

PROTECTION OF WITNESSES AGAINST INTIMIDATION IN THE INDIAN CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

Witness testimony plays a pivotal role in both national and international criminal proceedings, as criminal cases are “built on the edifice of evidence”.¹ In particular, in adversarial criminal systems like India, where oral testimony fulfills a primary function and the burden of the proof lies on the prosecution, witness evidence is essential for the case’s success, to bring the offender to justice. Witnesses are, thus, required to provide both “direct evidence or circumstantial evidence”.² As it has been stated in the Malimath Committee Report in 2003, witnesses perform a “sacred duty of assisting the court to discover the truth”,³ leading to the conviction or acquittal of the accused. However, in India, witnesses and their families often face intimidation and pressure by the accused, being threatened, bribed, abducted, or even killed before testifying in court.⁴ For these reasons, witnesses appear reluctant to testify in court or turn hostile, as occurred in several high-level criminal cases. For instance, during the BMW and Jessica Lal murder case and the Best Bakery case, witnesses changed their initial statement due to intimidation, leading to the acquittal of several persons.⁵ A study conducted by the Parliament of India in 2005 pointed out that the conviction rate in criminal cases was only 10 percent, due to witnesses’ perjury.⁶ The issue of witness protection and the need for a legislative framework in this regard assume, therefore, crucial relevance in the Indian panorama.

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¹ Madhya Pradesh High Court, *Shivraj Bhil vs The State of Madhya Pradesh* (7 January 2019) AIR (2000) 5 SCC 68, para 36, <<https://indiankanoon.org/doc/114711852/>> accessed 9 April 2022.

² Ibid, para 36.

³ Government of India, Ministry of Home Affairs, ‘Committee on Reforms of Criminal Justice System’ (March 2003), para 11.1, <https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf>, accessed 9 April 2022.

⁴ Ibid, para 11.3.

⁵ Sorit Gupto, ‘Best Bakery Jessica Lal and the Cake of Justice’ (9 March 2006), <<https://www.countercurrents.org/gupto090306.htm>> accessed 9 April 2022.

⁶ Parliament of India, Rajya Sabha, ‘One hundred and Eleventh Report on Criminal Law (Amendment) Bill, 2003’ (February 2005), para 4.1.0, <<http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Home%20Affairs/111threport.htm>> accessed 9 April 2022.

WITNESS PROTECTION AS A STATE DUTY

Under Article 21 of the Indian Constitution, according to which “no person shall be deprived of his life or personal liberty except according to procedure established by law”,⁷ the State has a specific duty to protect the life and liberty of its citizens, including witnesses. Moreover, according to a broad interpretation, Article 21 of the Constitution implies the right to a free and fair trial. Since a fair trial means a trial without biases or prejudices for or against the accused or the witnesses, “if the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial”.⁸ Likewise, the failure to hear witnesses, for instance, due to their refrain to testify, constitutes a denial of a fair trial.

The Supreme Court of India, in the *Zahira Habibullah Sheikh and others* case, recognized the fundamental role of the State in ensuring witness protection and affirmed the imminent and inevitable need to enact legislative measures in the matter.⁹ A similar conclusion was reached in 2009 by the Supreme Court in the *National Human Rights Commission vs the State of Gujarat*.¹⁰

INADEQUACY OF PREVIOUS INDIAN LEGAL FRAMEWORK

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Even though the Indian Evidence Act of 1872 did not provide any express provision to protect witnesses from intimidation,¹¹ several committees and commissions in India have repeatedly discussed the issue since 1958. For the first time, witness protection was mentioned in the 14th Report of the Law Commission in 1958.¹² However, since witnesses seldom faced threats at that time, the act mainly focused on guaranteeing basic arrangements, such as daily allowance or reimbursements for witnesses.

Fifteen years later, the Code of Criminal Procedure did not provide any specific provisions for the protection of witnesses. However, while stating that criminal trials must be held before the

⁷ Constitution of India (adopted 26 January 1950), article 21, <https://www.constitutionofindia.net/constitution_of_india> accessed 9 April 2022.

⁸ Supreme Court of India, *Zahira Habibullah Sheikh & Anr vs State of Gujarat & Ors* (8 March 2006) 3 SCC 374, <<https://indiankanoon.org/doc/1067991/>> accessed 9 April 2022.

⁹ *Ibid.*

¹⁰ Supreme Court of India, *National Human Rights Commission vs State of Gujarat & Ors* (1 May 2009) MANU/SC/0713, para 40, <<https://indiankanoon.org/doc/168922/>> accessed 9 April 2022.

¹¹ The Indian Evidence Act, 1987, <<https://legislative.gov.in/sites/default/files/A1872-01.pdf>> accessed 9 April 2022.

¹² Law Commission of India, 14th Report, Reform of Judicial Administration (26 September 1958), <<https://lawcommissionofindia.nic.in/1-50/report14voll.pdf>> accessed 9 April 2022.

accused¹³ and in open Courts,¹⁴ section 327 recognized the possibility for the presiding Judge or Magistrate to order that specific cases will be held without the presence of the general public or particular persons.¹⁵ The issue of witness protection was effectively considered in the 4th National Police Commission Report of 1980, which, recognizing an increase in the number of prosecution witnesses turning hostile due to pressure exercised by the accused, pointed out the “need of regulation to check manipulation of witnesses”.¹⁶ Further discussions on the topic continued in the 154th and 178th reports of the Law Commission in India, respectively enacting the Criminal Procedure Code and amending the same act. Notably, in introducing Section 164A into the Criminal Procedure Code, the 178th report recognized the importance of recording witnesses’ statements as soon as possible to ensure the accuracy of testimony and reduce the risk of the accused influencing the witness.¹⁷ Moreover, such a recording might be used as evidence during the trial in certain circumstances left to the discretion of the Court,¹⁸ for instance, in those cases in which the witness retracts his initial statement.

In 2003, the Malimath Committee Report highlighted an urgent need to enact a comprehensive law for the protection of witnesses, following the example of other countries around the world. Such legislation should allow for anonymous or in-camera proceedings or other measures to protect the witness’s identity.¹⁹ During the same year, the Delhi High Court, aware of the lack of appropriate legislature in respect of witnesses’ protection in India when compared to other adversarial criminal systems (the UK, the USA, Canada, Australia), issued specific guidelines on the matter, known as “Witness Protection Guidelines”.²⁰ Specifically, the Delhi Legal Services Authority was in charge of analyzing the requests for protection, establishing whether witnesses required (or not) police protection, to what extent, and for how long.²¹

¹³ The Code of Criminal Procedure, 1973, Section 273, <<https://legislative.gov.in/sites/default/files/A1974-02.pdf>> accessed 9 April 2022.

¹⁴ Ibid, Section 327.

¹⁵ Ibid, Section 327(a).

¹⁶ Fourth Report of the National Police Commission (June 1980), <<https://www.indianculture.gov.in/fourth-report-national-police-commission>> accessed 9 April 2022.

¹⁷ Law Commission of India, 178th Report, The Law Reform (Miscellaneous Provisions Amendment) Bill, 2002 (13 January 2003), section 13, <<https://lawcommissionofindia.nic.in/reports/178rpt2.pdf>> accessed 9 April 2022.

¹⁸ Ibid, section 13.

¹⁹ Government of India, Ministry of Home Affairs, ‘Committee on Reforms of Criminal Justice System’ (n 3), para 11.3.

²⁰ Delhi High Court, *Neelam Katara Petitioner v Union of India & Ors* (14 October 2003) 2 Del 377, para 6, <<https://www.casemine.com/judgement/in/56e0ee2f607dba38965ec479>> accessed 9 April 2022.

²¹ Ibid, para 16.

Ultimately, in 2006, the Law Commission of India published its 198th Report, dedicated to “Witness identity protection and witness protection programs”.²² Under such an act, it has been stated that the accused’s right to be held in an open public trial and examine witnesses in their presence is not absolute but may, otherwise, be restricted to guarantee identity protection so that witnesses can testify without any fear.²³ Moreover, Part II of the report affirmed the necessity to establish a protection program to guarantee witness protection even outside the Court.²⁴ In the same year, the legislator amended the Indian Criminal Code by introducing Section 195A, which recognized the criminal intimidation of witnesses as a criminal offense punishable with seven years of imprisonment.²⁵

PROTECTION OF WITNESSES UNDER SPECIAL STATUTES

In the meantime, the protection of witnesses has been considered in several special statutes since 1985. First of all, statutes that prevent terrorist activities contain specific provisions related to the protection of witnesses’ identities. Notably, Section 16 of the Terrorist and Disruptive Activities (Prevention) Act of 1987, then replaced by Section 30 of the 2002 Prevention of Terrorism Act (POTA), provided for in-camera proceedings, as well as for particular measures to maintain witness anonymity.²⁶

Furthermore, the Children Act of 1960 and the Juvenile Justice (Care and Protection of Children) Act of 2015 contain a specific provision concerning the prohibition of publicizing names and details of children involved in proceedings under the legislation.²⁷ Similarly, Section 12 of the Whistle-Blowers Protection Act enacted in 2011 establishes that the

²² Law Commission of India, 198th Report, Witness Identity Protection and Witness Protection Programmes (31 August 2006), <<https://lawcommissionofindia.nic.in/reports/rep198.pdf>> accessed 9 April 2022.

²³ Ibid, part I, para 1.

²⁴ Ibid, part II.

²⁵ Indian Penal Code, Section 195A, inserted by section 2 of the Criminal Law Amendment Act, 2005 (adopted 11 January 2006), <https://prsindia.org/files/bills_acts/acts_parliament/2005/the-criminal-law-amendment-act-2005.pdf> accessed 9 April 2022.

²⁶ Terrorist and Disruptive Activities (Prevention) Act, 1987 (adopted 3 September 1987), section 16, <<http://hrlibrary.umn.edu/research/terroristpreventionact-1987.html>> accessed 9 April 2022; Prevention of Terrorism Act, 2002, section 30, <<http://odishapolicecidcb.gov.in/sites/default/files/THE%20PREVENTION%20OF%20TERRORISM%20ACT%202002.pdf>> accessed 9 April 2022.

²⁷ The Children Act, 1960 (adopted 26 December 1960), section 36, <<https://indiankanoon.org/doc/1973522/>> accessed 9 April 2022; The Juvenile Justice (Care and Protection of Children) Act, 2015 (adopted 31 December 2015), section 74(1), <<http://cara.nic.in/PDF/JJ%20act%202015.pdf>> accessed 9 April 2022.

government authorities, including police, might take the necessary measures to protect witnesses.²⁸

WITNESS PROTECTION SCHEME

The road towards Indian comprehensive legislation on witness protection has been tortuous for a long time. Indeed, despite the initial governmental plan to enact the act in 2007, the adoption of such legislation was postponed until 2017 due to a lack of agreement. It was only in 2018 that the Supreme Court of India affirmed the entry into force of the Witness Protection Scheme under Article 114 of the Indian Constitution.²⁹

The Scheme aims to ensure that criminal proceedings are “not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination”.³⁰ One of the essential features of the Scheme is the classification of witnesses into three categories, according to the level of threat perception. Specifically, whereas category no. A concerns witnesses who perceive a threat to their lives and category no. B concerns witnesses who experienced a threat to their safety, reputation, or property, the category no. 3 is related to moderate threats.³¹ Considering the proceeding to obtain protection, witnesses should file an application form before the Competent Authority of the relevant district.³² Once the application is received by the Member Secretary of the Competent Authority, such authority will order to produce the Threat Analysis Report within five working days.³³ However, the Competent Authority might also enact an order for interim protection of the witness during the pendency of the application.³⁴ The Threat Analysis Report will assess whether the witness meets - or not - the requirements for an identity protection order. In this case, the threat will be categorized according to its perceived severity, and recommendations for protection measures

²⁸ The Whistle Blowers Protection Act, 2011 (adopted 14 May 2014), section 12, <<https://egazette.nic.in/WriteReadData/2014/159420.pdf>> accessed 9 April 2022.

²⁹ Supreme Court of India, *Mahender Chawla vs Union of India Ministry of Home* (5 December 2018), 14 SCC 615, section 34, <<https://indiankanoon.org/doc/80302994/>> accessed 9 April 2022.

³⁰ Witness Protection Scheme, 2018, <https://www.mha.gov.in/sites/default/files/Documents_PolNGuide_finalWPS_08072019.pdf> accessed 10 April 2022.

³¹ *Ibid*, section 3.

³² *Ibid*, section 5.

³³ *Ibid*, section 6(a) and 6(c).

³⁴ *Ibid*, section 6(b).

will be issued.³⁵ The overall implementation of the witness protection order will be ensured by the State/Union Territory's Head of Police.³⁶

The Scheme establishes several protective measures aiming to safeguard witnesses and their families "from intimidation and threats against their lives, reputation, and property".³⁷ The Scheme may provide measures to ensure that the witness and the accused do not come face to face during the trial, even though the employment of in-camera trials.³⁸ Other measures include monitoring witnesses' communications, installing CCTV and alarms in the witness's house, protecting witnesses' names through the use of a pseudonym, as well as relocation and change of identity in the most severe cases.³⁹

ASSESSING THE CURRENT FRAMEWORK

Although the need for a comprehensive scheme of witness protection had long been expected in the Indian criminal legal framework and the act surely represents a step forward for the protection of witnesses, such legislation is not exempt from lacunae. First of all, the degree of protection guaranteed to witnesses is determined by police officials, which might however be subject to corruption or political pressure and, therefore, refrain from maintaining anonymity on witnesses.⁴⁰ Furthermore, the eventual disclosure of a witness's identity by an official does not imply criminal punishment, given the lack of a specific provision in this sense.⁴¹ Another challenge concerns the fact that protection does not extend for a long period, but it is strictly limited to three months.⁴² More generally, the Scheme faces further challenges when implemented due to a lack of funding and adequate personnel to ensure witness protection.⁴³ This is even worsened by the fact that a large majority of witnesses are still not aware of the Scheme.⁴⁴ In this regard, it is worth noticing that several High Courts, for instance, the

³⁵ Ibid, section 6(d).

³⁶ Ibid, section 6(h).

³⁷ Ibid.

³⁸ Ibid, section 7(a).

³⁹ Witness Protection Scheme, 2018, section 7.

⁴⁰ Abbassi, 'Current Position of Witness Protection in India', <<https://abbasilegal.com/current-position-of-witness-protection-in-india/>> accessed 10 April 2022.

⁴¹ Ibid.

⁴² Law Inside, 'What is Witness Protection Scheme?' <<https://www.lawinsider.in/columns/what-is-witness-protection-scheme>> accessed 10 April 2022.

⁴³ Abbassi, 'Current Position of Witness Protection in India' (n 40).

⁴⁴ Law Inside, 'What is Witness Protection Scheme?' (n 42).

Allahabad High Court,⁴⁵ the Madras High Court,⁴⁶ and the Karnataka High Court,⁴⁷ have raised their concern and asked the concerned authorities to immediately implement the Scheme.

CONCLUSION

Whereas the Witness Protection Scheme enacted in 2018 is a remarkable effort to grant protection and prevent witnesses from being threatened and intimidated, there is still a need to effectively implement such legislation in the Indian criminal system. Not only the government should guarantee outreach so that witnesses can be more aware of their rights under the Scheme, but the government should also increase its efforts by establishing a special unit responsible for witness protection and enacting specific legislation to ensure disciplinary sanctions and criminal punishment for those public officials who do not guarantee witnesses' protective measures.



⁴⁵ Live Law, 'Allahabad High Court Directs UP Govt, its Authorities & Committees To Implement Witness Protection Scheme' (17 November 2021) <<https://www.livelaw.in/news-updates/allahabad-high-court-directs-state-govt-authorities-committees-implement-witness-protection-scheme-185736>> accessed 10 April 2022.

⁴⁶ The Times of India, 'Take all measures to implement witness protection scheme: Madras HC to registry' (5 August 2021) <<https://timesofindia.indiatimes.com/city/madurai/take-all-measures-to-implement-witness-protection-scheme-madras-hc-to-registry/articleshow/85051724.cms>> accessed 10 April 2022.

⁴⁷ Live Law, 'Cases Against MPs/MLAs: Karnataka High Court Directs Implementation of witness protection scheme' (2 December 2020) <<https://www.livelaw.in/news-updates/cases-against-mpsmlas-karnataka-high-court-directs-implementation-of-witness-protection-scheme-166666>> accessed 10 April 2022.