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WITNESS PROTECTION

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Introduction

Witness are regarded as one of the most indispensable element in the criminal justice system. It is because of them that the trial finds some substance so as to arrive at a fair conclusion. The inputs provided by the witness may have direct bearing on the conviction or acquittal of an accused, hence it is desired that such witness be protected from the wrath of extraneous factors that have the capability to change his stance over a particular case. Extraneous factors in form of corruption or threats form a majority which result in turning of the witness hostile, hence it becomes rudimentary for the state to ensure protection of such witness so as not to alter the prescribed course of justice.

Who is Witness?

As per the The Witness (Identity) Protection Bill, 2006, "witness" means (i) any person who is acquainted with the facts and circumstances, or is in possession of any information or has knowledge, necessary for the purpose of investigation, inquiry or trial of any crime involving serious offence, and who is or may be required to give information or make a statement or produce any document during investigation, inquiry or trial of such case, and (ii) includes a victim of such serious offence. There are three categories of witnesses: (i) victim-witnesses who are known to the accused; (ii) victims-witnesses not known to the accused (e.g. as in a case of indiscriminate firing by the accused) and (iii) witnesses whose identity is not known to the accused. Category (i) requires protection from trauma and categories (ii) and (iii) require protection against disclosure of identity . A reader interested in knowing about the possible varieties of witnesses may refer to Halsbury's Laws of India . However, the list is not exhaustive. Therein we come across different categories vis; eye witnesses, natural witnesses, chance witnesses, official witnesses, sole witnesses, injured witnesses, independent witnesses, interested, related and partisan witnesses, inimical witnesses, trap witnesses, rustic witnesses, child witnesses, hostile witnesses, approver, accomplice etc .

The Indian Criminal Laws have not provided any definition for the word "Witness". Therefore, it is imperative that one ought to fall back on the ordinary dictionary meaning of the word. The Oxford Dictionary defines the term as "[o]ne who gives evidence in a cause; an indifferent person to each party, sworn to speak the truth, the whole truth and nothing but the truth".

Black's Law Dictionary defines the word Witness as "one who sees, knows or vouches for something or one who gives testimony, under oath or affirmation face to face or by oral or written deposition, or by affidavit". The Indian Evidence Act, 1872 states about competency of

witnesses⁶ and also provides for mode of examination of witnesses . As general rule, every person is competent to testify unless the court feels that he is not able to understand the questions put to him or to give rational answers to them. This may be due to tender age, extreme old age, disease, whether of body or mind, or any other cause of same kind. Thus, no person is particularly declared to be incompetent. Even a lunatic is not declared to be incompetent unless his lunacy prevents him understanding or answering questions

Witness protection is security provided to a threatened person providing key evidence to the justice system, including defendants and other important clients, during, before, and after court case, usually by police and other security agencies of the nation. While a witness may only require protection until the finalization of a trial, some witnesses are provided with a new identity and should live out the rest of their lives under government security and protection.

Evidence holds the key to prosecution. Thus, the easiest way to impair an investigation and, by extension, the process of dispensing justice is to cause harm to the witness. Harm, in this instance, may not imply intimidation only, even though threatening witnesses is a common method of silencing them. In many instances, witnesses whose testimonials are of critical importance have been done away with. The fate of the Right to Information activists is a case in point. It has been reported that over 50 activists have been killed and scores assaulted for pursuing the risky causes of truth and justice. The Supreme Court's directive to the Centre and the states to set up India's first witness protection scheme by the end of next year needs to be seen in the light of such violations. The highest court has stated, with good reason, that the programme that had been formulated by the Centre in consultation with 18 states and Union territories after an earlier judicial prod would be treated as a law till the time Parliament and state assemblies create similar legislations to protect those testifying against influential persons. The provisions of the programme, which will be implemented on the basis of the threat perception, appear to be quiet exhaustive. A range of protections has been envisaged: providing police escorts to courtrooms, the implementation of technology to avoid depositions in open court, in-camera proceedings, restrictions on the media to disclose the identity of the witnesses, even temporary safe houses if the need arises, among other measures. If implemented properly, these measures could go a long way in preventing the travesty of justice, an unfortunate, but not uncommon, occurrence.

Ironically, the urgency to create what seems to be a comprehensive security net for witnesses is an acknowledgement of the shadowy nexus among vested interests that seek to derail justice. It would not be incorrect to suggest that politicians and influential lobbies usually benefit from stalling investigations. A corrupt police force is an able ally in this nefarious enterprise. Protecting witnesses is important, perhaps as important as eliciting a deeper public commitment to the cause of justice and transparency. Therefore, mobilizing public opinion against the pervasive culture of intimidating and eliminating witnesses holds the key. The court's decree would reassure conscientious citizens. But it could alarm segments of the polity that remain hand in glove with criminals.

Examination of Witnesses and Law in India

Examination of witnesses forms one of the key steps in the four essential steps of criminal trial. As far as back as 1932, the Section 31 of Bengal Suppression of Terrorist Outrages Act, 1932 empowered the Special Magistrate to exclude persons or public from the premises of the Court in

order to protect the identity of certain witnesses¹⁴ . Apart from this, there are other provisions also under Indian laws which speak about dealing with witnesses.

Evidence Act- Under S.151 and 152 of Indian Evidence Act, 1872, victims and witnesses -are protected from being asked indecent, scandalous, offensive questions, and questions intended to annoy or insult them. Otherwise, there is no other provision for protection of witnesses, as against threats, intimidation or any inducement whereby they are prevented from telling the truth. Very often, when an accused is released on bail, one of the terms and conditions imposed by the Court on the accused is that he shall not tamper the evidence, or approach the witnesses.

Hostile Witnesses- Section 154 of the Evidence Act prescribes for dealing with the hostile witnesses. Hostile witness has not been defined under the Act. A 'hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the Court. Where a party calling a witness and examining him discovers that he is either hostile or unwilling to answer questions put to him, he can obtain permission of the Court to put questions to him which may be put to him by way of cross-examination. The problem of hostile witnesses is increasing and one of the main reasons for the same is lack of witness protection measures.

Indian Penal Code- Disclosing the identity of the victim under section 376, section 376A, section 376B, section 376C or section 376D of IPC is punishable . However, this protection does not extend to the witnesses. 3.2.1 Perjury – Giving false or misleading testimony under oath amounts to committing the offence of perjury. Perjury is punishable since the time of Manu . This is another evil in the criminal justice administration. Chapter XI of IPC provides for the offence of giving false evidence (offence against public justice) and Section 340 of the Cr.P.C. states the procedure for the prosecution for contempt of lawful authority of the public servants, for the offences against public justice and for the offences relating to documents given in evidence. Section 340 of Cr.P.C. prescribes the procedure with dealing such offences.

Criminal Procedure Code- Normally the criminal trial is to be conducted in an open court, however, the Judge presiding may order that the public generally, or any particular person, shall not have access to, or be or remain in, the room building used by the Court²¹ . The inquiry into and trial of rape or an offence under section 376, section 376A, section 376 B, section 376C or section 376D of the IPC shall be conducted in camera ²² . As a principle of natural justice the accused is entitled to the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173²³ . Further, Section 273 of Cr.P.C. mandates that all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader. Section 200 to 202 provides for examination of witnesses in front of complainant by the Magistrate.

Witness Protection Scheme, 2018

The Supreme Court on December 6th, 2018 gave its nod for approval of the Draft Witness Protection Scheme which had been prepared by the inputs from 18 States/Union Territories, various open sources inviting suggestions from police personnel, judges and civil society which was then eventually finalized by the National Legal Services Authority (NALSA). The bench comprising of Justice A.K. Sikri and Justice S. Abdul Nazeer identified the rights of the witness to testify within the ambit of Article 21 of the Constitution and said *"The right to testify in courts*

in a free and fair manner without any pressure and threat whatsoever is under serious attack today. If one is unable to testify in courts due to threats or other pressures, then it is a clear violation of Article 21 of the Constitution.” Further, the bench regarded the scheme as a ‘law’ within Article 141/142 of the Constitution and the centre and state need to follow it until a competent legislation is made on the same subject.

Need for this Scheme

It is a rule of law that no rights of the witness should be prejudiced by way of threats, intimidation or corruption therefore, to allow him to testify for or against the case which he had been a witness to with full liberty. In the words of Jeremy Bentham “Witnesses are eyes and ears of the Courts”, hence, it becomes imperative on part of the State to provide adequate protection to the witness to ensure ideal working of the wheel of justice. The need to protect witnesses has been emphasized by the Hon’ble Supreme Court of India in ***Zahira Habibulla H. Sheikh and Another v. State of Gujarat*** wherein while defining ‘Fair Trial’, the Hon’ble Supreme Court observed that “If the witnesses get threatened or are forced to give false evidence that also would not result in fair trial”. Further the hon’ble Supreme Court of India also held in ***State of Gujarat v. Anirudh Singh*** 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.”

The need for this scheme had been envisaged by various reports of the Law Commission of India and the Malimath Committee. The **14th Law Commission Report** was the first ever instance where the issue of witness protection was brought forth. Further, the **154th Report** dealt with the plight of the witnesses. The **172nd** and **178th Report** laid emphasis on protection of witness from the wrath of the accused. The **172nd Report** in particular inherited a great deal from the judgement in ***Sakshi v. Union of India*** which advocated for *in camera trials* to keep the witness away from the accused and to ensure her testimony is procured without any public fear. The **198th Report** titled “*Witness Identity Protection and Witness Protection Programmes*” emphasized that the witness protection scheme need not be limited to cases of terrorism or sexual offences but should extend to all serious offences, thereby increasing the ambit of its applicability and functioning.

The ‘*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*’ adopted by the United Nations General Assembly in November 1985 regarded the victims of crime to be an important witness and gave forth four objectives, the applicability of whose need to be ensured by the member nations towards the victims of crime:

- (i) Access to justice and fair treatment
- (ii) Restitution
- (iii) Compensation
- (iv) Assistance

Rights of the witnesses

There needs to be a certain sense of safety that need to be given by the state to the witness who comes forward to testify and it is the responsibility of the State to impart adequate protection to the witness. The various Law Commission Reports and the Witness Protection Scheme had identified certain rights that a witness possess:

- (i) Right to secure waiting place while at Court proceedings;

- (ii) Right to information of the status of the investigation and prosecution of the crime;
- (iii) Right to be treated with compassion and dignity and respecting privacy;
- (iv) Right to protection from harm and intimidation;
- (v) Right to give evidence without revealing identity; and,
- (vi) Right to a stay at a safe place and transportation.

It shall be mandatory for Investigating Officer/Court to inform each and every witness about the existence of “Witness Protection Scheme” and its salient features

Type of Protection Measures

As per the provisions of the Victim Protection Scheme, 2018, the magnanimity of protective measures taken up by the competent authority shall always be proportional to the threat faced by the witness for the given period of time. They may include but is not limited to the following:

- To ensure that the accused and the witness are not put up together during a trial or investigation
- Contacting the telephone company to allot the witness an unlisted telephone number;
- Giving adequate security to the witness in form of body protection, regular patrol and by use of security devices such as CCTV, fencing, security doors in his home;
- Change in identity of the witness and suppressing the original identity;
- Changing the residence of the witness to somewhere else;
- Providing a conveyance in a Government vehicle to and from the court on the date of hearing;
- To ensure the presence of an additional person at the time of recording statements of the witness;
- Holding of in-camera trials;
- Using specially designed courtrooms equipped with one way mirrors, separate passage for the accused and the witness along with options to modify the face or using voice change mechanisms through software, of the witness to suppress his identity;
- Giving timely financial aids for the subsistence of the witness from the Witness Protection Fund;
- Apart from the above protection measures, other miscellaneous measures may be taken up at the request of the witness;

Apart from the above protective measures, the witness may ask for himself any other measures by way of an application forwarded to the Competent Authority.

Procedure for filing and processing the application under the scheme:

- (i) the applicant seeking protection under this scheme has to file an application (application form attached in *Annexure I*) before the competent authority having territorial jurisdiction along with supporting documents through the Superintendent of Police or at the time of the trial;

- (ii) on receipt of application by the competent authority, the Commissioner will formulate a Threat Analysis Report keeping in mind to impart full confidentiality to the information mentioned therein and forward the report to the competent authority within five working days;
- (iii) in matters of urgency where there is imminent threat an interim order for the protection of witness and his family members can be passed;
- (iv) the Threat Analysis Report shall contain the threat level perception and may also contain some suggestive measures for adequate protection of the witness and his family members;
- (v) hearings in matter of Witness Protection Application shall be held in-camera by the competent authority to maintain full confidentiality;
- (vi) overall implementation of the witness protection order to be made by the head of Police of the State/UT;
- (vii) if in case there is a need to revise the Witness Protection Order previously passed, the Competent Authority may forward the same to the Commissioner of Police to draft a fresh Threat Analysis Report.

Protection of witness is directly proportional to the threat level perception

The scheme has divided the witnesses as per threat perception into three categories:

Category	Threat Level Perception
A'	threat extends to the life of witness or his family and thereby affecting their normal way of life
B'	threat extends to safety and reputation
C'	moderate threat that extends to harassment and intimidation

The Category 'A' forms the gravest among all because the threat extending therein may find its presence even after the trial or investigation is complete.

Protection of Identity

The scheme recognizes the protection of identity of the witness. If the witness desires to protect his identity he may file an application in the prescribed form as per the Scheme before a Competent Authority. The competent authority there looks out for the Threat Analysis Report for ascertaining the quantum of threat possessed by the witness or his family members and whether it meets the requirements to be eligible for an identity protection order. However, during the course of examining the application, the identity of the witness should not be revealed to any person and after the aforesaid examination the competent authority to dispose off the application basis the material available on record.

Once an order of concealment of identity is passed by the Competent Authority it shall be the responsibility of Department/Ministry of Home of State/UT/Witness Protection Cell to ensure that identity of the witness or his family members be fully protected.

• Change of Identity

The witness also has the option to change his identity in appropriate cases, the request for change in identity by the witness is to be entertained by the Commissioner of Police or the SSP in District Police on the parameters of threat perception.

The witness can be conferred with new identities including new name, profession and parentage and providing supporting documents acceptable by the Government agencies. However, such change in identity shall have no bearing over the educational, professional or property rights of the witness.

• **Relocation of Witness**

In the similar manner as above by following the procedural formalities and eligibility, the witness has to option to be relocated to a different place within the limits of State/Union Territory or territory of Union of India keeping in view the safety, well-being and welfare of the witness.

Witness Protection Fund

Under the scheme, there shall be a Witness Protection Fund operated by the Ministry or Department of Home Affairs under the State or Union Territory, from which the expenses of implementation of the Witness Protection Order have to be met. The fund is to be maintained by the States and Union Territories and shall comprise of:

- (i) budgetary allocation made by the Annual Budget presented by the State Government;
- (ii) receipts of fines imposed under Section 357 of Code of Criminal Procedure ordered to be deposited by the courts;
- (iii) donations and contributions from various charitable trust, philanthropist and individual permitted by the Government;
- (iv) funds contributed under Corporate Social Responsibility.

Drawbacks of the Scheme

Even though the scheme offers a great deal of respite to the witnesses regarding their safety during the continuance of the trial and in exceptional cases even after the trial is complete, but it also suffers from certain flaws such as:

- (i) the functioning criminal justice system is the responsibility of the State and some states may not have adequate resources to implement this scheme effectively. The alternative to this is assistance by the centre but nowhere in the scheme the centre has been entitled to give in a single penny for the Witness Protection Fund;
- (ii) the functioning of the Witness Protection Order has been made limited only to three months;
- (iii) the task of deciding the contents and preparation of the Threat Analysis Report has been accorded to the head of the police in the district, so in high profile cases involving politicians or influential people the police officer can be put under pressure to provide those people the information regarding the witness.

Case Studies

In Mahender Chawla versus Union of India, the Supreme Court had asked the Union government 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. 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. 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.

The only remedy, as suggested by courts, victims and the prosecution, is to have an effective witness protection regime. In the United States of America, the Federal Witness Security Program, an independent agency, not only helps relocate witnesses who are under threat but also issues new identities to them. It works under the authority of the attorney general. The Witsec has successfully protected approximately 18,865 participants from intimidation and retribution since the programme began in 1971.

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.

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.

Lastly, 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.

In the Best Bakery case, the Supreme Court had recognized that political patronage and corrupt practices have a role to play in witnesses turning hostile. Witness protection requires foolproof mechanisms. It is possible that the existing scheme would have addressed the problems embedded in it if the provisions were deliberated upon by the stakeholders. Such a procedure, however, was surpassed. In its current form, the scheme is a disservice to the cause of witness protection.

The 2018 witness protection scheme, formulated by the Centre in consultation with 18 states and Union territories following an earlier directive, proposes protective umbrellas ranging from police escort to the witness up to the courtroom to the application of communication technology for recording of testimony, instead of asking the witness to depose in the open court. The scheme envisages provision for in-camera proceedings, a ban on the media on making public the identity of the witnesses and the creation of a special witness protection cell in each state and Union territory.

In more complex cases involving organised criminal groups, extraordinary measures to ensure the witness's safety, such as offering temporary residence in a safe house, giving a new identity and relocation of the witness at an undisclosed place. However, witness protection rules will be

applied on a case-to-case basis, depending upon the vulnerability and threat perception, the apex court said while approving the draft rules evolved by the Union home ministry.

A bench of Justices A.K. Sikri and Abdul Nazeer passed the directive while dealing with a petition filed by four petitioners who are witnesses or related to witnesses in separate cases of rape, murder and intimidation tied to the alleged henchmen of jailed self-styled godman Asaram Bapu. Asaram has been sentenced to jail for life in a rape case.

The petitioners have moved the top court through Utsav Singh Bains and others, alleging a threat to their lives from the goons allegedly engaged by Asaram even while being in jail.

The court said: "The Union of India as well as states and Union territories shall enforce the witness protection Scheme, 2018, in letter and spirit. It shall be the 'law' under Article 141/142 (extraordinary powers of Supreme Court) of the Constitution, till the enactment of suitable parliamentary and/or state legislations on the subject... in line with the aforesaid provisions contained in the scheme.

"In all the district courts in India, witness deposition complexes shall be set up by the states and Union territories. This should be achieved within a period of one year, i.e., by the end of the year 2019. The central government should also support this endeavour of the states/Union territories by helping them financially and otherwise," Justice Sikri said.

The apex court said the identity of witness should be concealed. Publication or revealing, in any manner, directly or indirectly, of the name, address and other particulars which may lead to the identification of the witness during investigation, trial and post-trial stage, should be prohibited, the court said.

The court noted that one of the main reasons for witnesses to turn hostile is that they are not accorded appropriate protection by the State.

"It is a harsh reality, particularly in those cases where the accused persons/ criminals are tried for heinous offences, or where the accused persons are influential persons or in a dominating position that they make attempts to terrorise or intimidate the witnesses because of which these witnesses either avoid coming to courts or refrain from deposing truthfully," the court said.

The four petitioners are a witness to a child rape and atrocity, the father of a murdered witness, the father of a child rape victim and a journalist who escaped a murder attempt by the goons.

Conclusion & Suggestions

In view of the above discussion on findings and suggestions the researcher subsequently recommends that there is an emergent need to enact a law on witness protection covering all the issues concerning witness. The issues of witness identity protection, witness protection, hostility, and witness assistance are part of larger problems that the criminal justice in India faces today. It is therefore recommended that all these matters should be dealt in single legislation. The researcher further feels that the following prerequisites would be instrumental in providing a sound legislation.

The need of the hour is to Decision to set up a witness protection programme under witness protection legislation should be reached on the basis of a thorough analysis of factors relating to the level and types of criminality within the society, frequency of violence against participants in criminal proceedings, demonstrated ability and will to prosecute high-profile crimes and availability of resource.

The Witness Protection Scheme, 2018 has been approved by the Supreme Court in its landmark judgement of *Mahendra Chawla v. Union of India*, making it the first attempt to bring the protection of witness under the ambit of law and putting the responsibility on the State to implement it effectively.

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