

SECURITY TO THE SOUL OF JUSTICE PROTECTING WITNESS AND ENSURING JUSTICE

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Introduction and Historical Background

The term Witness refers to a person who possess some information with regard to commission of a crime. A witness honor his public duty by deposing and testifying before the Court of Law and plays a critical role in free and fair trial. However the cases of threat, intimidation, annoyance and assault to witnesses frequently find place in the daily journals. Hence it becomes imperative to formulate effective policies for the protection of witness.

The idea of witness protection is not novel in India. It has been advocated since independence. The 14th Law Commission's Report highlighted the hardships and inconvenience faced by the witnesses while visiting the Court. However the protection from physical and mental threats was not discussed until the 42nd Report of Law Commission where the Commission suggested insertion of new provisions in India Penda Code to protect the witness against threats and bribery. Similarly the 154th, 172nd and 178th also suggested various measures to ensure the witness protection in our criminal justice system. The 198th Report of the Law Commission, however, was very crucial and suggested many measures and provisions to deal with the witness protection. It also prepared a Draft Witness (Identity) Protection Bill 2006. It recommended the Government to adopt Section 13B and 13C of the *Evidence (Witness Anonymity) Amendment Act, 1997* of New Zealand. Similarly *the Report of Committee on Reforms of Criminal Justice System* also suggested that India should enact the legislation for Witness Protection in line with other nations. Apart from these developments at executive level, the Indian Courts were also advocating for the witness protection since long. The Hon'ble Supreme Court, had time and again stated that if witness are not protected and they are threatened or bribed or if they are made to turn hostile then it would betray the notion of free and fair trial.² The Supreme Court had

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² *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.*, (2006) 3 SCC 374

stressed the need of witness protection in numerous cases, one such matter was the *National Human Rights Commission v. State of Gujarat and Ors*³ wherein the Apex Court examined various laws and held that the witness protection is an imperative for a free and fair trial and recognized the duty of the State Governments⁴ in according protection to the witnesses. It also asked the SIT to investigate and identify the categories of witness of who need protection and the kind of the protection they need. Similarly the various High Courts have also, from time to time, stressed upon the need of a mechanism to ensure protection to witnesses.⁵ The Delhi High Court had even laid the guidelines for witness protection as early as in year 2003⁶. However the crucial development took place in the matter of *Mahendar Chawla vs Union of India and Others*⁷ where the Hon'ble Supreme Court directed the State Governments to indicate the steps taken by them towards witness protection, and also directed the Union Government to prepare a Draft Scheme for protection of witness. The Union Government then, in consultation with all the State/UT Governments and the National Legal Service Authority submitted the *Draft Witness Protection Scheme 2018* which was approved by the Hon'ble Supreme Court vide its judgment dated December 05, 2018. The Court also went upon to declare the said Scheme to be a Law under Article 141 of the Constitution and directed all the State Governments and Union Government to strictly enforce and implement the said Scheme. As the said Scheme is a law under Article 141, it doesn't require any legislative backing and it is binding on all the High Courts and the courts subordinate to them.

Understanding the Scheme

The Witness Protection Scheme, 2018 (hereinafter referred to as "the Scheme") comprises of six parts which are subdivided into various clauses. As per Clause 12 of the Scheme it is the duty of every State to give wide publicity to the Scheme and also of the IO of every court to appraise the witnesses of the Scheme and its salient

³ MANU/SC/0713/2009,

⁴ See also, *Sister Meena Lalita Borwa v. State of Orissa and others* (2010 Cri.L.J. 2779);

⁵ Please see *Rajubhai Dhamirbhai Baria and Ors. v. The State of Gujarat and Ors* (2012 (114) BomLR 3549; MANUMH/1415/2012); *Mrs. Neelam Katara v. Union of India* (Crl. W. No. 247/2002 (High. Court of Delhi))

⁶ *Neelam Katara v. Union of India*, ILR (2003) 2 Del 377

⁷ 2019 (14) SCC 615

features. Part-I of the Scheme deals with the Definition Clause which defines various key terms. It also makes the reference to the Code of Criminal Procedure, 1973 as 'the Code'. It provides for an inclusive definition of *Concealment of Identity of Witness* as a condition prohibiting publication or revealing of particulars of any witness which may lead to its identification.

The Scheme involves and provides for various bodies such as Competent Authority, Witness Protection Cell, Home Department of State/UTs and Police Authorities. The Competent Authority is defined under Clause 2 (c) to mean *a Standing Committee in each District chaired by District and Sessions Judge with Head of the Police in the District as Member and Head of the Prosecution in the District as its Member Secretary*. The competent authority discharge the decision making functions whereas the Witness Protection Cell and Home Departments implement such decision and the Police Authorities assist the Competent Authority. The Witness Protection Cell is defined under Clause 2(o) to mean *a dedicated Cell of State/UT Police or Central Police Agencies assigned the duty to implement the witness protection order*. In addition to the above bodies the Scheme also provide for a fund named Witness Protection Fund under Clause 4 which is maintained by the Home Department of the concerned State/UT for implementation of the witness protection orders and incurring incidental expenses. The Fund is comprised of the annual budgetary allocation by the concerned State/UT Government, the costs imposed by the courts, donations from the charitable organizations and individuals and amounts received under corporate social responsibility.

Part – II of the Scheme contains various clauses pertaining the protection of witness and procedure thereof. Clause 3 categorize the Witness into three categories viz. Category A, Category B and Category C in the declining degree of threat. A witness would fall under Category A where there is a threat to the life of his own or any of his family member. The term Family Member is defined in Clause 2(d) to include the parents/guardian, spouse, live-in partner, siblings, children, grandchildren of the witness. In case there is no life threat, but there is a potential threat to the safety, reputation and property of the witness or its family member then such witness would fall under Category B.

Similarly where the threat is moderate and there is a likelihood of harassment or intimidation to the witness or its family member or their reputation or property then the witness would fall under Category C.

The witness is given various types of protection under the scheme depending on the gravity of threat and Category for a specific duration not exceeding three months. The protections are called Witness Protection Measures under Clause 2(h). Clause 7 of the Scheme lists out various protection measures such as ensuring that the witness doesn't face the accused⁸, monitoring of mails and calls of witness and even temporary arrangement of different mobile number, installing security devices at witness's residence, regular patrolling, escorting him in government vehicles, temporary change in name, temporary relocation, ensuring short adjournments etc. In furtherance to these protection Part – III (Clause 9) and Part – IV (Clause 10) provides for measures to conceal the identity of the witness. Clause 9 empowers the Competent Authority to pass Identity Protection Order. Once such order is passed then it shall be the duty of the Witness Protection Cell to conceal and protect the identity of the witness and his family members. The Witness Protection Cell shall also provide the contact details of persons who can be contacted by the witness or his family members during the emergency. Further Clause 10 empowers the Competent Authority to Change the identity of the witness upon his request. Such change can be done by way of conferring new identities including new name/profession/parentage and providing supporting documents acceptable by the Government Agencies. The new identities should not deprive the witness from existing educational/ professional/property rights. In addition to the above the Competent Authority can also order for relocation of the witness within the State of Union Territory keeping the safety, well-being and welfare of the witness in mind. The expenses of such relocation are to be borne by the Witness Protection Fund. It is pertinent to note that Unlike Clause 7 where the duration of protection is limited to three months, Clause 9, 10 and 11 doesn't prescribe any duration. Hence this position needs to be clarified.

⁸ See also *Sakshi vs Union of India* (2004) 5 SCC 518.

Clause 5 and Clause 6 of the Scheme deals with the procedure of seeking protection under the Scheme. Clause 5 empowers a witness to make an application in the prescribed form to the Competent Authority through its Member Secretary. Clause 6 provides for the proceeding after application. Once the Application is received by the Competent Authority then it shall call for a Threat Analysis Report from the ACP/DSP of the concerned Police Sub-Division, who shall submit such report to reach within five days from the date of order. A Threat Analysis Report is a detailed report *'with regard to the seriousness and credibility of the threat perception to the witness or his family members. It shall contain specific details about the nature of threats by the witness or his family to their life, reputation or property apart from analyzing the extent, or the persons making the threat, have the intent, motive and resources to implement the threats. It shall also categorize the threat perception apart from suggesting the specific witness protection measures which deserves to be taken in the matter'* in terms of Clause 2(f). Further during the pendency of the proceedings the Competent Authority can provide interim protection to the witness and his family members. The Competent Authority shall also interact with the witness or his family members or appropriate persons to understand the protection needs of the witness. The entire proceedings has to be confidential and shall be disposed within five days from the date of the Threat Analysis Report. Upon favorable conclusion in this regard the Competent Authority shall pass an order called Witness Protection Order (defined under Clause 2(n)) which shall be implemented by the Witness Protection Cell which shall file monthly follow-up report on the same. However if such order pertains change in identity or relocation of the witness then such order shall be implemented by the Home Department of concerned State/UTs. The Competent Authority is also empowered to revise the witness protection order, if required, by calling a fresh Treat Analysis report. It shall also review the order quarterly basing upon the follow-up reports (Clause 8). Where the witness or police authorities are aggrieved by the order of the Competent Authority, then they can file a review application under Clause 15 within a period of fifteen days from the date of order.

All stakeholders shall maintain full confidentiality and ensure that information regarding the proceedings are shared with anyone except the Court. All the records pertaining to proceedings shall be preserved till the time matter is pending before the Court, and after one year of the disposal of court proceedings the hard copy can be destroyed by keeping soft copies of such records.

Witness Protection under other legislations

Apart from the Scheme discussed above, there are various legislations which directly and indirectly provides for the witness protection. However majority of such legislations applies in case of investigation/trial of serious offences. There are few Central legislations which provides for protection of witness. The India Penal Code, 1860 being a general penal law of the land covers various aspects touching the witness protection. However such protection hardly resolve the issue of immediate protection to the witness. The Code of Criminal Procedure, 1973 being a procedural law also contains provisions to facilitate the witness in discharging his duties such as Section 160 which require payment of reasonable expenses incurred by a witness in travelling at the instance of police officer, Section 284 provides for payment of expenses incurred for the issuance of commission by the accused. Further Section 312 gives power to criminal court to order payment of reasonable expense incurred by witness for attending court proceedings by the Government. However these are merely facilitations and not the protections against threats. The specific provision for protection of witness is contained Section 17 of the National Investigation Agency Act, 2008, which empowers the court to direct protection of identity and maintain secrecy of address of the witness, where it appears that life of witness or the person on whom witness has an interest is in danger. It also provides for imprisonment to anyone who contravenes such provision. Similarly other special legislations such as the Unlawful Activities (Prevention) Act, 1987 and Prevention of Terrorism Act, 2002, also contained similar provisions for protection of witness. Apart from the above legislations, various states have also made provisions for the protection of witness in form of Schemes and Acts. Such frameworks were formulated before the enforcement of the Witness Protection Scheme, 2018.

One such framework is the Delhi Witness Protection Scheme, 2015 (hereinafter referred to as **"the DWPS"**) is one of the earliest Schemes for witness protections. The overall scheme is same as the Witness Protection Scheme, 2018, however with certain differences. Unlike Clause 15 the Scheme the DWPS doesn't contain any provision for review of the order by the competent authority. The DWPS also provides for keeping of Hard copies of the record for three years whereas the Scheme only provide for one year. The DWPS also fails to provide the provision for Change in the identity of the witness unlike the Scheme. Though DWPS also provides for monitoring and review of its order but no periodic interval is provided whereas the Scheme requires such review to be done on quarterly basis. The DWPS also provides for the definition of Serious Offence which is not to be found in the Scheme. Similarly the Rajasthan Witness Protection Scheme, 2018 is a replica of the DWPS which has similar differences with the Scheme.

Another State which has provided for a framework for witness protection is Maharashtra. The Maharashtra Witness Protection and Security Act, 2017 provides for protection of witness and their relatives during the trail of serious offences. Section 6 of the Act empowers the witness and it's relative to apply for protection. The committee upon a detailed enquiry regarding the threat perception may order for protection of the witness under section 7. The protection is granted during the investigation and trial under Section 8 and 9. Section 11 casts a liability on the investigating officers not to disclose the names and addresses of the witnesses, failing which they can be punished with imprisonment under Section 13.

Conclusion

Though the Scheme is a positive step in ensuring a nationwide framework for witness protection, it is not immune from drawbacks. The Scheme fails to provide for any penalty or punishment for contravention of the Scheme which makes it difficult to implement effectively. Provisions such as Change in Identity etc. requires collaboration from various departments especially those which the IDs and Certificates pertaining the Identity but the Scheme fails to give a complete framework for the same and even lack enough legislative backing to enforce it. The Protection measures are also given for a period of mere three months which is too short considering the case disposal rate in India. India has a very low conviction rate even for heinous offences such as Rape, Murder etc. For example the Statistics revealed by NCRB in 2018 showed that the conviction rate is just 27% in case of the rape. Similarly the conviction rate for economic offenders is also less than 25%. These trends not only question the effectiveness of our criminal justice system but reflect how safe does a witness feel. Thus it is desirable that a specific legislation may be introduced or a Chapter be included in the IPC to deal with the protection of witness. The Witness Protection Bill, 2015 was indeed a significant step in achieving it, however it could never see the light of the day. The said Bill provided various safeguards such as alternate occupation to the witness, continuation of the education of juvenile, strict punishment etc. Thus, India has a long way to go in formulating an effective framework for Witness Protection. Indeed, the present Scheme provides for a good start in this regard but a much more strong and effective law is required to ensure witness protection. In this regard all the State Governments should come forward with their inputs and advocate for a common Witness Protection Act throughout India.