Witness Protection - A Legal Crisis in India

By Sumit Mishra

The role of the witness in any criminal proceeding is of paramount importance as it helps to determine the final outcome of the case. This has been witnessed in various cases where the parties have threatened the witness and forced him to become hostile and, as a result, interfere with the fair administration of justice. Seeing the plight of witnesses, it has become necessary to protect witnesses because they fear being intimidated and living in fear of revealing the truth in court. Looking in our own country, we find that India still does not have a well-functioning witness protection program despite various attempts by the justice system to improve this area.

The witness protection program and the witness protection laws are simply necessary. In fact, the absence of these laws has helped to further strengthen criminals and offenders. But ironically, in India, such programs and laws are far from reality, where to leave protection alone, the witness is not even treated with respect or asked for water.

The importance of a witness can be assessed from the observation of the Supreme Court in the Himanshu Singh Sabharwal v. State of Madhya Pradesh. In 2008, Supreme Court observed that witnesses are eyes and ears of justice system and that a witness is threatened, killed or harassed, but that a citizen's fundamental right to a fair and just trial is justified. Protection of the witness is the duty of the state and when the state fails to protect a witness, it does not respect the national motto - Satyamev Jayate.

Current justice system has completely taken the witnesses for granted. Witnesses are summoned to court regardless of whether they have no money or cannot leave their family, children, business, etc. and appear before the Court. But that's not all. On arriving at the Court, some are informed that the case has been adjourned (for reasons that may occur endlessly) and the respective lawyer politely gives them an extra date for their next appearance.

In Swaran Singh v. the State of Punjab, the Supreme Court observed," A witness must go to the Court at his own expense, whenever the case is deferred for a different date. Today, it has become more or less fashionable to postpone a case several times. The witness is tired and gives up."
The Court further held that, while adjourning a case without just cause, a court involuntarily becomes a party to a miscarriage of justice. Most witnesses must wait for their participation. And when it comes time to file or provide evidence, lawyers examine and question them as if they themselves were the perpetrators.

Since the accused's guilt is largely proven on the basis of the evidence or information provided by such a witness, perjury or the provision of false evidence must be severely censored. Today's perjury has also become a way of life in the courts. In some cases, the judge knows that what the witness says is not true and goes back to his previous statement. The judge here ignores this fact and does not even file a complaint against him. Article 340 of the 1972 Code of Criminal Procedure lays down the procedure for the prosecution of contempt of public officials, offences against public justice and offences relating to exhibits.

**Landmark Cases:**

- **Ketan Thirodkar case:**

  In another case, the Bombay High Court had granted police protection to a former journalist, Ketan Thirodkar, because he had been threatened shortly after filing a complaint against the police, which revealed a series of illegal acts by the police. Thirodkar had filed a petition for police protection and a police investigation into the police-mob link. However, the prosecutor objected to the granting of police protection on the grounds that Thirodkar himself was involved in the underworld.

  In 2013, India enacted new and stricter laws to combat rape and sexual violence against women, leading to a growing number of girls and women willing to report such crimes. These were important initiatives taken by the government to respond to public consternation over rape and other violent attacks. However, the lack of protection for victims and witnesses is a major obstacle to achieving justice. This deters victims from cooperating with investigations and testifying in court and is more likely to become "hostile" and withdraw previous statements, thereby contributing to wrongful acquittals.

  Victims and witnesses of serious crimes are particularly at risk when the perpetrator is powerful, influential, or rich, and the victims or witnesses belong to a socially or economically marginalized community. Girls and women who report sexual violence are
often even more vulnerable and face extreme pressure or threats from the accused, as Human Rights Watch, found in its "Everyone Blames Me".

The Supreme Court has repeatedly observed that India needs a system of witness protection. In 2006, the Law Commission of India issued detailed recommendations on "administrative or legislative measures" for the protection of witnesses. Yet, to date, India has not passed legislation or developed a national witness protection program outside courtrooms.

Article 30 of the Prevention of Terrorism Act provides: "As the life of the witness is in danger, adequate measures should be taken to keep the identity and address of such a witness secret. The mention of the name and address of the witness should be avoided in all cases. And even in the ordinances or the judgment of the court."

While Pandey was detained in an unknown location with police guards, his family was not protected, although it was possible that under the guise of a political activist, a terrorist could approach Pandey or members of his family. They could have bribed Pandey or his family members or, for that reason, do anything to make sure Pandey becomes hostile.

The charge in many cases, including the murder cases BMW and Jessica Lal, in addition to those registered under the Terrorist and Terrorist Activities Act (TADA), has repeatedly failed due to the withdrawal of witnesses.

Time and time again, prosecutions in some of the most sensitive cases have failed because of the witnesses, who were originally responsible for setting up the state apparatus, had changed their minds during their examination before the court. Court. This has occurred in the majority of cases registered in many TADA states.

In sensational affairs like the murder cases BMW and Jessica Lal; and more recently in the case of Best Bakery, in which the Human Rights Commission intervened when witnesses changed their statements in court because of the lack of protection for them and their families. While in previous cases (the assassination of BMW and Jessica Lal), most eyewitnesses had not realized why they had changed positions.

The fact is that the accused are in a position to intimidate witnesses because there is no such thing as and there is no program under which, after the assessment of the need to protect a particular witness, the administration could give the required security blanket.
In April 2003, a high-level panel headed by Judge V.S. Malimath (former Chief Justice of the High Court of Gujarat) was appointed by the Ministry of the Interior to reform the existing criminal justice system. The Commission said the time has come to adopt a law that also establishes a witness protection program in India. In recommending the witness protection program, however, the Malimath committee did not focus on any particular case. He generally spoke of the need to control the growing trend of hostile witnesses.

The committee said nothing more than a simple recommendation to adopt such a law. He made no effort to understand how the concept of a witness protection program can be adapted to the legal topography of India. It is not a question of whether the witness protection program is a luxury that a poor country like India cannot afford.

So, as long as our police officers are not released from political dictates, as recommended by the National Police Commission more than two decades ago, it is not worthwhile to try a witness protection program, even in the United States' most serious cases.

**Witness Protection Bill, 2015**

This bill was prepared and presented to parliament in 2015. Its purpose was to put in place a strong law for the protection of witnesses in order to guarantee a fair trial for both parties. The purpose of the bill was to ensure the protection of witnesses by:

- Formulation of a witness protection program to be provided to a witness at all stages during an investigation; during the trial; and after the judgment is pronounced
- Establishment of a "Witness Protection Cell" to prepare a report for the trial court judge to review and grant protection to a witness referred to a "person in need of protection" after admission in the program
- Constitution of the National Witness Protection Council and National Witness Protection Councils to ensure the implementation of the witness protection program in its letter and spirit
- Provide safeguards to protect the identity of the witness
- Ensure the transfer of cases out of the original jurisdiction to ensure that the witness can testify freely
- Provide a strict sanction to those who contravene the provisions;
* Prescribe strict actions against false testimony and misrepresentation.
* The above bill has not yet been passed.

**Update status on witness protection program:**

Due to lack of consensus among states, the witness protection program has been abandoned. In 2016, the Union Government entrusted the Office of Police Research and Development (OPI & D) with the task of examining the concerns raised by the latter regarding the feasibility of the program and examining the financial implications from the program. To date, this question is the responsibility of BPR & D.

**Delhi Witness Protection Scheme, 2015:**

Delhi has become the first state in the country to announce a scheme for witness protection. State Government notified the Delhi Witness Protection Scheme, 2015.

This was in pursuance of a 2013 Delhi High Court order passed by a DB headed by HMJ S. Ravinder Bhatt that the original Draft was prepared and presented by Surinder S Rathi, Addl District & Sessions Judge/OSD, DSLSA before it was approved by a High Powered Committee consisting of Principal Secretary Law, Principal Secretary Home, Secretary Finance, Director of Prosecutions, GNCTD, Commissioner Delhi Police and OSD, DSLSA.

The Government of Delhi will make budgetary provisions in its annual budget for implementation of the scheme.

The policy follows directions of the High Court which, in the Jessica Lal and Nitish Katara murder cases, had asked the government to frame such a policy. "We are the first state to have such a policy. The Government is committed to acting upon more such court directions," said Home Minister Satyendar Jain.

Witnesses under three categories will be provided protection, depending on the threat perception.

"The categories have been drawn up based on type of threat and duration for which the protection has to be given. For instance, if there is a threat to life and it affects the day-to-day activities of a witness for a substantial period during the investigation or even after that, then the person will be in the 'A' category," said an official.
Officials say the Government has appointed Member Secretary and Officer on Special Duty of Delhi State Legal Services Authority (DSLSA) as the competent authority for implementation of the scheme. All decisions and reviews will be under the purview of DSLSA. The witness has to apply for protection following which DSLSA will seek a threat analysis report from Delhi Police.

"The decision to give protection or not, the category and type of protection will be decided accordingly. The report will be prepared by an ACP/DCP level officer of the district investigating the case. It will have to be submitted to the authority within five working days of receipt of the order," said a senior official. All hearings of applications will be held in-camera and full confidentiality will be maintained. The witness will have the option of applying for concealment of identity.

Government will provide different types of protection, depending on the sensitivity of the case and threat perception.

It has identified 15 ways of providing protection, varying from monitoring calls and mails to temporary change of residence.

Sources say orders passed by the competent authority will be implemented by the Witness Protection Cell (WPC), which will be under Delhi Police.

The WPC will have to file a monthly follow-up report on each case. There is a provision using which the identity and location of the witness can be changed. These orders will be implemented by the divisional commissioner. It will be mandatory for the investigating officer and court to inform all witnesses that such provisions exist.

Under the scheme, witnesses will be given financial aid or grant from a witness protection fund following the orders of the DSLSA.

NALSA and BPR&D drafted India’s first Witness Protection Scheme, 2018.

A Bench of Hon’ble Supreme Court of India headed by HMJ SA Bobde and HMJ L. Nageshwar Rao dealt with a case titled Prem Chand vs State of NCT of Delhi, SLP (Cr) No. 647/2017.

In this case a witness was shot dead inside the Court Complex in the National Capital itself despite the fact that he was in Custody and was being escorted by Police to the Lock up.
Apex Court Bench was constrained to observe, “This Case represent a serious degeneration in the atmosphere in which justice is administered in Courts, particularly subordinate Courts. In the instant case, the deceased, who is a witness, was shot while being escorted by police to the lockup. Apparently he had refused to turn hostile. We have no doubt that such incidents pose a grave threat to the security of Courts and interfere with the administration of Justice. It seriously affects the willingness of witness to state the truth. We, therefore, consider it appropriate to issue notice to the Union of India for inviting suggestions on making the Courts secure through CISF or any other agency and for expeditiously framing Guidelines to make the Witness protection”.

Consequently on the asking of MHA, the NALSA and BPR&D drafted India’s first Witness Protection Scheme, 2018.

A copy of it was placed on the record of above Apex Court Bench.

Bench permitted NALSA to publish the Draft Scheme on NALSA’s website www.nalsa.gov.in for inviting suggestions from the stakeholders.

A copy of the Scheme was also shared with various stakeholders namely, Registrar General of all High Courts, Director General of Police of all States and UTs and all State Legal Services Authorities.

The salient features of the Scheme is that it not only categorises threats into Three Types but also provide various protection measures for witnesses.

Scheme provide for identity protection as well as method of giving new identity to a witness.

It even has a provision for Relocation of a witness with a new identity. Duty to decide witness protection applications is caste on Legal Service functionaries working under NALSA.

Types of protection provided in the Scheme include-

**TYPES OF PROTECTION MEASURES:**
The witness protection measures ordered shall be proportional to the threat and for a specific duration. They may include:
(a) Ensuring that witness and accused do not come face to face during investigation or trial;
(b) Monitoring of mail and telephone calls;
(c) Arrangement with the telephone company to change the witness’s telephone number or assign him or her an unlisted telephone number;
(d) Installation of security devices in the witness’s home such as security doors, CCTV, alarms, fencing etc;
(e) Concealment of identity of the witness by referring to him/her with the changed name or alphabet;
(f) Emergency contact persons for the witness;
(g) Close protection, regular patrolling around the witness’s house;
(h) Temporary change of residence to a relative’s house or a nearby town;
(i) Escort to and from the court and provision of Government vehicle or a State funded conveyance for the date of hearing;
(j) Holding of in-camera trials;
(k) Allowing a support person to remain present during recording of statement and deposition;
(l) Usage of specially designed vulnerable witness court rooms which have special arrangements like live links, one way mirrors and screens apart from separate passages for witnesses and accused, with option to modify the image of face of the witness and to modify the audio feed of the witness’ voice, so that he/she is not identifiable;
(m) Ensuring expeditious recording of deposition during trial on day to day basis without adjournments;
(n) Awarding time to time periodical financial aids/grants to the witness from Witness Protection Fund for the purpose of re-location, sustenance or starting new vocation/profession, if desired;
(o) Any other form of protection measures considered necessary, and specifically, those requested by the witness.

Obstacles to an effective witness protection system:

A major obstacle to an effective witness protection system in India is also the lack of independence and accountability of the police. In the Barkha case, it took the police eight months to file a first information report after a court decision. Forced to live hundreds of kilometers from her village, unable to follow through on her case, Barkha says she has lost all hope of justice.

If Barkha and others like her receive protection and support after filing complaints of rape, sexual assault and other violent crimes, they would be more likely to get justice. To do this, the government will have to pass effective legislation on the protection of witnesses and victims and ensure that it is adequately funded.

Conclusion:

Today, in the current circumstances, the Indian government is evaluating US witness protection laws, where a new name and new identity are assigned to men gangs after their change of approval. In the United States, the federal witness protection program was created to respond to the dangers faced by witnesses who testified against gangsters. In a high-risk
environment, including pre-trial conferences, trial testimony and other court appearances, 24-hour protection is provided to all witnesses through the U.S. Marshall service.

The witness protection program has existed in the United States since 1967. It has been used so far to rehabilitate no more than eight thousand witnesses and their fifteen thousand family members. The US system generally employs a witness protection program to assist a mafioso that has endorsed the court, while it also uses a witness protection program to crack down on terrorist and international drug-related activities.

Recently, Canada provided witness protection coverage under the 1996 Witness Protection Act to a Sikh woman, Satnam Kaur Reyat, who shed new light on the Kanishka attacks.