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Witness Protection is a Need of the Hour

Saumya Uma

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and the police, asking them to withdraw their cases, as well as a ‘cash incentive’ of Rs. 30 lakh to them to drop the charges, have been documented. 3 Thereafter, the Supreme Court directed police protection to the seven victim-survivors and their families. Naseem Ahmed - the husband of one of the women - has reportedly lodged seven complaints after receiving 16 death threats.4

Victim-witnesses to atrocities against Dalits too have been routinely subjected to threats and intimidation. For example, Dalits of Ramgarh village in Uttar Pradesh were threatened as they testified in court against perpetrators from the Gujjar community who had attacked them in March 2014.5 In the Mirchpur carnage of Dalits in Haryana (2010), the perpetrators were released on bail, returned to the village to intimidate and threaten the victim-survivors and their lawyers against seeking legal recourse. This forced the Supreme Court to transfer the trial from the sessions court at Hisar, Haryana to Rohini, Delhi, following which 15 out of 97 accused persons were held guilty of various criminal acts.6

ARTICLES OF INTEREST

Ms. Saumya Uma*

The killing of Akhil Gupta - a key witness in Asaram Bapu’s sexual assault case – has brought to the fore the need for a rational, transparent and comprehensive legal framework on witness protection once again. On 11 January 2015, Akhil Gupta - a cook and personal aide of Asaram Bapu - was shot dead in Muzaffarnagar, in the state of Uttar Pradesh1. In another related case, one of the two women – referred to as Surat-based sisters – who had accused Asaram and his son Narayan Sai of raping them, recently approached the court recently for permission to change her earlier statement, raising speculation that she was being threatened / intimidated / coerced into changing her statement, in order to exonerate the accused. Asaram Bapu’s case is symptomatic of the common practice of threatening witnesses into silence or killing them in order to scuttle processes of justice, employed particularly by perpetrators with political, religious and / or socio-economic clout.

A. Context

In India, there is a growing climate of impunity for heinous offences and a rampant threatening of victims and witnesses who seek to testify regarding such violations. Threat to and intimidation of victims and witnesses prevails across a large spectrum of crimes in India, despite a 2008 amendment in the Indian Penal Code (S. 195A) that criminalizes the same. Victim-survivors of violations from marginalized communities, including Dalits, adivasis, religious minorities, women and children, are routinely threatened against accessing mechanisms for justice and accountability and giving their truthful testimonies before courts of law.

For example, during the communal violence in Muzaffarnagar in September 2013, many Muslim women and girls were targeted for rape, gang rape and heinous forms of sexual assault. Seven courageous women approached the Supreme Court with a writ petition against police inaction.2 Their ordeal of rising above social stigma and opposition from within their community, to threats from the accused, the local leaders and the police, asking them to withdraw their cases, as well as a ‘cash incentive’ of Rs. 30 lakh to them to drop the charges, have been documented.3 Thereafter, the Supreme Court directed police protection to the seven victim-survivors and their families. Naseem Ahmed - the husband of one of the women - has reportedly lodged seven complaints after receiving 16 death threats.4

Victim-witnesses to atrocities against Dalits too have been routinely subjected to threats and intimidation. For example, Dalits of Ramgarh village in Uttar Pradesh were threatened as they testified in court against perpetrators from the Gujjar community who had attacked them in March 2014.5 In the Mirchpur carnage of Dalits in Haryana (2010), the perpetrators were released on bail, returned to the village to intimidate and threaten the victim-survivors and their lawyers against seeking legal recourse. This forced the Supreme Court to transfer the trial from the sessions court at Hisar, Haryana to Rohini, Delhi, following which 15 out of 97 accused persons were held guilty of various criminal acts.6

1. A minor girl had complained of having been raped by Asaram Bapu in his room in 2014. Asaram Bapu has since been arrested and has been denied bail by the High Court and the Supreme Court.
5. See ‘Land Grab Case: As Court Date Nears, Dalits in Ramgarh Village Allege Fresh Threats from Gujjars’, The Indian Express, 21 July, 2014.

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Some common features of threats to witnesses in the Indian context are as follows:

- The threats are particularly severe in cases where the accused enjoys political, religious and / or socio-economic clout;
- Members of marginalized communities such as Dalits, Adivasis and religious minorities, are often at the receiving end of such threats;
- Women from such communities are more vulnerable than their male counterparts, as they are additionally threatened with rape and various forms of sexual violence;
- Mild threats accompanied by enticement through monetary offers, are often followed by more severe threats, sometimes resulting in killing of the witness;
- In such cases, the acceptance of a monetary offer by the witness is often based on his / her assessment of the threat to self and family, and a serious consideration of issues of survival; and
- In almost all such cases, threatening of witnesses is practiced with near-total impunity. In recent times, there is no known instance of an accused being punished for threatening the witnesses and scuttling processes of justice.

B. Why Protect Victims and Witnesses?

Protecting victims and witnesses is important, both from the state’s and the victims’ perspectives.

From the victims’ perspective:

- Victims and witnesses are an integral part of justice and accountability mechanisms;
- Protecting victims and witnesses provides them the assurance of safety and security from intimidation and harm which perpetrators or their supporters may cause, thereby encouraging them to participate constructively and fearlessly in processes of justice;
- Appropriate protection mechanisms facilitate effective investigation and prosecution of heinous crimes, and contribute to the victim’s right to an effective remedy; and
- Such mechanisms are also essential for protecting witnesses’ and victims’ right to life, right to truth and closure, and recognising their invaluable contribution to processes of investigation and prosecution.

From the state’s perspective:

- The state has a concurrent & fundamental responsibility to protect – Articles 14, 15, 19 and 21 of the Indian Constitution & Article 3 of the Universal Declaration of Human Rights – right to life (with dignity), liberty and security;
- From this responsibility, stems the duty of care for the witnesses and protect them from threat, intimidation, coercion and undue influence, which have the potential to scuttle processes of justice;
- State’s responsibility towards promoting justice and rule of law are enhanced through victim and witness protection; and
- States have an additional obligation towards vulnerable victims and witnesses, such as Dalits, Adivasis, religious minorities, women, senior citizens, children, physically and mentally challenged persons.

The Orissa High Court reiterated the need for witness protection in the following words:

“It is now well settled principle of law that the State has a definite role to play in protecting the witnesses, especially in sensitive cases, involving those in power, who have political patronage and could wield muscle and money power in order to avoid the trial getting tainted and de-railed and truth becoming a casualty. The State as a protector of its citizens also has to ensure that during a trial in court, the witness could safely depose the truth without any fear of being hunted by those against whom he has deposed. This is a prime requirement of law and the criminal justice system, since the object of the criminal trial, is not only to mete out justice to accused, but also to protect the innocent. A criminal trial is in essence a search for truth. In our criminal justice system, which is substantially dependent on the oral testimony of witnesses, truth can only be arrived at, if such witnesses, who are the eyes and ears of justice system can come fearlessly and depose the truth in Court. Therefore, witnesses need to be protected by the State (in appropriate cases) in order to ensure that the interests of justice are best served and to ensure that criminal proceedings do not become mere mock trials.”

C. Need to Overhaul the Criminal Justice System

It is easy for many of us, situated away from the ground realities of witnesses, to lay the blame on the witness who has turned hostile – often a poor, illiterate person from a marginalized community, who is expected to rise above all his / her concerns over physical and psychological security, ignore the family’s survival needs, forego daily wages, and subject oneself to extreme inconvenience, harassment and humiliation to champion the cause of justice. However, it is important to analyze how India’s criminal justice system treats a witness, and then ask ourselves if we can blame a witness turning hostile.

In the context of communal violence in Kandhamal, Odisha, one woman who testified against an MLA who was accused of arson and murder, narrated her experience of engaging with the criminal justice system:

“I must have gone to the court to testify at least 20 times as there were many accused, and not all were arrested at the same time. Each time an accused surrendered or was arrested, I was re-called to court to testify to his participation in the attack. On each occasion, the court was filled with people, most of who were supporters of the accused and looked frightening… On some occasions, a supporter of the accused showed gestures in the court with his hands, indicating that my head would be cut off, and that I would be cut into pieces. He had positioned himself in such a manner that the judge could not see him but I could. I was terrified, especially because I could not see a single person in my support. My husband was made to stay outside the court. Only the PP remained and he was very quiet. Two lawyers who were in my support were frightened and left the court.”

The above quotes indicate the sense of alienation and extreme fear that a witness feels during trial. Typically the court room atmosphere is vitiated during trials where the accused are influential persons. The court hall is filled with hundreds of supporters of the accused. The Public Prosecutor, his / her assistant and prosecution witnesses are only a few in numbers. The witnesses frequently receive threats by phone, through word of mouth from other persons, and through gestures in court while deposing. The court is often a mute spectator and remains unresponsive in the few instances when witnesses complain that they are being threatened.

Time delay is a major contributing factor to threatening of witnesses - delay in lodging the First Information Report (FIR), delay in arresting the perpetrators, and enormous delays during investigation and trial. For example, in the case of Sr. Meena’s gang rape in Kandhamal, the first arrests were made 38 days after the lodging of the FIR. In the Muzaffarnagar rape cases, an enormous delay in arrest of accused persons forced the victims to seek a direction from the Supreme Court against the UP police. The women and their families were provided police protection as late as nine months after the lodging of the FIR. In the infamous carnage of Dalits in Laxmanpur-Bathe, Bihar, the incident took place in 1997, but the charges were framed only in 2008, the trial court convicted 26 accused in 2010, while the Patna High Court acquitted all of them in 2013.

The accused and their supporters clearly gain from such delays. However the solution does not lie in merely establishing Fast Track courts that potentially churn out speedy injustice, trampling over fair trial procedures. Realistic time limit has to be set for each stage of a case, and mechanisms established to ensure that the time limit is adhered to.

If witness protection is to be effectively integrated within the criminal justice system, the system needs an overhaul, with a high level of transparency, accountability and sensitivity of the relevant stakeholders of the system at each stage of the justice process.

D. What Does Witness Protection Entail?

Many countries have institutionalized witness protection programmes and / or have legislated on the issue. These include Argentina, Australia, Canada, Germany, Greece, Italy, Kenya, New Zealand, South Africa, Spain, the Netherlands and United States of America. Typically, international mechanisms make a distinction between witness protection measures and programmes. Witness protection measures are a set of measures addressing the physical, psychological and psycho-social well-being of witnesses taken at any stage of the proceedings, aimed at protecting the witness from threat and intimidation. A witness protection programme is a comprehensive set of measures implemented by a witness protection agency in respect of witnesses and their family members / close relatives who have been admitted to the programme.

Guiding Principles

All interventions related to witness protection are based on principles such as

- the best interests of the witness – an objective assessment by officials responsible for threat assessment;
- full and informed consent of the concerned witness;
- confidentiality;
- threat and risk assessment - through collection of information and intelligence in a systematic manner, and a baseline assessment of the threat environment and specific vulnerabilities of the witness concerned, by skilled personnel;
- proportionality of the protection measure (to the assessed risk);
- adopting measures that would be least intrusive to the life of the witness;
- protection as a consequence of the engagement of the witness with investigation and / or trial (in other words, though the humanitarian condition may require protection to all victims and witnesses, due to a resource crunch, usually no protection is accorded for those who do not engage with the justice processes); and
- balancing the rights of the accused with the rights of the witness in the interests of a fair trial.

Short Term Strategies and Immediate Measures

Some countries have implemented a series of short term strategies and immediate measures to protect witnesses in
criminal trials, to complement a long-term legislative solution. This is what India should be looking to implement as well. Such measures are aimed at protecting the identity of the witness from the public, and in some situations, from the other party to the proceedings. For example, the Witness Protection Program Act of Canada provides the flexibility for a range of short-term measures as well as emergency protective measures to enable investigators and coordinators to respond promptly to potential threats. Short term protective measures adopted by countries include:

- Adopting pre-emptive strategies by the police at the stage of investigation in order to reduce the risk of witness intimidation;
- Changing the infrastructure in police stations to prevent witnesses from coming into contact with the accused persons before and during the trial (unless required);
- Modifying the courtroom set up – so as to exclude the public or limit the number of persons present in the courtroom, shielding the witness from the direct view of the accused, providing witnesses with a separate entry into / exit from the courtroom to avoid contact with the accused;
- Making the courtroom set up less formal, and hence less intimidating;
- Controlling methods of questioning and cross-examination;
- Limiting disclosures of identity, identifying information or statements of witnesses between parties to the proceedings;
- Issuing specific instructions to increase confidentiality – such as on handling and storage of, and access to relevant documents, and naming specific officials as responsible for the same;
- Limiting disclosures to the public – such as removal of all information relating to identity of a witness (such as name, address, profession, place of work etc.) from documents within the public domain;
- Protecting the identity of the witness during trial – such as by assigning a pseudonym, constructing a screen to prevent public view of the witness, in camera trials, image and voice distortion techniques, use of closed circuit / video link testimonies; and
- Trial observation by independent monitors to deter threatening behaviour and hostile atmosphere in court.

Assistance to Victims and Witnesses

Witness protection, which aims at protecting the physical and psychological security of the witness and his / her family members, goes hand-in-hand with assistance to victims and witnesses to avoid secondary victimization during the criminal justice process. These are aimed at creating an enabling, emotionally safe environment where the witness will feel supported, reassured and respected while giving testimony. Assistance measures include

- Orienting witnesses with the basic aspects of a trial;
- Familiarizing them with the court room and the seating arrangement, roles and responsibilities of various court officials;
- Briefing them on what to expect during examination and cross-examination;
- Providing psychological support to minimize the stress accrued from participating in a trial, including allowing a psychologist to accompany the witness during trial;
- Providing transportation and assistance for the safe passage to and from court; and
- Assisting with accommodation and childcare facilities where required.

Though these do not strictly fall within the arena of “witness protection”, these are essential elements that encourage and facilitate a witness to give a truthful and fearless testimony in court. Victims and witnesses who are adversely impacted by poverty, destitution and lack of access to resources necessary for an effective engagement with the criminal justice process are quite often the beneficiaries of such forms of assistance.

E. The Path Ahead for India

In 2006, the Law Commission of India took the suo-motu initiative of studying witness protection laws, programmes and practices across the world and prepared a comprehensive report and proposal for formulation of a law on witness protection for the consideration of the Indian government. The report acknowledges that victim and witness protection is essential for all serious offences, and report recommends procedures for witness identity protection during investigation, inquiry and trial, as well as witness protection programmes which are applicable for the physical protection of witnesses outside the court. The report ought to form the foundation of any initiative in India on formulating a comprehensive law on witness protection.

There is a growing realization of the importance of witness protection for India, particularly among members of the police and the judiciary. However, there is a lack of clarity on how to formulate and implement protective measures. India certainly needs to adopt short term strategies and immediate measures while working towards a formulation of a legal framework for witness protection in the long term.

A factor that contributes to the lack of clarity is a misconception that witness protection is a resource-intensive proposition, and

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that a developing country like India cannot afford it. On one hand, any country that is committed to justice for heinous offences cannot afford but to invest human and financial resources in witness protection. On the other hand, most of the protective measures discussed above are not resource intensive; many can be implemented with relative ease and without a substantial cost, using existing resources and frameworks. Every witness does not require a re-location to another country, cosmetic surgery to his/her face and a fresh set of identification documents – an expensive proposition - as depicted in Hindi films! Even in developed countries with sophisticated witness protection programmes, witness relocation is considered an exceptional measure that is adopted as a last resort.

It is also possible to start with protection measures at a small scale with a modest budget, and increase the same progressively. However there is a need to clearly lay down protective measures, identify officials responsible for protection at each stage of the criminal justice process, ensure coordination between them, and provide for sensitization, perspective-building and capacity-building of police personnel, judges, public prosecutors and other court officials. Above all, a political will and creativity to implement the protective measures are urgently warranted.

ARTICLES OF INTEREST (Contd.)

It was my thirst to gain more knowledge in the legal field that led me to the door steps of DED. It would come as a surprise to one and all that I am presently handling legal Department in my company, Lloyd Insulations India Ltd a construction company which is the world’s largest insulation company as Additional General Manager (Credit Control) without a formal LAW background. My search for doing LLB without attending classes in Chennai was fruitless.

I came to know about NLS through my elder brother. I realised than that this was a God sent oppurtunity to fulfil my academic dreams of having a proper degree in law (minus the practicals which is a requisite for LLB) that would help me in my professional life as well as act as a tool for being a consultant post retirement in the corporate world. For instance if we take CONTRACTS LAW, CORPORATE LAW, TAXATION (BOTH DIRECT AND INDIRECT), INDUSTRIAL LAW we find that knowledge in these subjects is extremely relevant in THE CORPORATE WORLD what with the increase in litigation in this country in all these branches of LAW.

Infact I would go to the extent of saying all the ten papers in MBL are extremely interesting and bring about tremendous awareness in law relating to these subjects which probably a LLB OR LLM course may not be able to do full justice.

The thought of attending classroom lectures excited me to a great extent. As they say in transactional analysis the exuberant child in me got activated.

Now coming to the Brass Tracks and nitty gritty of the course. I had no clue whatsoever as to how to approach the subjects. Cramming was simply out of question. It came as a big relief that i could clear Corporate Law in the very first attempt. That gave me the confidence. But still I realised that there was something lacking in my preparation.

Friends, the secret in clearing all the papers is not all that difficult to decipher. Post DEC 2014 exams I am following a system which i am confident would fetch amazing results. I am sharing the same for the benefit of one and all.

a) Following a disciplined regime by way of studying every day without fail.

b) Attending contact program without fail.

c) Taking notes for the important topics by preparing flash cards (thank you Deepa and Prof Sai Ram Bhat) for this suggestion. doing this along with relevant case laws and sections if possible will make the task that much easier. But one should avoid catch-22 situation. The focus should be to understand theory (SECTIONS AND THEIR ELABORATION) with decided case laws after doing proper analysis. Analysis of the case under study and framing issues in a given problem is the backbone of answering a question. Last but not the least how the case was decided is to be highlighted and how that decision is relevant to the problem given in the exam is to be seen and answered in a logical manner.

d) I always make it a habit to spend quality time in our NLS LIBRARY especially before exams believe me it can set your intellectual juices flowing. It gives an oppurtunity to go through decided cases in a detailed manner which helps in understanding and interpreting the Law better.

e) We have also formed a study group consisting of following Deepa from Switzerland, Vivek from Dubai, Prasad, Keerthi and Rama from India. We have some brainstorming sessions before exams and exchange notes.

I am confident of doing well and will endeavour to clear the course by JUNE, 2015.

Above all I would like to use this forum to thank Shri Venkata Rao our Vice Chancellor who has always been a guiding spirit and willing to lend a helping ear to our suggestions and also Prof Sai Ram Bhat a bundle of energy who has taken steps to revamp the entire study material and also the DED staff who are doing a stupendous job considering the volume of work they have.

BEST OF LUCK TO ONE AND ALL for the JUNE 2015 exams.

Mr. M.K. Sateesh
Il Year MBL

Impression of DED Scholar

Sai Ram Bhat a bundle of energy who has taken steps to revamp