

THE SILENCE OF WITNESSES -WITNESS PROTECTION IN THE INDIAN SUBCONTINENT

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INTRODUCTION

“Not only that a witness is threatened; he is maimed, he is done away with, or even bribed. There is no protection for him.” The given description was provided by Justice Wadhwa in 1976¹, wherein he attempted to project the plight that thousands of witnesses in the Indian criminal justice system face on a daily basis. However, forty years since, we see that this portrayal still remains distressingly accurate. Despite a population of approximately 1.2 billion individuals, India continues to exist without a functioning witness protection system. The absence of such a scheme has not gone unnoticed, with calls for comprehensive legislation on the matter arising from various avenues. Numerous judgments, public media opinions, Committee Reports and Law Commission Reports have all advocated for a change in the system.

The manipulation of a witness in any manner goes directly against the principle of a fair trial. Indeed, witness protection is a critical element in ensuring the integrity of any testimony. The judiciary in India faces an abundant number of cases in which witnesses go hostile, which is unacceptable in matters dealing with relatively small misdemeanors, let alone those of life and death. We see that even in the few rare instances where witnesses have been provided with some physical protection, the same has remained to be woefully inadequate. Such was the case for a key witness in the infamous Naroda-Patia riots, who was beaten up by a mob of over thirty men, while the single police officer who was assigned to protect him was absent.²

The inadequacies of the system must be considered in light of practical difficulties; a police force that is understaffed, and in many cases inefficient. With lakhs of witnesses spread across the country, extensive efforts must be directed towards the development of a system that can adequately ensure the protection of witnesses with the available resources.

EXISTING SAFEGUARDS

¹ Swaran Singh v. State of Punjab, (1976) AIR 1976 SC 2304, 2310 (SC).

² *Naroda-Patia Witness Beaten Up*, THE TIMES OF INDIA, October 1, 2003.

There are a limited number of provisions in India that exist with regards to the well being of a witness. These safeguards remain scattered across various statutes and judgments in the country, rather than in a single, all- inclusive legislation. To elaborate, the Indian Evidence Act protects witnesses from being asked questions that the Court deems indecent, offensive, insulting, scandalous, or simply intended to annoy the witness.³ Moreover, Section 312 of the CrPC places an obligation on Criminal Courts to refund every witness for all those reasonable expenses that the latter incurs while attending the court.⁴ Section 309(2) of the Code provides that when a witness is in attendance, the court shall not grant a postponement or adjournment of the case until that witness has been examined.⁵

In *Neelam Katara v. Union of India*⁶, the Delhi High Court issued several guidelines on the matter of witness protection. It allowed for protection to witnesses on their application to the Member Secretary of the Delhi Legal Services Authority. However, this protection would be guaranteed only in those cases involving possible sentences of life imprisonment, or death.⁷ These guidelines have been criticized for their silence on the matter of hiding the identity of witnesses in potentially dangerous cases.⁸

LAW COMMISSION REPORTS

The concept of witness protection was given a restricted meaning by members of earlier Law Commissions. It was considered to only imply the protection from the inconveniences and discomfort that witnesses faced in the course of investigation and trial. Subsequently, the reports mainly consisted of recommendations for the provision of general facilities. However, contemporary trends have required an expansion of such limited interpretation, as witnesses now require protection from real and physical danger. Written in 1958, the 14TH LAW COMMISSION REPORT⁹ was the first to identify the plight of witnesses. It studied the requirement of providing adequate facilities to those attending court to testify, and recommended that efforts be taken to respect the valuable time that witnesses were sparing in the performance of their duties. The report suggested allowances for travel and other

³ Indian Evidence Act, §§ 151 - 152, (1872).

⁴ Code of Criminal Procedure, § 312 (1973).

⁵ *id.*, at § 309(2).

⁶ *Neelam Katara v. Union of India*, (2002) CrI. WP 247 of 2002.

⁷ *ibid.*

⁸ 198th Report of the Law Commission of India, Witness Identity Protection and Witness Protection Programmes (2006).

⁹ 14th Report of the Law Commission, Reform of Judicial Administration (1958).

arrangements, as well as for the very attendance of the witness. The reasoning was that unless a witness is cared for, they are likely to turn indifferent towards the outcome of the case. This report contained no mention of the requirement of physical protection.

In the 154TH LAW COMMISSION REPORT¹⁰, attention was for the first time drawn to the possibility of physical harm and danger to witnesses. The report stressed that regardless of circumstances, every witness must be protected from the potential wrath of an accused. The Commission observed that the general apathy and reluctance of witnesses to attend Court was more than justified, considering the conditions that they were made to face. Suggestions were made for the provision of reasonable allowances to witnesses, adequate facilities being allowed, physical protection from harm, and for trials be conducted on a daily basis.¹¹ However, despite citing the need for the physical protection, no procedure for doing so was provided.

The 172ND LAW COMMISSION REPORT¹² provided specific provisions in the context of rape laws, and was in response to a request of the Supreme Court following the case of *Sakshi v. Union of India*¹³. Taking into consideration the various suggestions made by women's organizations and NGO's, the Commission put forth certain recommendations. The first was that in cases involving the sexual abuse of a minor, the testimony of the child should be taken at the earliest, in the presence of a Judge as well as a child support worker. Secondly, it was advised that such witnesses should not be required to testify in the presence of the accused. Rather, the court must permit the usage of techniques such as video testimonies, and cross examinations that are conducted by the Judge based on written questions presented by the defense. Finally, it was suggested that there be a proviso attached to Section 273 of the Code of Criminal Procedure, 1973¹⁴, so as to allow the request for a physical screen to be provided during trial, whereby the young victim would not have to see the accused.¹⁵ This would offer a reasonable balance between maintaining the right of the accused to hear the evidence against him, while at the same time protecting the interests of the victim.

¹⁰ 154th Report of the Law Commission, The Code of Criminal Procedure, 1973 (1996).

¹¹ *ibid.*

¹² 172nd Report of the Law Commission, Review of Rape Laws, (2000).

¹³ *Sakshi v. Union of India*, (2004) AIR 2004 SC 3566.

¹⁴ *Supra* note 4, at § 273. ("Evidence to be taken in the presence of the accused")

¹⁵ *Supra* note 12.

The 178TH LAW COMMISSION REPORT¹⁶ discussed the urgent need to prevent witnesses from turning hostile. For this purpose, some recommendations were made, such as requiring the signature of a witness on his police statement, and sending such statement to a senior police officer or appropriate Magistrate. Primarily, it was suggested that Section 164A be added to the CrPC. For those offences punishable with imprisonment for ten years or more, the material witnesses of such case would have to have their statements recorded in the presence of a Magistrate.¹⁷ However, on a practical note, this would require the recruitment of a sizeable number of available Magistrates, and would thus only be applicable to cases of a serious nature. Moreover, the report unfortunately did not address the problem of physical danger that witnesses face.

Some of these recommendations were applied in the CRIMINAL LAW AMENDMENT BILL of 2003¹⁸. The Bill supported the inclusion of Section 164A, even increasing its application to offences punishable with imprisonment above seven years, rather than ten. The context in which this Bill came about is also relevant, as it was proposed immediately after public and judicial outcry following the infamous *Best Bakery* case, wherein 14 individuals were burned to death. This case showcased a majority of the witnesses turning hostile.¹⁹ While it still remains unclear as to whether this was the consequence of inducement or intimidation, the retraction of the witnesses was widely condemned.

However, the Bill only focused on the practice of witnesses to give false testimonies in return for financial or material gains, and ignored those instances where witnesses are threatened or coerced into doing so. Consequently, amendments were proposed for the summary punishment of all hostile witnesses.²⁰ Provisions for the protection of witnesses were regrettably absent. Such a law would thus be turning a blind eye to the thousands of witnesses and victims who are currently living in fear for the safety of their own lives, and the lives of their loved ones.

¹⁶ 178th Report of the Law Commission, Recommendations for Amending Various Enactments, Both Civil and Criminal, (2001).

¹⁷ *ibid.*

¹⁸ The Criminal Law (Amendment) Bill, 2003.

¹⁹ D. Bunsha, *Riot witness turns hostile*, FRONTLINE, June 7, 2003.

²⁰ *Supra* note 18.

It was also astonishing to note that many of the proposals submitted in the various Law Commission Reports were not adequately acknowledged, causing the COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM (under the chairmanship of Dr. Justice V. S. Malimath) to produce an extensive paper on possible improvements to the criminal justice system.²¹ Containing as many as 158 provisions, the spirit of the report is in the nature of supporting the struggles of witnesses as best as possible. It is felt that victims can only attain justice if due consideration is placed on the rights of witnesses, as the latter themselves are a special kind of victim.

The Law Commission sought to resolve the lacunae apparent in the above paper through its 198TH REPORT²². Through it, a draft legislation on ‘witness identity protection’ was provided to the Union. The report began by citing the need for law on the subject: to prevent witnesses from turning hostile, and to care for their well-being and safety by offering them protection.²³ With that in mind, the report considered the practical aspects of implementing such a programme in the country. This related to the offering of police protection, relocation, changing of identities, rights and duties of a witness and of the law enforcement officers, potential expenditure on the system, etc. With regards to the expenses arising out of whatever witness protection scheme is implemented, it was held that the funds should be provided by the State Legal Aid Authority, through the District Legal Aid Authorities. Moreover, it was held that there be a balance between the rights of the accused and those of the victims and witnesses.

Protection of the witness was deemed necessary even in the stage of investigation, and this could be done by an examination by a Magistrate who would decide whether the identity of the witness need be kept anonymous. During inquiry, the Magistrate would have to pass a fresh order with regards to anonymity, and if done, the accused would be informed of all the evidence he is entitled to, but without the disclosure of the identity of the witness. Finally, at the stage of trial, the anonymous witness would be made to depose before the magistrate using audio video technology, thus protecting him and his identity at all stages.

²¹ Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System, (2003) (Chaired by Dr. Justice V. S. Malimath).

²² 198th Report of the Law Commission, Witness Identity Protection and Witness Protection Programmes, (2006).

²³ *ibid.*

JUDICIAL PRONOUNCEMENTS

One of the earliest judgments on witness protection dealt with a rather interesting and unexplored aspect of it. This was in the case of *Naresh Mirajkar v. State of Maharashtra*²⁴, wherein prior to being cross-examined, a witness requested the court to abstain from the publication of his evidence. The reasoning behind this request was the fact that when his earlier statements had been made public, he had faced heavy losses to his business. The court allowed him protection against publication, one of the only instances where the occupational interests of the witness were sought to be safeguarded, rather than the witness himself.

In *Gurbachan Singh v. State of Bombay*²⁵, the accused was shifted to a different state in order for the witness to freely depose against him. This was done under Section 27 of the Greater Bombay Police Act, 1902²⁶, which permitted the Commissioner to remove an accused person from a state for a limited period of time, on the grounds that the accused was preventing some witness from testifying due to the latter's apprehension of some harm to his safety. In this case, the accused protested the constitutionality of such a section, as it put an unreasonable restriction on his freedom of movement. The Court upheld the provision, in that it was used only in those exceptional circumstances where the interest and safety of the public was in jeopardy.²⁷ However, the Supreme Court did not consider the possibility of simply protecting the victim, rather than passing an externment order against the accused.

If it is felt that there are some serious local tensions that may impede the subsistence of a fair trial, then the case may be transferred to a different place. This was held by the Supreme Court in the case of *Maneka Sanjay Gandhi vs. Rani Jethmalani*²⁸. There must be a congenial and conducive atmosphere for an impartial trial to take place, as severe public hostility can cause the safety of the accused or complainant to be compromised. If there is general consternation among the members of the public, such that 'sides are being taken' and the 'climate is being polluted', then the transfer of the case may be necessary to allow for a detached and neutral trial.²⁹

²⁴ Naresh Shridhar Mirajkar v. State of Maharashtra, (1967) AIR 1967 SC 1.

²⁵ Gurbachan Singh v. State of Bombay, (1952) AIR 1952 SC 221.

²⁶ Now § 56 of the Bombay Police Act, 1951.

²⁷ *Supra* note 25.

²⁸ Maneka Sanjay Gandhi vs. Rani Jethmalani (1979) 4 SCC 167.

²⁹ *Supra* note 28.

The Supreme Court has also held that the anonymity of victims in rape trials must be protected as far as possible.³⁰ Victims already face unbearable trauma while being asked to depose in court, and having their identity publicized to the media and general public will simply add to the existing vulnerability and pain that they possess.

The Judiciary made it clear in *National Human Rights Commission v. State of Gujarat*³¹ that the current state of the criminal justice system is not sustainable. The NHRC sought retrial of the case on the grounds that the accused had pressurized the witnesses to go back on their earlier statements, thus vitiating the trial. The Supreme Court agreed that this situation was opposed to the principle of a fair trial as guaranteed by Articles 14 and 21 of the Indian Constitution. Moreover, the Court recognized the absence of any comprehensive law providing for witness protection, and ordered that the States propose and formulate appropriate guidelines for the same.

These guidelines were provided in the case of *Ms. Neelam Katara v. Union of India*³², to be followed until the implementation of some statute on the matter. In this case, the son of the petitioner had been murdered by some powerful men in society, in what was suspected to be an honour killing. She feared that the trial would not be fair, and that the witnesses would be harmed or intimidated, and thus submitted a writ petition praying for the issue of directions for protecting such witnesses.³³ While these guidelines are unique in that they are the first of their kind to apply to *all* cases of witness protection rather than specific situations (such as rape), they are limited by the lack of any mention of the *procedure* for witness anonymity.

CHALLENGES TOWARDS WITNESS PROTECTION

The practical efficacy of implementing a programme for the protection of witnesses in a country like India is questionable. One of the primary difficulties is the problem of balancing the need to protect the interests of the victim with that of the accused. Section 327 of the Code of Criminal Procedure³⁴ stresses on the need for an open trial, as the accused must necessarily know who is testifying against him in order to defend himself against such testimony. The

³⁰ Delhi Domestic Working Women's Forum v. Union of India (1995) 1 SCC 14.

³¹ National Human Rights Commission v. State of Gujarat, (2003) (9) SCALE 329.

³² Ms. Neelam Katara v. Union of India, ILR (2003) II Del 377 260.

³³ *ibid.*

³⁴ *Supra* note 4, at § 327.

only exception that the code provides for is in Section 299, which holds that a witness may only testify in the absence of the accused in an instance where such accused has either absconded or is not available for some reason.³⁵ However, as we have discussed, keeping the identity of a witness as anonymous is essential in some cases.

The second foreseeable problem of implementing such a programme is that of financing and infrastructure. The cost of providing security to witnesses, as well as the funds required of relocation, are bound to be quite high. This is especially relevant in light of the large number of witnesses who may require protection for extended periods of time. The only possible solution would be to offer such aid only in those grave cases which seem to possess a greater threat to the witness than in other cases.

Another eventuality to consider is the leaking of confidential information regarding the identity or whereabouts of a protected and vulnerable witness. In most cases where witnesses are in danger, those posing the danger are either in positions of wealth or power. Such individuals may find it easy to bribe officials in order to receive the information they require, especially in a system that is inherently corrupt. In response to this danger, it is often recommended that a body independent of the political realm be appointed to handle cases of witness protection³⁶, and that the number of persons having such confidential knowledge be kept as small as possible. Lastly, it is often difficult to conclude upon the scope of witness protection. This includes whom it should extend to, as well as the time period for which it ought to subsist. These particulars can only be decided on a case-to-case basis.

WITNESS PROTECTION IN THE UNITED STATES

The Justice Malimath Committee Report³⁷ recommended that India institute a system for witness protection along the lines of the well-established structure in the United States of America. Indeed, the United States Federal Witness Security Program is arguably among the most advanced systems in the world. Previously authorized by the Comprehensive Crime Control Act of 1984, the program finds a detailed description of its procedure in the Witness Security Reform Act of 1984.³⁸ The purpose of the program is to protect witnesses in such a

³⁵ *id.*, at § 299.

³⁶ Renu Solkhe, *Protection of witness under law of evidence: a comparative study*, 2013.

³⁷ *Supra* note 21.

³⁸ Witness Security Reform Act (1984).

manner that they may safely testify at trial, and thus aid the state in convicting dangerous criminals, or the members of gangs, organized crime, or terrorist networks.

In the event of their being relocated, a witness is offered the opportunity to receive housing, assistance in obtaining employment, medical care, and some amount of subsistence funding until the witness can become self sufficient.³⁹ Before a decision is made, the law enforcement authorities first analyze the situation and assess the extent to which the persons posing a threat are able to carry out a threat, in terms of their intent, resources and motivation. The seriousness of the threat is also determined, and it must be agreed that the witness is in some substantial danger.⁴⁰

On entering the program, the witness as well as his or her family members are made to sign a Memorandum of Understanding that is organized by several government agencies, in complete secrecy.⁴¹ Marshals Service personnel brief each witness on their admittance, and the witnesses and their families are then immediately extracted from their current location to a secure, temporary holding area.⁴² The abovementioned assistance is then provided.

The State ensures that witnesses are provided with new identities, along with the requisite documents. Keeping in mind the mental turmoil that the relocated persons possibly undergo, the agency also arranges for counseling services.⁴³ When the witness is required to be present in a high threat area, such as during pre- trial proceedings and court appearances, he or she is provided with all day protection.

On the completion of the trial, the witnesses generally presume new identities. Moreover, the participants of the program are assisted by the Marshals Service to find employment and become self- sufficient. Ever since the program was implemented in 1970, the United States was able to secure a successful conviction in nearly 90% of all the cases that witnesses were involved in.⁴⁴

³⁹ 18 U.S Code, § 3521(b) (2000).

⁴⁰ T. Bhushan, *Witness Protection in India and United States: A Comparative Analysis*, 2(1) INT. JOURNAL OF CRIMINAL JUSTICE SCIENCES, (2007) .

⁴¹ *ibid.*

⁴² *Supra* note 51.

⁴³ *ibid.*

⁴⁴ United States Marshals Service, Fact Sheet Prepared by the Office of Congressional and Public Affairs, (1992).

CONCLUSION

We have extensively discussed the urgent need to implement comprehensive legislation on the topic of witness protection. The principles of natural justice dictate the necessity of a fair trial, and such a trial can only be achieved if the witnesses of each case give truthful testimonies. The witnesses must thus be able to depose freely, and without any fear of being harmed. Moreover, the criminal justice system as a whole will collapse if witnesses continue to turn hostile in the face of inducements and intimidation.

The potential challenges of establishing a witness protection scheme have also been addressed in the course of this paper. The primary problem is that of maintaining a balance between the rights of the accused and those of the victim and witnesses. In those instances where the identity of the witness need be anonymous, the right of the accused to have an open trial may be vitiated. Moreover, practical issues related to the funding of such a potentially expensive programme have to be considered. We also examined difficulties in terms of preventing powerful and rich accused persons from using such power to obtain confidential information.

The various reports, judgments and articles have all reached consensus on similar grounds—that the absence of law on a matter as crucial as witness protection vitiates the possibility of justice. Whether protection is to be offered by means of compensating a witness for his or her time, or through the provision of security, new identities or location, the fact remains that change in the current system is essential. Despite the high rate of crime in the country, the abysmally low ratio of conviction can be ascribed to the countless instances of witnesses turning hostile in criminal cases.⁴⁵ It is uncertain if the recently proposed witness protection scheme of the Delhi Government⁴⁶ will be successful, but it is commendable for being the first attempt to alter a tremendously unjust system that has been prevailing for years, despite the numerous cries of help from witnesses fearing inevitable harm to their lives.

⁴⁵ *Hostile witness cause low conviction rate*, REDIFF, (March 26, 2006), <http://www.rediff.com/news/2006/mar/26cji.htm>; *Crime rate high, but conviction is low*, THE HINDUSTAN TIMES, August 6, 2013.

⁴⁶ Pragma Kaushika, Delhi government notifies witness protection programme, THE INDIAN EXPRESS, July 31, 2015.