

**THE SAFETY OF WITNESSES AND UNNECESSARY
CONUNDRUM**

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ABSTRACT

“Threat to justice anywhere is a threat to justice everywhere”.

When a wrong is done to a person and whether that person is an under-trial prisoner, victim, witness or anyone related to a crime, deserves the justice. It is a very common misconception that either being in the law enforcing profession or helping it or being associated with it through any means, is a ‘professional hazard’ as to accept all the ill effects associated to it. If this so, then as one of the organ of government, judiciary fails the people of that country.

This paper will present an analysis as to how much protected the lives of witnesses are, especially who are involved in high profile cases and in general too in India and briefing about the cases which not even come into light and how even the lives of law enforcing officers is not safe.

I. Introduction To Role Of Witness And Witness Protection Scheme

A ‘witness’ means “person who comes to court and swears under oath to give truthful evidence. One who, being sworn or affirmed, according to law, deposes as to his knowledge of facts in issue between the parties in a cause.”

So the role of a witness is very essential. It either helps in building the prosecution case or helps defendant to weaken the plaintiff’s claim. It is the witness upon whom either side of the case put reliance for the attestation of a particular fact or event. Because of this heavy burden, the protection of witnesses has become very important. In the contemporary times, the legal world has seen that defeat is not an option and the victory is only what is being hunted, even when such victory is obtained by unfair means. The most reliable way is by shutting the mouths of witnesses either by buying them or not leaving them with any option, but to end their lives.

For stopping of this, it is very important for the Indian Judiciary along with Legislature to address this grave issue. By reading this, one may have a question in his or her mind as to why the Judge has to get involved in the ‘protection or safety of the witnesses’ or ‘witness protection program’ of any sort. It is pertinent to note that it is a general connotation that protection of witness is an essential function or the duty of the State which however is not true. It is also the duty of the Court to make sure that a trial is conducted in a fair manner. A

fair trial can be categorized by *two* chief characteristics which are *firstly*, it should be fair to the accused and *secondly*, fair to the prosecution. The main objective of Criminal procedure is to conduct a fair trial by bringing the offenders to their justice. By this the Judge is assigned with a very unique role of its own. He is responsible in ensuring that witnesses are testifying without any pressure, fear, force from external forces in the courts and if so, they are being given the necessary protection or not.

Therefore, this paper shall be divided into 4 parts covering *firstly*, 'Judicial Trends' in which the various moves taken by the Indian Judiciary for the witness protection and how Judiciary played the constructive part in providing different means and methods for the protection of witness. *Secondly*, The 'Legal Framework', pertaining to the protection of witnesses. *Thirdly*, 'International Aspect' as how the world has addressed this issue. *Finally*, in the 'conclusion', the findings of the authors shall be presented.

II. Need For Legal Framework For Protection Of Witness

Rule of Law on a combined reading with principles of Natural Justice obligate the courts to ensure that in no circumstance, the rights of the witnesses should be allowed to be prejudiced. The courts must warrant ample protection to the witness against any threat, intimidation or corruption so as to empower him with total liberty to testify for or against a case in which he has been called as a witness.

Witnesses have time and again been considered to be inalienable and pivotal rivets of any Judicial System, who invariably assist the Judges to reach correct factual findings as well as help them in complete and conclusive adjudication of the matter in question. The immense importance of a witness cannot be overlooked, especially taking into consideration, reliance placed on the testimonies and cooperation rendered by witnesses, primarily in criminal matters at all the stages of the proceedings.

The significant position of the witness, especially in reference to a criminal trial has been denounced in the following words "*In search of truth, he plays that sacred role of the sun, which eliminates the darkness of ignorance and illuminates the face of justice, encircled by devils of humanity and compassion.*"¹

However, contrary to the jurisprudential importance accorded to witnesses, their position in the Indian Legal System can be termed as '*Pathetic*' taking into consideration the hardships

¹ Witness Protection in Criminal Trial in India by Girish Abhyankar & Asawari Abhyankar.

faced by them at all stages of the Trail. A witness has to face several threats at different stages, not only during investigation but even during the trail of a case.

Apart from facing the trauma of attending the court on a regular basis, a witness may even have to encounter life threatening intimidation to himself, his family and even his close relatives. Lack of any witness protection programme in addition to the unbearable treatment bestowed to them, there is a tendency of reluctance on the part of the witnesses to come forward and make any statement during the investigation process or to testify in courts. Not only the current legal system takes witnesses for granted but also devoid them of any substantial legal remedy. They are summoned to testify in courts without paying any heed to their financial or even personal circumstances. In many cases, they are called upon long after the alleged crime took place, which hampers their ability to recall precisely, the necessary details as at the time at which actual crime took place.

The significance accorded to the witnesses in the process of trail could be unambiguously inferred from the words of eminent jurist Jeremy Bentham who outlines that “*witnesses are the eyes and ears of justice*”. Hence so as to ensure and achieve ideal administration of Justice, it becomes exigent for the state to furnish not only sufficient but as well as satisfactory protection to the witnesses.

The Hon’ble Supreme Court has time and again, at several instances has laid emphasis on the need to protect the witness and frame a comprehensive policy or scheme over the subject if not a full-fledged legislation. The Supreme Court in *State of Gujrat v. Anirudh Singh*² that: “*It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence.*”

In *Zahira Habibulla H. Shiekh and Another v. State of Gujarat and others*³ the term ‘Fair Trail’ was given a wide interpretation and was defined as a trail “*in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.*”

Committee on Reforms of Criminal justice System said in its report that “*By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth. It is because of this reason that the witness either takes an oath in*

²AIR 1997 6 SCC 514.

³(2004) 4 SCC 158.

*the name of God or solemnly affirms to speak the truth, the whole of the truth and nothing but truth”.*⁴

At this point it is noteworthy to observe that ironically while the perpetrators of crime have a variety of rights ranging from Constitutional to other legal rights, victims of crime and more particularly the witnesses are confined to limited array of rights available to them. Thus, this disparate distribution of rights amongst offender and Witness results in a situation where witness lack sufficient rights to protect themselves and end up in a helpless situation, thereby ultimately compelled to turn hostile.

The issue of Witness Protection should be studied in light of the fact that conviction rate is low in India and acquittal rate is high. The Supreme Court too observed in *Swaran Singh v State of Punjab*⁵, that procedures are being followed is one of reasons for a person to abhor becoming a witness.

The need for this scheme had been envisaged by various reports of the Law Commission of India and the **Malimath Committee**. The **14th Law Commission Report** was the first ever instance where the issue of witness protection was brought forth. Further, **154th Report** dealt with the plight of the witnesses. The **172nd** and **178th Report** laid emphasis on protection of witness from the wrath of the accused. The **172nd Report** in particular inherited a great deal from the judgement in *Sakshi v. Union of India*⁶ which advocated for *in camera trials* to keep the witness away from the accused and to ensure her testimony is procured without any public fear. The **198th Report** titled “*Witness Identity Protection and Witness Protection Programmes*” emphasized that the witness protection scheme need not be limited to cases of terrorism or sexual offences but should extend to all serious offences, thereby increasing the ambit of its applicability and functioning.

The disturbing fact remains that such a big democracy as India is yet devoid of a Witness Protection law. While formulating such law, the focus and emphasis of the legislature should be the protection of witnesses, not only before, but also during and after the trial.

III. Witness Protection In India

⁴ Government of India, Report: Committee on Reforms of Criminal Justice System (Ministry of Home Affairs, 2003).

⁵AIR 2000 SC 2017.

⁶2004 (2) ALD Cri 504.

Protection of witnesses whether being in India or in any country, is very important for the purpose of serving justice. This portion of the paper will try to cover the *statutory part* where different acts will be under consideration as to how they serve the purpose of witness protection. Along with this, *the role of Judiciary* will be observed as to how it has taken the responsibility of witness protection.

The witness protection should be a very important element of any criminal law. Unfortunately, due to the codification of British Criminal law, this aspect is less seen. It is seen that the provisions regarding the witness protection being integrated within different legislations rather being made into a separate law while in other jurisdictions the reversal of this trend is observed.

Under the Code of Criminal Procedure, 1973: the procedural code provides for the trial in an open court⁷ and also provides for the in-camera trials⁸ for the offences involving rape. All this being done is to make the witness free from any sort of pressure or shyness. The Hon'ble SC in the case of *State of Punjab v. Gurmit Singh*⁹ observed that:

“If the witness or victim is protected it would enable the victims of crimes to be a little comfortable and answer the questions with greater ease in not too familiar surroundings.”

It is observed that especially women and children are not very comfortable to speak in presence of offenders. So, to the counter that, the **Law Commission Report**¹⁰ suggested of inserting a provision to **Section 273** of the Act as to when the evidence of a person below 16 years of age is to be recorded who is subject to sexual offence shall not be taken in the presence of the offender. The SC in the case of *Sakshi V. Union of India*¹¹ observed that:

“the whole inquiry before a court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment....The mere sight of the accused may induce an element of extreme fear in the mind of victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the

⁷Sec. 327, Code of Criminal Procedure, 1973.

⁸*Ibid.*

⁹1996 AIR 1393, 1996 SCC (2) 384.

¹⁰Law Commission of India, 172nd Report on Review of Rape Laws (March, 2000).

¹¹2004 (6) SCALE 15.

victim or witness do not have to undergo the trauma of seeing the body or face of the accused”

The use of the screen as suggested by the Law Commission and also recommended by the Supreme Court would make it a little more comfortable for the victims to testify in Court where he or she may confront the accused directly. Another method along with this is the recording the deposition of the witness via Video Conferencing. This method was upheld by the SC in the case of *State of Maharashtra V. Dr. Praful B. Desai*¹².

Also in order to reduce any sort of harassment to the witnesses, the procedure of cross-examination has been specified in the Code. Sections provide for the specified dates as to on each of the side’s witness to be examined in trials instituted before the Magistrate of the Judge. Also the venue of the examination can be changed for the convenience of witnesses who are not in a position to depose freely due to any reason.

By the Criminal Amendment Act of 2008, a new section has also been inserted, that is, *Section 195A*. This section empowers the witness or any other person to file a complaint in relation to an offence under section 195A of the Indian Penal Code. Also, the court can order for the payment of reasonable expenses, on behalf of the State Government to witnesses or complainants for the purpose of inquiry, trial or other proceedings¹³.

The Indian Evidence Act, 1872 also provides provisions for the witness protection too. *Section 132* of the Act provides that no witness shall be excused from answering a question that will criminate or may tend directly or indirectly to criminate such witness or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind. However, the proviso to the section engrafts a protection that whatever answer he is ‘*compelled to provide*’ to the questions asked shall not be used against him under any circumstance except for providing false evidence. Also, under certain exceptional circumstances where cross examination is not possible, then the previous deposition of a witness can be considered relevant in subsequent proceedings. This is provided in *Section 33 of the Evidence Act*. *Section 148* of the Act provides the court with the discretion as to decide whether witness should be compelled to answer a particular question or not as the question might not be related to the case and is only being asked to “*discredit the witness*” reliability. The object of this section is to prevent the unnecessary action racking up of

¹²Appeal (Crl.) 477 of 2003.

¹³Section 311 of the Cr.P.C.

the past history of a witness, when it throws no light whatsoever on the questions at issue in a case. It protects a witness from the evils of a reckless and unjustifiable cross-examination under the guise of impeaching his credit. **Section 149** provides that there should be in existence some well relied grounds as on which the questions are being asked regarding the witness's credit worthiness. Also, **Section 150** provides for a penalty against reckless cross examination of witnesses.

Along with the above statutes there have been some other special statutes in this regard. As per The **Unlawful Activities (Prevention) Amendment Act, 2004** which applies to 'unlawful activities' and also to 'terrorist acts. **Section 44 (1) to (4)** of the above Act bears the heading 'Protection of Witness' and is in identical language as section **30(1) to (4) of the POTA, 2002**. Additionally, The **Juvenile (Care and Protection of Children) Act, 2000**, provides for the 'prohibition of publication of name' etc. of any juvenile who is involved in any proceedings under **Section 21** of the act. Under the **National Investigation Agency Act**, as per **Section 17**, it is provided that under certain circumstances the witness identity shall not be disclosed, to protect additional safety to witnesses when there is some credible risk to his life and some other additional orders in the public interest as by the Special Court Judge.

The Indian Supreme Court is both powerful and independent. In dozens of major cases each year its orders have far reaching political, economic, and social consequences. In **S.P. Gupta v. Union of India**¹⁴, the Apex 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. Under this section, a few of the Honorable Supreme Court's judgements will be analyzed to understand its attempt to fill in the gap in the criminal justice system by conferring certain degree of protection to witnesses and victims.

In the **People's Union for Civil Liberties v. Union of India**¹⁵, a few provisions of the **Prevention of Terrorist Activities (POTA)** were challenged for being unconstitutional, it was observed by the SC that **Section 30** of the Act provides for protection of the witnesses. This provision provides for the proceedings to be conducted in the camera in order to keep the identity of witness confidential. The court expressed its concern in the regard that witnesses do not feel secured and comfortable so as to openly testify in the court against heinous crimes. By this they don't come forward and offenders might get away for their misdeeds. However, the 'confidentiality of witness' identity is just an exception and not a

¹⁴SCC Supp. 87.

¹⁵AIR [2003] SC 2363.

rule. The importance of witness protection was reiterated by the Apex Court in the case of *Leelawati v. Ramesh Chand*¹⁶, in which the transfer petition was rejected and stated that the need of adequate arrangements for the witness, where she was 9 years old girl and other witnesses for them to freely depose in the court.

In case of *Naresh Shridhar Mirajkar v. State of Maharashtra*, it was held by the SC that the 'publication of the witness' evidence in the daily newspaper or anywhere can be done only during the trial and not afterwards. It was contended by the petitioners (witnesses) suing the newspaper agency for publishing his testimony. Along with this, the court further held that it would not be violative of the Article 19 of Newspaper Agencies for not able to publish that particular news content.

In *Bimal Kaur Khalsa v. Union of India*¹⁷, 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 and tough job for the court or the government to ensure the safety of the witness in totality. A witness who approaches the court gives his testimony on account of public duty. What a court can least do is make sure and 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. The obiter dicta of this case was that the court has a limited role in the protection of witnesses and a greater emphasis is put on the positive obligation which the executive has to successfully complete this task by making a statute in this regard.

The need for a proper institution to ensure the safety of witnesses was raised by the SC in the case of *Vineet Narian v. Union of India*¹⁸, where by the court said that a competent and independent 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 role associated to this was that of looking over the activities and programs for witness protection schemes.

IV. Legal Trends Promoting Witness Protection Across The Globe

The effective and efficient operation of any country's legal and judicial system to a large extent depends upon the disposition of the victim to come forward to report the crime done against them and willingness of the witness to step forward so as to testify and provide full as

¹⁶AIR 2004 SC 1488.

¹⁷ AIR 1988 P&H 95.

¹⁸1998 (1) SCC 226.

well as impartial information available with him. Thus, a case where a witness feels threatened or intimidated undermines his willingness to come forward to testify and ultimately, the society as a whole is denied justice.¹⁹

Even the international law lacks a proper comprehensive definition as to who constitutes to be a "witness". However, several international tribunals have time and again recognized as well as emphasized over the need to introduce and set up a comprehensive victim & witness protection unit in addition to existing scheme/programmes/policies especially to provide protection in cases of mass crimes or cases in which Political, economic, or muscle power is involved.

Taking this into consideration, so as to overcome these hurdles, many countries have adopted witness and victim protection programmes in different forms at different stages to investigation and trial so as to encourage maximum reporting of crimes as well as to ensure a conducive atmosphere for witnesses to testify in courts without any vulnerability, having complete protection from intimidation in any form.²⁰ Laws Relating to Witness Protection of a few countries which can serve as a model to Indian Legislation are discussed in brief as follows:

A. United States of America

The Law related to witness protection in United States of America was first introduced way back in 1970 by passing of **Organized Crime Control Act**. This act empowered the attorney general of United States, to grant protection and security to a witness, appearing in cases related to Organized crime.²¹ Additionally, under the supervision of Attorney General, the **Witness Security Programme (WITSEC)** provides for not only relocation but also for a completely new identity to the vulnerable witness.²² It was only in 1984 when the **Witness Security Reforms Act** addressed the shortcomings of the aforementioned programme.²³ Some powers conferred upon the Attorney General are as follows:

¹⁹ Rosalind Sipos, "The Draft Bill for the Assistance and Protection of Victims of Crime and Witnesses: Critique and Recommendations", available at www.cpalanka.org/wp-content/.../and_Witness_Protection_Bill.pdf, last visited on 8th October, 2019.

²⁰ *Ibid.*

²¹ United Nations Office on Drugs and Crime, Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organised Crimes, United Nations, New York, 2008, p.8.

²² *Ibid.*

²³ *Ibid.*

1. *“take necessary action to protect the person involved from bodily injury and otherwise to assure the health, safety and welfare of that person including the psychological wellbeing and social adjustment of that person.”*²⁴
2. *“provide suitable documents to enable a witness to establish a new identity. Again a witness may also be provided housing, transportation of household furniture and other personal property to a new residence as well as payment to meet basic living expense.”*²⁵
3. *“provide assistance to a witness, who has been granted new identity, for obtaining employment. It is the duty of the Attorney General to ensure that the confidentiality of the identity and location of such witness is duly protected.”*²⁶

However, the importance of the statement made by the witness for prosecution, his psychological profile and his willingness to follow the Law the of state are given due consideration before conferring any protection to the witness under this scheme. Hence for this purpose a Memorandum Of Understanding (MOU) is entered into between the Attorney General and the witness while granting any protection or security to him which clearly defines the roles and responsibilities of the witness alongside consequences ensued in case of breach of MOU.²⁷

Apart from these provisions, *the United States Code, Title 18- Crimes and Criminal Procedure*, also provide for safety of witnesses. *Chapter 224*, thereof, deals with *“protection of witnesses or potential witnesses for Federal Government or for a State Government in any official proceeding in connection with organised criminal activity or other serious offences.”*²⁸

It is interesting to note that in the US, alongside the specific legislation on the subject, the Code of Criminal Procedure also comprises a chapter dedicated to protection of Witness.

B. United Kingdom

The status in United Kingdom pertains to be that, law enforcement agencies along with police services ensure protection for the Vulnerable witnesses depending upon the facts and

²⁴ See, YvonDandurand, Kristin Farr, A Review of Selected Witness Protection Programmes, Report No. 001, 2010, p.33, available at publications.gc.ca/collections/collection_2011/sp.../PS4-96-2010- eng.pdf, last visited on 8th October, 2019.

²⁵ *Ibid.*

²⁶ For details see, the Law Commission of India, One Hundred Ninety Eighth Report, 2006, pp.481- 482, available at <http://lawcommissionofindia.nic.in/reports/rep198.pdf>, last visited on 9th October, 2019.

²⁷ The Law Commission of India, One Hundred Ninety Eighth Report, 2006, p.483.

²⁸ The Law Commission of India, One Hundred Ninety Eighth Report, 2006, p.481.

circumstances of the case in question.²⁹ Majority of provisions related to protection of witness are comprised by the **Serious Organized Crime and Police Act, 2005**.³⁰

The Act provides “*uniform criteria for admission and eligibility; penalises the disclosure of information about protection arrangements or about the identity or location of a protected witness; establishes the duty of public authorities to tender assistance to protection units and allows the transfer of responsibilities for witnesses between police forces (in case of relocation).*”³¹

An officer authorized to provide protection under the *Serious Organized Crime and Police Act, 2005* considers for the purpose of granting protection to the witness “*the nature and extent of the risk to the persons' safety, the cost of the arrangements, the likelihood that the person, and any person associated with him will be able to adjust to any change in their circumstances which may arise from the making of the arrangements and that whether the person is or might be a witness in other legal proceedings.*”³² It is also pertinent to note that “*a protection provider is a chief officer of a police force in England*”³³ under the aforesaid legislation.

C. Australia

In Australia, **The Witness Protection Act, 1991** which constitutes the witness protection programme is an utmost comprehensive legal framework. The original definition of “*witness*” as provided under the act was exceptionally wide in its practical ambit, however the **Amending act of 1996** by way of **S. 4(2)(d)** has gone a step further by inculcating the phrase “*a person who, for any other reason, may require protection or other assistance under this Act*” in definition of “*witness*” which is intended to give extremely wide and liberal interpretation to the said term.³⁴

The act consists of express provisions for change of identity with regard to birth, death and even marriages under the Registration of Births Deaths and Marriages Act, 1959. These provisions under this act are considered to be visionary and take the protection of witness to pedestal of inherent human right. Though no formal statistics are available, this extensive and

²⁹ Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organised Crime, p.45.

³⁰ Available at <http://www.legislation.gov.uk/ukpga/2005/15/contents> last visited on 10th October, 2019.

³¹ *Supra Note 11.*

³² Section 82(4), the Serious Organised Crime and Police Act, 2005, available at www.legislation.gov.uk/ukpga/2005/15/contents last visited on 10th October, 2019.

³³ Section 82(5) (a), The Serious Organised Crime and Police Act, 2005.

³⁴ Section 4(2)(d), The Witness protection Act, 1991.

precise piece of legislation can be considered to be a model for countries making an effort to develop witness protection programmes especially in reference to India considering its recent efforts to formulate a Witness Protection Scheme.

V. Conclusion

“It is better that guilty persons go unpunished than one innocent person suffers”

- Blackstone

The statement holds its ground very firmly in the contemporary judicial world. Law is a means to achieve an end, and that is justice. If this end is to be achieved law cannot remain stagnant and must change according to the transition of the society. No nation can afford to lose its citizens to the peril of being haunted or harassed by anti-social elements, for the simple reason that they testified the truth in a court of law. Protection is required to be given during or even after the trial depending upon the type of witness and trial. The government should adopt a more positive and responsible attitude towards the issue of witness protection as by establishing of witness protection cells, and other necessary arrangements during times of emergency of any sort.

So the role of a witness is very essential. It either helps in building the prosecution case or helps defendant to weaken the plaintiff's claim. It is the witness upon whom either side of the case put reliance for the attestation of a particular fact or event. Because of this heavy burden, the protection of witnesses has become very important. For stopping of this, it is very important for the Indian Judiciary along with the Legislature to address this grave issue

Hence, it is submitted that the Indian Legislature should take inspiration from the legislations of aforementioned as well as other countries across the globe on the this subject which provide for comprehensive enactments so as to ensure complete protection to the witness from any sort of threat or intimidation. Hence, India shall endeavour to meet the requirements of modern times and frame Comprehensive Legal Framework to ensure complete protection to witnesses from all sorts of threat or intimidation. Though Witness Protection Scheme, 2018 seems to be a progress in the direction, there still seems a long journey ahead.