

# **A Comparative Analysis of Witness Protection in India and Developed Countries**

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## **Abstract:**

*“Witnesses are the eyes and ears of justice.”*

*-Bentham*

*Witnesses play a crucial role in the administration of truth. They help the judges to arrive at a conclusion in a given case. Threatening of witnesses in the cases where the accused is an influential person is common phenomenon in India. In order to uphold the notion of fair trial it is very important to ensure the safety and security of the witness. Inadequate means for protection of witness can be one of the causes for low rate of conviction in India. The article deals with the importance of witness protection. Special Emphasis is placed on various legal provisions which are in some manner relating to the safety of the witness. Further the article focuses on important judicial pronouncement wherein the courts have tried to provide certain guidelines to tackle the issue of witness protection. Furthermore, the article will stress on the laws enacted in other developed countries such as Canada, United Kingdom and United States of America to deal with the issue of witness protection. Such comparative analysis is helpful in deriving certain positive measures which India could adopt to deal with the issue of witness protection.*

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## **Introduction:**

According to Black's Law Dictionary the word witness is defined as, "In the primary sense of the word, a witness is a person who has knowledge of an event. As the most direct mode of acquiring knowledge of an event is by seeing it, witness has acquired the sense of a person who is present at and observes a transaction<sup>1</sup>." This definition particularly focuses on acquiring of knowledge by physical presence. Witness is a person who has knowledge about the occurrence of a crime.

According to Jeremy Bentham, "Witnesses are the eyes and ears of justice." The great philosopher and the thinker Bentham rightly emphasized on the relevancy of witnesses. Witnesses can be considered as the pillars of justice. The truthfulness in the deposition of the witness determines the decision in a case. In adversarial system, the judge acts as an impartial referee and it is up to the parties to prove their case. In a criminal trial, the prosecution proves its case on the basis of the testimony of witnesses and other evidence produced before the court. So, it can be inferred that the testimony of witnesses helps in shaping the decision of the court.

Many a times, the decision of the court will not affect the witness because he is neither the accused nor the victim. Yet he takes pain in appearing before the court to give evidence. He invests his time and effort without any interest in the case. He assists the court in the discovery of the truth and thus performs an important public duty. So, considering the vital role of witness in administration of justice their safety should be ensured.

## **Research Methodology:**

The present research work is purely doctrinal in nature. It has been carried out by adopting the analytical method of research which is considered relevant in view of the nature and scope of the study and the data has been collected from credible sources. The landmark judicial decisions have been studied and a comparative analysis of laws in other countries is done to find appropriate solution to the problem

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<sup>1</sup> Black's Law Dictionary, available at <https://thelawdictionary.org/witness-n/#ixzz2cm686Dz8>, last seen on 20<sup>th</sup> October, 2018.

## **Objectives:**

The present research work is carried out with the following objectives:

- 1) To study the existing legal framework provided for witness protection in India.
- 2) To evaluate the judicial responses of our country to the problem of witness protection.
- 3) To analyze the laws of developed countries dealing with the issue of witness protection.
- 4) To suggest at the end of the study the proper measures that can be taken to tackle the issue of witness protection.

## **Description of the Research Issues:**

In a criminal trial, witnesses are considered as one of the important ingredient. So protection of witness is necessary for the smooth functioning of criminal justice system. Most of the cases in which the accused is an influential person, the witnesses are threatened and are not in a state to freely testify before the court. The accused in such cases either try to intimidate the witness by using some physical threat or try to bribe them to testify in favor of the accused person.

Though the witness plays an important role in the judicial proceeding yet there are no substantial and specific legal provisions in India which can tackle the issue of protection of witness. There are certain provisions which are in some kind related to the safety of witness but those provisions are not sufficient to deal with this issue. The high rate of acquittal in the criminal cases can be attributed to the witnesses turning hostile due to threat or intimidation from the accused person. The vulnerability of the witnesses is quite obvious as there are no relevant safety measures available to them, which will enable them to come forward and speak the truth before the court. So the witness may a times surrender before the threat of accused person and change their statement before the court which gives benefit to the accused leading to his acquittal. When a witness is turned hostile due to threat from accused person, subsequently he starts losing his faith and hope in the rule of law.

## **Developments in India:**

### **Indian Statutory Provisions:**

Section 151 of Evidence Act gives power to the court to forbid putting any question which is indecent or scandalous, provided it does not relate to fact in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed. This provision allows indecent and scandalous question if it is in any way relating to the fact in issue. Here it is to be noted that all the irrelevant questions which are asked only to embarrass and harass the victim is prohibited under this provision.

Section 152 of Evidence Act confers power upon the court to forbid any question which appears to be intended to insult or annoy or needlessly offensive in form. Section 152 along with section 151 is included in Evidence Act to protect a witness from improper cross-examination. Also when the accused person is released on bail one of the condition for bail is that the accused person shall not in any manner try to threaten the witnesses.

Section 16 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 provides that, the proceedings before the Court may be in camera. Also it provides that the Court acting on its own motion or an application made by the witness or Public Prosecutor may take measures to keep secret the identity and address of the witness. This Act was repealed by Prevention of Terrorism Act, 2002 in which section 30 deals with witness protection and is similar to section 16 of Terrorist and Disruptive Activities (Prevention) Act, 1987. Subsequently the Prevention of Terrorism Act was repealed in 2004. In 2004, the Unlawful Activities (Prevention) Act was amended. It inserted section 44 with the heading 'Protection of Witness' which is similar to section 30 of Prevention of Terrorism Act.

Section 17 of National Investigation Agency Act, 2008 states that, if the court is satisfied that the life of such witness is in danger, then the court may take all the measures necessary to keep the identity and address of such witness secret.

A detailed perusal of all the provisions given above does not specifically provides certain substantial law for ensuring the safety of the witness. It can be noted that the laws dealing with terrorist activities provides for maintaining secrecy regarding the name of the accused. But in the present scenario, the cases of threatening the witnesses are not restricted to the cases of terrorism.

The Witness Protection Bill, 2015<sup>2</sup> is framed with an objective to provide protection to the people who are coming forward to give information as witness in a court of law. It seeks to establish the National Witness Protection Council and State Witness Protection Councils to ensure proper implementation of witness protection programme. It also contains provisions regarding witness protection cell which will be responsible for preparing a report for the judge of the trial court to examine and grant protection to the witness. The bill contains a provision which states that when an application is made to a police-station regarding witness protection, the station officer shall ensure that the application is processed and produced before a court within forty-eight hours of receipt. Here the time given for processing the application and submitting the report does not seem to be justifiable. If it is a case of immediate threat to the life or property of the witness and the police-officer ignores the case considering the provision that he has forty-eight hours to submit the report, then it can be detrimental to the interest of the witness. However, the Bill has not been passed so far.

### **Judicial Perspective:**

In *Kartar Singh vs. State of Punjab*,<sup>3</sup> the validity of section 16 of Terrorists and Disruptive Activities (Prevention) Act, 1987 was challenged. Section 16 empowers the Court to exclude the names and addresses of the witness secret which was alleged to be against the notion of fair trial. Here the Supreme Court stated that witnesses are not willing to testify against the accused of bad character because of threat or fear from such person. In such a situation no witness will testify against the risk of his life or property. So the object of the legislature behind enacting the impugned provision is quite clear and valid.

In *National Human Rights Commission vs. State of Gujarat*,<sup>4</sup> the Apex Court stated that though Malimath Committee on Judicial Reforms has recommended the inclusion of provision relating to witness protection yet the legislature has failed to enact such law. Not even a scheme relating to witness protection has been framed by the government. Further the court emphasized on the alarming decrease in the conviction rate and attributed it to the absence of provisions relating to witness protection.

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<sup>2</sup> The Witness Protection Bill, 2015, available at <http://164.100.47.4/billstexts/lbills/lbills/AsIntroduced/3109LS.pdf>, last seen on 24<sup>th</sup> October, 2018.

<sup>3</sup> *Kartar Singh v. State of Punjab*, 1994(3) S.C.C. 569. (India)

<sup>4</sup> *National Human Rights Commission v. State of Gujarat*, 2003 (9) SCALE 329. (India)

*Neelam Katara vs. Union of India*<sup>5</sup> is considered as one of the landmark judgment of the Delhi High Court which deals with the issue of witness protection. Here the court has given certain guidelines which are known as ‘Witness Protection Guidelines.’ It stated that the Member Secretary of the Legal Services Authority is the Competent Authority to deal with the issue of witness protection. The witness pertaining to a crime punishable with death or life imprisonment may make a request for police protection to the Competent Authority. Here the Competent Authority shall consider the following factors while determining whether or not a witness should be provided police protection:

- i. “The nature of the risk to the security of the witness which may emanate from the accused or his associates.
- ii. The nature of the investigation or the criminal case.
- iii. The importance of the witness in the matter and the value of the information or evidence given or agreed to be given by the witness.
- iv. The cost of providing police protection to the witness.<sup>6</sup>”

Further the court also imposed duty on the Investigating Officer to inform the witnesses regarding the witness protection guidelines while recording the statement under section 161 of Criminal Procedure Code.

In *Zahira Sheikh vs. State of Gujarat*, the Supreme Court stated that, “The State has a definite role to play in protecting the witnesses, to startwith at least in sensitive cases involving those in power, who havepolitical patronage and could wield muscle and money power, to avert the trial getting tainted and derailed and truth becoming a casualty.<sup>7</sup>” Here the court has expressed the need to have specific legislation in relation to protection of witness. The court further noted that if the witness is threatened or forced to give false evidence than it would not amount to fair trial which is the basis of criminal trial in India. Here the court has also discussed the witness protection programmes’ which are prevalent in other parts of globe.

### **Witness Protection in Other Countries:**

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<sup>5</sup>Neelam Katara v. Union of India, I.L.R. (2003) 2 Del. 377. (India)

<sup>6</sup>*Ibid*, see p.379.

<sup>7</sup>Zahira Sheikh v. State of Gujarat, (2004) 4 S.C.C. 158. (India)

**Canada:**

In Canada, there is Witness Protection Program Act,<sup>8</sup> (1996) which is enacted with an object to promote law enforcement, national security, national defence and public safety by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement. There is a Commissioner appointed to deal with the matters arising under the said Act. It has dedicated witness protection units across the country which co-ordinates the program with the help of local police. There are different types of measures available under this Act. So depending upon the facts and circumstances of the case, various measures are taken by the protection unit. A short-term measure usually involves quick response to the threat affecting the witness whereas a long-term measure involves relocation, accommodation and change of identity. It also includes security and financial support to the witness which will help him in rehabilitation. An important aspect of this Act is that it has an independent unit to deal with witness protection which is separate from the investigation department. Other unique feature of this program is that, when a witness is admitted to this program and there is a need for changing his identity, in such a situation the Competent Authority provides him with new identity but his past criminal records will be maintained as it is with the new identity. Therefore, it can be deduced that when a habitual offender turns who has past criminal records enters into the program by becoming a government approver for a specific crime he will be given new identity but his past criminal records will be maintained with his new identity.

**United Kingdom:**

In United Kingdom, there is UK Protected Persons Service which is a part of National Crime Agency which is responsible for giving protection to the members of the public who are under some threat or under risk of getting harmed. Though this unit is a part of National crime Agency, yet it functions independently. The detailed legislation under which the protection unit performs its function is the Serious Organised Crime and Police Act 2005<sup>9</sup>. There is a dedicated chapter

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<sup>8</sup> Witness Protection Program Act, available at <https://laws-lois.justice.gc.ca/eng/acts/W-11.2/>, last seen on 24<sup>th</sup> October, 2018.

<sup>9</sup> Serious Organised Crime and Police Act, 2005 c. 15, available at <https://www.legislation.gov.uk/ukpga/2005/15/part/2/chapter/4>, last seen on 24<sup>th</sup> October, 2018.

under this Act which specifically contains provisions relating to witness protection. It provides circumstances in which the person can be given protection.

One of the important principles of criminal justice system in UK is the concept of open justice which basically means transparency in justice delivery system. Transparency in general sense conveys that Courts are open for the general public to see and hear the cases, publishing the judgments and making judgments easily accessible to the public. But there are some exceptions to the notion of open justice. The Official Secret Act, 1920 empowers the court to prohibit the members of public from attending court proceedings. In *Attorney General vs. Leveller Magazine*,<sup>10</sup> the court stated that it is the inherent power of the court to withhold the name of the witness in a criminal trial also such powers can be conferred by the Parliament by enacting certain statute. The Youth Justice and Criminal Evidence Act 1999,<sup>11</sup> also contains certain provisions relating to witness protection. One of the provision deals with screening of witness from the accused person. It also contains provision in which the witness with prior permission of the court may testify by means of a live link.

### **United States of America:**

In United States, the Federal Witness Security Program is created to protect the witness. The witness security program was created under the Organized Crime Control Act of 1970 and amended by the Comprehensive Crime Control Act of 1984. There is a special wing known as U.S. Marshals Service which is responsible for the safety of the witnesses and their immediate dependents, whose lives are in danger as a result of their testimony. The US Attorney General's also plays a vital role in the witness security program. Usually an evaluation is done regarding the nature of the threat before the witness is admitted to the program. The officers of the US Marshal Service give a brief summary of the program to the witness and his family members and are immediately moved to a safe and discreet location. Further witness rehabilitation and assistance fund is also given to the witness, which will help in the rehabilitation of such witnesses. The Marshals Service provides 24-hour protection while they are in a high-threat area, including pre-trial proceedings and court appearances. The program also includes counseling sessions for the witness which will help in rehabilitation.

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<sup>10</sup>Attorney General v. Leveller Magazine, 1979 A.C. 440. (U.K.)

<sup>11</sup> Youth Justice and Criminal Evidence Act 1999, available at <http://www.legislation.gov.uk/ukpga/1999/23/contents>, last seen on 24<sup>th</sup> October, 2018.

## **Conclusion and Suggestions:**

The witnesses, who plays crucial role in discovery of truth and consequently administration of justice are entitled to get protection from the accused person in order to testify freely in the court of law. Without assurance of safety no person will be ready to come forward and share the information related to the crime. Here, it is the duty of the state to ensure the safety of witnesses so that people will be encouraged to testify against the accused. Witness is the source under whose direction the judge is trying to search the truth hidden in a particular case. In such a situation if the source itself is incapacitated than the judge could be misdirected in arriving at a conclusion which is against the notion of fair trial. The rate of conviction can be increased on providing adequate safety measure for the witnesses. The successful implementation of the witness security programme in different countries could form the basis for enactment of one such programme in India.

The Witness Protection Bill, 2015 is being considered by the state governments but there is as such no consensus formed on that issue. As police and public order are included in the state list under the seventh schedule of the Constitution of India, so the state governments are responsible for witness protection also. An important thing that is to be noted is that the witness protection programme would incur extra burden on the state revenue and most of the states are not ready to incur expenditure on witness protection.

The following measures may be considered for protection of witness in India:

1. Separate and more detailed legislation may be enacted to deal with the issue of witness protection.
2. There should be policy regarding Witness rehabilitation fund and tax benefits must be given to any person who is contributing to such fund.
3. Specialized Witness Security Unit may be established in resemblance to US Marshal Service which should be responsible for the safety and security of the witness and his family members.
4. Effective Witness Assistance Service should be started under the guidance of District Legal Services Authority in each district.
5. Video conferencing for the purpose of giving testimony in the court may be ensured which will enable the witness to testify freely.

