

Comparative examination of the witness protection

Review

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Abstract

Witness protection is a relatively new concept though one that has been in use by countries as well as international criminal courts. Nonetheless, for the purposes of this paper, we will be looking at a few countries, by comparison, to see how they have treated witness protection.

This paper analyses witness protection by comparing the practices of some states directly through the newly enforced Law on Witness Protection, giving an overview of the law and identifying key challenges for its implementation. It further examines what has been done so far in the area of witness protection in country and abroad, looking into possible alternatives for improving implementation. Finally, it analyses two key policy options and recommends the most feasible alternative.

Keywords: Witness Protection, Law on Witness Protection, comparative.

1. Introduction

As we are aware, organized crime demands the use of particularly effective investigation methods for its detection and suppression, as well as particularly effective measures to protect witnesses. Organized crime has the lack of scruple and the special power to use its considerable financial resources and connections to interfere with detection, in particular to intimidate witnesses and even, where necessary, to silence them. Detection must, of necessity, remain insufficient, and indeed fail, if witness protection does not.

Around the world, but especially in post-conflict countries, witness protection is considered a key component of the rule of law and a state's ability to provide justice. In the four key components of conflict transformation – the right to know, the right to justice, the right to reparation and guarantee of non-recurrence – witness protection is a condition and key component of the right to justice (Swiss Peace, 2012). Therefore, witness protection is key to enabling transitional justice in post-conflict countries such as Kosovo. In such cases, without a justice system in place where potential witnesses can testify without fear of revenge and risk to their person and to their family, the rule of law is impossible (United Nations Office of Drugs and Crime, 2008). It is therefore important

to recognize the vital role of witness protection for transitional justice, and for the rule of law in general. Nonetheless, many countries going through post-conflict reconstruction, such as Bosnia and Herzegovina, Timor Leste, DR Congo, Kosovo and Cambodia, have experienced challenges in information exchange and cooperation between the relevant people and authorities who deal with prosecutions for crimes against humanity and the realities of the country's justice system and its reform (McAuliffe, 2013).

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2. Colombia

Colombia is one of the most frequently mentioned when it comes to witness protection, due to its experience and the structures it has created to protect witnesses of crime, especially organized crime. In Colombia, unlike other countries, witness protection is even addressed within its Constitution, designating witness protection responsibility with the Office of the Attorney General (OAG). According to its Law No.418 (enforced in 1997), it further separates the program into three different witness protection programs. The first program deals with the witnesses and the information useful for their own safety, the second deals with monitoring of witnesses and the third with direct protection (change of identity) of witnesses, victims and even officials of the OAG (United Nations Office of Drugs and Crime, 2008).

3. Germany

In Germany, there are no specific legal provisions to protect witnesses against organized crime. There is however a large number of regulations aimed to protect witnesses - largely independently of the nature of the offence committed; such regulations are, for instance, also applicable to terrorist crimes or offences against sexual self-determination, and they can be applied in respect of the criminal offences of organized crime. In overall terms, there is a need here to distinguish between B. Regulations in criminal proceedings and C: Regulations in very general terms to avert danger.

Germany is another good example of regulating structures and processes to provide adequate witness protection. According to the German Criminal Police Task Force concept developed in 1998, every institution involved in witness protection has a specific detailed role as well as specified measure to be taken. A follow-up Act to Harmonize the Protection of Witnesses at Risk was adopted in 2001 and goes even further in detailing all the witness categories and criteria for 71 ENG entrance and removal from the program. It also details the authority granted under specific circumstances to both the witness protection unit and public prosecutor. And finally, it addresses the issue of protecting witness files, and how they are handled; they are held by the unit that

protects the witness and only submitted to a prosecutor upon official request (United Nations Office of Drugs and Crime, 2008).

4. Italy

The Italian system for witness protection goes one step further in laying out in great detail the criteria for who is eligible for witness protection, under what conditions, and for what type of protection. It is also unique in that it saves the identity of the witness, in case the witness program ends and the witness chooses to reclaim the previous identity, though not all have this option (United Nations Office of Drugs and Crime, 2008). Every country mentioned above differs in the legal, structural and procedural elements of witness protection, but that is a sign that all of them have brought local context into their witness protection legal framework.

The new law gives new means to investigate since it provides for improved protection of witnesses living under threat. This is a challenge that the magistrates in Italy know only too well: In 2001, the status "Justice Witness" was introduced into Italian law in a bid to fight the Mafia. Since then, hundreds of people have come forward to help police by providing important information. People feel safe in doing so since the program allows witnesses to assume new identities, transfer to other regions, and have both housing and compensation provided to them by the state. But these witnesses still often lead very difficult lives, filled with fear.

Local context is therefore extremely significant yet completely lacking in the case of the Law for Witness Protection of the Republic of Kosovo. For Kosovo, the German case is the most relevant model, as it addresses many above-mentioned issues with the LWP in Kosovo. First, the German law on witness protection defines the role of each institution involved in witness protection, which is something lacking completely in Kosovo's LWP. Also, it details all criteria under which someone enters or leaves a witness protection program, which is extremely important, and has been vaguely addressed in the Law on Witness Protection in Kosovo. Very importantly, it also addresses the handling of sensitive information, which is also only very vaguely addressed in Kosovo's LWP. Finally, having a review board for complaints is a useful element used by some countries, but an option Kosovo does not have within the LWP. 72 Witness Protection in the Republic of Kosovo - Policy Analysis.

5. Kosovo

Kosovo presents a unique case study of a newly independent country born out of a violent conflict. Since 2000, Kosovo has gone through a transitional phase of reconstruction and the establishment of security and stability, followed by the establishment of its self-governing capacities and the creation of new institutions. The International Criminal Tribunal for the former Yugoslavia (ICTY) was used to deal with war crimes in the successor states of the former Yugoslavia. The ICTY was established as a United Nations court of law in 1993, with the aim of prosecuting war crimes committed in the Balkans, from 1991 onwards (UN ICTY). Nonetheless,

transitional justice has remained marginal to political and social life in Kosovo, and in consequence, so has the process of rebuilding a credible justice system and the rule of law. This is in part due to local institutional shortcomings and in part due to lack of a more effective international community approach to supporting the creation of a self-sustainable and self-sufficient justice system, and especially a judiciary. According to McAuliffe, in theory, transitional justice is conducive to the rule of law, though in reality, transitional justice and a well-established justice system do not necessarily go hand in hand. The information flow between those who deal with transitional justice and the prosecution of war crimes and those who are involved in justice sector reform is weak. Moreover, processes such as transitional justice can attract more attention, funding, and human capital internationally and locally, leaving a weaker support system for justice sector reform (McAuliffe, 2013).

6. Conclusion

Inadequate witness protection remains a major obstacle in the justice system and to the ability to provide justice, especially in the cases of organized crime and war crimes. As cases of witness intimidation and harassment are widespread, many witnesses are still unwilling to testify, for fear of retaliation, and the danger that they and their families are exposed to.

Effective witness protection is indispensable to detect and suppress organized crime, but must not lead to serious difficulties in ascertaining the truth, or pose a detriment to the possibility of defence of the accused to a degree which is objectionable or indeed unjustifiable in terms of the rule of law. On the other hand, it is not a matter of ascertaining the truth at any price, and especially not at the expense of endangering the life or limb of a witness. In this difficult area, criminal prosecution authorities, courts and the preventive police, if possible in cooperation with counsel for the defence, must find viable compromises which are justifiable for all interests.

Compared to its neighbours, Kosovo is still a beginner in witness protection. The core problem is that witness protection, as a key component of the transitional justice process and the country's justice system, is paramount for the ability to improve the rule of law, but until now has been handled mostly by international organizations in Kosovo, and is now facing major challenges under the new law in place and with young and immature personnel and institutions who are inexperienced in this field.

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