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Protection for Parties in the Case (Accused/Victim/Witness)

An Indian Scenario in the Global Perspective

By

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Every crime has an Owner, Offence and Offender. When an Owner of a Person (body, or mind) or property is deprived of his right to enjoy the same, he / she become a **Victim**. To prove the deprivation, **Witnesses** are necessary. The Offender is the **Accused** in the Case.

According to Article 10 of Universal Declaration of Human Rights, "Everyone is entitled in full equality to a fair and Public Hearing....." This is the common standard of achievement for every Individual and every organ of the Society; this includes Accused, Victim and Witness. The purpose of every Court or Tribunal is to serve the ends of Justice. Hence the Court or Tribunal has the duty to protect the Right of Parties in the Case i.e. Accused, Witnesses and Victims.

Protection to the Accused

Most of the International Covenants and respective Constitutions of the Countries give adequate directions to the civilized society to ensure the well being of the Accused which begins from Investigation, continues to be effective during trial, Appeal and also after pronouncement of verdict i.e. on conviction or probation.

There are two kinds of Protection bestowed on Accused:

1. Physical Protection and 2. Psychological Protection.

Laws on Human Rights and the basic Principle of Criminal Justice System offer protection to the "Accused". The system followed in many of the Countries including in India for dispensation of Criminal Justice is the Adversarial System of Common Law inherited from the British Colonial

rule. The accused is presumed to be innocent until proved guilty and it's incumbent on the Prosecution to prove beyond reasonable doubt that the accused is guilty. The benefit of doubt always goes in favor of the Accused. This presumption starts from the moment an accused is arrested.

On effecting every arrest, the person who is arrested shall be informed about the ground of Arrest and an Arrest Memo has to be prepared duly attested by Witness to Arrest. As far as the law relating to Bail in India is concerned, it is governed by The Code of Criminal Procedure, 1973. The code categorizes offences under two heads (i) Bailable Offences and (ii) Non Bailable Offences. Bailable offences are minor offences and when a person is arrested for a bailable offence, he is enlarged on bail from the Police Stations itself. Whereas in the event of arrest in a Non bailable offence, the intimation regarding the arrest of arrestee is to be given to his friends, relatives or such other persons disclosed or nominated by the arrestee. His arrest shall be intimated to a Legal Aid Counsel. It is mandatory that the arrested person be produced within 24 hours of Arrest, before a Judicial Magistrate and if his plea for enlargement on bail is rejected, he will be send to Judicial Custody for maximum of 15 days. If the Investigation is not completed and Charge Sheet (Final Report) is not filed within 60 or 90 days (differs according to the gravity of offence), the accused shall be released on bail.

When the arrested person is produced before the Court, the court is duty bound to enquire about the allegation of abuse or torture if any by the arresting authorities and act accordingly. If an accused person appears before the Court undefended, the court has an obligation to enquire whether he needs the services of a lawyer. If the accused seeks for such assistance the Court shall appoint a Counsel from the Taluk¹ Legal Services Committee. The Court has to ensure the presence of the Legal Aid Counsel thus appointed before proceeding further with the hearing of the case. Many youngsters are involved in crimes not knowing the consequences of the same and for the first time. Counseling at this stage, preferably initiated by the concerned Judicial Officer, may help them to realize the effect of being in a criminal case.

Crime is a wrong not only against an Individual but also against the State. The State takes upon itself the responsibilities of prosecution. Hence the Prosecutor is appointed by the State. But at the same time, it has adopted the Adversary System of Criminal Trail based on "Accusatorial Method".

¹ Taluk is an administrative division within a district

The onus is on the Prosecution to prove the case against an accused. The Court is more or less like an umpire and must not show any favor or disfavor to any party.

Among other protections, the accused person has the following guaranteed protections i.e., protection from unreasonable search, seizure, arbitrary arrest or detention, protection from unfair interrogation and irregular trial. During the trial stage the accused has following rights too:

- (i) To know the Accusation
- (ii) To be tried in his presence
- (iii) To take evidence in his presence
- (iv) To cross examine Prosecution Witness
- (v) To produce evidence in Defense
- (vi) To have reasoned decision
- (vii) To get the benefit of doctrines of *Autrefois Acquit* and *Autrefois Convict*

PROTECTION OF VICTIM / WITNESS

The accused have umpteen numbers of protections and rights including open public trial in a criminal court and also a right to examination of witnesses in open court in their presence. But, the law has to balance that right of the accused. These rights of the accused are not absolute and may be restricted to a reasonable extent in the interests of fair administration of Justice and for ensuring that victims and witnesses depose without any fear or danger to their lives or property or that of their loved ones.

The role of a witness is very important in a trial. He is an indispensable aid in the justice dispensation system in any civilized society. According to Bentham, "witnesses are the eyes and

ears of justice". Each and every statement of theirs is very important as it has a magic force to change the course of the whole case.

Many of the important criminal cases are acquitted on the ground that the prosecution witnesses retract from statements made earlier before the police and turn hostile in the Court. Witnesses turn hostile with predictable regularity in cases involving heinous crimes or high profile personalities due to external pressures, thereby leading to the failures of the criminal justice system.

Why Witness turns Hostile?

Let us examine how witness becomes "Hostile". Section 161(3) of the Code of Criminal Procedure vests in police officers the power to record statement of witnesses. However, these statements are not admissible in court by virtue of Section 162(1). The aim of this section is to protect accused persons from being prejudiced by statements made to police officers who may coerce the witnesses. So what happens is that during the trial the witness has to restate what he said to the police. Here the statements recorded by the police constitute a reference to which the veracity of the witness can be tested. If the witness goes back on his/her earlier statements he/she may have turned hostile.²

There are various reasons why a witness may turn hostile. Common causes for hostility or adversity exhibited by the witnesses are the following: ³

- i) Threat/intimidation
- ii) Inducement by various means
- iii) Allurement/seduction
- iv) Disillusionment caused by the delay in the judicial process

There are at least two reasons to explain why a witness turn hostile. The first is that the police had recorded their statements incorrectly. Another important reason is that the police had recorded the statements correctly but were retracted by the witnesses because of "intimidation and other methods of manipulation". Witnesses are extremely vulnerable to intimidation in the form of threats

² Need for a Witness Protection Program: The Solution to the problem of Hostile Witness by ankit,kejriwal @ legalservicesindia.com

³ Witness Protection-Bird's-eye view by A.Hariprasad, Director, Kerala Judicial Academy

by the accused⁴. In Asian courts, a lot of weight is put on witness testimonies, and the protection of witnesses and victims is crucial when dealing with corruption and police torture and other human rights violations⁵.

Another major reason for this growing menace is protracted trials. The working of judicial process is very slow. Several dates are fixed for cross examination of witnesses, who become frustrated for being summoned again and again only to find that the case is adjourned. This frustration takes its toll, and the witness decides to turn hostile to get rid of the harassment. The 4th Report of the National Police Commission of India (1980) acknowledged the troubles undergone by witnesses attending proceedings in courts.

According to UN *Declaration of Basic Principles for Victims of Crime and Abuse of Power in 1985*, necessary guidelines for the Protection of Victims and Witness were established such as:

- to be treated with respect and recognition
- to be referred to adequate support services
- to receive information about the progress of the case
- to be present and to be involved in the decision-making process
- to counsel
- to protection of physical safety and privacy
- to compensation, both from the offender and the court.

Categories of witnesses

There are three categories of witnesses:

- (i) victim-witnesses who are known to the accused;

⁴ Press release of People's Union of Civil Liberties dt. 02/07/2003

⁵ Indonesia: A critical review of the new witness protection law – Asian Human Rights Commission

- (ii) victims-witnesses not known to the accused (e.g.as in a case of indiscriminate firing by the accused) and
- (iii) witnesses whose identity is not known to the accused.

Category (i) requires protection from trauma and (ii) & (iii) require protection against disclosure of identity.⁶

Supreme Court of India on Victim / Witness Protection

An effective witness protection law that is founded on a genuine attempt to cope with human rights violation is an integral part of a functioning criminal justice system. The Supreme Court of India has referred to the questions of 'Witness Identity Protection' and 'Witness Protection Programs' in a number of judgments: In view of these observations, the **Law Commission of India (LCI)** has taken up the subject suo moto. Witness Identity Protection may require during investigation, inquiry and trial whereas Witness Protection Programs apply to the physical protection of the witness outside the Court. It is accepted today that Witness Identity Protection is necessary in the case of all serious offences wherein there is danger to witnesses and it is not confined to cases of terrorism or sexual offences.

Honorable Supreme Court of India in "**Best Bakery Case**", (*Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others*)⁷ came down heavily on the State administration in general and the investigating agency in particular for rashly and negligently handling their duties and abdicating their responsibilities. The categorical finding is that the whole machinery of a State failed in maintaining the confidence of public in the justice delivery system. Apex Court in strong words reminded the trial Courts to be alive to the reality about the witness hostility. One of the predominant points taken note of by the Honorable Supreme Court is the lack of witness protection in the country. The principles stated in the above decision have been reiterated by the Honorable Supreme Court in the contempt proceedings taken up against *Zahira Habibulla H. Sheikh and Another*. Apex Court highlighted the importance and primacy of the quality of trial process. It has been observed that if the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralyzed.

⁶ Law Commission of India 198th report on witness identity protection and witness protection program

⁷ 2004 (4) SCC 158

There has been debate in several countries as to how the rights of the accused and the need for witness identity protection can be balanced. Such a balance has been achieved even in USA and some other countries where confrontation of witnesses in open court is indeed a constitutional or statutory right. They have devised appropriate procedures that can be prescribed in the interest of victims and witnesses.

There is no law for the protection of witness in India barring few sections of Indian Evidence Act, 1872. Section 151 and Section 152 protect the witnesses from being asked indecent, scandalous, offensive questions, and questions which intend to annoy or insult them. The Law Commission of India recognized the need for the same and came up with detailed report on witness protection which is under consideration of Parliament. Some of the Highlights of Recommendation are as follows:

I. Witness Identity Protection

(i) At the stage of investigation:

Law Commission of India is of the opinion that witness protection is necessary even at the stage of investigation. This can be provided by the prosecutor moving the Magistrate to a conduct a preliminary inquiry in his chambers, i.e. *in camera*. The Magistrate will have to consider the material relied upon by the prosecutor for substantiating the danger to the witness or his property or those of his relatives, and, if necessary, the Magistrate can examine the witness. The suspect is not entitled to be heard at this stage during investigation. If the Magistrate comes to the conclusion that there is likelihood of danger, he can grant identity protection. This will, however, be disclosed to the Magistrate and none else. Further, the real identity will not be reflected in the Court records but the witness will be described by a pseudonym or a letter from the alphabet.

(ii) During inquiry and before recording evidence at the trial:

In the inquiry before the Magistrate or Court of Session (before the trial starts), the prosecutor or the witness has to make a fresh application and this is necessary even if some of the witnesses have been allowed anonymity and given a new identity during investigation. The Magistrate or

judge has to pass a fresh preliminary order granting anonymity. The reason is that, unlike at the stage of investigation, in the case of identity protection during inquiry/or before trial, such protection can be granted only after giving a reasonable opportunity to the accused. The Magistrate or Judge will consider the material produced by the prosecutor or the witness as to the danger to his life or property or that of his relatives, and will, if necessary, hear the witness. All this has to be *in camera* and the accused/his lawyer will not be present. However, the Magistrate or Judge will have to hear the accused or his lawyer separately and disclose to them the material relating to the alleged danger to the witness, but not any facts which may enable the accused or his lawyer to discover the real identity of the witness. It satisfies the requirement of law where rights of the accused and the rights of the witness get balanced. If, during inquiry, the Magistrate or Judge grants identity protection by a preliminary order, it will ensure not only for the period during inquiry, trial, but at the later stages of appeal or revision and even after the case has been finally concluded. The record of the proceedings shall not, however, contain the real identity of the witness or any facts from which identity can be discovered.

(iii) Recording evidence during the trial in the Sessions Court: Two-way closed circuit television:

The next stage is the final stage of trial in the Sessions Court. The witness, if he had already been granted anonymity by the Magistrate or Judge, as stated above, he need not apply again for anonymity. In respect of the evidence during the trial a two-way closed-circuit television or video link and two-way audio link is proposed and these will be installed connecting two rooms. As per the decision of the Supreme Court of India (1) such evidence by video-link is admissible. There are two separate procedures, for cases of victims/witnesses not known to accused who require identity protection and to victims known to the accused and who are to be protected from trauma.

(a) So far as the ***victims and witnesses not known to the accused*** whose identity has to be protected, trial will be conducted in one room, which may be called (A), the Presiding Judge, the court master, the stenographer, the public prosecutor, the threatened witness and the technical personnel (who will be employees of the court) will be present. In another room, which we may call (B), the accused, his pleader and the technical persons operating the system will alone be present. Both rooms will be connected by a two-way closed circuit television or video link coupled with a two-way audio link. The threatened witness (i.e. victim or witness not known to the accused) will

be examined by the prosecutor in Room A directly. The witness may identify the accused on the video screen in his room but the camera in Room A where the witness is present shall not be focused on the witness and therefore his image will not be visible in Room B where the accused is present. The witness in Room A shall be cross-examined by the accused or his pleader who are in Room B, through the two-way video and audio system.

(b) So far as ***victims known to the accused*** who have only to be protected from trauma, the procedure will be like in Room A, the Presiding Judge, the court-master and the stenographer, the accused and the technical personnel will be present. In this Room B, the victim, the public prosecutor and the pleader for the accused and the technical persons shall be present. Only when the victim has to identify the accused, the camera in Room A will be focused on the accused, thereafter the picture of the accused will not be visible in the screen in Room B. In this Room B, the witness will be examined or cross-examined by the prosecutor/defense lawyer. From Room B, the Judge and the accused can see the witness who is in Room A and is being examined.

II. Witness Protection Programs:

The **LCI** has given their recommendations so far as “Witness Protection Programs” are concerned. Witness Protection Programs refer to witness protection outside the Court. At the instance of the Public Prosecutor, the witness can be given a new identity by a Magistrate after conducting an ex parte inquiry in his chambers. In case of likelihood of danger of his life, he is given a different identity and may, if need be, even relocated in a different place along with his dependants till the trial of the case against the accused is completed. The expenses for maintenance of all the persons must be met by the State Legal Services Authority through the District Legal Services Authority. The witness has to sign an MOU which will list out the obligations of the State as well as the witness. Being admitted to the program, the witness has an obligation to depose and the State has an obligation to protect him physically outside Court. Breach of MOU by the witness will result in his being taken out of the program. Under the Act, The Law Commission has recommended for punishment to those who violate the provisions of the Act and reveal the identity of protected witnesses including officials who comes under the Act.

There are a lot of practical problems for implementing the suggestion in India. The main aspect is the Infrastructure which is necessary for the system to have a smooth run. Financial constraints and illiteracy of majority of people also become hurdles in implementation. But at the same time these reasons cannot be stand in the way in a time where revolutionary changes are prescribed by the Law Commission of India which started the initiative for a brand new Witness Protection Laws.

III. Witness Protection Program – A comparative study of programs in various countries

In the **United Kingdom**, under s.24 of the Youth Justice and Criminal Evidence Act, 1999 evidence may be given through a live telecast link where the witness is outside UK or is a child. Ss.16 to 33 of the same Act requires the court to consider special measures of various kinds for the protection of vulnerable and intimidated witnesses. In *R vs. DJX, SCY,GCZ* (1991) CrI. A Rep. 36, the Court of Appeal allowed child witnesses to be screened from the accused.

In **Australia**, the Supreme Court of Victoria (Australia) in *Jarvie* (1995) approved of non-disclosure of the names and addresses of informers and undercover police officers as well as other witnesses whose personal safety would be endangered by the disclosure of their identity. S.2A (1) (b) of the Australian Evidence Act, 1989 deals with special witnesses who are suffering from trauma or likely to be intimidated.

In **New Zealand**, under s.13A of the (New Zealand) Evidence Act, 1908 (introduced in 1986), protection is available to undercover officers in cases involving drug offences and offences tried on indictment attracting a maximum penalty of at least 7 years imprisonment. In 1997, s.13G was introduced making protection applicable to all witnesses if their lives were likely to be endangered.

In **Canada**, the courts have granted more importance to the exception of 'innocence at stake' rather than the needs of administration of justice. In other words, anonymity of witnesses is treated as a privilege granted under the common law unless there is a material to show that it will jeopardize the proof of innocence of the accused.

S.153 of the (**South Africa**) Criminal Procedure Code permits criminal proceedings to be held in camera to protect privacy to the witness. S.154 gives discretion to the court to refuse publication of the name of the accused. The South African courts have permitted the witness to give evidence behind close doors or to give witness anonymity.

The courts in the **United States of America** have held that the constitutional protection in favor of the right to confrontation by way of cross examination, as provided in the 6th Amendment to the Constitution, is not absolute and could be restricted for the purpose of protecting witness identity by using video link or by shielding the witness from the accused though not from the lawyers to the defense or the court or the jury.

As per the Witness Protection Act of **Thailand**, In a criminal case, a witness has the right to protection, proper treatment, necessary and appropriate remuneration from the State as provided by law [Section 244]. An injured person has the right to protection, proper treatment and necessary and appropriate remuneration from the State, as provided by law. In the case where any person suffers an injury to the life, body or mind on account of the commission of a criminal offence by another person without the injured person participating in such commission and the injury cannot be remedied by other means, such person or his or her heir has the right to receive aid from the State, upon the conditions and in the manner provided by law. [Section 245]

In Hong Kong, the Victim Impact Statement can be used in some circumstances to advise the court of the nature and extent of any harm caused, directly or indirectly, to any person by the act in respect of which the person has been so convicted. Victims enjoy the protection of their own charter of rights

Victimology and Compensation to the Victims

*It is observed in R. vs. Chief Constable for Kent & Crown Prosecution Services*⁸ that “The Prosecuting Agency must protect the interests of victims. It is basically the responsibility of the

⁸ 1991 Cr.LR.841

State to do so. The Victim of the Crime is at once the Victim of the State's failure to protect him or her".

Compensation to Victims of Crimes was visualized in India even in ancient days. The "Manusmriti" bears evidence to this. Moghul Emperor Jehangir ordered payment of a munificent compensation to a laundress, whose husband was slain. Hammurabi's code provided compensation to Victims of Robbery even if the Robber is not found. The Holy Bible identified the cases for compensation such as for striking a man, injuring his ox or ass or for violating a virgin etc. Homer's Iliad also refers to compensation to victims of wrongs. But succeeding ages notices a shift in the attitude. While punishment of crime was regarded as a State concern, compensation to victim was regarded as a matter of Tort/Civil liability

On the death of a 14 year old boy by the act of the accused placing a live electric wire at an open place and there by the boy getting electrocuted when the deceased stepped on the wire, **Honorable Mr. Justice Chettur Sankaran Nair of High Court of Kerala**, India held that "Right of the victim to receive compensation, and duty of the State and offender to pay compensation, were recognized by law". There could be cases where the offender can pay compensation, and where he cannot. A methodology must be found for the creation of a fund by the State as in the case of Netherlands, Switzerland etc". In this case, the accused was asked to pay Rs.25,000/- (about 500 US \$) to the mother of the deceased who was only 28 at the time of occurrence had lost her only son, perhaps the only support in life in a tragic manner (*State of Kerala v Ashraf*).⁹

While awarding Compensation of Rs.50,000/- (about 1000 US \$) to a victim whose power of speech was impaired as a result of the injury suffered by him, Honorable Supreme Court of India¹⁰ observed that the compensation to the victim was intended to do something to reassure the victim that he or she is not forgotten in the Criminal Justice System. It is a measure of responding appropriately to crimes as well as reconciling the Victim with the offender...

In India, Section 357 of Code of Criminal Procedure and Section 5 of the Probation of Offenders Act are powerful legislative devices to ensure justice to Victims and to make Vicitmology a meaningful reality. The Code of Criminal Procedure enables the Court to award compensation, in addition to fine, which in certain cases is limited. The Probation of Offenders Act, while sparing the accused the agony in incarceration, provides for atonement of his wrong. Even when there is no direct victim, the compensation can be ordered to the State.

⁹ (1993 (1) KLT 501)

¹⁰ AIR 1988 SC 2127

The Government of Kerala, India has implemented a **Victim Rehabilitation Scheme for victims of criminal cases**¹¹. The compensation is awarded to the victims of cases like assault, rape, murder, riot, arson, etc. The Compensation is paid to the victims for the treatment of Injury, medical expenses, Housing, Destruction of Crops, Education and in rape cases. A District level Committee headed by the District Collector, comprising of members such as Public Prosecutor, Superintendent of Police, District Medical Officer, District Probation Officer and 2 representative from After Care Associations will scrutinize the applications and will forward to the State Government for Compensation. With much satisfaction I can announce that all the cases recommended by me to the Committee were given compensation by the State Government.

III. Victim Witness Assistance Programs

When a Crime is reported to the Police and is registered, the preoccupation of the Police is to meet the requirements of the law on the subject, to take the case to Court wherever possible, and to bring the offender to book. The personal traumatic aspects of the crime as far as the victim or his next-of-kin is concerned hardly get any attention from the first functionary of the Criminal Justice System with whom the victim comes in contact. There is hardly anybody in the system who has the time or who makes an effort to assess the emotional, familial, traumatic, financial and other impact of the crime on the victim.¹²

The sufferings of the victim / witness inside and outside of the Court are unbearable. Most of them reach the Courts with spending money from their pocket and by taking leave from their job. Many times they go back to home without completing their examination. These aspects affect people and force them to turn their face away from being a witness to the crime and make them reluctant to depose the same before the Court.

A strong Victim and Witness Assistance Program is necessary to reinforce the spirit and willingness of the people to get involved as witness. The object of the Program should include;

¹¹ Govt. of Kerala G.O(MS) No.33/2001/Social Welfare Dept.

¹² Victimology in India by V.N.Rajan, IG of Police (Retd.), Kerala

1. To enlighten Citizen on laws
2. To help the victims to overcome difficulties in language,
3. To advice them on the problems
4. To provide basic information such as
 - a. date of hearing
 - b. name of other witness
 - c. date of adjournment if any
 - d. mode of transport
 - e. assistance available for Women & accompanying Children
 - f. provision to get Leave from employer to attend Court
 - g. preparation for the trial
 - h. provision for Victim Compensation and Travelling Expense from Court
 - i. information regarding the result of the case and subsequent actions.
 - j. protection for the Victim/Witness
 - k. Counseling to overcome the trauma
 - l. Facilities available for Victims in the Court hall etc.

A Prosecutor has a great role in the Protection Program whether it is for the Accused/Victim/Witness. He being the officer of Court and minister of justice is duty bound to safe guard the interest of affected people. If he fails on his duty the justice will always suffer and people's faith in the credibility of judicial process and justice system will continue to erode and shatter, Hence the Prosecutor should be in a position to correct the system when it goes idle or wrong.

Books & Papers referred:

Witness Protection-Bird's-eye view by A.Hariprasad, Director, Kerala Judicial Academy

Law Commission of India 198th report on witness identity protection and witness protection program

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Director of Public Prosecutions Department of Justice Hong Kong Special Administrative Region People's Republic of China**

Protecting witnesses or perverting justice in Thailand by Asian Legal Resource Centre, Hong Kong

.Need for a Witness Protection Program: The Solution to the problem of Hostile Witness by ankit,kejriwal @
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Indonesia: A critical review of the new witness protection law – Asian Human Rights Commission

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