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DISSERTATION ON THE TOPIC OF

**CRITICAL ANALYSIS ON WITNESS PROTECTION IN CRIMINAL TRIAL IN INDIA**

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SUBMITTED TO



INSTITUTE OF LAW, NIRMA UNIVERSITY

AS A PARTIAL FULFILMENT OF REQUIREMENT FOR THE

DEGREE OF MASTER OF LAWS [LL.M]

**UNDER THE GUIDANCE OF**

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# DECLARATION

I, Tejaswini Nagar, bearing roll no. 17ML020, do hereby declare that the dissertation submitted is original and is the outcome of the independent investigations/ research carried out by me and contains no plagiarism. This work has not been submitted to any other university or body in quest of a degree, diploma or any other kind of academic award.

I do hereby further declare that the text, diagrams or any other material taken from other sources including but not limited to books, journals and web have been acknowledged, referred and cited to the best of my knowledge, ability, and understanding.

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# **CERTIFICATE**

This is to certify that LL.M. dissertation titled “**Critical Analysis on Witness Protection in Criminal Trial in India**” submitted to Institute of Law, Nirma University in partial fulfillment of the requirement for the award of the degree of Master of Laws [LL.M.] in Criminal And Security Laws, is a bona fide research work carried out by Tejaswini Nagar independently under my guidance and supervision in the Institute of Law.

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## ABBREVIATIONS

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All India Reporter	AIR
Code of Criminal Procedure, 1973	Cr.P.C.
Criminal Law Journal	Cri.L.J.
Indian Penal Code, 1860	IPC
Kerala Law Times	KLT
Memorandum of Understanding	MOU
Supreme Court Cases	SCC
Supreme Court Journal	SCJ
The Indian Police Journal	IPJ
The National Capital Territory of Delhi	NCT
The Supreme Court	SC
The United Nations Office on Drugs and Crime	UNODC
The Witness Security Programme (America)	WITSEC
United Nations Convention against Transnational Organized Crime	(UNITOC)

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# **CHAPTER 1**

## **INTRODUCTION**

### **1.1 INTRODUCTION**

In any criminal case, the witness plays an important role in determining the final outcome. Due to this, the parties often threaten the witnesses, turning them hostile and interfering with the fair administration of justice. Hence, it becomes very important to protect the witnesses so that they do not get intimidated and tell the truth in court. There are witness protection programmes in a large number of countries all over the world. But India still lacks a well-functioning witness protection programme. There are so many attempts to make programme effective but implementation continue to be poor and still a vast number of cases where the witnesses turn hostile. Reason behind turning hostile is that the witness have no courage to speak against accused because of the threat of life, and especially when the offenders are habitual criminals or having political, economic or muscles power. Keeping this view in mind this research has been undertaken to identify the gaps in the protection of witness under domestic law. Absence of witness protection laws leads to the high rate of crime and low rate of conviction. Therefore enacting the witness protection laws is the immediate need in India.

Commission of a crime is a multifarious process — culmination of set of connected events and series of acts. One of the main objectives of criminal justice system is to apprehend and punish the offender which could be done only after the careful and methodical investigation identifying the series of acts imperative to prove the crime. Systematic collection and presentation of evidence is critical to the investigative process as the defense invariably seek to undermine its veracity to cast away the criminal liability during the trial.

The instrument of evidence is the medium through which facts, either disputed or required to be proved, are effectively conveyed to the judiciary in civil as well criminal matters. The evidence before the court or a judicial authority can be broadly divided into two (1) documentary evidence and (2) oral

evidence. Oral evidence is generally given by the witnesses, be it the victim himself, the accused or any other person having any information relating to the matter. Here the witness plays an important role in the criminal trials and aids the court in the administration of justice. It is by means of witnesses that both the documentary and material evidences are usually presented to the court. A witness may thus be broadly defined as a person who gives evidence to a judicial tribunal. All quasi-judicial tribunals and tribunals of all other kinds receive evidence through witnesses. A witness is, in the words of Whittaker Chambers, —a man whose life and faith are so completely one that when the challenge comes to step out and testify for his faith, he does so, disregarding all risks, accepting all consequences.<sup>1</sup>

The present research seeks to focus over the relevant functions, standing and significance of witnesses in the criminal proceedings in India, subsequently justifying the call for an appropriate legal structure to provide requisite protection to witnesses.

**Categorising Witnesses** The broadest categorisation of victims could be twofold:-

1. Victims of Distributive Injustice
2. Victims of Street Crime

The victims of Distributive Injustice are the victims of different kinds of trauma which are not foreseeable and hence cannot be prevented such as trauma caused by cancer, hurricanes, natural calamities etc. whereas the victims of Street Crime are those who suffer from avoidable trauma caused by crimes, accidents, diseases, and systemic injustices.<sup>10</sup> The present research focuses on the victims of street crimes who suffer injuries because of commission of crime by another person or persons. They could be further categorised according to gender and vulnerability— women victims, child victims etc.

The following could be another categorization of witnesses, which is relatively exhaustive:

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<sup>1</sup> Whittaker Chambers, WITNESS QUOTES, <http://www.brainyquote.com/quotes/keywords/witness>.

i. Prosecution Witness – All the persons giving evidence on behalf of the prosecution are prosecution witnesses. The person suffering due to the commission of crime is called as victim. Statement made by him is an important piece of evidence and he is the primary prosecution witness. It also includes Investigation officer.

ii. Defence Witness– Witnesses appearing on behalf of defence are defence witnesses.

iii. Child Witness– A child even of 6 or 7 years of age may be permitted to give evidence if he has the capacity to answer rationally.

iv. Eye Witness– Eye witness is the one who has personally act in question and is able to give first-hand description of it.

v. Partisan or interested witness– A partisan or interested witness is one who is in a near relationship with the victim of crime and is concerned with the conviction of the accused person.

vi. Chance Witnesses– If by coincidence or chance a person happened to be at a place of occurrence of the incident, he is a chance witness. The evidence given by such witness is highly reliable because he is not connected to either party. But if he is related to either party then his depositions may be weighed after considering other facts and circumstances.

vii. Expert as a witness– The Evidence Act provides that in medical examination it is mandatory in certain cases that a medical officer should give his report accordingly after conducting an examination. For example in cases of post-mortem and the cause of death. Experts from other fields e.g. handwriting experts, could also be called to testify in the case.

viii. Character witness<sup>2</sup>– A character witness is a person providing information in respect of the reputation of another person.

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<sup>2</sup> <http://www.wisageek.com/what-is-a-character-witness.htm>

## 1.2 IMPORTANCE OF WITNESSES

"Likhitam Saakshino Bhukti Pramanam Trividham Sprutham" i.e. evidence is the means to arrive at the truth, whether documentary, oral, direct, or indirect.<sup>3</sup> A court requires reliable and truthful evidence to arrive at a just decision. The Indian Evidence Act, 1872, provides, "Evidence includes oral as well as documentary evidence. Oral evidence includes all statements made by witnesses, before the court, in relation to matters of fact under inquiry. Documents produced before the court for inspection are called documentary evidence."<sup>4</sup>

The word 'evidence' as provided in the Indian Evidence Act, 1872, signifies the instruments i.e. witnesses and documents by means of which relevant facts are brought before the court.<sup>5</sup> Thus, witnesses play an important role by giving oral evidence before the court. Even in case of documentary evidence, witnesses are required to prove the genuineness of the contents of the documents. Hence, the role of a witness is indispensable for successful completion of a criminal trial. The Malimath Committee in its Report of 2003, on Criminal Justice Reforms, discussed the importance of witnesses in following words:<sup>6</sup>

"Witness is an important constituent of the administration of justice. By giving evidence relating to the commission of the offence he performs a sacred duty of assisting the court to discover truth. That is why before giving evidence he either takes oath in the name of God or makes a solemn affirmation that he will speak truth, the whole of truth and nothing but truth. The witness has no stake in the decision of the criminal court when he is neither the accused nor the victim. The witness performs an important public duty of assisting the court in deciding on the guilt or otherwise of the accused in the case. He sacrifices his time and takes the trouble to travel all the way to the court to give evidence. He submits himself to cross-examination and cannot refuse to answer questions on the ground that the answer will incriminate him. He will incur the displeasure

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<sup>3</sup> Ravulapati Madhavi, p. 84.

<sup>4</sup> *ibid.*

<sup>5</sup> Batuk Lal, *The Law of Evidence*, Central Law Agency, 2001, p. 9.

<sup>6</sup> *The Report of the Committee on Reforms of Criminal Justice System*, Ministry of Home Affairs, Government of India, 2003, p. 151.

of persons against whom he gives evidence. He takes all this trouble and risk not for any personal benefit but to advance the cause of justice. Under section 39 of the Criminal Procedure Code, 1973, every citizen is legally and morally duty-bound to give information to police about crime and criminals. It is, however, a harsh reality that willing cooperation and support from public and independent witnesses is hardly available in criminal cases. Only very few independent witnesses come forward voluntarily to assist the police in investigation, considering it their legal and national duty to help the State to prosecute the criminals. That is why, the criminal justice system in India has failed to determine the guilt or innocence of those charged with crime, promptly."<sup>7</sup>

### **1.3 TREATMENT OF WITNESSES UNDER INDIAN CRIMINAL JUSTICE SYSTEM**

It is common place to see the persons who are eye-witness to a crime turning away and leaving the place of occurrence in order to make sure that they are not dragged in as witnesses.<sup>8</sup> The Malimath Committee has observed in its Report that the treatment given to the witnesses is very shabby.<sup>9</sup> It suggested that "The witnesses should be treated with great respect and consideration as a guest of honour. The Committee noticed that quite the reverse is happening in the courts. When the witness goes to the court for giving evidence there is hardly any officer who will be there to receive him, provide a seat and tell him where the court he is to give evidence is located or to give him such other assistance as he may need."<sup>10</sup>In the words of Lord Chief Justice Cockburn<sup>11</sup>:

"Witnesses are just as necessary for the administration of justice as judge or jurymen, and are entitled to be treated with the same consideration...."

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<sup>7</sup> *ibid*

<sup>8</sup> V. N. Rajan, *Victimology in India-Perspectives beyond Frontiers*, Ashish Publishing House, New Delhi, 1995, p. 89

<sup>9</sup> The Report of the Committee on Reforms of Criminal Justice System, p. 20.

<sup>10</sup> *id.*, p. 151.

<sup>11</sup> P.C. Sarkar, *Sarkar's Law of Evidence (India, Pakistan, Burma and Ceylon)*, S.C. Sarkar & Sons (Private Limited), Calcutta, 1971, p.1317

The above quoted lines underline the necessity to treat witnesses with proper respect and courtesy. Testifying as a witness in a criminal trial is, however, no easy task. Such an experience has been variously described as 'terrifying', 'intimidating', 'confusing', and 'a difficult and stressful ordeal'.<sup>12</sup>

The hon'ble Apex Court in *Swaran Singh v. State of Punjab*<sup>13</sup> elaborately discussed the harassment faced by a witness in the following words:

".... here are the witnesses who are a harassed lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others, a person abhors becoming a witness. It is the administration of justice that suffers. Then appropriate diet money for a witness is a far cry. Here, again the process of harassment starts and he decides not to get the diet money at all."<sup>14</sup>

The above quoted lines highlight that in the present criminal justice system the problems faced by the witnesses are completely overlooked. The court further held that ".... while adjourning a case without any valid cause, a court

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<sup>12</sup> A. Riding, "The Crown Court Witness Service: Little Help in the Witness Box", (1999) 38 *Howard Journal of Criminal Justice* 411; and L. Ellison, "The Protection of Vulnerable Witnesses in Court: An Anglo Dutch Comparison" (1999) 3 *International Journal of Evidence and Proof* 29, quoted in Bala Reddy

<sup>13</sup> AIR 2000 SC 2017.

<sup>14</sup> AIR 2000 SC 2017.

unwillingly becomes party to miscarriage of justice. Most witnesses have to wait for their turn. And when the time for deposing or the giving of evidence comes, the lawyers examine and cross-examine them, as if they themselves are the perpetrators of the crime."<sup>15</sup>

The Supreme Court in *State of Uttar Pradesh v. Shambhu Nath Singh*<sup>16</sup> summed up the dilemma faced by witnesses and its impact on criminal justice delivery system as following:

"Witnesses tremble on getting summons from courts, in India, not because they fear examination or cross-examination in courts but because of the fear that they might not be examined at all for several days and on all such days they would be nailed to the precincts of the courts awaiting their chance of being examined. The witnesses, perforce, keep aside their avocation and go to the courts and wait and wait for hours to be told at the end of the day to come again and wait and wait like that. This is the infelicitous scenario in many of the courts in India so far as witnesses are concerned. It is high time that trial courts should regard witnesses as guests invited (through summons) for helping such courts with their testimony for reaching judicial findings. But the malady is that the predicament of the witnesses is worse than the litigants themselves.... The only casualty in the aforesaid process is criminal justice."

It is submitted that witness should no longer be taken as for granted. There is an urgent need to address their grievances.

Some special enactments regarding the protection of witnesses also exist under Indian law. These are predominantly on matters affecting the Government and public at large; for instance, terrorism. There were certain specific statutes providing for the protection of the identity of witnesses –

1. Terrorists and Disruptive Activities Act, 1985 – (TADA) – This Act via Sec. 13 offered a meticulous modus operandi for the ‘identity protection’ of witnesses who were endangering their lives while testifying in the proceeding . In a criminal trial involving the acts punishable under the Act. It was

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<sup>15</sup> Ibid

<sup>16</sup> (2001) 4 SCC 667.



subsequently reinstate in 1987 (via TADA 1987) and under section 16 of the new Act the same procedure was mentioned. The validity of section 16 of the Act was upheld by the Supreme Court in *Kartar Singh v. State of Punjab*.

2. Prevention of Terrorism Act, 2002 (POTA) – This Act repealed TADA, 1987. Sec. 30 of the Act provided for in camera proceedings and protection of the identity of witnesses. The validity of section 30 was challenged in *PUCL v. UOI*<sup>17</sup> wherein the Supreme Court upheld its validity.

3. The Unlawful Activities (Prevention) Amendment Act, 2004 – POTA was repealed and the Unlawful Activities (Prevention) Act, 1967, was amended accordingly. Sec.44 of the Act provides for the protection of the witnesses which is identically worded with Sec. 30 of POTA.

4. Juvenile Justice (Care and Protection of Children) Act, 2000 – Sec. 21, hereby, under the act offers the identity protection of juveniles. It provides that no report in any newspaper, magazine, news sheet or visual made of any inquiry regarding a juvenile in conflict with law shall disclose any sort of details which can identify a juvenile in any circumstance or by any reason whatsoever. The provisions mentioned above are applied only in specific types of cases and cannot be applied elsewhere. The person who witnesses violent crimes or other serious crimes is not covered under the purview of any other law.

## **1.4 WITNESS PROTECTION AND WITNESS PROTECTION PROGRAMME**

In the words of Rosalind Sipos, " The provision of victim and witness protection is fundamental to the credibility of any justice system and to the battle against impunity. Asking victims and witnesses to come forward without the provision of protection may indeed be irresponsible in cases where they face the

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<sup>17</sup> (2003) 10 SCALE 967.

possibility of re-victimised or becoming victims in their own right by reason of living up to their duty to provide their evidence."<sup>18</sup>

Witness protection is the procedure in which witnesses, such as, those who testify in criminal trials are protected against intimidation before their testimony or criminal retaliation after the trial.<sup>19</sup> Most of the times, a witness may require protection until the conclusion of a trial only. However, some witnesses are provided with a new identity and lifelong government protection. Witness protection is usually required in trials against organised crime, where law enforcement sees a risk for witnesses to be intimidated by colleagues of defendants.<sup>20</sup>

The Serious Organised Crime and Police Act, 2005 of the United Kingdom provides, " Witness protection is generally directed to those persons who have provided crucial evidence and against whom there is substantial threat."<sup>21</sup>

Witness protection programme in general means a state programme designed to protect prosecution witnesses in serious criminal cases, especially, from bodily injury or tampering.<sup>22</sup> The United Nations office on Drugs and Crime (UNODC) defines witness protection programmes as, " Formally established covert programme(s) subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their co-operation with law enforcing authorities."<sup>23</sup>

## **1.5 STATEMENT OF PROBLEM:**

- 1) Witnesses are summoned to the court regardless of the fact that they have no money, or they cannot leave their family, children, business etc. and appear before the court.

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<sup>18</sup> Rosalind Sipos, " The Draft Bill for the Assistance and Protection of Witnesses: Critique and Recommendations," available at [www.cpalanka.com](http://www.cpalanka.com).

<sup>19</sup> B.D. Harindranath, " The Case of Hostile Witnesses", Kerala law Times, 2006, p. 27.

<sup>20</sup> Available at [http://en.wikipedia.org/wiki/witness\\_protection](http://en.wikipedia.org/wiki/witness_protection)

<sup>21</sup> Available at [http://www.cps.gov.uk/legal/v\\_to\\_z/witness\\_protection-and\\_anonymity](http://www.cps.gov.uk/legal/v_to_z/witness_protection-and_anonymity)

<sup>22</sup> P. Ramanatha Aiyar, Advanced Law Lexicon, 3rd Edition, Book IV, Wadhwa and Company, Nagpur, 2005, 4974.

<sup>23</sup> Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organised Crime, United Nations Office on Drugs and Crime, 2008, p. 5.

- 2) Main aim of criminal justice system is to deliver the justice and convict the offenders but due to absence of witness protection programme it leads to high rate of crime and low rate conviction.
- 3) The current condition of witness in criminal justice system is very miserable because due to the lack of witness protection programme they became victims of the system.

## **1.6 OBJECTIVES OF THE STUDY:**

The objective of the study are as follows:

- 1) To understand the meaning and nature of the term witness protection and achieving new insights into it.
- 2) To understand the historical perspectives at national level.
- 3) To highlight the need and significance of witness protection in India.
- 4) To make an analytical study of the concept of “Hostile Witness” and emerging challenges and issues concerning the same.
- 5) To find out and analyze the difficulties in adapting the witness protection programme in Indian Legal system, to assess how it acts as a hurdle and remedies which can be suggested to remove these hurdles.
- 6) To study the deciding factors in providing the protection to witnesses.
- 7) To analyse and discuss the rights of accused vis-à-vis the witnesses protection.
- 8) To study and critically evaluate the Legislative process with respect to witness protection in India.

## **1.7 RESEARCH QUESTIONS**

- 1) What is the importance of a witness in a criminal trial?
- 2) What are the various problems faced by witnesses in Indian criminal justice system?
- 3) Whether the existing fair trial principles pose hindrance to protection of witnesses in domestic law?

- 4) What is the contribution of judiciary on the subject of witness protection?
- 5) Are the existing legislations relating to witness protection adequate?
- 6) Whether the Law Commission's report on witness protection programme effectively deal with witness protection?
- 7) Whether the witness protection programs established in other countries and international criminal courts and ad-hoc tribunals be helpful in framing the witness protection policy for India?
- 8) Whether India needs a special scheme for witness protection in criminal trials?

## **1.8 HYPOTHESES**

The following hypotheses would be examined in this study:

- 1) Is it mandatory to a witness to attend the court at the cost of losing his fundamental rights in criminal trial.
- 2) Concept of witness protection is still in experimental stage and law is evolving.

## **1.9 RESEARCH METHODOLOGY**

The present study comprises doctrinal methods together with an adoption of comparative approaches. However, data will be supplied to make the study real and effective. Case study methods are more applied to achieve the objective. For this work doctrinal method is more suitable than empirical method, although at some place it also has played its role, but most of the part of study is done according to Doctrinal research. At last some conclusions and concrete suggestions will be forwarded to improve the witness protection.

## **1.10 DATA COLLECTION:**

Primary & Secondary Sources both are used for the purpose of this study, the researcher has consulted vast literature, some of memorial lectures

delivered by eminent public men and jurists, various judgments delivered by hon'ble courts, reports of Law commission, police commission, and committees on reforms of criminal justice system, journals, commentaries of eminent jurists, daily newspapers, collected relevant data from published and unpublished sources. The researcher also relied on AIR, SCR, SCC, Cr.L.J., RCR etc. The established principles of law and historical facts have also been discussed. The researcher visited various law libraries. The researcher also took the help of internet also. The names of such books, reports, journals etc.

### **1.11 LITERATURE REVIEW:**

The study includes the analysis of legislative response on the subject of witness protection including existing legal provisions of the Indian Penal Code, 1860, the Criminal Procedure Code, 1973, the Indian Evidence Act, 1872, as well as provisions of special laws like the Terrorist and Disruptive Activities (Prevention) Act (TADA), 1987 and the Prevention of Terrorist Activities Act (POTA), 2002. The study covers critical analysis and evaluation of recommendations made by the expert bodies like the Law Commission of India and the Malimath Committee. The study also includes the observations made and directions issued by the judiciary on the subject of witness protection in its various pioneering and landmark judgements. It then focuses on laws on 'Witness Protection' which are in force in other countries. It also examines relevant provisions of manual published by United Nations Office on Drugs Control and Organised Crime on the subject of witness protection.

### **1.12 SCHEME OF THE RESEARCH**

I. Introduction The entire study is divided into five chapters which address different dimensions of the problem. The first chapter covers the introductory part consisting of significance of the problem including methodology, followed by hypothesis/research problems, literature review and plan of study.

II. International Parameters in relation to Protection of Witnesses This Chapter covers various international legal instruments dealing with the witness protection. It also provides an overview of the legal provisions relating to witness protection in various developed as well as developing countries.

III. Constitutional Mandate and Legislative Process in India This chapter broadly deals with the various Constitutional provisions guaranteeing the rights to an accused person juxtaposed with the rights of witnesses. It also covers analysis of various Legislations enacted in India dealing with the witness protection.

IV Judicial Process and Witness Protection in India This chapter analyses the role of judiciary in protection of the witnesses during the trial— various judgments and the guidelines and recommendations pronounced time to time, by High Courts and the Honourable Supreme Court of India in respect of the provisions relating to witness protection from various legislations like TADA and POTA.

V. Conclusion and Recommendations This chapter concludes the study and makes suggestions with the hope that they may prove helpful to (1) the Legislature in enacting an updated and wholesome law; (2) to the Executive for its proper implementation and (3) to the judiciary inter alia for reviewing the current standards in India and comparing them with the best practices abroad.

**CHAPTER 2**

**INTERNATIONAL PARAMETERS FOR THE**

**PROTECTION OF WITNESSES**

**2.1 DEVELOPMENT OF THE UNITED NATIONS AND  
UNIVERSAL HUMAN RIGHTS**

Before the end of World War II there was no laws regarding the states and the people of states. But after the atrocities done by the Germany and its allies strict international laws were made but they are subjected to the states not the individuals. After the establishment of united states a new era of human rights protection came in which rights of the individuals recognized not only the internation criminal jurisprudence is developed but also concept of fair trial is introduced, , especially in the arena of rights of the victims along with rights of accused.

For the security of individuals United Nations passed so many convention. They adopted Universal Declaration of Human Rights on December 10, 1948. This was passed without any opposition. And this is marked as a new beginning of this era of human rights protection. The Declaration, at the time of its adoption, was only a resolution of the General Assembly of the UN that was not intended to create a binding obligation on the states; thus no enforcement mechanism was introduced. It constituted —common standard of achievement for all people and all Nations.¶ Over a period of thirty years, however, most of the rights mentioned in it became part of customary international law making them binding on all states.

Article11 (1) of the UDHR states that everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a

public trial at which he has had all the guarantees necessary for his defence.<sup>24</sup> Clause (2) of this article talks about non retrospectivity of law.

### **2.1.1 Convention against Torture**

The United Nations Convention against Torture<sup>25</sup> is made to protect a prisoner and to prevent the torture against the accused. This convention is binding only upon the states parties. However, some of the provisions therein, overtime, have acquired the status of customary international law.<sup>26</sup> It defines torture as any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions.

This convention secures the rights of accused person and prisoners against the police atrocities in order to protect the rights of the accused and prisoners mentioned under UDHR and ICCPR.<sup>27</sup> The convention provides for constitution of a committee known as Committee against Torture. The Committee empowered to visit any prison in the territory of the ratifying state to see if the provisions of the Convention are properly followed.

## **2.2 JURISPRUDENCE OF INTERNATIONAL CRIMINAL LAW**

It can be rightly said that International Criminal Law is the outcome of the Nuremberg Trials, which were conducted to punish the war criminals, persons, committing genocide / crime against humanity and crime against peace.

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<sup>24</sup> See also Article 14 (2) ICCPR.

<sup>25</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly of United Nations on Dec. 10, 1984.

<sup>26</sup> See generally MANFRED NOWAK, ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY (Oxford Commentaries on International Law, Oxford University Press, 2008)

<sup>27</sup> Article 5 of UDHR and Article 7 of ICCPR.



However, whether Nuremberg and Tokyo Trials are truly of international character is a matter of debate. This is primarily because only the Allied powers in the WW II took part in the establishment of a tribunal and procedures of trials prosecuting of trials prosecuting only German and Japanese war criminals.<sup>28</sup> Nonetheless, the Nuremberg and Tokyo trials prepared the ground work for other international criminal tribunals that were to be established in future.

### **2.2.1 International Criminal Tribunal for Former Yugoslavia and For Rwanda**

The International Criminal Tribunals for former Yugoslavia and for Rwanda were established by United Nations under chapter 7 of the United Nations Charter. The International Criminal Tribunal for Former Yugoslavia (ICTY)<sup>29</sup> was the first international tribunal established by United Nations for prosecuting the war criminals for the violations of International Humanitarian Law. The ICTY Statute was adopted by UN Security Council Resolution No.808 (1993). International Criminal Tribunal for Rwanda (ICTR)<sup>30</sup> was established by United Nations, Security Council's Resolution 955 (1994). It was established for prosecuting the leaders of Hutu, a racial community for responsible, directly or vicariously, for killing thousands of Tutsis, a minority ethnic group. Both the tribunals were conferred jurisdiction to try crimes categorised under four heads: (1) Genocide (2) Crime against Humanity (3) War Crimes and (4) Crime of Aggression.<sup>31</sup>

These tribunals are entitled to make their own rules of procedure and evidence before them.<sup>32</sup> These provision mention that the judges of international tribunals shall adopt the rules of procedure and evidence for the conduct of pre-trial phase of the proceedings, trials, and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

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<sup>28</sup> MICHEAL SCHARF, THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW 22 (Martinus Nijhoff Publishers, 2008).

<sup>29</sup>Id. at 24

<sup>30</sup> Id.

<sup>31</sup> Id. at 26.

<sup>32</sup> See Article 15 of ICTY Statute and Article 14 of ICTR Statute.

A victim and witnesses unit has been constituted by ICTY in its rule 34. The importance of testimony of witnesses was realized by the tribunal while giving justice to the victims of massive crimes. Thus, the tribunal is committed to support all witnesses who willingly come before the tribunal to testify. The special unit created for victims and witnesses undertakes the responsibilities of supporting and protecting witnesses irrespective of the fact that they were called by the prosecution, defense or the chambers.

#### Witness Protection Measures in ICTY

The ICTY and ICTR categorize the witnesses as follows:

##### “Insider” witnesses

Many of the Tribunal’s accused are high-level political, military or police leaders who are charged with planning crimes and ordering others to commit them. Persons who were close to the accused, called “insider witnesses,” can provide the court with evidence about their actions and state of mind. The evidence gained from their testimony is often crucial for establishing the degree of responsibility of the accused.<sup>33</sup>

##### Perpetrator witnesses

A number of those accused by the Tribunal pleaded guilty to all or some of the crimes with which they were charged, and agreed to testify for the prosecution and help the court to establish the truth. These witnesses provide a unique insight into how political, police and military leaders planned and committed crimes on a massive scale.<sup>34</sup>

##### Expert witnesses

These witnesses are professionals who provide their expert opinion on topics such as military doctrine, political structures, former Yugoslav law, demographics, financial transactions, and forensic evidence. They help the

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<sup>33</sup> <http://www.icty.org/sid/158> (JULY 22, 2018).

<sup>34</sup> Ibid.

judges to determine the circumstances in which crimes were committed, the accused's authority over their subordinates, the identity and number of victims found in mass graves, the number of victims killed in an area, among others.<sup>35</sup>

According to general principles of fair trial (which are also applicable to tribunal) witnesses must testify in an open court. However, in exceptional circumstances the prosecutor or tribunal may ask the courts to take the testimony of witnesses in a closed court by applying protective measures.<sup>36</sup>

### **2.2.2 International Criminal Court**

The protection of victims and witnesses is regulated in the Statutes and Rules and a rich jurisprudence has developed.<sup>37</sup> It is the priority of the chambers of tribunal ensure and approve the protective means and methods, but the task is also shared by the Prosecutor and the Chambers along with the Registrar and Registry at the ICC; the Pre-Trial Chambers have been particularly active, including during the investigation.<sup>38</sup> Rule 85 of the Rules of Procedures and Evidence provides for the definition of victim which includes natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court. It is also provided that victims may include organisations or institutions that have sustained direct harm to any of their property which is dedicated to their religion, education, art or science or charitable purpose and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Due to the increasing cases special units for victim and witness are made to protect the victim and witness and for their security arrangements. Special registry units also provided to avoid secondary victimization. There is a refutation in the cooperation of witness in the court proceedings because these proceeding creates nervousness, fear and disinterest in the minds of victims/witnesses and stark lack of proper protection facilities adds insult to injury.

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<sup>35</sup> Ibid.

<sup>36</sup> Rule 75 & 79 of Rules and Procedure of Evidences of ICTY

<sup>37</sup> Articles 54(1)(b) and (3)(f), 57(3)(c), 64(6)(e) and 68 of the ICC Statute

<sup>38</sup> See Håkan Friman, Protection of Victims and Witnesses in ANDRÉ KLIP AND GÖRAN SLUITER (EDS.), ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS.

Hence, there is abundant use of protective measures. The protection may be motivated by privacy or security concerns.<sup>39</sup> The implementation of out of court security safeguards are subject to many restrictions, especially relocation option, as it is impossible without cooperation of the concerned government agencies. In order to secure minimum reliability on state agencies, it is devised to develop a less expensive alternative protection & investigation modus operandi, where not only highly susceptible victims/witnesses (including their close relatives/family members) but also prospective potential witnesses, are subjected & exposed to least possible contact and communication, whereby, during criminal trial, various defensive as well as secrete methods i.e. voice and image distortion, pseudonyms, declaration/testimony by video links, in camera proceedings, video screening, prohibition of media and public in court, photo proscription, postponement of confession/testimony etc. are made accessible for execution.

#### **The International Bar Association of International Criminal Court's Report on Witnesses in ICC<sup>40</sup>**

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies.<sup>41</sup> The IBA is known for influencing shaping the reforms in international law and contributing in the development of legal profession throughout the world. The IBA is currently implementing a MacArthur Foundation-funded programme to monitor the work and proceedings of the International Criminal Court (the Court or ICC) and to conduct outreach activities.<sup>42</sup>

In the beginning of March 2013, the International Criminal Court (ICC or the Court) faced with a major problem when the Prosecutor of ICC withdrew the charges of Genocide against Mr. Francis Kirimi Muthaura, former head of

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<sup>39</sup> ICC has concluded special (confidential) agreements with States for the purpose of witness protection.

<sup>40</sup> Witnesses before the International Criminal Court: An International Bar Association International Criminal Court Program report on the ICC's efforts and challenges to protect, support and ensure the rights of witnesses, July 2013

<sup>41</sup> Id pg. 7

<sup>42</sup> Id.

Kenyan army, on the ground of loss of material evidences and serious problems with eyewitnesses. It was alleged that due to these problems it was impossible to prove the guilt of Mr. Muthaura beyond reasonable doubt. Recalling the issue of false testimony in the trial of Mr. Thomas Lubanga Dyilo and Mathieu Ngudjolo Chui the first trials from the Democratic Republic of Congo (DRC); the International Bar Association (IBA) of ICC conducted wide research on success and failure of Witness Protection Program (WPP) of ICC. The IBA conducted various meetings with the judicial officers and other stakeholders to address the issues in this area and came up with this report on July 2013.

The IBA after an extensive research have figured out certain problems in WPP at ICC and have suggested possible solutions for overcoming these problems. These problems are summarized as follows:

1) Mandating attendance of witnesses in person – the ICC procedure relies heavily on the personal attendance of the witness in the court for testifying against or in favour of the accused whereby the Judge can decide on the credibility of the testimony of the witness directly. IBA has observed that such compulsory attendance of witnesses at Hague may result in number of challenges for witness protection like, providing protection measures, addressing immigration issues, logistical challenges and risk of rising claims for asylums. Another major problem in this regard is the ICC lacks subpoena powers and thus may have to rely on State for attendance of witnesses. The Court also has been unwilling to accept any evidence from other sources like, reports of NGO and media reports. To reduce these problems, IBA suggests that the Court should be flexible in adopting latest techniques for recording the testimony of witnesses like video conferencing and voice and cyber communications.<sup>43</sup>

2) Nevertheless, the VWU facing many challenges in implementation of the WPP. The problem of shortage of qualified and trained staff and lack of leadership at the management level has made it difficult to deal with WPP effectively. Further, there is no increase in the allocation of budget in proportion

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<sup>43</sup> Id pg. 18

to the rising number of cases admitted to the program. The IBA has suggested that the operational structure of the VWU must to be reinforced.<sup>44</sup>

3) It was pointed out in the IBA report that there was no protection offered to the defence witness under VWU initially. When the Joint Protocol on the Mandate, Standards and Procedure for Protection in March 2011 for extension of protection to such witnesses was extended to cover defence witnesses, the defence is not assisted in any procedure relating to the effective protection of its witnesses. For example, it is the defence counsel who has to carry out the psych-social risk assessment of witnesses and submit to the VWU which is not expected as such risk assessment must be done by trained professionals and not by counsel. Currently at ICC Registry office there are two offices dealing with counsel matters; one is Office of Public Counsel for Defence (OPCD) that is duty bound to protect the rights of defence and to provide all required assistance to them including research and legal aid; and Counsel for Support (CSS) that helps with admission and training to the Counsel. IBA therefore suggested that the Registry must also hold meetings with the defence in order to know their problems and provide assistance wherever necessary. It is also emphasised that the separate defence unit under OPCD could be formed to assist in the protection of the defence witness. IBA suggests that in absence of protection to defence witnesses the Court's efficiency will be seriously questioned.<sup>45</sup>

IBA further observed that the special measures that are adopted during the trial for protection of identity of witnesses shall not hinder the right of defence counsel to cross examine the witnesses. The right of the accused to have an open trial must be upheld by the court.

4) The next issue at hands was the cooperation of state parties to the requests made by Registry or OTP and the Defence for the conduct of fair trial. Many a times it was found that the requests are not clear or that they are not made on time or some are made without having any regard to national law. Moreover, the defence has to apply for such cooperation either through Registry or on its own. Most of the State parties were found not cooperating enough to these requests. The IBA has suggested formulating a proper procedure for sending

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<sup>44</sup> Id pg. 28

<sup>45</sup> Id pg. 30

requests and also adequate provision for the assistance to defence in the same matter. It is observed by IBA that only few member states have cooperated in the relocation of witnesses. The ICC in 2009 has established ‘Special Fund for Relocation (Special Fund)’ to facilitate the State parties who do not have sufficient finances for relocation of witnesses which the State parties has not availed. IBA proposes the Assembly of State Parties (ASP) to encourage the States to effectively cooperate ICC in achieving the intended object.

5) Because the ICC does not have its own staff it has to rely on cooperation of States resulting in certain major problems. One of such problems is the use of intermediaries in conducting investigations. In any new situation in any State, it is not possible for the ICC prosecutor and its limited staff to conduct investigation without the help of the local people who are normally called as intermediaries. These intermediaries help the staff to find witnesses and other relevant material to prove the case. In Lubanga case however it was noticed that these intermediaries were responsible for identifying witnesses who were provoked to give the false evidence. Thus in order to regulate the use of these intermediaries ASP came up with Draft Guidelines Governing the Relationship between Court and Intermediaries in August 2011. However, it does not have clarity as to the role of intermediaries and so its effectiveness is debatable. The IBA has urged to ICC in matters relating to standardised the policy relating to intermediaries, timely action against those giving false evidence in Court and formulate universal procedure rather than adopting case to case procedures.

6) Another problem faced by ICC is the application for seeking asylum by the witnesses. IBA points out that the witnesses seeking asylum could be a sign of lack of effective security assessment by the officers of the Court. IBA in this behalf has suggested that ICC, state parties and the Host state must formulate a joint policy on the relocation of the witnesses or the acquitted persons seeking asylum.

7) Lastly the IBA has suggested an amendment to Article 93(1) (e) of the Rome Statute conferring subpoena powers on the Court and casting a duty on the State parties to transfer the witnesses to the Court whenever asked by the Court. The word ‘voluntary’ must be omitted and the word ‘facilitating’ must be replaced

with ensuring<sup>46</sup>. The IBA proposes that where such transfer is not possible for the security reasons, the Registry must experiment the use of video conferencing etc. to extract the testimony. The IBA also has emphasised the use of other evidences like forensic evidence, government record, medical reports video footage etc.<sup>47</sup>

The IBA report on witness protection in ICC is based on extensive research and consultation with the relevant stakeholders. It has given a much needed insight into the existing problems of the ICC organs. It not only has pointed out the lacunae but has also provided with feasible solutions to them. In order to increase the efficiency, the ASP must accept these recommendations as soon as possible and bring the effective changes in its procedure.

## **2.3 WITNESS PROTECTION PROGRAMMES IN OTHER JURISDICTIONS**

### **2.3.1 Witness Protection in Canada**

Canada recently amended its witness protection legislation which was established to operate and administer the protection of certain persons involved in certain investigations, proceedings and trials to make it more robust and comprehensive.<sup>48</sup> The purpose of this Act is to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters.<sup>49</sup> This legislation consists of 21 sections is divided into two parts.

It defines a —Witness as a person who has given or has agreed to give information or evidence or participates or who has agreed to participate in a matter, relating to an inquiry or the investigation or prosecution of an offence and who may require protection because of risk to the security of the person arising in relation to the inquiry, investigation or prosecution or a person who,

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<sup>46</sup> Id pg. 58

<sup>47</sup> Id.

<sup>48</sup> Witness Protection Programme Act, 1996 as amended in April 23, 2012, (March 8, 2014), <http://lawslois.justice.gc.ca/eng/acts/W-11.2/>

<sup>49</sup> Id. section 3.



because of their relationship to or association with a person referred to, may also require protection for the reasons referred to.

Further, the Act provides that witness protection programme is to be administered by the Commissioner,<sup>50</sup> whereby he is entrusted with adequate powers to ensure the rationale of admission of witness into protection programmes as well as the category /level of protection to be assigned, upon compulsory recommendation of a law enforcement authority or an international criminal tribunal. The commissioner can also provide suo moto protection if witness himself provides the information essential for admittance into the programme. These factors shall be considered for determining whether a witness should be admitted to the programme.<sup>51</sup>

1. The nature of the risk to the security of the witness.
2. The danger to the community if witness is admitted to the programme.
3. The nature of inquiry, investigation or prosecution involving witness and the importance of witness in the matter.
4. The value of information or evidence given or agreed to be given or of the participation by the witness.
5. The probability of the \_adjustment by witness‘ in the protection programme, keeping into view, his family and his personal traits such as his rationale, ethics, maturity, sensibility, better sense of righteousness etc.
6. The cost/funds/assets involved in the administration of witness protection programme.
7. Other measures of witness protection which can be applied without any formal admittance in the programme.
8. Such other factors as commissioner deems fit.

The witness has to enter into an agreement with the Commissioner which sets out the obligations on behalf of both the parties. The Commissioner has power to admit any person (without signing agreement) into the protection programme

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<sup>50</sup> Id. section 4

<sup>51</sup> Id. section 7

(for maximum 90 days), if there is any emergency.<sup>52</sup> A witness protection agreement is deemed to include following obligations<sup>53</sup>:

1. Commissioner must take reasonable steps necessary to provide protection referred in the agreement to the protectee.
2. On the other hand the protectee shall,
  - a. Give information and evidence or to participate as required in relation to inquiry, investigation or prosecution to which the protection provided in the agreement relates.
  - b. Meet other financial obligations which are not provided in the agreement
  - c. Meet all legal obligations incurred by the protectee, including any other obligations regarding custody and maintenance of the children.
  - d. Refrain from activities that constitute offence against Act of Parliament or which compromises the security of the protectee or programme.
  - e. To accept and give effect to the reasonable directions given by the commissioner in relation to the protection provided to the protectee.

### **2.3.2 Witness Protection Program in United States of America (USA)**

The Witness Security Program (WITSEC) in the USA is run by United States Department of Justice and is executed by United States Marshall Service (U.S. Marshall Service). The U.S. Marshals Service looks after the safety, health and security of prosecution witnesses and their immediate family members if there is a danger to their life and limb. The Witness Security Program was sanctioned under the Organized Crime Control Act of 1970. It is now included in the Comprehensive Crime Control Act of 1984.

The U.S. Marshals Service is the oldest and most resourceful federal law enforcement agency and has worked in most critical conditions. The Marshals Service has achieved a very important position in the administration of justice system. The Marshals are appointed by President. They lead the activities of 94 districts being in-charge of one for each federal judicial district. Roughly 3,829

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<sup>52</sup> Id. see section 6(2)

<sup>53</sup> Id. section 8

deputy U.S. marshals and criminal investigators work for the effective results from the agency. One of the major duties of the U.S. Marshals Service is to execute the Witness Security Program.<sup>54</sup>

Till now The U.S. Marshals have protected, relocated and given new identity to more than 8,500 witnesses and 9,900 of their family members, since the program began in 1971.<sup>55</sup>

Mainly three organizations are involved in Witness Security Program:<sup>56</sup>

- United States Marshals Service that offers safety, health and security witnesses admitted in the program
- U.S. Department of Justice: Office of Enforcement Operations (OEO) which permits the admission of witnesses in protection program who faces the threat to his life due to him becoming a prospective witness in serious crimes.
- Federal Bureau of Prisons (BOP) which looks into the safety of the imprisoned witnesses

The admission to the program may be granted in following cases defined by the U.S. Attorney General's office which is the final authority<sup>57</sup> to decide on the admission to the program:

- Any offense defined in Title 18, United States Code<sup>58</sup>
- Any offence of drug trafficking specified in Title 21, United States Code<sup>59</sup>
- Any other serious crime for which if a witness depose, may result in he being subjected to intimidation

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[http://webcache.googleusercontent.com/search?q=cache:http://www.usmarshals.gov/witsec/\(july 22 2018\)](http://webcache.googleusercontent.com/search?q=cache:http://www.usmarshals.gov/witsec/(july+22+2018))

<sup>55</sup> Id.

<sup>56</sup><http://people.howstuffworks.com/witness-protection1.htm> (july22 2018)

<sup>57</sup> Conferred the final authority on the Attorney General under the Organized Crime Control Act of 1970 which is extended by The Witness Security Reform Act of 1984

<sup>58</sup> OFFICE OF THE LAW REVISION COUNCIL, (March 12, 2014), <http://uscode.house.gov/download/download.shtml>

<sup>59</sup> Id.

- Any State offense that is similar in nature to those set forth above
- Any proceedings, civil or administrative nature in which the deposition by a witness may put his life in danger

Process of Enrollment: It is the state or federal law enforcement agency that has to submit a request for protection of a witness. The application then is forwarded to OEO mentioning in short the deposition to be made by the witness and gravity of threat and intimidation requiring him to seek protection. A preliminary meeting is arranged with Marshals service to counsel the witness about the kind of measures applied for his protection during the program.

It is the prosecutor or the law enforcement agency that has to submit an application with the Marshals Service who organizes the interview. The Marshall Service then has to recommend to the OEO its opinion as to the admission of the prospective witness. The final decision as to the admission of the witness rests with the U.S. Attorney General. Considering that most of these witnesses are criminal themselves, on the proposal of the Marshals Service and the prosecuting attorneys, the Attorney General or his delgatee has to assess the danger that such witness or his dependants pose to their new community. Such assessment must be in writing. The Attorney General has to take into account the criminal records of the witness, alternatives to protection and the testimony of other prospective witnesses while considering the protection. The witness will be admitted to the program if his testimony in the court is more important than the risk posed to the new community. As soon as he is admitted to the program, he and his family members has to sign a MOU which shall be explained to them in a clear and simple language making sure that they understand it. All the communications relating to witnesses there after takes place through Marshall Service or OEO.

After admission the Marshall Service has to arrange for new identities of the witness and his family members as soon as possible. There is a total secrecy in all governmental agencies as to the identity of the accused. The Marshall Service may require the local law enforcement agencies in the new community, where the witness is placed, to take random drug and alcohol testing or put other

conditions in order to protect the new community as well. The Marshall Agency helps the victim mainly in following ways:

- To offer one reasonable job opportunity for the witness
- Assistance in finding housing
- Provide survival allowance on average of \$60,000 per year
- Providing the documents revealing a new identity for witnesses and his family members with their changed names for their security
- Counseling sessions may be organized for the psychological, psychiatric assistance by the trained doctors or social workers<sup>60</sup>

The Witness Protection Program is generally recognized as the most important in combating the major criminal acts like, terrorism, organized crimes, racketeering and drug trafficking. It is one of the best models existing in the field of witness protection laws worldwide. The kind of support and cooperation is offered by the different intergovernmental departments is worth appreciating and following. (For more information, a comparative chart of Witness Protection measures adopted in different countries is annexed.)

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<sup>60</sup>[http://people.howstuffworks.com/witness-protection3.\(july 22, 2018\)](http://people.howstuffworks.com/witness-protection3.(july 22, 2018))

**CHAPTER III**  
**CONSTITUTIONAL MANDATE AND**  
**LEGISLATIVE PROCESS IN INDIA**

**3.1 INTRODUCTION**

No justice system can sustain unless it reconciles the rights of both the parties in question. The Criminal justice system though aims at the protection of society at large it also has to satisfy the urge of the victims for the justice. Since the early ages, the crime was treated as heinous, and the punishment was considered to be essential to curb it. The early theories of punishments denote that the primary purpose of punishment is retribution. The victims suffering due to the act of accused must have a right to take revenge. The Code of Hammurabi mentions a —Eye for an eye and tooth for a toothl which is considered to be the basis of this theory. It was accepted that the criminals deserve to suffer.<sup>61</sup> The theory aimed at the vengeance and thus the psychological satisfaction of the victim that the perpetrator of the crime is punished.

Sir James F. Stephen says;

"The criminal law stands to passion of revenge in much the same relation as marriage to the sexual appetite." <sup>62</sup>

Victim, in criminal justice system consider as a main area of attraction. And changes in time so many criminologist consider criminals as a patient according to them they should be treated more than punished. They must be rehabilitated so that they can live a normal life in the society. Imprisonment is the first step of rehabilitation. The Human Rights movement and the proactive role of the Indian Supreme Court have also played a major role in shaping the rights of the accused person. Due these debates the point of attraction is shifted from victim

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<sup>61</sup> EDWIN SURTHERLAND AND DONALD R. CRESSEY, CRIMINOLOGY 335 (1974).

<sup>62</sup> JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81-82 (1883).

to accused. For that so many principle were made such as fair trial, reasonable opportunity to defend himself properly. The principle of Fair Trial was recognized and the importance of rights of accused was emphasised by the Supreme Court.

In India constitution is called as a law of land it is a supreme law, no law can go beyond the limits set by the constitution. Part III of the Indian constitution deals with the fundamental rights to all subject to reasonable restrictions. It is pertinent to study the rights afforded to accused person and to the victims and witnesses under this Part of the Constitution in order to analyse the effectiveness of the criminal justice administration system. The analysis will also include the other legislative provisions conferring rights on accused and the victims and witnesses.

### **3.2 RIGHTS OF ACCUSED**

Article 14 of the Constitution guarantees the right to equality. Also, the procedure laid down by law has to be fair, just and reasonable.<sup>63</sup> This article restrain on the legislative as well as administrating power in last several years. Article 14 has strongly work against any arbitrary or discriminatory state action. Equality before law and equal protection of laws are two basic concepts of Art 14. The first warrants that there is absence of special privilege to anyone and that all are equal before the law and no one is above the law. The second concept talks about equal protection of laws. . It suggests that a law should be applicable to all equally when they are placed in a similar situation. Article 14 guarantees equal protection not only as regards substantive laws but procedural laws as well. Article 14 guarantees equal protection not only as regards substantive laws but procedural laws as well. Article 14 denounces discrimination on the basis of substantive as well as procedural law.<sup>64</sup>

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<sup>63</sup> Maneka Gandhi v. Union of India, AIR 1978 SC 597

<sup>64</sup> Charan Lal Sahu v. Union of India, AIR 1990 SC 1480

The Supreme Court has observed that article 14 not only guarantees equal protection as regards substantive laws. But procedural laws also come within its ambit. The implication of this provision is that all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief and for defense with like protection and without discrimination. It means that all litigants, similarly situated, are entitled to the same procedural rights for relief and for defense.<sup>65</sup>

J. Bhagwati, in *Bachan Singh v. State of Punjab*<sup>66</sup> explained that Rule of Law which permeates the entire fabric of the Indian Constitution excludes arbitrariness. Another notable principle developed by the Supreme Court while expounding on article 14 is that every action of the government, or any of its instrumentalities, must be informed by reason. Any state action which is not informed by reason cannot be protected as it can be easily challenged as being arbitrary.

—Non arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary in whatever sphere must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the state and exercise of all powers must be for public good instead of being an abuse of power.<sup>67</sup> The Government and other public authorities must act with reasonable fairness and that each action of such authorities must pass the test of reasonableness.<sup>68</sup>

In many cases the courts have insisted with a view to control arbitrary action on the part of the administration that the person adversely affected by administrative action be given the right of being heard before the administration passes an order against him in pursuance of minimising arbitrariness.

Thus the Supreme Court has extracted from article 14 the principle that natural justice is an integral part of administrative process. Article 14 guarantees the right of hearing to the person adversely affected by an administrative order. The *Audi alteram partem* rule, in essence, enforces the equality clause in article 14

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<sup>65</sup> *Shri. Meenakshi Mills Ltd., Madurai v. A.V. Vishanatha Sastri*, AIR 1955 SC 13.

<sup>66</sup> AIR 1982 SC 1325

<sup>67</sup> *Style (Dressland) v. Union Territory, Chandigarh*, (1999) 7 SCC 89

<sup>68</sup> *Hansraj H. Jain v. State of Maharashtra*, (1993) 3 SCC 634



and it is applicable not only to quasijudicial bodies but also to administrative orders adversely the party in question.<sup>69</sup>

*Maneka Gandhi v. Union of India*<sup>70</sup> is an authority for the precept that the principles of natural justice are an integral part of the guarantee of equality assured by article 14, an order depriving a person of his civil right passed without affording him an opportunity of being heard suffers from the vice of violation of natural justice and is thus an arbitrary order.

Article 20 (1) of the Constitution grants protection against ex-post-facto laws. An ex-post-facto law is imposes or increases the penalties retrospectively upon acts already done. Such laws are undesirable in the interest of justice requires strong constitutional resistance. The immunity applies only against conviction or sentence given by courts in a criminal trial under the ex post facto law. But it does not restrict the trial under the new law. The objection does not apply to a change of procedure or of court. No person charged with the commission of a crime has an inherent right to ask for trial by a particular court or unless shows the violation of right to fair trial.

Several privileges provided to the accused are:

- Guarantee against Double Jeopardy
- Privilege against Self Incrimination – Art. 20(3)
- Arrest
- Fair Trial
- Speedy Trial and Long Pre-trial Confinement
- Bail
- Requirement of more Criminal Courts
- Legal Aid
- Handcuffing of Under Trials
- Police Torture

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<sup>69</sup> *Union of India v. Amrik Singh*, AIR 1991 SC 564

<sup>70</sup> AIR 1978 SC 597

### 3.3 PROTECTING VICTIMS

In India accused are more privileged as compared to the victim due to the concept of fair trial. The accused is more favoured by the system and pampered in any way. But due to the process of fair trial the victim was totally ignored. He is left without any satisfaction of bringing the criminal to justice.

In recent years a branch of victimology developed by various criminologists to get focus upon the victims in the criminal justice delivery system. This branch is established to gain the confidence of the victim which he lost during the trials. He therefore needs the protection and assurance from the system administrators that their effective participation will be rewarded by bringing the perpetrators of the crime to justice.

In the Indian criminal justice delivery system the importance of witness is recognised only in few cases such as rape and murder. Under this it was acknowledged that the victim of crime should be compensated through legislative enforcement so that he can lead his remaining life peacefully.

Recognising the plight of the victims the Supreme Court of India allowed a person to move to the High Court u/Art 226 or to Supreme Court u/Art 32 directly for an action against the government inaction or the arbitrary action of the government and its agent resulting in the violation of the fundamental rights of victims rather than going for an ordinary civil suit. In *Khatri v. State of Bihar*<sup>71</sup>, the police was alleged of blinding certain prisoners and the state was held liable to pay compensation to them. Similarly in *Rudul Shah v. State of Bihar*<sup>72</sup>, the petitioner was granted a compensation of Rs. 35,000/- because he was kept in prison for 14 years after he had been acquitted by a criminal court. In *Saheli v. Commissioner of Police*<sup>73</sup>, the State was held liable to pay compensation to the mother of a deceased person who had died because of police beating assault and torture. Victims and offenders are called as 'penal couple'. Previously, there were no adequate laws, even in other countries providing for victim compensation. But the legal system cannot discriminate in

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<sup>71</sup> AIR 1981 SC 928

<sup>72</sup> AIR 1983 SC 1086

<sup>73</sup> AIR 1990 SC 513 also see *Neelabati Behera v. State of Orissa*, AIR 1993 SC 1960

favour of one party against another. So in many countries either separate law or victim compensation schemes were formulated and given effect. Lately, Indian legal system also has started responding towards compensatory demands of victims in a positive manner. There are legislative provisions providing for compensation to victim of crime. The significant amongst these are provided under Code of Criminal Procedure, 1973. This is the first and the oldest legislation in India to deal with subject of compensation to the victims of crime.

Later, the concept of victim has been enlarged by Cr.P.C. Amendment Act, 2008. In clause (w) of section 2, a new clause (wa) has been added which defines victim as “....a person who has suffered any loss or injury caused by reason of the act or omission for which accused person has been charged and expression victim includes his or her guardian or legal heir.” Section 195A of Cr.P.C. inserted by the Amendment Act of 2008 lays down a procedure of filing a complaint with the Magistrate by a witness or any other person on his behalf, if he is threatened by any other person to give false evidence. Such threatening is an offence under section 195A of Indian Penal Code.

### **3.3.1 LEGISLATIVE PROCESS RELATING TO RIGHTS OF VICTIM AND WITNESSES**

According to evidence act any statement made before the police is not confession but it is admission. It is done due to the corruption in the police department they might abuse their power while recording the statement of the witness. But due to the changing nature of the crime and increase in the frequency of crime, in certain cases like terrorism it was thought that the menace must be controlled through all possible means. Accordingly, the Terrorist and Disruptive Activities (Prevention) Act, (TADA), 1987 was enacted giving abundant powers to police officers above a specific rank that any statement made to such police officer, to be taken as admissible piece of evidence. A procedure was prescribed about the protection of witnesses. A special magistrate of the court was given discretion to afford protection to witnesses on application.

Under some legislative Act special power is given to the police to protect the rights of the victims and witness these are :

- Terrorist and Disruptive Activities (Prevention) Act, 1987
- Prevention of Terrorism Act, 2002 (POTA)
- The Unlawful Activities (Prevention) Amendment Act, 2004
- Juvenile Justice (Care and Protection of Children) Act, 2000

## **LAW COMMISSION OF INDIA'S 198th REPORT ON WITNESS IDENTITY PROTECTION AND WITNESS PROTECTION PROGRAMMES AUGUST 2006**

Keeping in view the various observations made by Supreme Court recently in number of cases<sup>245</sup> that referred the necessity of Witness Identity Protection<sup>74</sup> during investigation, inquiry and trial and Witness Protection outside the Court in all kinds of serious offences, the Law Commission<sup>74</sup> of India took suo motu cognizance to the issue (confining the Witness Identity Protection procedures to cases triable by the Court of Session of Courts or equal rank) and prepared a Consultation Paper on —Witness Identity Protection and Witness Protection Programmes (August 2004) and invited responses to the Questionnaire (in two parts A and B, the former dealing with Witness Identity Protection and the latter dealing with Witness Protection Programmes). The Law Commission, in 198th report, has taken cognizance of necessity & quantum of provision required to enable witnesses to provide evidence anonymously during criminal trials, the physical/mental vulnerability of witnesses and the need to look into various other spheres of witness protections mainly physical, at all the stages of criminal trial.

The fundamental necessities of an ideal Witness Protection Programme, congregated by Law Commission of India may be summarized as below:

1. At preliminary level, a Senior Police Officer or a Court will enquire into the requirement of protection outside a court to a victim-witness or other witnesses;

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<sup>74</sup> NHRC v. State of Gujarat: 2003 (9) SCALE 329, P UCL v. Union of India: 2003(10) SCALE 967, Zahira v. State of Gujarat: 2004(4) SCC 158, Sakshi v. Union of India: 2004 (6) SCALE 15 and Zahira v. Gujarat 2006 (3) SCALE 104

2. The general criteria for grant of protection is when a witnesses has to depose in trials relating to serious‘ crimes;
3. The protection starts at the preliminary stage of investigation till the completion of the trial;
4. An MOU (Memorandum of Understanding) laying down the mutual obligations has to be entered into between the in charge of protection programme and the victim-witness or other witnesses, breach of which will result in termination of the protection;
5. The most important and sought protection, relates to a new identity‘ given to witness and/or relocation in a different place;
6. Protection may be extended to the relatives of the witness also;
7. No person is permitted to disclose the name of the admitted witness or his identity in any way whatsoever,
8. The identity and relocation cannot be published;

The Law Commission hold two seminars on this topic; one in New Delhi on 9th October, 2004 and another at Hyderabad on 22nd January, 2005 and invited number of Judges of the High Court, lawyers, police officers, public prosecutors, judicial officers (Magistrates and Sessions Judges) for participation. A good number of responses were received from State Governments, Directors General of Police/Inspectors General of Police, High Court Judges, international and local organizations, Judges of the subordinate judiciary, jurists, advocates and public prosecutors. The Commission discussed the responses & gave its recommendations, both in regard to Witness Identity Protection and Witness Protection Programmes. It also proposed a Draft bill on Witness Identity Protection. It mainly emphasized on the balancing the rights of accused & witnesses and reiterated via various cases that the rights of accused may be restricted if the witnesses are subject to risk of life and property, coercion and intimidation, so the justice may not lose its essence.

The report is divided into various sections and chapters, and covers step by step and detailed aspects of —Witness Protection. It has categorized the witnesses into three categories as per the requirement of protection.

1. Victim-witnesses who are known to the accused
2. Victims-witnesses not known to the accused
3. Witnesses whose identity is not known to the accused

Category first requires protection from trauma and categories second & third require protection against disclosure of identity.

The Law Commission has talked about admissibility of the evidence by video-link/two way audio system/two way close circuit television, considering the protection of witnesses in sensitive cases which the Supreme Court had pointed out along with certain guidelines.<sup>75</sup> The procedure for witness protection suggested by the Supreme Court is mentioned by the Law Commission in its report.<sup>76</sup>

Chapter I contains various observations of Supreme Court, with special attention to NHRC vs. State of Gujarat.<sup>77</sup> In Zahira's case<sup>78</sup>, Court observed —Legislative measures to emphasize prohibition against tampering with witnesses, victims or informants, have become imminent and inevitable need of the day. It also added that<sup>79</sup> Witness protection programmes are imperative as well as imminent in the context of alarming rate of somersaults by witnesses. Regarding techniques of video conferencing and screening, in Sakshi vs. Union of India<sup>80</sup>, the Supreme Court stated:

—”...We hope and trust that Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves.”

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<sup>75</sup> Maharashtra v. Dr. Praful B Desai, 2003 (4) SCC 601 and Sakshi, 2004 (6) SCALE 15

<sup>76</sup> (Chapters IX & sec.12, Schedule I contains procedure for trial in cases of victims/witnesses not known to accused who require identity protection and Chapter X, sec.13, Schedules II to the victims known to the accused and who need protection from trauma).

<sup>77</sup> 2003(9) SCALE 329

<sup>78</sup> 2004(4) SCALE 377 at 395

<sup>79</sup> Id 399

<sup>80</sup> 2004(6) SCALE 15

The Law Commission has made a detailed analysis of section 327(2) the Code of Criminal Procedure, 1973 which permit in camera proceedings, section 228A of the Penal Code, section 21 of the Juvenile Justice (Care and Protection of Children Act, 2000) and sec 146(3) of the Indian Evidence Act, 1872 (as amended in 2002) while taking into consideration the course of action that needs to be adopted while proposing a better witness protection program. The Commission has enumerated some Legislations that were aimed at protecting witness identity i.e. sec 16 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and 30 of the Prevention of Terrorist Act, 2002 (POTA). The legitimacy of these special provisions of the TADA<sup>81</sup> and POTA<sup>82</sup> were sustained.

### **3.4 Witness Protection Program**

After considering various witness protection programme at international level and in different countries law commiseion sugested and recommended the establishment of the witness protection programme in India. But only toward the serious offences.it also ensure that this programme will apply equally to victim procecuton and defence witnesses, confining to cases triable by Sessions Courts or Courts of equal rank and Special Courts and actionable on an application made by the respective investigation agency or the public prosecutor, in the court of Magistrate. The Law Commission has recommended the inclusion of defense witnesses also along with prosecution Commission has recommended the inclusion of defense witnesses also along with prosecution witnesses, into witness protection programme if there is threat to their life or property, provided the funds are sufficient to cover defense witnesses too.

#### **3.4.1 Authority in-charge of Witness Protection Program**

Head of witness protection programme is Chief justice of state high court and he may administer the fund through the State Legal Aid Authority. The selection of witnesses for protection should be decided by Magistrate on counsel of police

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<sup>81</sup> Kartar Singh vs. State of Punjab, 1994(3) SCC 569

<sup>82</sup> PUCL vs. Union of India, 2003(10) SCALE 967.

officer and should be communicated to the state legal aid authority which should issue apt orders to the District Legal Services Authority, to release the funds for carrying out the order.

Regarding appeal against order (either admittance or refusal of a person into Witness Protection Programme), Law Commission has recommended, that in case the victim/witness is given physical protection along with identity protection and it is affecting the right of accused then accused can appeal to the High Court. In case a Magistrate refuses to admit victim/witness to the Witness Protection Programme, then the victim/witness should have right to appeal to the High Court.

### **3.4.2 Measures of Protection of Witnesses**

Only in some special cases according to their gravity of the case Re-location, maintenance, providing accommodation, transport etc are provided by this programme to the witness along with the change in identity. But according to the report of law commission in most of the cases mere change of identity of witness is sufficient. For this measures state/union government must make adequate funds available under the programme to the fund protection measures.

### **3.4.3 Admission to Witness Protection Program**

The Law Commission has recommended that the such a decision should be taken by a senior police officer of the rank of Superintendent of Police/Commissioner of Police, with due clarifications, and then magistrate on recommendations of police officer may duly examine the certificate, in camera, and may pass the judicial order regarding category of protection measure to be applied, as per circumstances of the case.

### **3.4.4 Extent of Protection**

While dealing with the extent of protection, the Law Commission has recommended that protection should be extended to the close family members‘ i.e. spouse, children, parents, grandparents, brothers and sisters, but relief may be limited to those whose life or property may be in danger or as per the circumstances of the case.



### **3.4.5 Funding for the Program**

Regarding provision of funds for the implementation of Witness Protection Programme, Law Commission has recommended that the Central Government and State Governments should contribute equally, as administration of justice is the joint responsibility of Central and State Governments.

### **3.4.6 Memorandum of Understanding**

Emphasising the importance the Law Commission mandates the Memorandum of Understanding (MOU) which contains rights, obligations and restrictions to both the parties. Law Commission has recommended that it should be compulsorily entered by the victim/witness, to get admission into protection programme and in case of breach of MOU, the affected party (victim/witness or the police or any other person) can move the Magistrate for appropriate orders. Law Commission has included in the report MOU's of Canada and South Africa for reference. In case, protected witness violates MOU/ fails or refuses to testify, without any reasonable excuse, Law Commission has recommended an action, moved by police or public prosecutor against that witness, for contempt of court and immediate cancellation of the order admitting that witness to the Witness protection programme.

### **3.4.7 Effect of Changed Identity**

In case the identity of the person is changed and he later acquires the status of an accused or complainant or witness in any other criminal proceedings under his old identity, the Law Commission has recommended that in such cases, his real identity and pseudonym/ relocated address may be disclosed only to the respective judicial authority (Judge/ Magistrate) dealing with the case and that proceeding has to be stayed till the trial of earlier proceeding in which the person is a protected witness is completed.

### **3.4.8 Punishment for Disclosure of Identity of a Protected Witness**

The Law Commission has recommended that any person who discloses the identity of protected witness without any authority by concerned judicial authority, shall be liable for the breach of statutory provisions relating to maintenance of confidentiality he should be subjected to severe punishment i.e. imprisonment for 3 years with a fine which may reach Rs.10,000/-).

### **3.4.9 Analysis of the Report**

While preparing this extremely comprehensive report and throwing light on various existing legislations and required amendments, to support the Witness Protection Programme, the Law Commission overlooked completely the possibility of assigning this extremely sensitive responsibility to an autonomous authority free from the influence of other legal/police authorities. In India —the nexus between police, politician and powerfull is no secret & is so extreme that it has become a vice and in most of the cases judiciary is left with no option but to dance on their tunes due to lack of sufficient evidence/witnesses. In this situation, involving police as recommending/certifying authority for admittance of witnesses in protection programme is nothing but an irony. Approaching police for protection in normal course is itself a very daunting task in India .The Witness Protection Programme should actually be administered by an autonomous body which could be easily approachable by anybody i.e victim/witness himself or anybody on his behalf. This autonomous authority should be created legitimately by a central Act of Parliament ad hoc, with national and state level presence, in sync with various international treaties and agreements to insure international cooperation and support, with a very strong spotless reputation laced with apt powers to carry out independently, respective investigation, inquiries, prosecution and remedies in case of need. It should be absolutely free from the influence of police/powerful/politician and should be presided over & managed by the top level legal experts. Regarding funds, it should not be dependent on Central / state as recommended by Commission, as it will again give rise to a sort of conflict in hour of need and will create unnecessary delay, when protection will be needed on emergency basis. In criminal proceedings, any kind of minutest delay in providing protection to witness may result in catastrophe. Instead it should be self sufficient regarding funds via approval by parliament as a part of national annual budget, so that allocation of funds should be quick and easy. The administration of The Witness Protection Law should be, in no condition, left to the discretion of states as it will create chaos instead of justice. Instead it should be a central legislation because all the criminal investigations/trial /proceedings are administered by Central legislations i.e. Code of Criminal Procedure, IPC, Indian Evidence Act etc.

**CHAPTER IV**

**THE INDIAN JUDICIARY ON WITNESS**

**PROTECTION**

**4.1 INTRODUCTION**

The Indian Supreme Court is both powerful and effective. In dozens of major cases each year its orders have far reaching political, economic, and social consequences.<sup>83</sup>

In *S.P. Gupta v. Union of India*<sup>84</sup> the Supreme Court has described its role and said that it has creative function and active role to bring social justice for common man. It cannot merely act as an umpire.<sup>85</sup>

The function of the judiciary is to protect people's rights, adjudicate disputes between two individuals and adjudicate whether a person is guilty of an offence or not.<sup>86</sup> The importance of judiciary as a whole in the smooth functioning of the present- day society cannot be overstated. Just like pure water is essential for life, a fine judiciary is also essential for the survival and development of the nation.<sup>87</sup> While law is laid down by the legislature, it is the courts that render justice. It is the courts whom a person in need of justice approaches. The judiciary being the third pillar in a democratic set-up, comprises of a hierarchy of courts with the Supreme Court at the top and a High Court in each state with subordinate courts. It must be remembered that ultimate power of the court (judicial system) arises not by the stick it wields, but by the degree of confidence that the citizens place in it.<sup>88</sup>

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<sup>83</sup> Nick Robinson, *The Indian Supreme Court By The Numbers*, LGDI WORKING PAPER NO 20122 (December 14, 2012), [http://azimpremjiuniversity.edu.in/sites/default/files/userfiles/files/LGDI\\_Working\\_Paper\\_14December2012\\_The%20Indian%20Supreme%20Court%20by%20the%20Numbers\\_NickRobinson.pdf](http://azimpremjiuniversity.edu.in/sites/default/files/userfiles/files/LGDI_Working_Paper_14December2012_The%20Indian%20Supreme%20Court%20by%20the%20Numbers_NickRobinson.pdf)

<sup>84</sup> *S.P. Gupta v. Union of India*, 1981 SCC Supp. 87.

<sup>85</sup> *Id.*

<sup>86</sup> ARUN MOHAN, *JUSTICE, COURTS AND DELAYS 2* (Universal Law Publication Co, 2009).

<sup>87</sup> *Id.* at 3.

<sup>88</sup> *Id.*

Judiciary has to interpret the laws made by the legislature according to the words used therein. Justice Holmes in this regard states that, “a word is not a crystal, transparent and unchanged. It is a skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.”<sup>89</sup> A judge can interpret the law in various dimensions which is the most constructive and innovative function of a judge.

Plato also posed a question that “Is it more advantageous to be subject to the best men or the best laws?”<sup>90</sup> According to him the laws are set of rules which are general and cannot stand before the complexities of life. Further, he keeps wisdom of king far superior than laws. So according to Plato wisdom of a king will always be able to serve better justice to people. On the other hand he has favored rule of law. He further says that “He who bids the law's rule bids God and reason rule, but he who bids man's rule adds the element of the beast, for desire is a wild beast and passion perverts the minds of rulers even though they be the best of men.”<sup>91</sup> Still Aristotle and Plato believed there has to be a gap between generalities of law and complexities of life which is filled by the judges. Judges play the important role of making laws also.

Thus it is the task of the Supreme Court to fill the gaps if any in the administration of justice. Though the task of the judiciary is to interpret the legislation, however, in case of no legislation it is the sacrosanct duty of the judiciary to point at the lacuna and guide the legislature further to fill up the gap by creation of a legislation, the best example is the similar kind of activism depicted by Supreme Court of India in the landmark judgment of *Vishaka v. State of Rajasthan*.<sup>92</sup>

The present chapter would give an account of the Supreme Court decisions which have attempted to fill in the gap in the criminal justice system by conferring certain degree of protection to witnesses and victims. Few judgments

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<sup>89</sup> *Towne vs. Eisner*, 245 U.S. 418, 425 (7 January 1918)

<sup>90</sup> P.N. Bhagwati, *Judicial Activism in India*, (March 12, 2014)

[http://www.law.wisc.edu/alumni/gargoyle/archive/17\\_1/gargoyle\\_17\\_1\\_3.pdf](http://www.law.wisc.edu/alumni/gargoyle/archive/17_1/gargoyle_17_1_3.pdf).

<sup>91</sup> *Id.*

<sup>92</sup> JT 1997 (7) SC 384

also signify the judicial agility of the Supreme Court in suggesting the creation of law to confer witness.

## **4.2 NEED FOR JUDICIAL INTERVENTION**

The impact of a crime committed on victim is always very deep. The suffering can be physical, mental, emotional and financial which sometimes cannot be recovered. There can be danger of threat to be inflicted upon victims, family of victims or witnesses and witnesses' family. This hampers the course of justice.<sup>93</sup>

Apart from the initiatives taken up by human rights institutions for the protection of victims also there are criminal justice incentives. The role of witnesses and victims in any case is very important for achieving the justice but the challenge here is getting their cooperation by winning their trust in our Criminal Justice System.<sup>94</sup> Victims and witnesses are least interested in giving the witness because of the danger of threats and intimidation which they might get. This sometimes may be worse when the witness or victim is vulnerable to such threats and can be affected very badly, for example children who are immature will suffer more harm of the threats given to them than others. This should be taken care of.<sup>95</sup> On the other hand victims and witnesses who get proper care and support are more likely to cooperate with the system in reaching to the verdict in better way. But this is not seen in our criminal justice system. Moreover, they can be revictimized none other than criminal justice system itself.<sup>96</sup>

The urgent need for witness protection has two aspects related to it.

1. The evidence collected throughout the investigation is not damaged by witnesses by withdrawing their statements given before a court.
2. For a transparent and fair trial with the opportunity to cross examine the witnesses, after knowing the details about them

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<sup>93</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, Victim Assistance and Victim Protection, (March 13, 2014) <http://www.unodc.org/unodc/en/organized-crime/witness-protection.html>.

<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Id.

### **4.3 IMPORTANCE OF WITNESS PROTECTION**

The Supreme Court commented upon the need and importance of Witness Protection in India in following cases:

In *Bhagwan Singh v. State of Haryana*<sup>97</sup>, it was held that just because prosecutor requested the witness to be declared as hostile will not discard his evidence and there is no bar to convict accused on the basis of such testimony.

In *State of U.P. v. Ramesh Prasad Misra*<sup>98</sup>, the Supreme Court held that the evidence of a hostile witness will not be totally rejected whether it is in favour of accused or prosecution, it must be closely scrutinised and the part of the evidence which is consistent with either parties may be accepted.

In *Balu Sonba Shinde v. State of Maharashtra*<sup>99</sup>, the Supreme Court held that merely the fact that the witness is declared as hostile, that evidence cannot be rejected. The court has to be cautious while accepting such evidence. The court should assess the testimony of such witness in the same manner as in case of any other witnesses.<sup>100</sup>

### **4.4 IMPENETRABILITY OF WITNESSES IN INDIA**

India is a country having no specific law on witness protection. The witness turning hostile is a common occurrence today. *Best Bakery case*<sup>101</sup> and *Jessica Lal murder case*<sup>102</sup> are well known some of the examples of acquittals that happened because witnesses turned hostile.<sup>103</sup>

Improper witness protection programmes is largely responsible for witnesses turning hostile. Witnesses are also sometimes harassed by the police who make

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<sup>97</sup> AIR 1976 SC 202.

<sup>98</sup> AIR 1996 SC 2766

<sup>99</sup> 2 2003 SCC (CrI.) 112.

<sup>100</sup> *Shyama v. State of Rajasthan*, 1977 WLN 278

<sup>101</sup> *Zahaira Habibulla H. Sheikh v. State of Gujarat*, (2004) 4 SCALE 375.

<sup>102</sup> CrI. M.C. No.3605/2009.

<sup>103</sup> *Police and the Citizen: Interrogation of Witnesses* (March 11, 2014), <http://www.indg.in/socialsector/socialwelfare-faqs/3.interrogationofwitnesses.pdf>.

the common man hesitant to boldly give evidence before the police and the court.<sup>104</sup>

In *Swaran Singh v. State of Punjab*<sup>105</sup>, Wadhwa J. expressed his view on conditions of witnesses by stating that:

The witnesses are harassed a lot. They come from distant places and see the case is adjourned. They have to attend the court many times on their own. It has become routine that case is adjourned till the witness is tired and will stop coming to the court. In this process lawyers also play an important role. Sometimes witness is threatened, maimed, or even bribed. There is no protection to the witnesses. By adjourning the case the court also becomes a party to such miscarriage of justice. The witness is not given respect by the court. They are pulled out of the court room by the peon. After waiting for the whole day he sees the matter being adjourned. There is no proper place for him to sit and drink a glass of water. When he appears, he is subjected to prolong stretched examinations and cross examinations. For these reasons persons avoid becoming a witness and because of this administration of justice are hampered. The witnesses are not paid money within time. The High courts must be vigilant in these matters and should avoid harassment in these matters by subordinate staff. The witnesses should be paid immediately irrespective of the fact whether he is examines or the matter is adjourned. The time has come now that all courts should be linked with each other through computer. The Bar Council of India has to play important role in this process to put the criminal justice system on track. Though the trial judge is aware that witness is telling lie still he is not ready to file complaint against such witness because he is required to sign the same. There is need to amend section 340(3) (b) of Cr.P.C.<sup>106</sup>

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<sup>104</sup> Id.

<sup>105</sup> (2000) 5 SCC 68 at 678

<sup>106</sup> Id.

## **4.5 JUDICIAL PRONOUNCEMENT ON THE NECESSITY FOR WITNESS PROTECTION IN INDIA**

State is consider as a protector of the citizen and it is the duty of the state to ensure the safety of its citizen during the trial so that the witness can speak the truth fearlessly. Indian constitution provide such protection under artice 21 that is to protect life and liberty of its citizens.

The Supreme Court of India in many recent judgments has raised the issues of protection of identity of witnesses and witness protection programmes in a number of judgments like NHRC v. State of Gujarat<sup>107</sup> , PUCL v. Union of India<sup>108</sup> , Zahira v. State of Gujarat<sup>109</sup> , Sakshi v. Union of India<sup>109</sup> and Zahira Habibulla Sheikh v. Gujarat<sup>110</sup> .

In People's Union for Civil Liberties v. Union of India<sup>111</sup>, wherein constitutionality some of the provisions of Prevention of Terrorism Act, 2002 (POTA) were challenged, the Apex Court carefully analysed section 30 of the Act which had mentioned about the protection of witnesses. This provision provides for the proceedings to be held in camera in order to keeping the identity of witness confidential. The court felt the reality that very often witnesses do not come forward to testify before court in serious crimes. Witnesses are not ready to give evidence mainly because their life might be in danger. In the court's view, section 30 of the act maintains a balance between rights of witness, rights of accused and interest of the public. However, it is to be noted that secrecy of witness is an exception and not a rule under this section.

### **4.5.1 Importance of Witness Protection Reiterated**

In Leelawati v. Ramesh Chand<sup>112</sup>, the Supreme Court denied a transfer of court petition and stated:

“As has been assured by the learned counsel for the State of Haryana, necessary directions may be obtained from the trial court so that the

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<sup>107</sup> 2003 (9) SCALE 329.

<sup>108</sup> 2003 (10) SCALE 967.

<sup>109</sup> (2004) 4 SCC 158.

<sup>110</sup> (2004) 5 SCC 518.

<sup>111</sup> 2003 (10) SCALE 967.

<sup>112</sup> AIR 2004 SC 1488



eyewitness, who is a girl child of nine years of age and other witnesses get adequate protection and police security to be able to depose in court without any fear and pressure.”

*Javed Alam v. State of Chhattisgarh*<sup>113</sup> is an appropriate case of insufficiency in the CJS to protect the witnesses from the threats they get by accused. They backed out from what was stated during investigation. Therein, it was observed by the court that the girl’s (witnesses) fate, is was under tremendous pressure, points out that there is immense need of a legislation providing for witness protection in order to sustain criminal justice system. Even close reading of the evidence shows that how the witness was under tremendous pressure not to speak the truth.

In *Sakshi v. Union of India*<sup>114</sup>, it was held that there is immediate want for witness protection law. It was suggested that during the trial cameras must be installed connecting two rooms. Thereafter the same observance was reiterated in *State of Maharashtra v. Dr. Praful B Desai*<sup>115</sup>, and thereafter the evidence with video-link is regarded as admissible evidence.

#### **4.5.2 Denial of Right of Accused to Cross Examine the Witness Deposing against Him**

The Apex Court in *Gurbachan Singh v. State of Bombay*<sup>116</sup> held that if the victim has deposed against the accused then the detinue cannot be permitted to cross examine the witness and hence upheld the validity of provision of Bombay Police Act, 1951. Furthermore the court said that such kind of provision is made to deal with the cases wherein the witness is exposed to the fear of violence and are not willing to depose in the court.

In this case the order of externment passed was challenged by the appellant. The appellant was ordered to move Amritsar from Bombay and later on to Kalyan so that the witnesses could depose at Bombay against the appellant without any fear. Under section 27 of Greater Bombay Police Act, 1902, police commissioner has the power to remove any person from a particular area, in

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<sup>113</sup> (2009) 6 SCC 450

<sup>114</sup> *Sakshi v. Union of India*, (2004) 5 SCC 518.

<sup>115</sup> 2003 (4) SCC 601.

<sup>116</sup> AIR 1952 SC 221.

case if the person is involved in an act which might cause harm or there is likelihood of causing harm, or his involvement in the commission of an offence or if the witnesses not coming forward because of apprehension with respect to the safety because of such person. The validity of this section has been upheld by the supreme court of India.<sup>117</sup>

Here, the appellant contended that the order to accused to move outside the Greater Bombay made under section 27 amounts to violation of article 19(1)(d) of the Indian constitution on account of unreasonable restriction. The Court upheld the validity of section 27.

The provision of the Act, which requires absence of accused in cross examination was also upheld by the Supreme Court and was held to be reasonable. Further the Court stated that the presence of accused in some cases might cause fear in the mind of the public and the safety would be in danger which will render the justice because in the presence of the accused, witness will not be able to give statement freely. Hence the power given under section 27 was justified. It is pertinent to note here that this case was adjudged before the Maneka Gandhi.<sup>118</sup> Therefore, there was no need to go into the question of fairness of the procedure.

#### **4.5.3 Ensuring Voluntary Statement by the Witnesses**

To elaborate on this, the decision in Talab Haji Hussain vs. Madhukar Purushottam Mondkar<sup>119</sup> needs to be considered. In this case, the offence which was alleged to be committed by the accused was a bailable offence. But the High Court under section 482 of Cr.P.C. rejected the bail application by allowing an application by complainant on ground that “it would not be safe to permit the appellant to be at large.” Subsequently, Supreme Court also confirmed this order of cancellation. The Court said that the primary object of Cr.P.C. is to provide fair trial to the accused and prosecution. The Court further observed that it is important to note that in a criminal case the witnesses should be able to depose without any fear of threat or inducement from either parties. If there is likelihood

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<sup>117</sup> Id.

<sup>118</sup> Maneka Gandhi v. Union of India,

<sup>119</sup> AIR 1958 SC 376.

that the trial may be affected because of the conduct of accused then the High Court can use inherent powers to meet the ends of justice.<sup>120</sup>

Here, this principle was based on the „inherent powers“ of the High Court. The conduct of the accused subsequent to release on bail rendered for the cancellation of bail and therefore it was justified on the same basis.

#### **4.5.4 Witness Protection and Fair Trial**

A trial can be called fair when there is harmony and unanimity in testimony. In *G.X. Francis v. Banke Bihari Singh*<sup>121</sup>, the Supreme Court adjudicated in the present matter by deciding upon a transfer petition filed under section 327 of the Cr.P.C for transfer of a criminal case from Jashpuranagar (M.P.) to another state. The complainant belonged to a royal family of Jashpur, who used to reside at Jashpurnagar. Among the seven accused, one was a Jacobite Christian and others were Roman Catholics. One of the grounds put forth by the complainant for seeking the transfer of the case was the animosity between the communities of the accused and that of the complainants i.e. Christians and Hindus, in Jashpurnagar. Because of the unanimity in testimony from both the sides about the nature of surcharged tension in Jashpurnagar, the Supreme Court by an order transferred the case from Jashpuranagar to the State of Orissa for fair trial.

#### **4.5.5 Fairness of Trial for the Accused, Victim, Prosecution and Witnesses**

In *Maneka Gandhi*<sup>122</sup>, the Supreme Court held that because of constitutional mandate under article 21, it requires a procedure to be „fair, just and reasonable“. This decision had a heavy impact on the administration of criminal justice. The phrase used in article 21 i.e. „procedure established by law“ means the procedure which is „just, fair and reasonable“. In any criminal proceeding, a fair trial alone can, at the same time, both the accused and the society are benefited if we go by, the presently being followed, principles laid down under article 21 of the Indian Constitution in as far as the right to a fair trial is considered.

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<sup>120</sup> Id.

<sup>121</sup> AIR 1958 SC 209.

<sup>122</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

The Supreme Court in *Maneka Sanjay Gandhi v. Rani Jethmalani*<sup>123</sup> stressed on the requirement of a friendly ambience for fair and impartial trial.

*NHRC v. State of Gujarat*<sup>124</sup> explicitly deals with the concept of a fair trial. In this case, the National Human Rights Commission (NHRC) filed a PIL to seek a retrial with for the reason that the witnesses were forced to change their statement in favour of accused by accused himself as a result of which the trial was vitiated.

#### **4.5.6 Failure to Hear Material Witnesses is Denial of Fair Trial**

In *National Human Rights Commission v. State of Gujarat*<sup>125</sup>, the Supreme Court stated that a fair trial is a trial where there is no biasness or prejudice for or against the accused, the witnesses, or the cause. If in a trial the evidence is taken from witnesses by threats or force then such trial would not be called as fair trial. Also, if the material witnesses are not heard then it will lead to injustice.

The court also suggested that if witnesses ask for protection, the same necessarily has to be provided to them. If a person identified as a witness needs protection so as to testify freely, then that person has to send an application to SIT and then SIT should pass necessary orders in appropriate matter. All the relevant factors should be taken into consideration and also required police protection should be given to that witness or the victim

#### **4.5.7 Publication of the Evidence of the Witness only during the Course of the Trial and Not After**

In *Naresh Shridhar Mirajkar. v. State of Maharashtra*<sup>126</sup>, in a suit for defamation against the editor of a weekly newspaper, one of the witnesses prayed that the court may order that publicity should not be given to his evidence in the press as his business would be affected. After hearing arguments, the trial Judge passed an order prohibiting the publication of the evidence of the witness. A reporter of the weekly along with other journalists moved to the Supreme Court under article 32 challenging the validity of the order. It was contended that : (i)

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<sup>123</sup> (1979) 4 SCC 167

<sup>124</sup> 2003 (9) SCALE 329.

<sup>125</sup> (2009) 6 SCC 342.

<sup>126</sup> 1966 SCR (3) 744

the High Court did not have inherent power to pass the order; (ii) the impugned order violated the fundamental rights of the petitioners under article 19(1) (a); and (iii) the order was amenable to the writ jurisdiction of the Supreme Court under article 32.

The Supreme Court held that as the impugned order must be held to prevent the publication of the evidence of the witness during the course of the trial and not thereafter, and the order was passed to aid the administration of justice for the purpose of obtaining true evidence in the case, the order was within the inherent power of the High Court.

#### **4.5.8 Retrial allowed due to Apprehension and Threat to the Life of Witnesses**

In *Sunil Kumar Pal v. Phota Sheikh*<sup>127</sup>, though representations were made to the higher authorities for according protection to the witnesses who was apprehending danger, nothing substantial was. The witnesses also pointed out to the appropriate authorities that the accused had threatened them with dire consequences if any of them helped in the prosecution of the accused and they also alleged that the local police was friendly with the accused and it was impossible for them to depose truly and fearlessly in an open court. These representations, according to the appellant, fell on deaf ears and no protection whatsoever was given to the witnesses.

The Supreme Court ordered a retrial due to intimidation to the complainant and the witnesses but no steps were taken for protecting them so as to enable them to testify without fear in conducive atmosphere.

#### **4.5.9 Witness Identity Protection Ensured as Total Safety of Prosecution Witness cannot be Ensured**

In *Bimal Kaur Khalsa v. Union of India*<sup>128</sup>, the High Court of Punjab and Haryana expressed its lack of ability in protecting the interest of witnesses by stating that it is very difficult for the court or the government to ensure the total safety to the witness. A witness approaching the court and testifying in a criminal case does so with a sense of public duty. The Court can make sure and

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<sup>127</sup> AIR 1984 SC 1591

<sup>128</sup> AIR 1988 P&H 95.

take measures to stop the leaking and distribution of information; ensuring that the name, address and identity of the witness are not given publicly in the media.

However the court suggested that “identity, names and addresses of the witnesses may be disclosed before the trial commences.”<sup>129</sup>

#### **4.5.10 Preventive Detention to Secure Protection to Witness**

In *Harpreet Kaur v. State of Maharashtra*<sup>130</sup>, the dispute revolved around the provisions under the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug Offenders Act, 1981 wherein the allegation was levelled on the grounds of instilling psychosis in the witnesses who were positioned to depose against those whose were allegedly indulged in the illicit transportation of liquor and illegal possession of arms.

#### **4.5.11 Necessity of Anonymity for Victims in Cases of Rape**

In the heinous crimes of rape, crimes relating to sexual offences which are so grave in nature having a social stigma attached to them it becomes necessary to ensure the protection of dignity so that this effect of social stigma doesn't come into picture at all. To ensure all this, the only possible and most effective measure to take is taking the refuge under the safeguard of „Anonymity“. This will imply fairness in trial which would dispense justice.

The Supreme Court has emphasized the importance of the anonymity in rape cases as under:

The Apex Court in *Delhi Domestic Working Women's Forum vs. Union of India*<sup>131</sup> recognised the need of maintaining utmost secrecy and confidentiality of the identity of the unfortunate victims of rape. Criminal trials must ensure that the name of the victims must be hidden and the same must be protected from disseminating in the media and general public. While mentioning the broad parameters to facilitate assistance to the victims of rape, the Court also observed that perpetually for every victim, as told by them to the Court, the trial for an offence of rape for them was a traumatic experience. It just doesn't end here, the condition has worsened to such an extent that victims, have not only

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<sup>129</sup> Id.

<sup>130</sup> AIR 1992 SC 779.

<sup>131</sup> 8 (1995) 1 SCC 14

been tormented by the experience of deposing in the court, they found the entire experience to be distasteful and destructive. Furthermore, they have also expressed their aversion to face the nightmare of the process of cross-examination in the criminal trial, as for them, it was even worse than the incident of rape itself.

Sections 327(2) and (3) of Cr. PC was discussed and the importance of the same was brought to light by the Supreme Court in *State of Punjab v. Gurmit Singh*<sup>132</sup>. Cases of rape and offences of such other nature were discussed in the same and the requirement of recording the evidence in camera was elaborated upon.

#### **4.5.12 Supreme Court emphasizes the Need for Witness Protection Programme in India**

In *Vineet Narian v. Union of India*<sup>133</sup>, the Apex Court issued directions that prompt constitution of a competent and capable institution, comprising men of integrity to dispense duties similar to those of the Director of Prosecution in England. Such an institution was established in the United Kingdom in the year 1879. The same was appointed by the Attorney General, the honourable members of the bar and the institution oversees the functions performed by the Attorney General in order to ensure smooth performance. The criticality of the role played by The Director of Prosecution can be witnessed from the fact that it is the same Institution which watches over the implementation of the programmes on witness protection. Legislative recognition to such programmes has been extended in countries such as Australia, the United States and Canada. The importance of such programmes cannot be overemphasized in a scenario wherein witnesses often retract from their statements for either gratifying gains or apprehensions about their security. Attempts to address such issues would be welcoming if something similar can be established in our country. It would also add immensely to the fairness of the trial. Verbosity in this regard without the same being backed by action on ground would imply travesty of justice and would demolish the confidence of populace in their own criminal justice system.

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<sup>132</sup> 1996 (2) SCC 384.

<sup>133</sup> 1998 (1) SCC 226.

Section 312 of the Criminal Procedure Code, 1973 was debated upon in Swaran Singh vs. State of Punjab<sup>134</sup>, wherein the cost incurred for providing witness protection assumed centre stage. Justice Wadhwa expressed his antagonism at the deplorable state of witnesses in criminal trials and his displeasure is apparent in his statement, “Not only that a witness is threatened; he is maimed; he is done away with; or even bribed. There is no protection for him.

#### **4.5.13 Witnesses could be Cross Examined by Video-Conferencing**

The Supreme Court in J.J. Merchant v. Shrinath Chaturvedi<sup>135</sup> A case under the Consumer (Protection) Act, 1986 held that, it is possible to conduct cross examination through video-conferencing or teleconferencing specially when stakes are high, but the party has to bear the expenses claiming such right or cross examination at work place of an expert can be conducted by the Commissioner.

#### **4.5.14 Threatening of Witnesses one of the Grounds for Cancellation of Bail**

“In Ram Govind Upadhyay v. Sudarshan Singh<sup>136</sup>, the Supreme Court held that manipulation of the evidence and danger the life of witnesses are the fundamental grounds for the cancellation of bail. Both these two factors stand alleged and by reason of subsequent filing of charge-sheet therein, there should have been some mention of it in the order for grant of bail.

It was held by court that since the liberty of women is valuable, there should always be an all round effort on the part of Courts to protect such liberties. This protection however can be made available to the deserving ones only since the term protection cannot by itself be termed to be absolute in any and every situation but stand qualified depending upon the exigencies of the situation. It is on this perspective that in the event of there being committal of a heinous crime it is the society that needs protection from these elements. Protection is thus to be allowed upon proper circumspection depending upon facts.

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<sup>134</sup> 1 AIR 2000 SC 2017.

<sup>135</sup> AIR 2002 SC 2931

<sup>136</sup> II (2002) SLT 587



#### **4.5.15 Witness Protection can be Assured only Till the Case is Disposed Off**

In *Paramjit Kaur v. State of Punjab*, it was directed to the authorities by Supreme Court to give protection and was told that the trial of the case is already over and that the witness no longer needs protection. Petitioner contended that there are other criminal cases pending in which the said witness also involved and so the protection should be extended further. Herein, it was held that if there are any such cases, the petitioner would be at liberty to approach the appropriate authorities.

## **CHAPTER 5**

### **CONCLUSION AND SUGGESTIONS**

#### **5.1 INTRODUCTION**

To know about the current status of the witness in the trials of criminal cases in India, the degree and necessity of protection given to them in national and international law, to evaluate recommendations given by the law commissions with reference to witness protection programme this research is conducted. This research also focuses on the guidelines given by judiciary for witness protection.

*In any criminal case, the witness plays an important role in determining the final outcome. Due to this, the parties often threaten the witnesses, turning them hostile and interfering with the fair administration of justice. Hence, it becomes very important to protect the witnesses so that they do not get intimidated and tell the truth in court. There are witness protection programmes in a large number of countries all over the world. But India still lacks a well-functioning witness protection programme. There are so many attempts to make programme effective but implementation continue to be poor and still a vast number of cases where the witnesses turn hostile. Reason behind turning hostile is that the witness have no courage to speak against accused because of the threat of life, and especially when the offenders are habitual criminals or having political, economic or muscles power. To identify the gaps of protection of witness this research is done. Absence of witness protection laws leads to the high rate of crime and low rate of conviction. Therefore enacting the witness protection laws is the immediate need in India. There are some problems in the system due to which witnesses are more suffered. And to eliminate these problem leads to a better living of witness.*

## **5.2 PROBLEMS IN THE CRIMINAL JUSTICE SYSTEM IN INDIA**

### **Low Conviction-**

Low conviction in India is the major factor or cause of increasing number of crimes. There is no effective witness protection scheme in India that would create confidence in the witness to come and put their views before courts and investigating authority.

### **Corruption**

Corruption is another problem in our justice delivery system. It affects the investigation procedure. False evidence is collected against the accused which harm the process and life of the person against whom these false evidences has been collected. Due to absence of effective witness protection programme it will leads to the increase in corrupt practices. Political influence adds more in it. It gives criminals sufficient chances to test criminal justice system to their favor.

### **Hostile Witnesses:**

The term hostile witness is considered under the common law evolution. Hostile witness are those who turned their opinion in the middle of the cases. Due to so many reasons especially due to threat. They spoil the whole proceeding and adversely affecting the case. The main reason of affecting the justice delivery system is lack of protection to the witnesses.

## **5.3 LAW COMMISSION'S REPORT**

- Witness identity protection is the only thing upon which The Law Commission deals which not sufficient to provide protection to the witness.
- There is a shortage of policemen creates threat to society.
- The report offers duty to achieve a complete witness protection programme. This report give burden to the police and adversally affect the quality of task given to them.
- The witness protection programme must be implemented properly for the proper delivery of justice.

## 5.4 SUGGESTIONS

In this research we find that witnesses play a very significant role to deliver the justice in the criminal justice system. This will help the judiciary especially in the grave crimes. So that there is an urgent need to make special laws for witness protection. For this researcher proposes the following suggestions:

### 5.4.1 Protection

The Law Commission of India provided a protection of changing the identity of the witness and in some special cases it depends upon facts and circumstances of the cases. But it is not enough these are some examples of protection:

- I. Address must be changed not exact address must be mentioned for the safety of the witness.
- II. Accommodation should be granted in the cases where there is a threat to the life of witness.
- III. Witness and his relatives must be protected by the police till the case ends.
- IV. The protection witnesses should also be allowed to apply for admission under witness protection programme, if there is any risk to their life or property.

### 5.4.2 Types of Protection suggested

**a) Protection Measures other than change of identity:** In the crimes where the witness/victim is recognised to the accused (human trafficking, sex offences, family crimes etc.), there is no need to change the identity of the victim. But if witness/prosecution insists to be examined in the court separately in order to evade direct clash with the accused, as the presence of accused may result in strain to witness, then court examine the witness separately to defend him from re-victimisation. Court may

also restrict the witness exposure to public and media, except his family member for moral and psychological support.

**b) Change of Identity:** protection must be given in the cases where accused know the witness or victim.

**c) Defence witness:** The defence witnesses should also be allowed to apply for admission under witness protection programme, if there is any risk to their life or property.

#### **5.4.3 Constitution of Witness Protection Unit**

The Witness Protection Portion contains of two separations: one will be the convincing authority which preferably should be established within the existing outline of National and State Human Rights Commission and the second will be a protection unit who will implement the orders of the NHRC or SHRC to provide protection to the concerned witness. This part should be a recognized NGO and/ or concerned Police officers.

#### **FUNCTION IN CONTEXT OF WITNESS PROTECTION:**

a) To safeguard actual implementation of the Witness protection program within their own jurisdictions.

b) To discuss recognition on NGOs to be sanctioned Witness Protections Agencies.

c) By seeing the number of cases registered in the witness protection annual budget should be decided accordingly.

d) funds are raised for the witness protection from the bodies other than the government.

e) Witness Protection Programme is reviewed periodically.

f) a report regarding the working of witness protection programme is quarterly submitted concerned government.

#### **5.4.4 Right to Appeal in Case of Refusal / Admission of Protection**

A witness can appeal directly to high court his appeal for protection is rejected by concerned authority and he feels that his relative and family member or his property needs protection.

#### **5.5 CONCLUSION**

It is submitted hereby that need for witness protection in India is not disputed, the only questions that need to be answered is how and to what extent. An analysis of the existing dispersed provisions in India pertaining to witness protection, the judicial guidelines, various law commission reports and other developing and developed nations and international instruments dealing with witness protection help us to complete that Indian legal system is matured and ready to accept and modification the strategies in light of modern needs and social growth. However, this indulgent is narrow by the Indian economic situation of being a developing economy and hence having numerous other serious matters apart from witness protection in its list of urgencies. Hence it is unavoidable to balance the struggle between these urgencies and within available resources making provisions for deal with each of these matters simultaneously. Task of balancing is bit difficult but not impossible

It is high time that the debates and negotiations in the form of Law Commissions and judicial verdicts have to be materialised and applied deprived of any further delay, hence the research endorses a wide-range witness protection programme, to be enacted as early as possible in order to ensure the immediately needed reformation to take in the Criminal Justice Mechanism. The judicial decisions and the jurist's discussions evident the popular purpose towards the pending need for a complete witness protection law. This mere intention is not sufficient unless and until it is manifested in the form of a complete code in itself dealing with all aspects of witness protection.

This research reads all the aspect of witness protection in india, and its inding are limited to the research.

Witness protection is suggested only in the crime which has more gravity.

The recommendations are limited to creation of witness protection units within the existing framework Of NHRC, SHRC, Police Officers and NGOs owing to the economic constraints.







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