



# Witness Protection Law In India: A Critical Analysis

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## Introduction

Witnesses are considered as one of the most indispensable element in the criminal justice system. 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.

## Definition

‘Witness’ has nowhere been defined in the Code of Criminal Procedure Code, 1908 or in the Indian Evidence Act, 1872. The Black’s Law Dictionary defines it as: *“In the primary sense of the word, a witness is a person who has knowledge of an event. As the most direct mode of acquiring knowledge of an event is by seeing it, ‘witness’ has acquired the sense of a person who is present at and observes a transaction.”*

Further, The Witness Protection Scheme, 2018 defines ‘witness’ as: *“‘Witness’ means any person, who possesses information or document about any crime regarded by the competent authority as being material to any Criminal proceedings and who has made a statement, or who has given or agreed or is required to give evidence in relation to such proceedings.”*

## 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.<sup>1</sup>

<sup>1</sup> <https://blog.ipleaders.in/witness-protection-scheme-india/>

## 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*<sup>2</sup> 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*<sup>3</sup> 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*[3] 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,

<sup>2</sup> (2004) 4 SCC 158

<sup>3</sup> (1997) 6 SCC 514

(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 1*) 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.

On 8th August 2003, in the case of National Human Rights Commission v. State of Gujarat, the Supreme Court regretted that "no law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses." Later on in the case of Zahira v. State of Gujarat, while transferring what is known as the Best Bakery Case, to Mumbai by its Order dated 12th April, 2004, directed: "The State of Gujarat shall also ensure that the witnesses are produced before the concerned court, whenever they are required to attend them, so that they can depose freely without any apprehension of threat or coercion from any person. In case any witness asks for protection, the State of Maharashtra shall also provide such protection as deemed necessary, in addition to the protection to be provided for by the State of Gujarat."

Between August 2003 and April 2004, neither Gujarat nor Maharashtra had framed any witness protection scheme. The Supreme Court itself did not spell out any guidelines for witness protection in either of these two cases. The erstwhile trial in Gujarat was an 'over-hasty stage-managed, tailored and partisan trial.' The worst culprit was the State of Gujarat itself and all its agencies. The censure and the reprimand, were all directed against the State and its modern day Neros. "When fences start to swallow the crops, no scope will be left for survival of law and order or truth and justice. Public order as well as public interest become martyrs and monuments." It is unfortunate that the State of Gujarat itself was entrusted with the responsibility of protection to the witnesses, as the case stood transferred to Maharashtra. The witnesses now are in the same predicament as before, in the re-trial that is going on in Mumbai.

It is said that, in India, in most of the cases involving rich influential persons or corrupt politicians, crucial witnesses turn hostile, making the rule of law, a mockery. Very often witnesses become untraceable. Sometimes they are just eliminated.

### **Recommendations by Law Commissions**

The Law Commission in its 14th Report (1958) referred to 'witness-protection', but that was in a limited sense. That related to proper arrangements being provided in the Courthouse, the scales of travelling allowance, their daily allowance etc. The National Police Commission Report (1980) again dealt with the inadequacy of daily allowance for the witnesses, but nothing more. The 154th Report of the Law Commission 1996 contains a chapter on *Protection and facilities to Witnesses*. The recommendations mostly related to allowances and facilities to be made available for the witnesses. However, one of the recommendations was: "Witnesses should be protected from the wrath of the accused in any eventuality", but, again, the Commission did not suggest any measures for the physical protection of witnesses. The 178th Report of Law Commission, again, referred to the fact of witness turning hostile, and the recommendations were only to prevent witnesses from turning hostile. The Report suggested an amendment to insert S.164 A to the Code of Criminal Procedure, as under:

164 A (1) Any police officer making an investigation into any offence punishable with imprisonment for a period of ten years or more (with or without fine) including an offence which is punishable with death, shall in the course of such investigation, forward all persons whose evidence is essential for the just decision of the case, to the nearest Magistrate for recording their statement.

(2) The Magistrate shall record the statements of such persons forwarded to him under sub-section (1) on oath and shall keep such statements with him awaiting further police report under Section 173.

(3) Copies of such statements shall be furnished to the investigating officer.

(4) If the Magistrate recording the statement is not empowered to take cognizance of such offence, he shall send the statements so recorded to the magistrate empowered to take cognizance of the case.

(5) The statement of any person duly recorded as a witness under sub-section (1) may, if such witness is produced and examined, in the discretion of the court and subject to the provisions of the Indian Evidence Act, 1872, be treated as evidence.

No Government has accepted this. The latest is Malimath Committee Report which contains a casual statement that a law should be enacted for giving protection to witnesses and their family members, without specifying any provision or scheme whatsoever.

It is ironic that draconian laws like Terrorist and Disruptive Activities (Prevention) Act, 1987, and Prevention of Terrorism Act, 2002, provided for protection of witnesses. The prosecution as also the Court could direct that the identity and the address of the witness be kept secret. The Court could even avoid the mention of the names and addresses in its order or judgement. It is generally perceived that these provisions were incorporated not with any concern for the witnesses, but to prevent the accused from preparing an effective defence and to deny fair trial.

In India, in most of the cases involving rich influential persons or corrupt politicians, crucial witnesses turn hostile, making the rule of law, a mockery. 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. This, again, is not as a provision for protection of the witnesses, but only to ensure the trial is not rendered infructuous. Judges also hold in-camera trials to ensure deposition by witnesses without any fear or embarrassment. Recently the Supreme Court has permitted recording of evidence by video-conferencing. All these are inadequate without a specific legal provision guaranteeing protective measures to victims before the trial and also after the trial.

## **Foreign legislations on witness protection**

### **United Kingdom**

Under the English law, threatening a witness from giving evidence, is contempt of Court. So also any act of threat or revenge against a witness after he has given evidence in Court, is also considered as contempt. Recently the U.K. Government has a law known as Criminal Justice and Public Order Act, 1994 which provides for punishment for intimidation of witnesses. S.51 of the Act not only protects a person who is actually going to give evidence at a trial, but also protects a person who is helping with or could help with the investigation of a crime. Under a similar law in Hongkong, Crimes Ord (Cap 200) HK, if the threat or intimidation is directed even as against a friend or relative of the witness, that becomes a punishable offence.

## International Criminal Court

The need for setting up separate victim and witness protection units in the trial of mass crimes has been acknowledged in the setting up of international tribunals to deal with them. The International Criminal Tribunal for Rwanda has formulated rules for protection of victims and witnesses. Similar provisions exist in the Statute for the creation of an International Criminal Court (ICC). In most of the cases, witnesses are the victims of the crime. And the most vulnerable amongst them are women and children. Under the existing system they are mere pawns in a criminal trial and there is very little concern for protecting their real interests. The protection is necessary so that there is no miscarriage of justice; but protection is also necessary to restore in them, a sense of human dignity which stands shattered in a situation like Gujarat carnage.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted by the United Nations General Assembly in resolution 40/34 of 29 November 1985. According to the first paragraph of this declaration, victims of crime are described as *persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative in Member States, including those laws proscribing criminal abuse of power.* It is they who need protection.

## Conclusion

As it is, as we have seen in Best Bakery case, the person who is most likely to suffer is Zahira, herself. She had seen the crime; she had seen the criminals, but when time came for her to be bold enough to depose before the Court, she found that she was in an atmosphere which was wholly hostile to her - the prosecutor, the defence lawyer, the accused, the supporters of the accused - perhaps the judge whom she was not sure of. The trial became a mockery. Later on, when she was resurrected by the efforts of well-meaning N.G.Os, and the Supreme Court transferred the case to Mumbai, apparently there was a feeling that justice will be done to the victims. Unfortunately, she is again caught in the same quandary. So, again she becomes a hostile witness, liable for perjury and also liable for contempt of court. Is there any legally just and fair solution for this conundrum of these events?

Protection is also necessary to restore a sense of human dignity which stands shattered in a situation like Gujarat carnage. Therefore, there is an urgent need to bring forth a bill of right to preserve and protect victims'/witnesses' rights, justice and due process. Such a bill should include the following: To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.

- To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
- To be present at and, upon request, to be informed of all criminal proceedings where the accused has the right to be present.
- To be heard at the time of the granting of bail to the accused and sentencing.
- To confer with the prosecution, after the crime against the victim has been charged, before a criminal court.
- To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.
- To be heard at any proceeding when any post-conviction bail from judicial custody is being considered by a competent court of law.
- To a speedy trial and prompt and final conclusion of the case after the conviction and sentence.
- To frame rules and provide for a witness protection programme which will remain in force not only before the trial, but also thereafter. The rules should also provide for recording of evidence of such witnesses, immediately on filing the charge-sheet, de-bene-esse-, while the rest of the trial could be held in due course. Since tele-conference has been recognised, such witnesses could be examined and cross-examined through tele-conference methods. AND above all,
- To be informed of victims' constitutional rights.

## United States

In the United States, the Organised Crime Control Act, 1970 and later the Comprehensive Crime Control Act, 1984 authorised the Witness Security Program. The Witness Security Reform Act, 1984 provides for relocation and other protection of a witness or a potential witness in an official proceeding concerning an organised criminal activity or other serious offence. Protection may also be provided to the immediate family of, or a person closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.

The Attorney General takes the final decision whether a person is qualified for protection from bodily injury and otherwise to assure the health, safety and welfare of that person. In a large number of cases, witnesses have been protected, relocated and sometimes even given new identities. The Program assists in providing housing, medical care, job training and assistance in obtaining employment and subsistence funding until the witness becomes self-sufficient. The Attorney General shall not provide protection to any person if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony. A similar program is in Canada under Witness Protection Act, 1996. The purpose of the Act is "to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters" [Section 3]. Protection given to a witness may include relocation, accommodation and change of identity as well as counselling and financial support to ensure the security of the protectee or to facilitate his becoming self-sufficient. Admission to the Program is determined by the Commissioner of Police on a recommendation by a law enforcement agency or an international criminal court or tribunal [Sections 5 and 6]. The extent of protection depends on the nature of the risk to the security of the witness, the value of the evidence and the importance in the matter.

## Australia

The Australian Witness Protection Act, 1994 establishes the National Witness Protection Program in which (amongst others) the Commissioner of the Australian Federal Police arranges or provides protection and other assistance for witnesses [Section 4]. The witness must disclose a wealth of information about himself before he is included in the Program. This includes his outstanding legal obligations, details of his criminal history, details of his financial liabilities and assets etc. [Section 7]. The Commissioner has the sole responsibility of deciding whether to include a witness in the Program.

## South Africa

The Witness Protection Act, 1998 of South Africa provides for the establishment of an office called the Office for Witness Protection within the Department of Justice. The Director of this office is responsible for the protection of witnesses and related persons and exercises control over Witness Protection Officers and Security Officers [Section 4]. Any witness who has reason to believe that his safety is threatened by any person or group or class of persons may report such belief to the Investigating Officer in a proceeding or any person in-charge of a police station or the Public Prosecutor etc. [Section 7] and apply for being placed under protection. The application is then considered by a Witness Protection Officer who prepares a report, which is then submitted to The Director [Section 9]. The Director, having due regard to the report and the recommendation of the Witness Protection Officer, takes into account the following factors, inter alia, [Section 10] for deciding whether a person should be placed under protection or not:

- The nature and extent of the risk to the safety of the witness or related person.
- The nature of the proceedings in which the witness has given evidence or may be required to give evidence.
- The importance, relevance and nature of the evidence, etc.

In European countries such as Italy, Germany and Netherlands, the Witness Protection Programme covers organised crimes, terrorism, and other violent crimes where the accused already know the witness/victim.



It is ironic that draconian laws like Terrorist and Disruptive Activities (Prevention) Act, 1987, and Prevention of Terrorism Act, 2002, provided for protection of witnesses. A comprehensive witness protection programme is in the Philippines. The law, the Witness Protection Security and Benefit Act, aims to protect witnesses and grant them certain rights and benefits to ensure their appearance in investigative bodies/court. Protection is given to witnesses in cases involving grave offences. Sometimes protection could be given to a person who has participated in the commission of a crime but desires to be a witness for the State (such as approvers). Before a person is provided protection under this Act, he/she shall first execute a Memorandum of Agreement with the Secretary of Department of Justice, which shall set forth the witness' duties and responsibilities such as, but not limited to, the following:

- To testify before and provide information to all appropriate law enforcement officials concerning or arising from the activities involved in the offense charged;
- To avoid the commission of a crime;
- To take all necessary precautions to avoid detection by others of the facts concerning the protection provided him under the Act;
- To comply with legal obligations and civil judgements against him;
- To cooperate with respect to all reasonable requests of officer and employers of the Government who are providing him protection.
- To regularly reform the program officials of his current activities and address;
- To comply with such other conditions as may be imposed by the Secretary of Justice.

Once a person/witness has been accepted under the witness protection program, he/she shall have the following rights and benefits:

- To have a secure housing facility or, when circumstances warrant, to relocation and/or change of personal identity at the expense of the Program.
- To have a means of livelihood and financial assistance from the Program for his support and that of his family.
- Not to be removed from or demoted in work provided his/her employer is notified through a certification to be issued by the Department of Justice. Further, he/she shall be paid his/her equivalent salaries or wages corresponding to the number of days of absence.
- To be provided with reasonable travelling expenses and subsistence allowance.
- To be provided with free medical treatment, hospitalisation and medical expenses.
- If a witness is killed because of his participation in the Program, his/her heirs shall be entitled to a burial benefit of not less than Ten Thousand Pesos P10,000.00 exclusive of any other benefit he may be entitled under the Program.
- In case of death or permanent incapacity, his minor or dependent children shall be entitled to free education from primary to college level in any state or private school, college or university as may be determined by the Department of Justice. However, if the witness covered by the scheme fails or refuses to testify, he would be liable for contempt and also for perjury, if he testifies falsely or evasively.