



# Witness Protection in India and United States: A Comparative Analysis

Tanuj Bhushan<sup>1</sup>

Hidayatullah National Law University, India

Pranati<sup>2</sup>

Hidayatullah National Law University, India

## Abstract

*In India, situation of protection of witnesses is bleak. A few witnesses in cases like Jessica Lal case remained courageous, but due to lack of witness protection in India, many witnesses do not favor the victim or appear in the court. In USA there is a very effective Witness Protection Programmes thus witness could remain courageous. A witness is considered to be a major clue which helps the judiciary to arrive at a conclusion in a particular case but in India where the problem of witness turning hostile is very common, the Judiciary fails to give proper judgment and the criminals escape. This article comparatively analyses the situation of witness protection in India and US and provides various recommendations for the improvement of witness protection in India.*

*Key Words: Witness protection; India; United States; programmes.*

## Introduction

"There will be no Zaheera Sheikhs and Shayan Munshis if we have more protection for witnesses" (The Tribune, December 18, 2006). This was the statement made by Ms. Ramani after the Delhi High Court had found Manu Sharma guilty in the *Jessica Lal's Case*. Ms. Ramani was an eye witness and had recognized the guilty Manu Sharma in the open court. The Court termed this act of Ms. Ramani as "courageous". But the question is whether we can expect all the witnesses to be as 'courageous' as Ms. Ramani acted in the above-mentioned matter in the absence of any Witness Protection Programmes as we have in India. There are a lot more Ms. Ramanis in the United States for not only the Witness Protection Programmes are in place there, but also that they are effective.

Witness intimidation has a profound and serious impact on the ability of government to enforce its laws and on society's confidence in the ability of government to protect its citizens. By depriving crime investigators and prosecutors of critical evidence, witness intimidation undermines the criminal justice system's ability to protect its citizens and ultimately undermines the confidence citizens have in their government (Finn & Healey 1996). At this juncture it would be quite relevant to discuss about the concept of "witnesses" as in the Indian context. When the police refrain from prosecuting a person against whom there is adequate evidence to justify his production for inquiry and trial

before a Magistrate,<sup>3</sup> he can be a competent witness unless he is tendered a conditional pardon under Sec. 306 of the Code of 1973. Since, there is no provision of law which precludes the Court from administering an oath to such a person he must be held to be a competent witness. It is true that he would suffer from the drawback of testifying under a deep shadow of suspicion that his evidence had been procured by threat or promise but that cannot affect his competency although it is bound to detract from its credibility<sup>4</sup> and it is due to the fear of intimidation that these witnesses turn hostile.

A witness is considered to be a major clue which helps the judiciary to arrive at a conclusion in a particular case. For this it is necessary that the witness comes to the court with full conviction and a sense of duty. The Supreme Court of India in *Swaransingh v. State of Punjab*<sup>5</sup> expressed deep concern about the predicament of a witness in the following words:

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

The word “hostile witness” is not defined in Indian Evidence Act, 1872. The draftsmen of the Indian Evidence Act, 1872 were not unanimous with regard to the meaning of this term. The matter therefore is left entirely to the discretion of the court. A witness is considered adverse when, in the opinion of the Judge, he bears a hostile animus to the party calling him and not merely when his testimony contradicts his proof.

In United States law, a hostile witness is a witness in a trial who testifies for the opposing party or a witness who offers adverse testimony to the calling party during direct examination. A witness called by the opposing party is presumed hostile. A witness called by the direct examiner can be declared hostile by a judge, at the request of the examiner, when the witness' testimony is openly antagonistic or clearly prejudiced to the opposing party. A party examining a hostile witness may question the witness as if in cross-examination, thus permitting the use of leading questions. A hostile witness is sometimes

known as an adverse witness. Although the practice of declaring a witness hostile is very prevalent in television and in movies, it is far rarer in reality.<sup>6</sup> Therefore, the aim of this paper is to recommend the need for effective Witness Protection Programmes in India.

This article is divided into four parts. Part I is a brief introduction to the problem of 'hostile witnesses'. Part II deals with the Indian position on the 'protection of witnesses' and its lacunae. Part III briefly introduces the United States' position on the subject. Lastly, Part IV recommends the developments required in the Indian law with special reference to the United States' jurisprudence on the subject.

### **Part I. Problem of Hostile Witnesses: A Brief Introduction**

In today's scenario, the problem of the Criminal Justice System is quite evident. In every criminal case, witnesses have an important role to play as the facts cannot be determined without them. It is only the witnesses who can prove the case if the testimony of the victim is insufficient, and in cases where the victim is dead, the role of the witnesses becomes all the more important.<sup>7</sup> The whole case of prosecution can fall only on a false statement of the witnesses, for whatever reason it may be.

Having described the importance of the witnesses, it would be important for us to know the factors because of which the witnesses turn 'hostile'. The main factor responsible for it is 'witness intimidation'.<sup>8</sup> It is not to state that it is the only factor but still it is the most important factor. There would definitely be certain other factors such as the favoritism, reluctance, certain social factors, inconvenience etc. which this article does not purport to deal with at length. The Indian Supreme Court has also realized these internationally known factors which act as hindrances in the Criminal Justice System –

“Witnesses tremble on getting summons from Courts, in India, not because they fear examination or cross-examination in Courts but because of the fear that they might not be examined at all for several days and on all such days they would be nailed to the precincts of the Courts awaiting their chance of being examined. The witnesses, perforce, keep aside their avocation and go to the Courts and wait and wait for hours to be told at the end of the day to come again and wait and wait like that. This is the infelicitous scenario in many of the Courts in India so far as witnesses are concerned. It is high time that trial Courts should regard witnesses as guests invited (through summons) for helping such Courts with their testimony for reaching judicial findings. But the malady is that the predicament of the witnesses is worse than the litigants themselves.... The only casualty in the aforesaid process is criminal justice.”<sup>9</sup>

This criticism from the Supreme Court of India pithily sums up the problem facing witnesses and, therefore, the criminal justice delivery system. The problem has been given a new dimension over the last few years in Delhi (and perhaps most other cities in India as well), which has seen quite a few 'high profile' criminal cases being dealt with by the Courts such as the Best Bakery Case, Manu Sharma's Murder Case, the BMW Hit & Run Case and so on and so forth.

## Part II. Indian Legal Statues and witness protection

In India, there are certain provisions relating to ‘protection of witnesses’ but there are certain very evident difficulties in implementing them. The provisions exist in various legislations and are not consolidated in a separate legislation; whereas, in the United States, there is a separate legislation to deal with the ‘protection of witnesses’.<sup>10</sup> Moreover, the existing laws are weak and apart from these provisions in special statutes, there is a need for a general law dealing with witness anonymity in all criminal cases where there is danger to the life of the witness or of his relatives or to his property.

### a. Provisions in Statutes

The Code of Criminal Procedure, 1973 provides for trial in the open court<sup>11</sup> and also provides for in-camera trials<sup>12</sup> for offences involving rape.<sup>13</sup> Sec. 273 requires the evidence to be taken in the presence of the accused. Sec. 299 indicates that in certain exceptional circumstances an accused may be denied his right to cross-examine a prosecution witness in open court. Further, the police officer can form an opinion that any part of the statement recorded u/s 161 of a person the prosecution proposes to examine as its witness need not be disclosed to the accused if it is not essential in the interests of justice or is inexpedient in the public interest.<sup>14</sup>

Indian Penal Code, 1861 prescribes punishment if the identity of the victim of rape is published.<sup>15</sup> Likewise, Sec. 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000 prohibits publication of the name, address and other particulars which may lead to the identification of the juvenile. The Indian Evidence Act, 1872 states that in certain exceptional cases, where cross examination is not possible, previous deposition of the witness can be considered that relevant in subsequent proceedings.<sup>16</sup> The Evidence Act requires to be looked into afresh to provide for protection to a witness.

In the pre-constitutional era, the Bengal Suppression of Terrorist Outrages Act, 1932 empowered the special Magistrate to exclude persons or public from the precincts of the court.<sup>17</sup> Terrorists and Disruptive Activities Act, 1985<sup>18</sup> and Sec. 16 Terrorists and Disruptive Activities Act, 1987<sup>19</sup> provided for protection of the identity and keep the address of a witness secret which ultimately allows the witness to do his/her duty effectively. Sec. 30 of the Prevention of Terrorism, 2002 is on the same lines as Sec. 16 of the Terrorists and Disruptive Activities Act, 1987.

### b. Reports of the Law Commission of India

The 14<sup>th</sup> Report of the Law Commission<sup>20</sup> examined, *inter alia*, the question of providing adequate facilities to witnesses attending cases in courts. The 4<sup>th</sup> Report of the National Police Commission<sup>21</sup> acknowledged the troubles undergone by witnesses attending proceedings in courts. The 154<sup>th</sup> Report of the Law Commission<sup>22</sup> particularly noted: “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”. The 172<sup>nd</sup> Report of the Law Commission<sup>23</sup>, dealing with the review of rape laws suggested that the testimony of a minor in the case of child sexual abuse should be recorded at the earliest possible opportunity in the presence of a Judge and a child support person. It further urged that the court should permit the use of video-taped interview of the child or allow the child to testify by a closed circuit television and that the cross examination of the minor should be carried out by the Judge based on written questions submitted by the defence. The

Commission also recommended insertion of a proviso to Sec. 273 of the Code of Criminal Procedure, 1973 to the effect that it should be open to the prosecution to request the court to provide a screen so that the child victim does not see the accused during the trial.

In its 178<sup>th</sup> Report, the Law Commission recommended the insertion of Sec. 164A in the Code of Criminal Procedure, 1973 to provide for recording of the statement of material witnesses in the presence of Magistrates where the offences were punishable with imprisonment of 10 years and more.<sup>24</sup> On the basis of this recommendation, the Criminal Law (Amendment) Bill, 2003 was introduced in the Rajya Sabha and is pending enactment. In its 178<sup>th</sup> Report,<sup>25</sup> the Law Commission again took up the issue of preventing witnesses from turning hostile. It considered three alternatives: (1) The insertion of sub-section (1A) in Section 164 of the Code of Criminal Procedure (as suggested in the 154<sup>th</sup> Report) so that the statements of material witnesses are recorded in the presence of Magistrates. [This would require the recruitment of a large number of Magistrates]; (2) Introducing certain checks so that witnesses do not turn hostile, such as taking the signature of a witness on his police statement and sending it to an appropriate Magistrate and a senior police officer; (3) In all serious offences, punishable with 10 or more years of imprisonment, the statement of important witnesses should be recorded, at the earliest, by a Magistrate under Section 164 of the Code. For less serious offences, the second alternative (with some modifications) was found viable. The Law Commission favorably considered the last two alternatives and recommended the insertion of Section 164A in the Code of Criminal Procedure.<sup>26</sup>

Apparently, neither any State Government nor the Central Government has accepted (or at least implemented) any of the above Reports of the Law Commission. This appears to be so because recently, the Committee on Reforms of Criminal Justice System under the chairmanship of Dr. Justice V. S. Malimath submitted its rather voluminous Report, containing as many as 158 recommendations. Many of these recommendations reiterate the earlier recommendations of the Law Commission and the National Police Commission.<sup>27</sup> As regards physical protection to a witness, the Justice Malimath Committee makes only a single line recommendation and it is to the effect that a law should be enacted for giving protection to witnesses and their family members on the lines of laws in USA and other countries.

### ***c. Principles of Law Developed by the Courts: Anonymity of the Witnesses and the Rights of the Accused***

In the *pre-Maneka Gandhi* phase the Supreme Court, in *Gurbachan Singh v. State of Bombay*,<sup>28</sup> upheld a provision of the Bombay Police Act, 1951 that denied permission to a detainee to cross-examine the witnesses who had deposed against him. It was held that the law was only to deal with exceptional cases where witnesses, for fear of violence to their person or property, were unwilling to depose publicly against bad character. At this stage, the issue was not examined whether the procedure was 'fair'. The decisions in *G.X. Francis v. Banke Bihari Singh*<sup>29</sup> and *Maneka Sanjay Gandhi v. Rani Jethmalani*<sup>30</sup> stressed the need for a congenial atmosphere for the conduct of a fair trial and this included the protection of witnesses.

In *Kartar Singh v. State of Punjab*<sup>31</sup> the Supreme Court upheld the validity of Sec. 16 (2) and (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 which gave the discretion to the designated Court to keep the identity and address of a witness secret

upon certain contingencies; to hold the proceedings at a place to be decided by the court and to withhold the names and addresses of witnesses in its orders. The court held that the right of the accused to cross-examine the prosecution witnesses was not absolute but was subject to exceptions. The same reasoning was applied to uphold the validity of Sec. 30 of the Prevention of Terrorism Act, 2002 in *People's Union of Civil Liberties v. Union of India*.<sup>32</sup>

In *Delhi Domestic Working Women's Forum v. Union of India*<sup>33</sup> the Supreme Court emphasized the maintenance of the anonymity of the victims of rape who would be the key witnesses in trials involving the offence of rape. The importance of holding rape trials in camera as mandated by Sec. 327 (2) and (3) of the Code of Criminal Procedure, 1973 was reiterated in *State of Punjab v. Gurmit Singh*.<sup>34</sup> In *Sakshi v. Union of India*<sup>35</sup> the Supreme Court referred to the 172<sup>nd</sup> Report of the Law Commission and laid down that certain procedural safeguards had to be followed to protect the victim of child sexual abuse during the conduct of the trial. In the *Best Bakery Case*,<sup>36</sup> in the context of the collapse of the trial on account of witnesses turning hostile as a result of intimidation, the Supreme Court reiterated that “legislative measures to emphasize prohibition against tampering with witness, victim or informant, have become the imminent and inevitable need of the day.”

Although, the guidelines for witness protection laid down by the Delhi High Court in *Neelam Katara v. Union of India*<sup>37</sup> require to be commended, they do not deal with the manner in which the identity of the witness can be kept confidential either before or during the trial. The judgment of the Full Bench of the Punjab and Haryana High Court in *Bimal Kaur Khalsa*,<sup>38</sup> which provides for protection of the witness from the media, does not deal with all the aspects of the problem. These judgments highlight the need for a comprehensive legislation on witness protection as there is in the United States.

### Part III. Witness protection in the United States

Unlike India, the law in the United States is far more developed in the field of ‘protection of witnesses’. On one hand, the legal system in India is still struggling with trying to have effective Witness Protection Programmes, especially with regard to the ‘witness intimidation’. On the other hand, the law in the United States is so advanced and is at such a stage that the Congress has come up with the Organized Crime Control Act way back in 1970 and since then, their Courts have only been trying to perfect by addressing as many lacunae as possible.

#### 1. Federal Programme

In the late 1960s, the United States Department of Justice recognized that victim and witness intimidation had become a serious impediment to obtaining testimony in organized crime cases. (Healey, 1995) This concern was also fueled by statistics that revealed that a staggering number of crimes were never reported (Tomz & McGillis 1995). In response, Congress enacted the Organized Crime Control Act of 1970, which laid the basis for the Federal Witness Protection Program (Healey 1995).

The Federal Witness Protection Program<sup>39</sup> was authorized by the Organized Crime Control Act of 1970.<sup>40</sup> Originally, the program was formulated to purchase and maintain housing facilities for protected witnesses, but that approach was discarded.<sup>41</sup> The legislative intent was *twofold*: to create an incentive for persons involved in organized crime to become informants<sup>42</sup> and to recognize “a felt moral obligation to repay citizens who risk life by carrying out their duty as citizens to testify.”<sup>43</sup> Again, as originally formulated,

services were to be limited to witnesses of organized crime,<sup>44</sup> but in its current form, the program provides protective services to witnesses and family members in cases involving organized crime "or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness . . . is likely to be committed."<sup>45</sup> Those services may be provided as long as the danger to the protected individual continues.<sup>46</sup>

The services provided to the protected individuals may include physical protection, documents for a new identity, housing, transportation, subsistence for living, assistance in obtaining employment, and other services needed to make the individual self-sustaining.<sup>47</sup> In return, the identity and location of the individual will not be disclosed, unless law enforcement officials indicate the individual is under a criminal felony investigation.<sup>48</sup> Knowing, unauthorized disclosure subjects a person to a fine of \$5000 and/or imprisonment for five years.<sup>49</sup>

Prior to admission into the program, an evaluation of the individual's suitability must be performed and the individual also must undergo a psychological examination.<sup>50</sup> Further, the individual must execute a memorandum of understanding that outlines his duties, obligations and responsibilities--to testify in and provide information to law enforcement concerning the criminal proceedings, to refrain from committing any crime, to avoid detection and to cooperate with all reasonable requests of those protecting the person.<sup>51</sup> The Attorney General may terminate protection if the protected person "substantially breaches" the memorandum of understanding, or provides false information.<sup>52</sup> Physical protection for those who enter the program is provided by the United States Marshal's office.<sup>53</sup>

## **2. The California Witness Protection Program**

In 1997, the State of California enacted its witness protection program,<sup>54</sup> administered by the attorney general. It provides for the protection and relocation of witnesses "where credible evidence exists that they may be in substantial danger of intimidation or retaliatory violence because of their testimony."<sup>55</sup> The reason for the enactment was the legislature's recognition that retaliation against witnesses has a serious negative impact on the prosecution of crime.<sup>56</sup>

The California witness protection program authorizes the attorney general to administer the program and to reimburse state and local agencies for the costs of providing witness protection services.<sup>57</sup> Unlike the federal program, which has its own enforcement agency, the state must rely on local enforcement departments to provide whatever services they decide are appropriate and necessary.<sup>58</sup> Those services include armed protection and armed escort before, during, and after legal proceedings; physical relocation; housing expenses; a new identity; transportation; subsistence allowance; and other services as needed.<sup>59</sup> The protection is limited to a period of six months. If additional protection is warranted, however, an extension may be granted.<sup>60</sup> Again, this differs from the federal program, which has no time limitation for its services. Furthermore, the period of protection is relatively short, because the time span of majority of murder cases last one year or more from the time of commission of the crime until a verdict are rendered.

Like the federal program, the witnesses protected under the California program must enter into a written agreement that specifies the responsibilities of the protected person, including the obligation to testify and provide information concerning the subject proceedings, to take steps to avoid detection, to cooperate with reasonable requests, and to continually inform program officials of his or her activities and current address.<sup>61</sup> Priority

for acceptance into the program is given to witnesses involved in matters related to organized crime, criminal street gangs, drug trafficking, and other cases involving a high degree of risk.<sup>62</sup>

All information about witnesses in the program is confidential and not subject to disclosure.<sup>63</sup> This raises the question of whether defense counsel is prevented from inquiring of a protected witness's true name, new identity, or current address when the witness testifies at trial. There is a possibility that this issue will arise in a future proceeding. In federal court, trial judges have allowed witnesses in the program to testify without revealing their new identity when a sufficient showing of danger to the witness has been presented to the court,<sup>64</sup> and have restricted questions on cross-examination about the protection program.<sup>65</sup> Questions about payments and other government support have been allowed, but information about the protection itself has not.<sup>66</sup>

#### **Part IV. Recommendations: Developing Indian witness programmes based on US programmes**

##### **1. Witness Intimidation**

As far as the United States is concerned, the law is clear on the definition or the meaning of 'witness intimidation'. This has, further, been divided into two – 'Community' and 'Direct' intimidation.

##### **a. Community Intimidation.**

Community intimidation exists in neighborhoods with criminal street gangs. Attempts by gangs or drug dealers to promote community-wide non-cooperation may include the public humiliation, assault, or even execution of victims or witnesses, or members of their families, as well as public acts of extreme brutality that are meant to terrify potential witnesses. Even though there may not be an express threat of harm addressed to any particular individual, intimidation felt by the neighborhood inhabitants is just as real. (Finn & Healey 1996) Those who live in the area of such a 'community intimidation' know that certain identified gangs claim the area as their "turf."<sup>67</sup> The residents have seen criminal acts and witnessed acts of retaliation sufficient for them to believe that the same sort of harm would come to them if any statements were given to law enforcement concerning any witnessed criminal activity.<sup>68</sup> Community intimidation is characterized by an atmosphere of fear and non-cooperation with the police. It is generated by a history of community members witnessing incidents of gang violence, crimes, and retaliation against cooperating witnesses (Finn & Healey 1996).

Each instance of witness intimidation by gang violence or threat of violence reinforces the perception that cooperation with the criminal justice system is dangerous.<sup>69</sup> Because penalties for witness tampering, suborning perjury, and obstruction of justice are slight in comparison to penalties for violent crimes such as murder, defendants accused of serious violent crimes may feel that they have little to lose and much to gain from witness intimidation.<sup>70</sup> Even when gang members are placed behind bars, neighborhood citizens feel no relief from community intimidation. The threat of retaliation from gang members who return after serving only brief sentences or who arrange for others to get to or threaten them remains.<sup>71</sup> Recognition of this dire situation is also reflected in the enactment of a California statute called the "STEP Act," a euphemism for the California Street Terrorism Enforcement and Prevention Act, passed in 1988.<sup>72</sup>



If we have to consider the same in the Indian context, it would be most pertinent to note that the community factor is more important than what it is in the United States. For India, the word 'community' would not only include the people in the neighborhood; rather, it would include a lot of other kinds of factors such as the caste system, the religion, etc., in a sense that, there might be pressure imposed on the witness by the people of his own caste or religion if the accused is also of the same caste or religion.

### ***b. Direct Intimidation***

In addition to community intimidation, the criminal defendant may directly intimidate a witness. Direct intimidation involves a threat communicated in some manner to a witness, or an actual physical assault on the witness. The threat is communicated either by the defendant, or those close to him, either at his direction or with his consent, and is intended to cause the witness not to testify or to change his or her testimony to benefit the defendant. Any physical assault is intended to have the same effect on the witness. (Finn & Healey, 1996) Such intimidation can take many forms, such as physical violence or threats of physical violence against the witness or a member of the witness's family.<sup>73</sup> Particularly effective are threats of physical violence against a witness's mother, children, or spouse. Threats may be communicated by drive-by shootings into the witness's home, fire bombings of cars, house burnings, or any other form of violent activity. Intimidation may also involve explicit threats of murder.<sup>74</sup> This is a very well known fact in India as well. For states like Uttar Pradesh and Bihar, it is an every day affair. Most of the politicians having criminal record are let out of the jails for the reason that the witnesses turn hostile. Even the most heinous crimes are ignored at the 'gun point'.

## ***2. Anonymity of Witnesses***

As early as 1931, the Supreme Court outlined its position on partial anonymity in *Alford v. United States* where defense counsel had not been permitted to interrogate the witness as to his current place of residence.<sup>75</sup> It held that to ascertain the veracity of a witness it was crucial to be able to place him in his environment. Since counsel for the defendant often does not know in advance what issues may be uncovered during cross-examination, "[p]rejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise him."<sup>76</sup> The right to effective cross-examination, therefore, encompasses access to material that could serve as a basis for such questioning, including a witness's address. But even though such has been the position but in certain cases 'anonymity' has been considered pertinent. For example, even though the Supreme Court of the United States in *Alford* and *Smith* seemed primarily concerned with the defendant's rights, federal appellate courts have appeared more inclined to weigh the value of disclosure against other factors.<sup>77</sup>

In *United States v. Palermo*, which has been followed by at least two other federal courts of appeal, the court, relying on Justice White's concurrence in *Smith*, held that the defendant had no absolute right to discover the names and addresses of witnesses if a threat to their personal safety existed.<sup>78</sup> Other courts affirmed non-disclosure orders independent of whether the threat to the witness's safety emanated from the defendant or from unknown third parties.<sup>79</sup> This would be the most effective remedy available to the Indian

scenario but would also be a difficult task for the corruption has crept into all levels of the Indian democracy. A separate plan for the high profile cases has to be made out as the power and the politics involved in such cases is high and promotes a biased decision.

### **3. Waiver of the Right of Confrontation of the Defense**

Confrontation, like any constitutional right, may be surrendered either expressly or by conduct. One doctrine that has been in existence since the seventeenth century is the doctrine of "waiver by misconduct."<sup>80</sup> Succinctly stated, the doctrine provides that if a defendant, through misconduct, has prevented a witness from appearing and testifying at his trial, then he has waived his right of confrontation as to that witness and hearsay evidence with respect to that witness's testimony is admissible.<sup>81</sup> The defendant may have procured the witness's nonappearance through threats, acts of violence, or murder; in fact, many cases involve instances where the witness has been murdered.<sup>82</sup> The waiver doctrine has been followed in the federal courts<sup>83</sup> and was codified as a rule of evidence in 1997.<sup>84</sup> When the argument against 'anonymity of witnesses' is given, it is the 'right of confrontation' or the 'cross-examination'. But it would be against the basic theme of the Witness Protection Programmes to expose the witnesses' identity to the defense. This would promote 'witness intimidation'. Hence, the rule of 'waiver by conduct' should also be adopted at length in India.

### **4. Need for Consolidated Legislation**

The law relating 'witness protection' in the United States had taken the shape of a legislation way back in the 1970.<sup>85</sup> But, the law in India is yet not developed enough to take the shape of legislation. Nevertheless, there is a need to come with a consolidated legislation following some other model. For example, the United States model would be appropriate for us as it is also a common law country and that our laws are based on the common law rules. Hence, to consolidate the already existing law and fill the lacunae and/or the gaps from the United States model would be a tedious task but, is the need of the hour. For this task, even the guidelines given by the Delhi High Court judgment can be considered.<sup>86</sup> This is an action to improve the Criminal Justice System in India and to uphold the delivery of justice, such a step is essential.

## **Conclusions**

If the Indian law is compared to that of the United States, it can be noted that a US lawyer would term the Indian law as 'ancient' as far as the law of 'witness protection' is concerned. In view of the latest developments that have been done the United States, it is submitted that India has a long way to go as far as the "Witness Protection" laws are concerned. It is not that the laws are not present. Some of them are in place, but the difficulty remains that they have not developed at the same pace as the crime itself. As and when more and more methods are being devised for tampering with the witnesses, there arises a need to see to the fact there is a law in place to tackle with the change in the scenario in the crime. The most important knowledge base for the development of our laws would be a country which already has the laws in the said field developed, such as the United States. The United States has the laws on "Witness Protection" which most of the countries do not have. The prevention of the 'witness intimidation', to maintain the 'anonymity' are some of the most important aspects of "Witness Protection" issues that

the “Witness Protection Programmes” at the United States deliberate upon and that too is done quite comprehensively and extensively dealt with. Hence, it is only in the interest of India to fall back upon the United States for starting the “Witness Protection Programmes”

## References

- Finn, & Healey. (1996). *Preventing Gang- and Drug-Related Witness Intimidation*, U.S. Dep't of Justice, 1.
- Healey (1995). *Victim and Witness Intimidation: New Developments and Emerging Responses*, in Nat'l Inst. of Justice, U.S. Dep't of Justice, Research in Action, 6.
- Tomz, & McGillis. (1997). *Serving Crime Victims and Witnesses*, U.S. Dep't of Justice, 2 (2d ed.), at 2.2.
- Verdict unbelievable, says Ramani (2006, December 18), The Tribune, Panaji, Retrieved 26th May 2008 <http://www.tribuneindia.com/2006/20061219/main2.htm>.

## Notes

- <sup>1</sup> Student, Hidayatullah National Law University, Next to Raj Bhawan, Civil Lines, Raipur – 492001, Chhattisgarh, India. E-Mail: tanujbhushan@gmail.com
- <sup>2</sup> Student, Hidayatullah National Law University, Next to Raj Bhawan, Civil Lines, Raipur – 492001, Chhattisgarh, India. E-Mail: pranati66@gmail.com
- <sup>3</sup> Sec. 170, *Code of Criminal Procedure, 1973*.
- <sup>4</sup> *Amdumlan v. Crown*, I.L.R. (1937) Nag. 315 at pp. 318, 322: AIR 1937 Nag. 17.
- <sup>5</sup> *Swaransingh v. State of Punjab*, AIR 2000 S.C. 2017.
- <sup>6</sup> Refer, <http://www.answers.com/topic/hostile-witness?cat=biz-fin>; accessed on 2/01/2008 at 5:33 pm.
- <sup>7</sup> Refer, *California Penal Code* (West 1999), § 679.
- <sup>8</sup> Refer, *Alvarado v. Superior Court*, 5 P.3d 203, 222 (Cal. 2000).
- <sup>9</sup> See, *State of Uttar Pradesh v. Shambhu Nath Singh*, (2001) 4 SCC 667.
- <sup>10</sup> Refer, *Organized Crime Control Act, 1970* (US).
- <sup>11</sup> See, Sec. 327 of the *Code of Criminal Procedure, 1973*.
- <sup>12</sup> See, Sec. 327 (2) of the *Code of Criminal Procedure, 1973*.
- <sup>13</sup> See, Sec. 376 & Sec. 376 A to 376 D of the *Indian Penal Code, 1861*.
- <sup>14</sup> See, Sec. 173 (6) of the *Code of Criminal Procedure, 1973*.
- <sup>15</sup> See, Sec. 228A of the *Indian Penal Code, 1861*.
- <sup>16</sup> See, Sec. 33 of the *Indian Evidence Act, 1872*.
- <sup>17</sup> See, Sec. 31 of the *Bengal Suppression of Terrorist Outrages Act, 1932*.
- <sup>18</sup> See, Sec. 13 of *Terrorists and Disruptive Activities Act, 1985*.
- <sup>19</sup> See, Sec. 16 of the *Terrorists and Disruptive Activities Act, 1987*.
- <sup>20</sup> Refer, Law Commission of India, *Reform of Judicial Administration*, 14<sup>th</sup> Report, First Law Commission under the Chairmanship of Mr. M. C. Setalvad 1955-1958, in 1958.
- <sup>21</sup> Refer, National Police Commission, 4<sup>th</sup> Report, 1980.
- <sup>22</sup> Refer, Law Commission of India, *The Code of Criminal Procedure, 1973 (Act No. 2 of 1974)*, 154<sup>th</sup> Report, Fourteenth Law Commission under the Chairmanship of Mr. Justice K. J. Reddy 1995-1997, in 1996.

<sup>23</sup> Refer, Law Commission of India, *Review of Rape Laws*, 172<sup>nd</sup> Report, Fifteenth Law Commission under the Chairmanship of Mr. Justice B. P. Jeevan Reddy 1997-2000, in 2000.

<sup>24</sup> Refer, Law Commission of India, *Recommendations for Amending Various Enactments, Both Civil and Criminal*, 178<sup>th</sup> Report, Sixteenth Law Commission under the Chairmanship of Mr. Justice B. P. Jeevan Reddy 2000-2001 & Mr. Justice M. Jagannadha Rao 2002-2003, in 2001.

<sup>25</sup> *Recommendations for Amending Various Enactments, Both Civil and Criminal*. Published in December 2001.

<sup>26</sup> Section 164A – (1) Any police officer making an investigation into any offence punishable with imprisonment for a period of ten years or more (with or without fine) including an offence which is punishable with death, shall in the course of such investigation, forward all persons whose evidence is essential for the just decision of the case, to the nearest Magistrate for recording their statement.

(2) The Magistrate shall record the statements of such persons forwarded to him under sub-section (1) on oath and shall keep such statements with him awaiting further police report under section 173.

(3) Copies of such statements shall be furnished to the investigating officer.

(4) If the Magistrate recording the statement is not empowered to take cognizance of such offence, he shall send the statements so recorded to the magistrate empowered to take cognizance of the case.

(5) The statement of any person duly recorded as a witness under subsection (1) may, if such witness is produced and examined, in the discretion of the court and subject to the provisions of the Indian Evidence Act, 1872, be treated as evidence.

<sup>27</sup> See, Government of India, Ministry of Home Affairs, *Committee on Reforms of Criminal Justice System*, March 2003 (Chaired by Dr. Justice V. S. Malimath), at p. 251 states as follows:

*“Unfortunately the witnesses are treated very shabbily by the system. There are no facilities for the witnesses when they come to the court and have to wait for long periods, often their cross-examination is unreasonable and occasionally rude. They are not given their TA/DA promptly. The witnesses are not treated with due courtesy and consideration; nor are they protected. Witnesses are required to come to the court unnecessarily and repeatedly as a large number of cases are posted and adjourned on frivolous grounds. To overcome these problems, the Committee has made the following recommendations:*

*(79) (a) Witness who comes to assist the court should be treated with dignity and shown due courtesy. An official should be assigned to provide assistance to him.*

*(b) Separate place should be provided with proper facilities such as seating, resting, toilet, drinking water etc. for the convenience of the witnesses in the court premises.*

*(80) Rates of traveling and other allowance to the witness should be reviewed so as to compensate him for the expenses that he incurs. Proper arrangements should be made for payment of the allowances due to the witness on the same day when the case is adjourned without examining the witness he should be paid T.A. and D.A. the same day.”*

<sup>28</sup> See, *Gurbachan Singh v. State of Bombay* AIR 1952 SC 221.

<sup>29</sup> See, *G.X. Francis v. Banke Bihari Singh* AIR 1958 SC 209.

<sup>30</sup> Refer, *Maneka Sanjay Gandhi v. Rani Jethmalani* (1979) 4 SCC 167.

<sup>31</sup> Refer, *Kartar Singh v. State of Punjab* (1994) 3 SCC 569.

<sup>32</sup> Refer, *People’s Union of Civil Liberties v. Union of India* (2003) 10 SCALE 967.

<sup>33</sup> Refer, *Delhi Domestic Working Women’s Forum v. Union of India* (1995) 1SCC 14.

<sup>34</sup> Refer, *State of Punjab v. Gurmit Singh* (1996) 2 SCC 384

<sup>35</sup> Refer, *Sakshi v. Union of India* (2004) 6 SCALE 15.

<sup>36</sup> See, *Best Bakery Case* (2004) 4 SCC 158.

<sup>37</sup> See, *Neelam Katara v. Union of India* (judgment dated 14.10.2003).

<sup>38</sup> Refer, *Bimal Kaur Khalsa*, AIR 1988 P&H 95.

<sup>39</sup> 18 U.S.C. §§ 3521-3528 (2000).

<sup>40</sup> *Organized Crime Control Act of 1970*, Pub. L. No. 91-452, §§ 501- 504, 84 Stat. 922, 933-34 (1970). Title V authorizes the United States Attorney General to protect and maintain federal or state organized crime witnesses and their families. Sections 501 through 504 provide:

Sec. 501 - The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.

Sec. 502 - The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

Sec. 503. As used in this title, "Government" means the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof. The offer of facilities to witnesses may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by any State or any political subdivision, or any department, agency, or instrumentality thereof of the cost of maintaining and protecting such witnesses.

Sec. 504. There is hereby authorized to be appropriated from time to time such funds as are necessary to carry out the provisions of this title.

Id. §§ 501-04.

<sup>41</sup> See, *Franz v. United States*, 707 F.2d 582, 586-87 (D.C. Cir. 1983).

<sup>42</sup> Id. at 586.

<sup>43</sup> See, *Garcia v. United States*, 666 F.2d 960, 963 (5th Cir. 1982).

<sup>44</sup> See, *Organized Crime Control Act*, § 501.

<sup>45</sup> 18 U.S.C. § 3521(a)(1) (2000).

<sup>46</sup> 18 U.S.C. § 3521(b)(1).

<sup>47</sup> 18 U.S.C. § 3521(b)(1)(A)-(F)(I) (2000).

<sup>48</sup> See, 18 U.S.C. § 3521(b)(1)(G). (2000).

<sup>49</sup> 18 U.S.C. § 3521(b)(3).

<sup>50</sup> 18 U.S.C. § 3521(c).

<sup>51</sup> 18 U.S.C. § 3521(d)(1)(A)-(E).

<sup>52</sup> 18 U.S.C. § 3521(f).

<sup>53</sup> *United States Marshals Service*, 28 C.F.R. § 0.111 (2001).

<sup>54</sup> *California Penal Code*, §§ 14020 through 14033.

<sup>55</sup> Id. § 14026(a).

<sup>56</sup> *Assembly Comm. Report on AB 856*, 1997-98 Reg. Sess., at 3 (Cal. Apr. 22, 1997), available at [http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab\\_0851-0900/ab856\\_cfa\\_19970421\\_073716\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0851-0900/ab856_cfa_19970421_073716_asm_comm.html) (last visited Nov. 15, 2002).

<sup>57</sup> *Cal. Penal Code* § 14022 (West 2002).

<sup>58</sup> See, id. § 14024. (West 2002).

<sup>59</sup> Id. § 14024(a)-(g).

<sup>60</sup> Cal. Dep't of Justice, *Policy and Procedures Manual for Local and State Prosecuting Agencies* 9 (2000).

<sup>61</sup> *Cal. Penal Code* § 14025 (West 2002).

<sup>62</sup> Id. § 14023.

<sup>63</sup> Id. § 14029.

<sup>64</sup> See, *United States v. Watson*, 599 F.2d 1149, 1157 (2d Cir. 1979).

<sup>65</sup> See, *United States v. Tarantino*, 846 F.2d 1384, 1407 (D.C. Cir. 1988).

<sup>66</sup> See, id.

<sup>67</sup> See, *People v. Gardeley*, 927 P.2d 713, 718 (Cal. 1996); *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 601 (Cal. 1997).

<sup>68</sup> See, *Acuna*, 929 P.2d at 601-02, 613-14.

<sup>69</sup> See, id.

<sup>70</sup> Id. at 79.

<sup>71</sup> Id. at 2.

<sup>72</sup> *Cal. Penal Code* §§ 186.20-186.28 (West 1999 & Supp. 2002).

<sup>73</sup> Id. at 5-7.

<sup>74</sup> Id. at 1-2.

<sup>75</sup> *Alford v. United States*, 282 U.S. 687 (1931).

<sup>76</sup> Id. at 692.

<sup>77</sup> See, *United States v. Cosby*, 500 F.2d 405, 407 (9th Cir. 1974).

<sup>78</sup> 410 F.2d 468 (7th Cir. 1969).

<sup>79</sup> See, e.g., *Clark v. Ricketts*, 958 F.2d 851, 855 (9th Cir. 1991), cert. denied sub nom. *Clark v. Lewis*, 506 U.S. 838 (1993) (witness "was a Drug Enforcement Agency informant, [ ] threats against his life had been made in the city where he lived, and [ ] he still had cases pending in which he would give information.").

<sup>80</sup> *Reynolds v. United States*, 98 U.S. 145, 158-59 (1878).

<sup>81</sup> See, id. at 158-60.

<sup>82</sup> See, e.g., *United States v. Cherry*, 217 F.3d 811, 813-15 (10th Cir. 2000); *United States v. Johnson*, 219 F.3d 349, 352 (4th Cir. 2000); *United States v. Emery*, 186 F.3d 921, 924-26 (8th Cir. 1999); *United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997); *United States v. Houlihan*, 92 F.3d 1271, 1278-79 (1st Cir. 1996); *United States v. Thai*, 29 F.3d 785, 798, 814 (2d Cir. 1994); *United States v. Miller*, 116 F.3d 641, 667-68 (2d Cir. 1993); *United States v. Rouco*, 765 F.2d 983, 985 (11th Cir. 1985); *United States v. Thevis*, 665 F.2d 616, 621 (5th Cir. 1982); *United States v. Mastrangelo*, 693 F.2d 269, 270 (2d Cir. 1982).0-56 (2d Cir. 2001).

<sup>83</sup> See, e.g., *Magouirk v. Warden*, 237 F.3d 549, 552-53 (5th Cir. 2001); *United States v. Ochoa*, 229 F.3d 631, 639 (7th Cir. 2000); *Johnson*, 219 F.3d at 355; *Cherry*, 217 F.3d at 814-21; *Geraci v. Senkowski*, 211 F.3d 6, 9-10 (2d Cir. 2000); *Emery*, 186 F.3d at 926-27; *Magouirk v. Phillips*, 144 F.3d 348, 361-62 (5th Cir. 1998); *White*, 116 F.3d at 911-16; *Miller*, 116 F.3d at 667-69; *Houlihan*, 92 F.3d at 1278- 81; *Thai*, 29 F.3d at 814-15; *United States v. Aguiar*, 975 F.2d 45, 47-48 (2d Cir. 1992); *Bagby v. Kuhlman*, 932 F.2d 131, 135-37 (2d Cir. 1991); *Rouco*, 765 F.2d at 995; *United States v. Potamitis*, 739 F.2d 784, 788-89 (2d Cir. 1984); *Mastrangelo*, 693 F.2d at 272-73; *Steele v. Taylor*, 684 F.2d 1193, 1200-03 (6th Cir. 1982); *Thevis*, 665 F.2d at 630-32; *United States v. Balano*, 618 F.2d 624, 625-30 (10th Cir. 1979); *United States v. Carlson*, 547 F.2d 1346, 1355-60 (8th Cir. 1976).

<sup>84</sup> In December 1997, subdivision (b)(6), which codified the waiver by misconduct doctrine, was added to Rule 804 of the *Federal Rules of Evidence*, Fed. R. Evid. 804.

<sup>85</sup> Refer, *Organized Crime Control Act 1970*.

<sup>86</sup> *Neelam Katara v. Union of India* (judgment dated 14.10.2003).