

PROTECTION OF WITNESSES AND CRIMINAL JUSTICE: NEEDS FOR A NEW LAW

Dr. Pawan Kr. Mishra¹

I. Introduction

Every criminal justice system is built on edifice of fairness and justness. A witness constitutes an important actor in the initiation of the criminal trial and ultimately bringing the accused to the book, by truthfully deposing before the court. The fairness of the justice system depends upon the evidence being collected and brought to the court, but, if fear prevails in the mind of the witness, then neither can the evidence be collected, nor can a fair trial be ensured. Witnesses are regarded as the eyes and ears of justice. If a witness himself is incapacitated from acting as the eyes and ears, the trial gets putrefied and paralyzed, and can no longer constitute a fair trial. In order to uphold the pillars of justice, the witnesses, who are harassed and threatened by the accused from deposing against him, must be provided with requisite security and protection from the wrath of the accused.

This Study attempts to highlight the need for witness protection and the challenge that is faced by the different agencies working under the criminal justice system, in providing protection to the witnesses, in view of a system that is *prima facie* accused centric and to analyze the existing laws governing the area of witness protection, their adequacy and a comparative analysis with the laws for witness protection at the International level.

In the light of judicial pronouncements and recommendations of various committees emphasizing on the persistent need to evolve an efficient scheme for providing protection to the witnesses, an attempt has been made to suggest that the existing laws are inadequate to ensure due protection to the witness from the worth address the issue of witness protection.

II. Definition of Witnesses

“Witnesses”, as *Bentham* said, “are the eyes and ears of justice”. If a witness himself is incapacitated from acting as the ears and eyes of justice, the trial gets putrefied and paralyzed, and can no longer constitute a fair trial. The incapacitation may be due to several factors, such as the witness not being in a position to speak the truth in court for reasons beyond the control of the witness or due to negligence or ignorance or some corrupt collusion².

¹ Assistant Professor, Faculty of Law, Patna University, Patna, Bihar.

² <http://www.sabrang.com/cc/archive/2005/dec05/humanrights.html>. visitd on 02-01-2007.

Witness no doubt is important to be protected from the wrath of the accused so as to enable him to stand up for justice by adhering to his true version.

Witness being the eyes and ears of justice, are the fulcrum of the criminal trial process.³ It is common experience in criminal trial in India that prosecution witness turn hostile due to intimidation and threats by the accused party. The possibility of money playing a part in witnesses turning hostile cannot be ruled out in India, a country plagued by widespread corruption.⁴

Black's law dictionary defines a witness as one who sees, knows or vouches for something (a witness to the accident) or, one who gives testimony, under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit. The term 'witness' in its strict legal sense means one who gives evidence in a cause before a court, and in its general sense includes all persons from whose lips testimony is extracted to be used in any judicial proceeding, and so includes deponents and affiants as well as persons delivering oral testimony before a court or jury.⁵

Every witness is an editor, he tells you not everything he saw and heard, for that would be impossible, but what he saw and heard and found significant and what he finds significant depends on his perception.⁶ A witness is someone who sees, knows, or vouches for something and gives testimony under oath during legal proceeding.⁷

A witness in criminal trial plays a pivotal role in determining the fate of the case. Yet, the word witness has been defined nowhere in the code of criminal procedure. A witness may be defined as one who gives evidence in a cause, an indifferent person to each party, sworn to speak the truth, the whole truth, and nothing but the truth.⁸

The term witness has not been defined anywhere under Indian Penal Code, 1860 or Code of Criminal Procedure, 1973 or even under the Indian Evidence Act, Section 118 of the Act reads shall be considered that they are prevented from understanding the "who may testify-All persons shall be

3 G. Sudarsan." Criminal Justice Systems and The Need for Witness Protection" Cr. L.J. 2005, Pg. 82-89.

4 Ibid.

5 97 C.J.s witnesses Q1 at 350 (1957).

6 Patrick Devlin, *The Criminal Prosecution in England*, 66 (1990).

7 http://www.legal_definition.com/u%20%20Zwitness_definition.html visited on 13-01-2007.

8 Sairam Sanath Kumar, 'The Menace of Hostile Witness in Criminal Trials in India -A Closer Look', Vol. 3 at page.166.

competent to testify unless the court questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation: - A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the question put to him and giving rational answers to them.⁹ Witness includes a dumb witness also i.e. one who is unable to speak and may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs, but such writing must be written and the signs made in open court.¹⁰ In the recent times, there has been a growing concern about the experience of witness leading to sprouting up of issue of ensuring protection to witness be it the victim as a witness in particular the vulnerable victims of child abuse.

III. International Scenario

Witness identity Protection Statutes as well as witness protection programmes have gained recognition internationally. Initiatives have been taken, both on the judicial side as well as by legislation, in several countries including the USA, UK, Scotland, Germany, Canada, South Africa, France, Portugal, Brazil, Japan, Philippines. Hong Kong, Korea, Pakistan, Australia, Malaysia, China, Fiji, Laos, Nigeria, Tanzania, Papua, New Guinea and Thailand, These encompass witness protection programmes. The statutes and rules governing the functioning of the Tribunal Constituted by UN to try the crimes against humanity in Yugoslavia and Rwanda also make provisions not only for the protection of identity of witnesses for prosecution (including victims of offences) but also, witness on behalf of the defense.¹¹ In speech on 2nd December, 2003, the Attorney General of Sri Lanka, Mr. K.C. Kamalassabayan PC, made the following observations.¹²

“Another important feature that requires consideration is the need for an efficient witness protection scheme that would ensure that witnesses are not intimidated and threatened. No doubt this would involve heavy expenses for the state and amendments to the law. It will only pose a simple question. Is it more important in civilized society to build roads to match with international standards spending literally millions of dollars rather than to have a peaceful and law abiding society where the rule of law prevails?¹³ However, most countries have no provisions at all including India, Sri Lanka and Bangladesh. In this regard it is necessary to discuss the law, whether statutory or judicial decisions, operating in the International field, dealing with protection of

9 Sec. 118. The Indian Evidence Act 1872.

10 Sec. 119. The India Evidence Act. 1872.

11 <http://www.lawcommissionofindia.nic.in> visited on 3-10-2006s.

12 <http://www.sabrang.com/nebor/srilanka/torture>. Visited on 20-01-2007.

13 <http://www.sabrang.com/nebor/srilanka/torture>. Visited on 20-01-2007.

witnesses in criminal trial.

IV. United Nations Conventions

International Covenant on Civil and Political Rights expressly provides under Article 14.¹⁴ “To ensure fair trial and the administration by necessary implication victims and witness protection is essential to fair trial. It therefore follows the states are obliged to provide such protection to witnesses.”¹⁵ Furthermore, international law also obliges states to ensure that the victim of human rights violation have recourse to effective remedies International covenant on Civil and Political Rights, Art. 2(3) provides prosecution and punishment of perpetrators, as well as the suitable reparation for victims. In seeking these remedies, victims and witnesses must not be intimidated or threatened; the circumstances present in most Asian Countries require that protection to be provided in order for victims and witnesses to effectively obtain remedies.¹⁶

Other obligations under ICCPR that hinge upon states having an effective witness protection program include the right to life (Art.6), freedom from torture and cruel, inhuman or degrading treatment of punishment (Art. 7), right to liberty and security of person (Art. 8) and freedom of movement Art(9)”.¹⁷

Similar rights are recognized under the Universal Declaration of Human Rights, such as Art. 3 that guarantees right to life, liberty and security of person and Art. 22 which provides, “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operational and in accordance with the organization and resources of each state of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”¹⁸

The transnational nature of organized crime is an additional challenge that requires inter agency and international cooperation for witness protection efforts to be effective. The United Nations convention against Transnational Organised crimes provides the framework for such cooperation and legally binds states parties to protect the persons who give testimony. Government could do so by, for example, by entering into reciprocal agreement to admit foreign national into witness protection programmes and to promote mutual legal assistance. The exchange of best practices in witness support and

14 See International Covenant on Civil and Political Rights. Art. 14.

15 Ibid.

16 <http://www.hrschool.org/doc/mainfile.php/lesson47> (1831) visited on 4-10-2006.

17 Ibid.

18 http://helloearth.wordpress.com/universal_declaration_of_human_rights visited 18-02-2006.

protection at the legislative, law enforcement and prosecutorial levels could also prove useful in helping countries with non-existent or weak witness protection programmes to either create or strengthen them.¹⁹ Under UN Convention against Transnational Organised Crimes, 2000, the purpose is to promote cooperation and combat trans-national organized crimes more effectively.²⁰ Article 24²¹ on Protection of witnesses states:

- (1) Each state party shall take appropriate measures within its means to provide effective protection from potential relation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this convention and as appropriate for their relations and other persons close to them.
- (2) The measures envisaged in paragraph of this article may include inter alia, without prejudice to the rights of the defendant including the rights to due process:
 - (a) establishing procedure for physical protection of such person, such as to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitation on the disclosure of information concerning the identity and whereabouts of such person;
 - (b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensure the safety of the witness, such as permitting testimony to be given through the use of communication technology such as video links or other adequate means;
- (3) State parties shall consider entering into agreement or arrangements with other states for the relocation of persons referred to in paragraph 1 of this article. The provision of this article shall also apply to victims in so far as they are witnesses.”²²

Assistance to and protection of victims,²³

- (1) Each state party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this convention, in particular in cases of threat of retaliation or intimidation.
- (2) Each state party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences

¹⁹ <http://www.unodc.org/newsletter/en/200504/Page004.html> visited on 15-02-2007.

²⁰ http://www.org/documents/conventions/dcatoc/final_2/convention_eng.pdf.
Visted on 14-02-2007.

²¹ United Nations Convention against Transnational Organized Crimes, 2000 Art. 24.

²² Ibid.

²³ Ibid. Art 25.

covered by this convention.

- (3) Each state party shall, subject to its domestic law, enable views and concern of victims to be presented and considered at appropriate stages of criminal proceedings against offender in a manner not prejudicial to the rights of the defense.²⁴

UN convention against corruption is on the same lines as Article 24 of UN convention against transnational organized crimes.²⁵

Article 33 on protection of reporting persons provides that each state party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this conventions.²⁶

V. Indian Position

In India there is no national level scheme or guidelines for witness protection and some states have no laws to protect witnesses and victims. The trial of persons accused of mass killings in Gujarat 2002 descended into a force after witnesses constantly changed their testimonies due to a systematic campaign of intimidation by the state authorities and powerful nationalist groups, coupled with a lack of witness protection.²⁷

In most parts of the country, witness brought to court in cases against rich and powerful people turn hostile, making a mockery of the law and India's pretensions to human rights and democracy. The police in many areas work together with corrupt judicial officers and criminals to intimidate and murder with impunity, though use of "crossfire" encounter killings and mob attacks on persons and property. The country's enormous bureaucracy remains largely inert and complicit and countless judicial reform committees and commissions have paid virtually no attention to witness protection.²⁸

Due to dearth of specific law on witness protection, of the many ills that plague the criminal justice system in India today, the most overwhelming and important one is the fact that prosecution witness retract from the statements made earlier before the police and turn hostile in the court. What

24 http://www.unejin.org/documents/conventions/dcatoc/final_2/convention_eng.pdf visited on 14-02-2007.

25 UN Convention Against Corruption Art. 32.

26 Ibid Art. 33.

27 [http://www.hrschool.org/doc/mainfile.php/lesson47\(183/\)](http://www.hrschool.org/doc/mainfile.php/lesson47(183/)) visited on 4/10/2006.

28 Ibid.

is shocking is that witnesses are turning hostile with predictable regularity in cases involving heinous crimes or high-profile personalities due to external pressure thereby leading to failure of the criminal justice system.²⁹ The brazen submission of justice in the 'Best Bakery' trial has known that otherwise fearless upright witness, already traumatized by events, are vulnerable to external pressures by the rich and powerful accused. However, this is not the first time that the criminal justice system has failed to deliver. It is routine in India for powerful people accused for heinous crimes to be acquitted for lack of evidence, largely because witnesses in such cases turn hostile with unflinching regularity. Jessica Lall's case, Nitish Katara Murder case, the BMW hit and run case and a host of other cases involving high profile personalities have exposed the disquieting truth that the rich and powerful can manipulate criminal justice by intimidating and coercing the witnesses.³⁰

In order to prevent witnesses from turning hostile, the best measure seems to be the affording of protection to such witnesses from the wrath of the accused as well as preventing the disclosure of identity of an endangered witness from being leaked out to the accused persons. But none of such protection to witness is provided, comprehensively, by the general criminal provisions contained in Indian Penal Code, 1860 or Criminal Procedure Code, 1973, or in India Evidence Act, 1872. Except a few provisions of these general Statute, some which have been added by amendments, there has been no specific enactment to deal with the issue of witness protection in heinous crimes such as murder and rape, where threat is likely to emanate from the accused or even the state itself (in case of defense witnesses). It is high time that the legislators realize the urgency of the issue and enact appropriate laws which comprehensively cover witness protection by extending it beyond terrorist crimes to other grave crimes also.

Our criminal justice delivery system..... gives us an impression that our criminal law system allows witnesses with impurity, to turn 'hostile', by choice or under 'compulsion, threat or inducement',³¹ makes a trial judge to feel 'helpless' and a 'mute spectator' when a witness turns 'hostile' to the prosecution in his court and when "atmosphere" in his court becomes hostile to, and intimidating for, key-witnesses to depose before him freely and fearlessly and thereby it makes him to feel that his court is not a court of justice but merely a court of evidence and, therefore, compels him to be mere

29 Subhararag Mu kherjee and Vastal Arya, "Independent Witnesses: A legal crisis in India", Cr. L.J. 2004. Pg. 186.

30 Ibid.

31 K.I. Vibhute, "The Best Bakery Case: Is Our Criminal Justice Delivery System Best?", scholastics- Journal of National Law University by National Law University, Jodhpur, Vol. I, July 2003. At page 29.

compulsive apathetic and insensitive observer of the plight of victims of crime, and allows a 'collusion' between investigatory and prosecutory agencies of the state to ensure 'acquittal' rather than 'conviction' of accused and thereby make a trial 'farce' and the whole system a 'mockery' and also permits 'political heavy weights' or 'powerbrokers' to hijack the whole criminal justice delivery system and thereby to make it an utter failure and a criminal injustice' delivery system.³²

The adversary system of trial which has been adopted in India is founded on the basis of two vital principles, firstly, that the burden of proof lies on the prosecution to prove the guilt of the accused and secondly, that the accused is presumed to be innocent until the contrary is proved. These principles provide a level playing field to an accused as against the mighty power of the state and its instrumentalities. In a criminal trial, the prosecution and defense prepare their respective cases and the prosecution has to first lead evidence. The defense cross-examines the prosecution witnesses to test the veracity of the prosecution witness. The accused has the right to silence and need not normally examine witnesses unless he chooses to examine himself or some defense witnesses and this is generally done in cases where he has a special plea or plea of alibi. The Indian Evidence Act, 1872 and the Code of the Criminal Procedure, 1973 lay down a comprehensive legal framework for recording the testimony of witnesses in criminal cases.³³

In absence of a definite and express law for guarding the witness against physical and mental threat emanating not just from the wrath of accused but in some matters also from corrupt police agency, generally in a high profile case, the general procedural provisions of code of Criminal Procedure 1973 and Evidence Act, 1872, as well as substantive provisions of India Penal Code, 1860 are made applicable. Although the constitution of India, which is an epitome of the fundamental rights of its citizen and epitome of justice, does not expressly provide for protecting 'witness' from the accused, its provisions especially Article 21 can be interpreted to be wide enough to ensure protection to witness against intimidating factors prohibiting him from deposing before the court.

VI. Judicial Response

The primary object of criminal procedure is to bring offenders to book and to ensure a fair trial to accused persons. Every criminal trial begins with the presumptions of innocence in favour of the accused and in India, the provisions of the code of Criminal Procedure, 1973 are so framed that a criminal trial should begin with and be throughout governed by this essential

³² Ibid.

³³ <http://www.LawcommissionofIndia.nic.in> Visted on 3/10/2006.

presumption. A fair trial has two objectives in view, i.e. first, it must be fair to the accused and secondly, it must also be fair to the prosecution or the victims. Thus, it is of utmost importance that in a criminal trial, witnesses should be able to give evidence without any inducement, allurement or threat either from the prosecution or the defence.³⁴ The courts have been endeavoring to strike a balance between the right of the accused to fair trial and the issue of witness protection. The Supreme Court in *Maneka Gandhi's*³⁵ case observed.

“It is therefore of the utmost importance that, in a criminal trial, witnesses should be able to give evidence without inducement or threat either from the prosecution or the defense..... the progress of a criminal trial must not be obstructed by the accused so as to lead to the acquittal of a really guilty offender there can be no possible doubt that, if any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the High Court to secure the ends of justice and it is for the continuance of such a fair trial that the inherent powers of the High Courts, are sought to be invoked by the prosecution in cases where it is alleged that accused person, either by suborning or intimidating witnesses, or obstructing the smooth progress of a fair trial.”³⁶

Stressing on the need to protect the identity of the informant, the Supreme Court in *A.K. Roy Vs. Union of India*,³⁷ held that the disclosure of the identity of the informant way abort the very process of preventive detention because, no one will be willing to come forward to give information of any prejudicial activity if his identity is going to be disclosed, which may have to be done under the stress of cross-examination evidence and victims have often expressed that they considered the ordeal of facing cross-examination in the criminal trial to be even worse than the rape itself.³⁸

The Supreme Court has discussed the issue of protection of witnesses in detail in *National Human Right Commission vs. State of Gujarat*.³⁹ well known as, the Best Bakery case, where the NHRC filed a public interest case⁴⁰ seeking retrial on the ground that the witnesses were pressurized by the accused to back on their earlier statements and the trial was totally vitiated. The Supreme Court observed:

“..... A right to reasonable and fair trial is protected under Article 14

34 <http://lawcommissionofindia.nc.in> Visited on 3-10-2006.

35 *Maneka Gandhi vs. Union of India*, 1978 (1) SCC 240: AIR 1978 SC 597.

36 *Ibid* Pg. 397.

37 (1982) 1 SCC 271.

38 *Ibid*.

39 2003(9) SCALE 329.

40 W.P. CrI. No. 1069/2003 and batch.

and 21 of the Constitution of India, Art. 14 of the International Covenant on signatory, as well as Art. 6 of the European Fundamental Freedoms..... The concept of reasonable and fair trial would suppose justice to the accused as also to the victim.” Then on the question of protection of witnesses, the Supreme Court referred to the absence of a statute on the subject, as follows:

“No law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government of giving protection to the witnesses is necessary as the criminal have often access to the police and influential people. We may also place on record that the conviction rate in the country has gone down to 39.6% and the trials in most of the sensational cases do not start till the witnesses are won over. In this view of the matter, we are of opinion that this petition (by NHRC) be treated to be one under Art. 32 of the Constitution of India as public interest litigation.”⁴¹

The court also directed the Gujarat Government, to indicate the steps taken by it for extending protection to the lives of victims, their families and their relations, and to take action against those who had allegedly extended threats of coercion to the witnesses. The court also directed the union of India to enact a law for grant of protection to the witnesses as is prevalent in several countries.⁴²

*Zahira Habibullah H. Sheikh vs. State of Gujarat*⁴³ has been one of the most highlighted cases raising concerns for and urgent need of witness protection scheme. The Supreme Court in this case, dealt with ‘witness protection’ and the need for a fair trial, whereby fairness is meted out not only to the accused but to the victims/witnesses. On the question of ‘witness protection’, the court observed:

“If the witnesses get threatened or are forced to give false evidence, that also would not result in a fair trial⁴⁴ Time has become ripe to act on account of numerous experiences faced by the court on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices, ingeniously adopted to smother and stifle truth and realities interest require that the victims of the crime who are not ordinarily parties to prosecution and the interests of state representing by their presenting agencies do not suffer.... There comes when serious and undiluted thoughts are to be

41 NHRC vs. State of Gujarat, 203 (9) SCALE 329.

42 Ibid.

43 2004 (4) SCALE 373; 2004 (4) SCC 158.

44 Ibid, Pg. 392.

bestowed for protecting witnesses so that ultimate truth presented before the court and justice triumphs and that the trial is not reduced to mockery.⁴⁵ Referring to witness protection programmes in other countries the court observed that the Witness Protection Programmes are imperatives as well as imminent in the context of alarming rate of summersaults by witnesses with ulterior motive and purely for personal gain or fear for security. It would be as welcome step if something in those lines is done in our country. That would be a step in the right direction for a fair trial.⁴⁶ Through this case outraged the nation's conscience, this is not a unique case of influential people getting away because witnesses under threat or allurements turned hostile and investigating agencies themselves sabotaged course of justice.⁴⁷

The prosecution, in a large number of cases including the BMW and the Jessica Lal murder cases, beside the ones registered under the Terrorist and Disruptive Activities Act (TADA), 1987 and Prevention of Terrorism Act, 2002 has failed due to the backing out of witnesses.⁴⁸ In the absence of general statute covering witness identity protection and partial restriction of the rights of the accused, the court has taken the lead and as an ad-hoc measure, formulated the aforesaid guidelines in different cases.

VII. Law Commission on Witness Protection

The concern for protection witnesses and maintaining anonymity of witnesses under the criminal justice system has not been confined to judicial decisions, laying down guidelines, but has moved far ahead from the precincts of the court to the opinion of recommendatory committees and other expert bodies. The issue has been the focus of several studies and report of expert bodies which have time and again pressed the need for evolving a witness protection scheme/law via legislative enactment. It is an undeniable fact that guidelines for protecting witnesses in a criminal trial laid down by court can only serve as an ephemeral measure and it is for this reason that these recommendatory bodies are strongly suggesting a permanent law on this point.

In its various report since 1996, the Law Commission of India has been stressing on the need for protecting witnesses and various measures for carrying out such witness protection.

154th Report of the Law Commission (1996): Lack of Facilities and Wrath of Accused.

In the 154th Report of the Commission,⁴⁹ the commission, while dealing

45 Ibid, pg. 394.

46 Ibid, Pg. 399.

47 The Times of India, 13-03-2006, Pg. 15, New Delhi.

48 Dhruv Desai, "Treatment and Protection of Witness in India", Cr. L.J. 2006. Pg. 94.

49 The Law Commission of India, 154th Report, 1996 Chapter X.

with 'Protection and Facilities of Witnesses', referred to the 14th Report of the Law Commission and the Report of the National Police Commission and conceded that there was plenty of justification for the reluctance of witnesses to come forward to attend court promptly in obedience to the summons. It was stated that the plight of witnesses appearing on behalf of the State was pitiable not only because of lack of proper facilities and conveniences but also because witnesses have to incur the wrath of the accused, particularly that of hardened criminals, which can result in their life falling into great peril. The Law Commission recommended, inter alia, as follow:⁵⁰

“The treatment afforded to them right from the stage of investigation upto the stage of conclusion of the trial should be in a fitting manner giving them due respect and removing all causes which contribute to any anguish on their part. Necessary confidence has to be created in the minds of the witnesses that they would be protected from the wrath of the accused in any eventuality.”

178th Report of the Law Commission (2001): Preventing witness turning hostile.

This report of Law Commission recommended the insertion of subsection (1A) in section 164 of CrPC so that the statements of material witnesses are recorded in the presence of Magistrate. It also proposed the introduction of certain checks so that witnesses do not turn hostile such as taking the signature of witness on his police statement and also by prescribing severe punishment for perjury in all serious offences.

However, in the above Report, the Law Commission did not suggest any measures for the physical protection of witnesses from the 'wrath of the accused' nor deal with the question whether the identity of witnesses can be kept secret and if so, in what manner the court could keep the identity secret and yet comply with the requirements of enabling the accused or his counsel to effectively cross examine the witness so that the fairness of the judicial procedure is not sacrificed.

Report of the Law Commission (2004): Witness Identity Protection and Witness Protection Programs.

The Law Commission of India issued its consultation paper on Witness Identity Protection and witness Protection Programs in August 2004.⁵¹ Among the problem areas that have been highlighted is the one relating to intimidation or allurement of victims or witnesses for the prosecution leading to inevitable consequence of the collapse of the trial, the criminal courts in the capital city New Delhi have witnessed this phenomenon with fair regularity in the recent

⁵⁰ Ibid Chapter VI.

⁵¹ <http://www.lawcommissionofindia.nic.in> visited on 3/10/2006.

past in a series of trials involving sensational and ghastly crimes. The impurity with which persons facing charges of mass murders, rape and gruesome killings are able to frustrate the justice process through the tactics of intimidations, threats and even elimination of witnesses has given cause for grave concern.

The Law Commission has in this Report proposed two broad aspects to the need for witness protection. The first is to ensure that evidence of witnesses that has already been collected at the stage of investigation is not allowed to be destroyed by witnesses reselling from their statements while deposing on oath before a court. This phenomenon of witnesses turning 'hostile' on account of failure to 'protect' their evidence is one aspect of the problem. This in turn would entail special procedure to be introduced into the criminal law after knowing all details about witnesses, to balance the need for anonymity of witnesses on the one hand and rights of the accused for an open public trial with a right to cross-examination of witnesses, on the other hand. The other aspect is the physical and mental vulnerability of the witness and to the taking care of his or her welfare various respect which calls for physical protection of the witness at all stages of the criminal justice process till the conclusion of the case.

The law Commission also expressed its concern for an urgent need to have a comprehensive legislative scheme dealing with the second aspect of physical protection of the witness as well. Further, witness protection will have to be ensured in all criminal cases involving grave crimes not limited to terrorist crimes.

VIII. Recommendation of Malimath Committee 2003

The Malimath Committee has suggested comprehensive reforms, though some of them are controversial, in the entire criminal law system, including some of the 'fundamental principles' that have been 'guiding principles' of, and 'foundations' for, the hitherto criminal justice delivery system in India.⁵²

The VS Malimath committee on reforms of the criminal justice system prepared an outline for such a wide ranging correction in 2003 for a situation like the Jessica Lal, where witnesses refused to support the prosecution case, the committee has suggested holding in camera proceedings, taking measures to keep identity of witnesses secret, ensuring anonymity and making arrangements to ensure their protection.⁵³

52 The Government of India, Report: Committee on Reforms of Criminal Justice System (Ministry of Home Affairs, 2003) Vol. I, para 7.2.

53 The Times of India, 13/03/2006, Editorial Section, New Delhi.

It suggested that witnesses in court should be treated like guests of honor and dignity of witnesses while deposing in the court of law should be ensured and a law for protection of witnesses should be enacted as there is no such law in India.

To ensure that the investigating machinery remains immune from political and other external influences, the committee recommended constitution of a National Security Commission at State Level. It will insulate the police from external pressure and ensure a level of integrity in their work. It will also restore faith and trust of people in police.⁵⁴ The committee recommended strengthening of police vigilance set-ups at State Level and constitution of similar mechanisms at range and district level. The situation nevertheless, some how fails to improve.

Referring to, with approval, the recommendation of the Law Commission of India⁵⁵ and of the K. Pradmanabham Committee on Police Reforms that Crime Police (an investigating agency) be separated from the Law and Order Police (ordinary police) by putting the former under the control of judiciary, and accepting it in principle, the Malimath Committee has recommended that all the serious crimes triable by sessions court be investigated into by the Crime Police and other crimes created by the special and local Acts be handled by the Law and Order police, in order to prevent the collusion between the investigatory and prosecutory agencies of a State. (This recommendation has been accepted by insertion of section 25A, CrPC by Act 25 of 2005) The Malimath Committee, with this spirit, has recommended a number of legislative, judicial, punitive and administrative measures. Prominent among them and concerned with protection of witnesses are:

1. A law, on the lines of the laws in USA and other countries, be enacted for giving protection to the witnesses and their family members.
2. The judges should be vigilant and regulate cross-examination to prevent the witness being subjected to harassment, annoyance or indignity.

The Malimath Committee report like so many other reports on reforms of the criminal justice system is gathering dust. Though, the Supreme Court recently sought details from the centre regarding steps taken to implement recommendations of the Malimath Committee report people are still to benefit

⁵⁴ Ibid.

⁵⁵ The Law Commission of India, 154th Report on CrPC, 1973 (Government of India, 1996).

from them.⁵⁶

IX. Initiatives by Police

With terrorist activities on the rise, the Mumbai police have formulated a four-point plan to protect vital witnesses in the bomb-blasts and other sensitive cases. Though this plan is still under deliberation, it shall be sent to the state Government for its approval, after which it will be enacted as a law.

The above mentioned four-point plan is made on the following guidelines:

1. Transferring the witness from his city of residence to another city.
2. Government will provide the witness with a job similar to the one he is/was doing.
3. The witness shall be given a new name, identification, ration card and a new passport.
4. The Government will accept the responsibility of the witnesses' entire family and provide it with security cover.⁵⁷

Fali. S. Nariman (an eminent lawyer and recipient of Padma Vibhushan 2007), writes:⁵⁸

“The trouble about protecting witnesses physically from harassment or threats is that it requires a complete change of identity of work not only for the witness but also for his or her family. In fact, since criminal trial does not end swiftly, a large part of the witness' life would be dominated by the need for continued security and constant supervision of that security by police officers: a task beyond the resources of the police force to provide. But there are alternatives to a witness protection program that have been tried abroad, such as appropriate steps to protect and reassure the witness about the process leading to, and the giving of evidence in, court. As for instance screening, voice modulation, and witness anonymity (not as yet experimented under our antiquated law of evidence).”⁵⁹ Further, he states that Jurisprudence in the West has accommodated itself to the idea that even though a criminal trial must be “fair” it need not always be “wrinkle-free”.

X. Need for a New Law

In absence of any witness protection legislation, the justice delivery system has turned to be a mockery in the hands of influential people and the entire system is gradually losing credibility. There is a surfeit opinion that the

⁵⁶ The Times of India, 13/3/2006, Editorial Section, New Delhi.

⁵⁷ <http://www.legalserviceindia.com/articles/witnesses.htm> Visited on 18/11/2006.

⁵⁸ The Hindu 27/03/2007, Editorial Page (Pg. 11) Delhi.

⁵⁹ Supra note 57.

present substantive and procedural laws are inadequate to deal with the rise in organized crime.⁶⁰

There is need to enact legislation to give powers and given law the force, which is required to tackle the menace. Developed countries like USA and European countries have comprehensive laws on their statute books.⁶¹ Features of these could be incorporated. The Indian Penal Code was a statute enacted close to a hundred and fifty years ago in colonial rule conditions where crimes of the present day nature could not have possibly been contemplated about.⁶² The Criminal Procedure Code is also in need of review and considerable change is called for in order to prevent procedural law from defeating substantial law.⁶³

There is no national level scheme or guidelines for witness protection in India and some states have no laws to protect witnesses and victims. The trial of persons accused of mass killings in Gujarat 2002 descended into force after witnesses constantly changed their testimonies due to a systematic campaign of intimidation by the state authorities and powerful nationalist groups, coupled with a lack of witness protection. In most parts of the country, witness, brought to court in cases against rich and powerful people turn hostile, making a mockery of the law and India's pretensions to human rights and democracy.⁶⁴ The police in many arrears work together with corrupted judicial officers and criminal to intimidate and murder with impunity, through use of "cross fire", encounter killings and mob attacks on persons and properties. The country's enormous bureaucracy remains largely inert and complicit and countless judicial reforms, committees and commissions have paid virtually no attention to witness protection.⁶⁵ Mr. Nani A. Palkhivala, eminent Senior Advocate once remarked that, "The trial of a civil suit in Indian Courts is the closest description to 'eternity'" Criminal cases are not far behind. Trial courts in the country are thronged by millions, who wait for decades for the disposal of their cases. Be it the shortage of presiding officers, the lack of required number of courts, the complexity of the legal process itself or the act pervasive callousness, the fact is that the judicial system in its present form is a painful grind on, rather than the last resort for the common man.⁶⁶

⁶⁰ Dr. Subhash C. Kashyap, *The Citizen and Judicial Reforms under Indian Polity*, 2003, Universal Law Pub. Delhi. P. 234.

⁶¹ *Ibid*, P.g. 31-34.

⁶² *Ibid* p. 230.

⁶³ *Ibid*.

⁶⁴ <http://www.hrschool.org/mainfile.php/lesson47> (1831) visited on 4-10-2006.

⁶⁵ <http://www.hrschool.org/mainfile.php/lesson47> (1831) visited on 4-10-2006.

⁶⁶ *Supra* Note 57.

While government is presently deliberately over making laws pertaining to hostile witnesses and laws for Witness Protection, it is imperative to note that witness Protection works on the premise that all the official in the secret exercise of changing somebody' identity are absolutely trustworthy.⁶⁷ The plain fact is that the level of professionalism demanded by witness protection is considered to be beyond the capability of our police in the existing system, making it as susceptible as it is to extraneous influences.⁶⁸

Inaugurating an International Seminar on "Criminal Justice System under Stress: Transnational perspective" Former President APJ Abdul Kalam suggested legal reforms such as witness Protection and concealing identity of witness to enable the witness to come forward without fear which will result in faster decision of the cases.⁶⁹ K.G, Balakrishnan J., (Now the Former Chief Justice of Supreme Court) on 22 December 2006, stressed on the urgent need to bring in a law for proper protection to witnesses that would help them prevent from turning hostile.⁷⁰

X. Conclusions

The Persistent need for the protection of witnesses and preserving of their anonymity in a criminal case has been universally recognized as being in the interest of the community and the administration of justice. The time has come to ensure the protection both physical as well as mental vulnerability of the witness who offers his deposition in the court as his duty towards the state for upholding the cause of justice thus imposing a reciprocal duty on the state to protect him against the wrath of unlawful elements.

In dearth of a salutary law on witness protection or witness anonymity the cause of justice is laid subservient in the hands of those who profit from it. Justice is supreme and justice ought to be beneficial for the society so that the society is placed in a better-off situation. Law courts exist for the society and ought to rise up to act in a manner so as to serve the basic requirement of the society. It is requirement of the society and law must respond to its need. The greatest virtue of the law is its flexibility and its adaptability; it must change from time to time so that it answers the cry of the people, the need of the hour and the order of the day.

A special legislation should be enacted for protection of witness from all sorts of harassment. The legislation can be framed on the lines of the

67 Dhruv Desai, "Treatment and Protection of Witness in India a View at the Existing Legal Position as Regards Witnesses" pg. Cr. L.J 2006,.

68 Ibid pg. 20.

69 [http:// www.indialawnews.com](http://www.indialawnews.com) visited on 02-01-2007.

70 The Times of India, 22-12-2006, New Delhi, pg 1.

victim and witness protection Act, 1982 of the US and the United Nations Declaration on Basic Principles of Justice for victims of Crime and Abuse of Power in 1985. Such legislation would call for stringent penal provisions should be made for interfering with the discretion of the witness. It can be argued that it is impossible to criminalize all conceivable forms of witness intimidation and the existing offences, such as offences against the life, personal security of the witness as well as those related to the integrity of the criminal justice system, may be sufficient. The tendency in many countries, however seems to be to move towards the specific criminalization of intimidation. Witnesses should further, be informed of their rights. A number of countries throughout the world have made specific constitutional and legislative amendments to provide for witness rights in their legal regime.

It is submitted that the protection to the witness as well as his anonymity can further be provided by:

- (i) permitting the use of video taped interview of the witness. A court of law cannot render justice unless the ultimate decision is based on the contemporary law as prevailing in the society. A decision based on an old law, which does not satisfy the requirements of the present situation, and environment should be avoided. In such a situation the efforts of the courts should be to give the law a “purposive, updating and an ongoing interpretation”. This position makes the interface of justice delivery system with the information technology inevitable and unavoidable, which the Indian Judiciary is capable of tackling effectively and efficiently.
- (ii) allowing the recording of testimony via closed circuit television or screening the witness from the accused such that only the judge and the defense counsel are able to see the witness and watch his demeanor. The trend of admitting evidence through video conferencing has been accepted in many other countries as a mode of protecting witnesses.
- (iii) disallowing the public and media inside the court in sensational, heinous crimes such as involving grave punishments or high political or underworld link criminals.

It is submitted that it is imperative for the legislature to enact a law in this behalf for preventing the annihilation of public trust and morale in the state and for putting a leash on the potential criminals from dismantling the process of law.