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Witness Protection Scheme: India and United States

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The Article deals with the different facets of the witness protection scheme operating in the Indian judicial system. It will also try and give you a glimpse of the same arena of law working in the USA which one says the oldest democracy in this globe. The authors have tried to draw such a comparison so that you guys can draw a broad picture of the witness protection schemes in a contrasting character in the oldest and the biggest democracies of the world. In this article, you will get to know about the need to adopt a witness protection scheme which is needed for creating a more just and fairer environment for the working of the judiciary in our country. We have touched in brief on the judicial approach and activism and the report of the 14th Law Commission of India which finally led to the drafting of what we know as the Witness Protection Scheme of 2018. At the start of the article, you will be encountered with three critical questions which we hope will get answered by the time you finish with the article.

Keywords: *witness, protection, scheme.*

INTRODUCTION

The working of the Indian justice system depends remarkably upon the witness coming forward and deposing without fear or favour, without intimidation or allurement in front of the judges and other important functionaries of the judicial system. The ability of a witness to cooperate with the authorities fearlessly is sin qua non to maintain the rule of law. Witnesses are very often

referred to as eyes and ears of the courts which makes them aware of the commission of an offence and thereby sets the criminal justice machinery into motion but unfortunately, they are turning hostile with unpredictable irregularity which in turn shakes the pillars of criminal justice.

Undoubtedly, the prime reason that compels witnesses to retract from their earlier deposition is the threat or intimidation. This fear is intensified when the offenders are habitual or very influential people or backed by political and economic power. In many cases, witnesses turn hostile because they are not provided with adequate protection by the State. Threat to life, induced by coercion, compulsion, violence, etc., may often result in witnesses contracting truth, even if the same may go against their conscience or will. Also, the manipulative techniques adopted by the defence or accused counsel during cross-examination are a contributing factor. The farfetched reason which can be attributed to hostility is the scanty right in the hands of the witnesses in contrast to the wide array of rights available to the accused person or victim.

Contrastingly, various foreign judicial systems have prominent programmes or have enacted comprehensive legislation for the protection of witnesses. These recognised witness protection programmes render a beacon to safeguard investigation, the trial and the security of witnesses. The United States enacted the witness protection act long ago in 1982 which aims to protect the life and personal liberty and security of witnesses as well as people close to them. The bird's eye view of Indian criminal law suggests the serious absence of a framework in dealing with the protection of the witnesses. It's time to come up with schemes for the witnesses which will enable them to come forward and depose fearlessly, without intimidation or impartiality. Also, the prevention of persons charged with the offence from sabotaging the witnesses and thereby turning them hostile has become the need of the hour.

RESEARCH QUESTION:

1. To examine the legislative framework dealing with witness protection in India.
2. To highlight the need for a programme for witness protection in India.

3. To study the scheme or program as adopted by the foreign jurisdictions limiting my study to the USA.

DEFINING WITNESS: FILLING THE VOID

However, the term 'witness' lacks any statutory definition albeit this term is widely used in the criminal law of the country. One such attempt to elaborate the meaning of the term '*Witness*' is made by the Code of Criminal Procedure, 1973[1] under section 161.[2] Since the term has not been comprehensively defined, it is imperative to take recourse to dictionary meaning. As per the Oxford Dictionary witness is defined as "*one 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*". Similarly, Black's Law Dictionary defines the term as "*one who sees, knows or vouches for something or one who gives testimony, under oath or affirmation in person or by oral or written deposition, or by affidavit*". The word draws its origin from the Ancient English word '*witness*' viz. '*attestation of fact from personal knowledge.*

Further, the definition which is widely accepted by the international community is conceived by the United Nations for the Good practices for witness protection in proceedings which involves organized crimes, which defines witnesses as, "*any person, irrespective of his or her legal status (informant, witness, judicial official, undercover agent or other), who is eligible, under the legislation or policy of the country involved, to be considered for admission to a witness protection programme*". However, the Delhi High court has made a first-ever attempt to define the term in the case of *Neelam Katara* v *Union of India*,[3] which defined the term *Witness means a person whose statement has been recorded by the Investigating Officer under section 161 of the Code of Criminal Procedure about a crime punishable with death or life imprisonment.*

[1] Code of Criminal Procedure 1973
[2] Code of Criminal Procedure 1973, s 161
[3] *Neelam Katara v Union of India* Cri WP 247 of 2002

WITNESS PROTECTION LAW IN INDIA: INEVITABLE NEED OF THE DAY

The Apex Court has time and again reiterated that evidence is the edifice of a criminal case, evidence that is admissible in law and thus the role of witnesses becomes crucial to depose such evidence, whether its direct evidence or indirect evidence such as circumstantial evidence. But ironically in India, witnesses are being harassed both physically and mentally. A witness in a criminal proceeding might come from a distant place and find the case adjourned. He/she may have to come to the court multiple times and at his/her own cost. The ugly game doesn't stop here; the witnesses are threatened, abducted and also bribed. The bitter truth that the rate of acquittal is far greater than that of conviction in India contributes to deterrence for a person who wishes to be a witness.

The courts must ensure that the trial must be fair not only from the perspective of the accused but also from that of the victim and thus the protection of the victim, as well as the witness, becomes vital in several cases. The phenomenon of witnesses turning hostile is horrific as it can dismantle the entire criminal law system, calling a need for a legislative measure emphasising prohibiting the tampering of witnesses or informants. It is pertinent to note that, under Indian criminal law certain provisions may appeal to fill the lacunae, but these provisions are found in bits and pieces under different legislations.

LAW COMMISSIONS OF INDIA: AN ATTEMPT TO BRIDGE THE GAP

Firstly, this void has been brought to the notice of the policymakers by the apex court which is supplemented by the Law Commission of India. The 14th Law commission report of India has emphasized the payment of travelling expenses as well as daily allowance for visiting courts in response to summoning orders. Further, the 154th law commission report to prevent the witness from turning hostile by taking the signature or the thumb impression of the witness on his statement and submitting copies of the same to the concerned magistrate along with the police officer. The report also highlighted the n*ecessity of creating confidence in the minds of the witnesses that they would be protected from the accused in any circumstance.*

However, this report also miserably failed in dealing with measures for the physical protection of the witnesses. Additionally, the 178th law commission report has issued guidelines as the precautionary measure police should adopt while investing to prevent them from turning hostile. Subsequently, on the recommendation of the Commission Section 164A was added to the Crto. These law commission reports have made the way for the formation of a committee for reforming the criminal justice system chaired by Dr Justice V Malimath. The committee emphasised the enactment of legislation to protect the witnesses and their family members too. On a progressive note, the 198th Law commission report recommended the protection of the identity of the witnesses. The report categorised the witnesses into three categories viz (a) Witnesses to whom the accused are known, which primarily includes victims (b) Victim-witness but not known to the accused (c) witnesses whose identity is not known at all. The report noted that different level of protection is required for different group of witnesses. Category (a) requires protection from trauma while categories (b) & (c) required that their identity shouldn't be revealed.

JUDICIAL APPRAISAL

Since its inception, the Apex court has put thrust on the need for the protection of witnesses. In ***Zahira Habibulla H. Sheikh and Another v State of Gujarat and Ors.***,[4] the Apex Court has emphasised on the State's role in witnesses' protection. The court has emphasised that the state as parens patriae has to ensure that during the proceedings the witness could safely depose his statement without any fear of the party who will be adversely affected by it. The Court also alarmed the State that it has a constitutional duty under Article 21 of the constitution[5] to protect the life and liberty of the citizens. Further, in the case of NHRC v State of Gujarat,[6] the Supreme Court highlighted that law is dormant on the rights of the witness who play a key role in a criminal case. Thereby calling for amending the flaws in the present statutes to provide sufficient safety to the witness. The decisions in ***G.X. Francis v Banke Bihari Singh***[7] and ***Maneka Sanjay***

[4] *Zahira Habibulla H Sheikh & Anr v State of Gujarat & Ors* Crl Appeal 446-449 of 2004
[5] Constitution of India, art 21
[6] *NHRC v State of Gujarat* Writ Petition Crl No 109 of 2003
[7] *GX Francis v Banke Bihari Singh* AIR 1958 SC 309

Gandhi v Rani Jethmalani[8] stressed the need for a compatible atmosphere for conducting a fair trial which is inclusive of witness protection.

WITNESS PROTECTION SCHEME 2018

Under recommendations put forth by the law commissions, directions issued by the Apex court and reports submitted by several States / UTs, the "*Witness Protection Scheme, 2018*" was formulated by the Government of India, in collaboration with National Legal Services Authority (NALSA). Subsequently, the Supreme Court vide its judgment dated 05.12.2018 highlighted the urgent need for formulating a witness protection mechanism scheme for our country. The Apex Court has duly adopted the scheme and declared the same to be law by the virtue of wide powers conferred under Article 141 of our Constitution.[9] However, the scheme has not been provided space in the statutory book to date. The Witness Protection Scheme, 2018[10] envisages means thereby ensuring the safety of witnesses. Escorting the witness up to the Courtroom or facilitation of audio video means for recording the statement of the witness to maintain confidentiality, providing temporary residence in a safe house, providing new identity, witnesses relocation, etc., in extreme cases are some of such measures.

The scheme classifies witnesses into three categories, viz. Category A[11] includes groups where threat extends to the life of the witness or his family members, during investigation/ trial or thereafter. Category B[12] includes groups where the threat extends to the safety, reputation or property of a witness or his family members, during investigation/ trial or thereafter and Category C[13] incorporates groups where the threat is moderate and extends to harassment or intimidation of a witness or his family member's, the reputation of property, during investigation/ trial or thereafter, and provides for the establishment of State Witness Protection

[8] *Maneka Sanjay Gandhi v Rani Jethmalani* 1979 AIR 468
[9] Constitution of India, art 141
[10] Witness Protection Scheme 2018
[11] Witness Protection Scheme 2018, category A
[12] Witness Protection Scheme 2018, category B
[13] Witness Protection Scheme 2018, category C

Fund. The fund will be utilized for incurring the expenses incurred during the implementation of any order within the witness protection order.

The Scheme has also put trust in securing the identity of witnesses (clauses 9[14] & 10[15]); Preservation and confidentiality of Records (clause 13[16]) etc. Further, as per Clause 12[17] of the Scheme, it has been made compulsory for every state to publicly advertise the scheme and for the Investigation Officer (I.O.) and Court to inform the witnesses about the scheme and its essentials. Though the Witness Protection Scheme, 2018 is a celebrated step in the direction of security of witness/victim, various shortcomings are inherently embedded in it which can't be ignored. Two of the major shortcomings of the scheme is the paucity of resources in terms of fund (monetary) and the Police force. Moreover, the scheme provides for interim protection of *three months* at a time only. However, both the stated bills have not been formulated as a statute.

WITNESS PROTECTION SCHEME IN USA AT GLANCE

Unlike India, the USA has a comprehensive witness protection scheme. The United States federal witness security program alias Witness Security Program (WITSEC) is a well-developed program in the world. Organized Crime Control Act of 1970[18] authorizes The Witness Security Program and was later on amended by the Comprehensive Crime Control Act of 1984.[19] The program has two-fold objectives, one is to provide an incentive to the persons to be an informant and the other is the moral duty to repay the responsible individuals who takes risk of their life to serve the purpose of the criminal justice system. In the USA the sole authority associated with the program is the United States Marshals Service which facilitates the security, health and safety of the state testators and their acquaintances who are susceptible to danger as a result of their statements against wrongdoers. The U.S. Marshals provide 24-hour protection to all witnesses, while their lives might be in danger during pre-trial conferences, trial testimonials

[14] Witness Protection Scheme 2018, cl 9
[15] Witness Protection Scheme 2018, cl 10
[16] Witness Protection Scheme 2018, cl 13
[17] Witness Protection Scheme 2018, cl 12
[18] Organized Crime Control Act 1970
[19] Comprehensive Crime Control Act 1984.

and other court appearances. It must be noted that almost negligible cases of any such person harmed or killed under the protection of the US Marshal Service are reported.

In addition to the existing scheme, in 1997, California adopted its witness protection program which provides protection and relocation of witnesses in case of the existence of credible witnesses. The scheme provides numerous facilities ranging from armed protection and armed escort before, during and after the legal proceedings; relocation of witnesses; housing expenses; a new identity; transportation; subsistence allowance; and other services as needed. This scheme provides more stringent mechanisms to maintain the confidentiality of the witnesses. While the United States has developed its law towards witness protection which has been working efficiently since 1970, India is still struggling with the same.

CONCLUSION

The hostility of witnesses is a major challenge in the criminal justice administration of our country. Influences and pressures often result in turning hostile to key witnesses and thereby they become reluctant to testify in front of the judges. The often-discussed cases like the Jessica Lal murder case, Best Bakery case etc. are evidence of the same which highlight the urgent need to deal with this facet of the criminal justice system which has failed miserably. At this juncture, the United States model would act as a torch bearer. It needs to be noted that, there is no complete void, some of the provisions are in place. However, a lack of binding written law without strict sanctions results in leaving the entire mechanism so adopted through judicial pronouncements. But owing to the social and economic conditions of our country, having an ideal model such as that of the USA will be like working against the clock.