution. A crucial bill was thus approved by circumventing the legislative process, which ensures discussions among various stakeholders and interest groups. Complainants, investigative agencies, the prosecution and other State agencies work hard to find witnesses to provide evidence in criminal trials to establish the guilt of the accused. Witnesses are also provided security. However, in spite of these arrangements, witnesses turn hostile.

Witness Protection Scheme, 2018

The Witness Protection Scheme, 2018 (Draft) is a first attempt at the National level to holistically provide for the protection of the witnesses which will go a long way in eliminating secondary victimization. This scheme attempts at ensuring that witnesses receive appropriate and adequate protection. This will go a long way in strengthening the Criminal Justice System in the Country and will consequently enhance National Security Scenario. The Supreme Court have approved India's first Witness Protection Scheme, noting that one of the main reasons for witnesses to turn hostile is that they are not provided appropriate protection by the State. The important features of the Witness Protection Scheme, 2018 include identifying categories of threat perceptions, preparation of a 'Threat Analysis Report' by the head of the police, protective measures like ensuring that the witness and accused do not come face to face during probe, protection of identity, change of identity, relocation of witness, witnesses to be apprised of the scheme, confidentiality and preservation of records, recovery of expenses etc.

The witness protection scheme is the first attempt in India to protect witnesses. But it suffers from serious limitations. The foremost problem is the time frame of protection. The scheme has limited the scope of protection for three months at a time. This renders it redundant as the possibility of threat from the accused cannot be eliminated once protection is terminated. Putting a cap on the duration of protection is akin to providing temporary protection at a premium. Witness protection should be provided until the threat has ceased to exist. Witness Protection Scheme, 2018 provides for protection of witnesses based on the threat assessment and protection measures inter alia include protection/change of identity of witnesses, their relocation, installation of security devices at the residence of witnesses, usage of specially designed Court rooms, etc. The Scheme provides for three categories of witness as per threat perception:

Category 'A': Where the threat extends to life of witness or his family members, during investigation/trial or thereafter.

Category 'B': Where the threat extends to safety, reputation or property of the witness or his family members, during the investigation/trial or thereafter.

Category 'C': Where the threat is moderate and extends to harassment or intimidation of the witness or his family member's, reputation or property, during the investigation/trial or thereafter.

The Scheme provides for a State Witness Protection Fund for meeting the expenses of the scheme. This fund shall be operated by the Department/Ministry of Home under State/UT Government and shall comprise of Budgetary allocation made in the Annual Budget by the State Government; Receipt of amount of costs imposed/ ordered to be deposited by the Courts/tribunals in the Witness Protection Fund; Donations/ contributions from Philanthropist/ Charitable Institutions/ Organizations and individuals permitted by the Government and funds contributed under Corporate Social Responsibility.

Objectives of the Scheme

The ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement and investigations without fear of intimidation or reprisal is essential in maintaining the rule of law. The objective of this Scheme is to ensure that the investigation, prosecution and trial of criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from

violent or other criminal recrimination. It aims to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance to criminal law enforcement agencies and overall administration of Justice . Witnesses need to be given the confidence to come forward to assist law enforcement and Judicial Authorities with full assurance of safety. It is aimed to identify series of measures that may be adopted to safeguard witnesses and their family members from intimidation and threats against their lives, reputation and property.

Need for the Scheme

Witness protection law in our country is spread through a number of legislations and judicial decisions. These legislations reveal that there is a lack of integrated and holistic approach and instead of directly focussing on witness protection as whole they reflect a piecemeal, segmented or object oriented approach in the matter of regulation of witness protection. Due to multiplicity of legislations the standards of witness protection have deteriorated sharply. It is therefore, high

time the country should move from a sporadic, haphazard, segmented object oriented approach to an integrated and holistic approach in the matter of witness protection. In the absence of a proper safety mechanism there is always a risk and threat of injury and fear of loss of life, limb and property that may be inflicted upon the victims, the family of victims, the witnesses and their family⁶. This may hamper the course of justice as neither the victims nor the witnesses would be eager to come to the help of the investigating agencies and that of the Courts for the purpose of bringing the wrongdoer to justice, resulting into the acquittal of the accused and further encouraging them to commit more crimes.

Hon'ble Supreme Court of India also held that: "It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence." Malimath Committee on Reforms of Criminal Justice System, 2003 said in its report that "By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the Court to discover the truth". Supreme Court while defining Fair Trial said "If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial". Hon'ble Supreme Court observed, "country can afford to expose its morally correct citizens to the peril of being harassed by anti-social elements like rapists and murderers".

Scope of the Scheme

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Witness Protection may be as simple as providing a police escort to the witness up to the Courtroom or using modern communication technology (such as audio video means) for recording of testimony. In other more complex cases, involving organised criminal group, extraordinary measures are required to ensure the witness's safety viz. anonymity, offering temporary residence in a safe house, giving a new identity, and relocation of the witness at an undisclosed place. However, Witness protection needs of a witness may have to be viewed on case to case basis depending upon their vulnerability and threat perception.

Drawbacks of the Scheme

1. Complainants, investigative agencies, the prosecution and other State agencies work hard to find witnesses to provide evidence in criminal trials to establish the guilt of the accused. Witnesses are also provided security. However, in spite of these arrangements, witnesses turn hostile. Each such instance the Jessica Lal murder case and the Asaram Bapu rape case can be cited as examples has subverted the process of justice. Worse, the scale of the problem has been increasing in recent years. In the Sohrabuddin Sheikh case, the Central investigating agency examined 135 witnesses, out of which 85 turned hostile.

2. The second drawback pertains to the categorization of witnesses according to threat perception. No scheme can succeed if a corrupt administration or police department is invested with the authority to assuage the threat perception and then categorize witnesses on the basis of its assessment.
3. Even though the scheme is committed to protecting the identity of witnesses by maintaining the confidentiality of personal information, it does not penalize any violation of the said provision, reducing the potency of the provision. An effective deterrent must be put in place to prevent the disclosure of such sensitive information. Owing to its major loopholes, the witness protection scheme is unlikely to instil confidence in witnesses. Neither can it resolve the problem of witnesses turning hostile.
4. The function of the judiciary is to protect people's rights, adjudicate disputes between two individuals and adjudicate whether a person is guilty of an offence or not. It acts as the important pillar for maintenance of Criminal Justice System in India. However, the Right of the victim for a fair trial in Criminal Justice System necessarily implies the obligation of the witness to give evidence on the case.
5. The core of the scheme remains the security to witnesses. An almost crude estimate suggests that not more than 20 per cent of all witnesses require this kind of a protection measure. In cases involving terrorist acts, organised crime and powerful people with connections and resources, there may be a dimension of security. However, a vast majority of cases in the lower Courts wherein witnesses refuse to be present or become hostile involve certain other factors which need to be appreciated.
6. The scheme emphasize on concealing the identity of witnesses and undertaking a detailed threat analysis report, to be prepared by the police. Both things look quite uncertain in the present context. Given the way the police and prosecution work in this country, the idea of hiding the identity of a witness as a measure of protection does not seem to be practical. Overworked and understaffed, the police are also unlikely to make any meaningful threat analysis for a witness. Therefore, ensuring and "executing a "Witness Protection Order" under the scheme by the police appears to be unlikely. The lower Courts, where all the witnesses have to appear, do not have the infrastructure to satisfy the mandate of the present WPS. Nor can they do much to avoid contact between the witness and the accused.
7. The in-camera trial arrangements in all such cases also have the same issue. The most problematic and unrealistic factors in this scheme are the arrangements to change identity and relocate witnesses. This borrowed idea devoid of empirical understanding does not fit Indian conditions. Further, the major source of harassment for the witnesses stemmed from the frequent adjournment of cases monetary loss and other kinds of deprivation due to their repeated appearances in the Courts. A majority of witnesses before the Courts are wage-earners, agriculturists, the not so well-educated, or belonging to Scheduled Castes. The witnesses also share some relationship with both the victim and the accused. Thus, giving statements in favour or against a particular party casts tremendous pressure on the witness, generally of a social or caste-related nature.

Critical Analysis of Witness Protection Laws

Indian criminal justice system is not a new concept from India's point of view; rather it has been in existence since the Vedic period. According to our ancient texts, the administration of justice was to be performed by the king and it was his most important and most pious function.⁸ In medieval India this function of administration of justice was shifted in the hands of the Islamic rulers and the ideals of the justice was changed according to Islamic laws. The Muslim kings

regarded the administration of justice as their religious duty and also emphasized the importance of administration of criminal justice and for this purpose they introduced various reforms for the purpose of improving the judicial machinery⁹. These Islamic rulers established different Courts for the purpose of dealing with different kinds of cases. Under the administration of the Islamic rulers, various Courts were established at central capital and at the headquarters of a province, district and parganah. However with the advent of the British rule in India, the criminal justice framework have gone through vast changes establishing a new system of criminal justice, falling in line with the common laws countries¹⁰. Thus we see that the modern criminal justice framework of India has been derived from the British legal system providing for the uniform system of the police, prison, bar and justice dispensation system.

As we know that the formal task of the criminal justice system is to investigate the commission of offence, collection of evidences regarding the commission of the offence, finding the accused and processing arrests, determining the guilt or innocence of the accused, and in the case of guilt of the accused being established to specify an appropriate sanction. Amongst, the major factors in the criminal justice system, the witness constitutes a key factor and plays a very important role in the administration of justice in its totality and his testimony provides important links to connect the criminal with the crime, to bring the guilty to book, to eliminate the innocent from being unnecessarily harassed. Thus we can say that witness plays the role of a game changer in the criminal justice system. The witnesses in the past used to decide the fate of many cases and had supported the criminal justice system and thus have assisted the State in achieving the goal of protecting life, liberty and property of the citizens¹¹.

The term 'witness' is not a new concept and has been described in detail in various ancient Indian texts, however the modern codified law in India have failed to define it. Neither the Constitution of India nor other Indian Statutes including the Code of Criminal Procedure, Indian Penal Code and the Evidence Act have defined the term 'witness'. The Delhi High Court have, for the first time, in case of *Neelam Katara v. Union of India*,¹² attempted to define the term 'witness' in India but, even that definition, was inadequate to cover all types of witnesses in its purview and was limited only to the person whose statement was recorded by the police. The definition of the witness, as provided by the Delhi High Court, does not include the family members of the witnesses.

Many times, a witness used to turn hostile by deviating from their previous statements due to various reasons. It is worth to mention that a witness turns hostile not only due to threat and coercion on himself but also on his/her family members. However in most of the cases the reasons for the witnesses turning hostile is the threat given to them for causing harm to them and their dear ones. So one of the most effective ways to prevent a witness from turning hostile is to provide them and their family members sufficient protection and safety¹³. However, As has been discussed earlier, the countries like the US, Australia, etc. have already included the family members of the family of witnesses under the definition of 'witness' and extended all the protection measures to them like that of the witness and the same measure is required to be adopted in Indian criminal justice system too¹⁴.

It is desired that, while drafting the law the Parliament should also pay attention towards these points. First, is to ensure that evidence of witnesses that has already been collected at the stage of investigation is not allowed to be destroyed by witnesses deviating from their statements while deposing on oath before a Court. This phenomenon of witnesses turning 'hostile' on account of the failure of the State to provide them the proper safety and protections is one aspect of the problem. This in turn would entail special procedures to be introduced into the criminal law after knowing all details about witnesses, to balance the need for anonymity of witnesses on the one hand and

rights of the accused for an open public trial with a right to cross-examination of the witnesses, on the other hand. The other aspect is the physical and mental vulnerability of the witness and to the taking care of his or her welfare in various respects which calls for physical protection of the witness at all stages of the criminal justice process till the conclusion of the case.

Another lacuna prevailing in the Indian legal system is that, it has failed to define the term 'witness protection'. The term Witness protection has been given a very narrow interpretation and has been confined to a strict meaning in India, and is limited only up to providing certain allowances to witnesses and does not extend to the protection of their person and property¹⁵. The Law Commission of India is also silent on this aspect.

Witnesses are extremely vulnerable to intimidation in the form of threats by the accused. The People's Union for Civil Liberties (PUCL) made a press release, pertaining to the *Zahira Habibulla H. Sheikh and another v. State of Gujarat and Others*,¹⁶ (Best Bakery Case) stating that, there are two ways to explain why witnesses turn hostile. The first is that the police had recorded the statements incorrectly. The second and more plausible is that the police had recorded the statements correctly but were retracted by witnesses because of intimidation and other methods of manipulation. However, these two factors are not the only factors responsible for hostility, rather there are many factors like protracted trial, lack of adequate facilities, defaults of payment of allowance, rude behaviour of police etc. but the major one being the absence of protection to the witnesses during and after the trial.

The State has to play a vital role in protecting the witnesses. The Court further added in *Krishna Mochi v. State of Bihar*,¹⁷ that as a protector of its citizens, the State has to ensure that during the trial in the Court, the witness is able to depose the truth without any fear of being haunted by those against whom he had deposed. The Supreme Court have reminded the State that it the constitutional obligation and an essential duty of the State to protect the life and liberty of the citizen who have acted as a truthful and earnest witness. Loss of vital testimonies leading to failure of prosecution in proving its case on account of witness turning hostile is a manifest ailment of this rickety criminal justice system that has frustrated Courts many times.

*Swaran Singh v. State of Punjab*¹⁸, A criminal case is built on the edifice of evidence that is admissible in law. For that, witnesses are required whether it is direct evidence or circumstantial evidence. Each and every statement of witness is very important and it has magic force to change the course of whole case. The testimony given by the witnesses enables the Court to decide the merit of facts and circumstances of the case. By giving evidence linking to the charge of the offence the witness performs a sacred duty of assisting the Court to discover the truth. The witness performs an important public duty of assisting the Court in deciding on the guilt or otherwise of the accused in the case. He sacrifices his time and takes the trouble to travel all the way to the Court to give evidence for saving the truth because truth and justice are synonymous. So when truth fails, justice fails. In spite of these facts, the condition relating to witnesses in India is highly pathetic. The witness in this country is no longer willing to come forward to depose his/her testimony due to threat, coercion, lures and endless inconvenience which he/she faces till the pronouncement of judgement. In some cases witnesses also face threat to their own life and the life of their family members and many times they lose their life also¹⁹. The plight of witness can be better understood from the fact that, if he abstains the State punishes and if he succeeds the accused punishes. Therefore, he/she becomes hostile for avoiding all dangers and inconvenience where adjournments are granted for very frivolous reasons and frequently, the problem of hostility of witness increases.

The witness also feels disgusted over having been summoned time and again and having appeared uselessly on number of dates, only to be told to appear again without fail at the risk and cost of being issued arrest warrant in case of his failure to appear or late coming. The witness then realizes the folly of his having volunteered or consented to become a prosecution witness to help the cause of justice and falls in line with the defence to get rid of the harassment.²⁰

The problem of hostile witness has now become a cause of grave concern for judiciary in India. The problem is so serious that the Apex Court held in case of *Zahira Habibullah Sheikh v. State of Gujarat*,²¹ that legislative measures to emphasise prohibition against tampering with witness, victim or informant, have become the imminent and inevitable need of the day. The Law commission of India in its various reports has also emphasised on the need for anonymity of witnesses and physical protection of the witness during various stages of trial so as to prevent loss of vital evidence, on account of witnesses turning hostile. However, no such restructured provision has been formulated by the legislation or judiciary entailing all these aspects. The Courts have revisited the need and structure of witness programmes in various cases, but they still need to be improvised so as to completely deter the menace of witness hostility.

India has still lagging behind the developed countries in adapting scientific evidence and other scientific techniques to be used in criminal justice system. Lack of e-Courts and use of video conferencing in Courts compels witness to take unnecessary pain in travelling on his own expenditure to give evidence which several times become cause of witnesses turning hostile thus resulting in acquittal of offenders of heinous crimes.²²

Unlike western countries, there is no specific witness protection legislation in India. The direct and indirect witness protection laws are scattered, segmented and has spread through the Constitution of India 1950, the Indian Penal Code 1860, the Criminal Procedure Code 1973, the Evidence Act 1872, the Contempt of Court Act 1971, the Juvenile Justice (Care and Protection of Children) Act 2000, the Terrorist and Disruptive Activities (Prevention) Act 1985 and 1987, the Maharashtra Control of Organised Crime Act 1999, the Prevention of Terrorism Act 2002, the National Investigation Agency Act 2008 and the Whistle Blower Protection Act 2011. Apart from these laws there are drafts Bills namely the Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011 and the Witness (Identity Protection) Bill, 2006.

Now time has come to make a comprehensive law for protection of witnesses. Even after the observations of the Supreme Court and various High Courts there is no specific statutory law relating to witness protection in India unlike America, Britain, and Australia etc.

Conclusion

It is seen that though various studies are conducted by different Law Commissions and other organisations but none of the studies deal directly with the issue of witness protection except 198th report of Law Commission. A critical analysis of these studies gives a clear idea of what areas have been covered and what remains to be done to protect witnesses from harm and intimidation thereby paving a way for the implementation of National Witness Protection law in India. It is disturbing to acknowledge that India lacked a Witness Protection law when every statement by the witness is important as it entails a magic force that can change the course of a case while administering justice. In more complex cases, involving organised criminal group, extraordinary measures are required to ensure the witness's safety viz. anonymity, offering temporary residence in a safe house, giving a new identity, and relocation of the witness at an undisclosed place. However, Witness protection needs may have to be viewed on case to case basis depending upon their vulnerability and threat perception. This in turn would entail special

procedures to be introduced into the criminal law after knowing all details about witnesses, to balance the need for anonymity of witnesses on the one hand and rights of the accused for an open public trial with a right to cross-examination of the witnesses, on the other hand. The other aspect is the physical and mental vulnerability of the witness and to the taking care of his or her welfare in various respects which calls for physical protection of the witness at all stages of the criminal justice process till the conclusion of the case. Another major problem prevailing in the Indian legal system is that, till date, the term 'witness protection' has not been given formal and definite definition. Despite the need of the hour being that the term 'witness protection' is to be given a wider connotation, it has been given a very narrow interpretation. This narrow interpretation of the term 'witness protection' is required to be done with and the ambit of witness protection is required to be extended to the widest possible extent. It should include not only the provision for the protection of witnesses and their family members, rather the ambit of witness protection should be extended to the protection of their person and property as well²³. The Law Commission of India is also silent on this aspect.

Endnotes

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³ 2019 (14) SCC 615

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¹⁵ 2004 (4) SCC 158

¹⁶ AIR 2003 SC 886

¹⁷ AIR 2000 SC 2017

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