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Protection of Witness and Whistle Blower in India

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Abstract:

This research paper looks into the major problem which lies in Indian legal system in relation to witnesses. Since adversarial judicial system does not afford effective protection mechanism to witness as to their identity and physical and mental protection of witness, the justice seems to be a dream because in most of the criminal cases the destiny of case depends upon the statement made by witness. The legislation has many grey areas which are to be corrected otherwise Indian criminal justice system will get worsen and the rate of successful justice will fall down. Though there is a Whistle-blowers Protection Act 2014, the effectiveness of the same is doubtful. The researcher has attempted to demonstrate the intense need for effective implementation of witness protection program and Whistle Blower protection by elaborating the problems faced by them.

In a number of criminal cases, including high profile cases such as Andhra film actor's shoot out case, Best Bakery case, a blast in a former Andhra minister's case, Jessica Lal case etc., the justice delivery system has failed to deliver justice and all these cases ended up with acquittal of accused due to the reason that witness turned hostile or witnesses were murdered. Other recent cases like VYAPAM case, ASARAM case, several witnesses were murdered or attacked. In Asaram's case, cook Akhil Gupta was attacked and other witness was killed since the arrest of Asaram in September, 2013. Other witnesses were subjected to acid attacks in the year 2014.

Similarly, the death of so many RTI activists and Satyendra yadav proves that there is a need to have a strong whistle-blower protection regime so that more people come forward and expose the wrongdoers. These cases have given rise to number of debates on the working of criminal justice system. In such state of affairs, we require to understand whether the carrying out of Witness Protection Program is a solution to prevent failure of justice due to witness turning hostile.

This research paper aims at discussing the inadequacy of law relating to protection of witness and whistle-blowers due to which there is a failure in criminal justice delivery system. Defending the defenders i.e. witness and whistle-blowers have become the need of an hour because they play an eminent role in the administration of justice.ⁱ

Keywords: *Witness Protection, whistle-blower, RTI activists, corruption, hostile witness, criminal justice system, The Whistle-blowers Protection Act, 2014, The Whistle-blowers Protection (Amendment) Bill, 2015.*

1. Introduction

Witness protection mechanism is the need of an hour for the effective delivery of justice since their statement can change the destiny of a case and thereby destiny of accused and victim. The Supreme Court has that "legislative measures to emphasise prohibition against tampering with witness, victim or informant, have become the imminent and inevitable need of the day."ⁱ In many cases whole issue revolves around the statement made by witnesses and many a times it happens that they retract from their earlier statement. Judicial system not only has a responsibility to guard witnesses from being injured by the unknown or known parties interested in case but also to ensure that they do not turn hostile. Further the working of investigating agencies in India also casts a serious doubt on their integrity since in many cases they fail to protect the witnesses and witnesses disappear or are killed. Article 21 of the constitution of India provides for right to life, the role of law in case or criminal justice system is to punish the wrongdoer and give justice to aggrieved, however in the present situation there is a hike in rate of crime, and state is not able to prevent such crimes from being committed, further criminals take advantage of the loopholes of law and escape, they threaten the witness and he retracts from his statement, thereby frustrating the justice delivery system in India.ⁱⁱ

The witnesses and whistle-blowers do not feel safe to come to court and give statement against the accused that may belong to a wicked family or any powerful family and even if they give statement afterwards they deviate from their statement and turn hostile thereby leaving avenues for the accused to get acquitted and hampers the justice. Similar is the issue with the protection of

ⁱ Zahira Habibullah Sheikh v/s State of Gujarat, 2004 AIR SCW 2325; 2004 (4) SCC 158, Sir William Shakespeare has said, "You cannot witness for me, being slain"

ⁱⁱ Law Commission of India, '185th Report on Review of the Indian Evidence Act, 1872' Part-III A (March, 2003) available at lawcommissionofindia.nic.in/reports/185thReport-PartIIIa.pdf accessed on 28th August, 2015

whistleblowers, who exposes the wrongdoings, as was done by Satyendra Dubey in Bihar who was killed because he exposed the wrongdoings of the highway authority. India does not have a law on protection of whistleblowers.

In 2010, of the total 1.68 lakh criminal cases pending before various magisterial and civil and session courts, the prosecution could secure conviction orders in just 1,948 cases, state CID figures reveal. The same year, defendants got acquitted in almost 7,000 cases, while another 1.58 lakh cases stayed pending.ⁱⁱⁱ Further in Nagpur on 10th of July 2012 100 of people attacked 3 witness in Nagpur Session court, defeating the police security.^{iv}

Although witness is the very important part in criminal justice system, he is a vital component for the administration of justice, he performs the public duty of assisting the court to reach to a decision, he invests his time and money, yet he is not treated with respect in the court of law, he is subjected to humiliation by the lawyers, they are put to lengthy irrelevant questions so that he feels frustrated and does not answer correctly in order to escape from the dishonour to which he is subjected, he is also subjected to threats, inducement, etc., at the hands of interested parties, all these things arouse a feeling that why is the judicial process in India not modified to cure such problems.? Often we come across with the issue that in criminal cases, the accused was acquitted because the witness on whose statement the edifice of evidence was based retracted from his earlier statement.

The witness protection has two aspects, firstly the investigating authority has to make sure that the statements made by witness before them is not changed during the proceedings in the court when he is put to oath. This is one aspect of problem of observable fact of witness turning hostile. So to prevent such occurrences, special provisions are to be introduced in the criminal law, but legislatures have to be careful while making law, since they have to make a balance between two aspects one is the need for anonymity of witnesses and other is the right of accused to cross examine the witness and to have an open trial. Secondly is the concern for physical as well as mental protection of the witness at every stage of criminal justice system, since he is under the clouds of death from the moment of witnessing the crime till the final conclusion of the case, for this we require a witness protection program.

Increase in rate of Hostile witness is a serious threat to criminal justice system. False statement given by hostile witness gives an opportunity to the accused to get acquitted, despite of the fact that he brutally committed any crime. There is a causal relationship between the increase in witness turning hostile and decrease in conviction rate in India. It can also be said that as the corruption grows in state machinery, the justice delivery system will collapse since it is the state on which we rely for delivery of justice. However, it is due to the weak judicial system and security issues that compels a witness to state false testimony and evidence. In most of the High profile cases, witness is threatened by the politicians, defence etc., due to which a weak witness does not dare to give statement against them. Due to which there is a very low conviction rate and in most of the cases the accused go unpunished thereby frustrating the very object of setting up the judiciary system. Every other day one can find in newspaper about the decrease in conviction rate in India, most of the accused escape by threatening the witness. In a number of case, witness has been attacked in the court itself, in front of the police, magistrate. This shows serious lack of responsibility on the part of police administration and security.

In trial of mass killing in Gujrat in 2002, witnesses changed their statements as they were threatened by the authorities and influential nationalist groups. If this continues to be so, then where the vulnerable section of society can get justice. Due to such prominent corruption in government, judiciary and other authorities, many cases are not filled in the courts and several lie in abeyance. If no witness protection program or and whistleblower program is drafted, then in future no person would come forward to give statements against the accused and conviction rate will go down till it reaches negligible.

The word witness has not been defined in Indian criminal law therefore the researcher refers to the Black's Law Dictionary which defines the word Witness as "one who sees, knows or vouches for something or one who gives testimony, under oath or affirmation in person or by oral or written deposition, or by affidavit"^v Successful conclusion of a case depends upon the central role played by witness from the very beginning till the end

The word hostile is taken from the common law country; Indian Evidence Act does not mention this word. A hostile witness is one who according to The Black's Law Dictionary as "A witness who is biased against the examining party or who is unwilling to testify" the word hostile is nowhere defined under Indian law. Hostile witness is one who deviates from his previous statement, and does not speak in favour of his calling party.^{vi} Section 38 of the evidence Act provides that party calling the witness can cross examine the witness when the party is not satisfied with the answers, it is at this point of time that witness turn hostile and cause failure of justice.^{vii}

2. Law Commission Report

Law commission 14th report initiated for the witness protection program, it focused on the decrease in conviction rate of accused due to witness turning hostile. This report provided for the allowances, adequate arrangement but no recommendations were made for physical security.

Further 154th law commission report also discussed other things; it provided for responsibilities of courts to work in such a manner that there are no unnecessary adjournments. Under The Chairmanship of Justice M. Jagannadha Rao Chairman Law Commission of

ⁱⁱⁱRebecca Samervel, TNN Dipping conviction rate a sign of 'poor sleuthing' available at http://articles.timesofindia.indiatimes.com/2012-02-01/mumbai/31012048_1_conviction-rate-prosecution-cases-case-beyond-reasonable-doubt last accessed on 7th September 2015.

^{iv} Low conviction rate, a result of poor security? TNN Jul 10, 2012, available at http://articles.timesofindia.indiatimes.com/2012-07-10/nagpur/32617550_1_district-court-security-measures-conviction-rate last accessed on 7th September 2015

^v Garner Bryan A. (Ed), Black's Law Dictionary, West Group, St. Paul, Minnesota, 17th Ed., 1999, p. 1596

^{vi} Hostile witnesses not only destruct the interest of litigating party but also the duty of the court to reach the end of justice.

^{vii} The term hostile is derived from the English law. Supreme Court in Gura Singh v State of Rajasthan (AIR 2001 SC 330) defined hostile witness under the common law as one who is not wishing to tell the truth at the request of party calling him and an unfavourable witness is one who fails to prove a particular fact or proves the opposite test.

India 198th Report^{viii} witness identity protection and witness protection programme was passed. This report provided a bill for the witness identity protection but does not provide a bill for witness protection program and only makes recommendations.

In its 178th Report (2001), the Law Commission recommended the insertion of Sec. 164A to provide for recording of the statement of material witnesses in the presence of magistrates on oath where the offences were punishable with imprisonment of 10 years and more. On the basis of this recommendation, the Criminal Law (Amendment) Bill, 2003 was introduced in the Rajya Sabha and is still pending. However, the second aspect has hardly received any attention in India.^{ix} However this proposed amendment is impractical since there are number of offences, whose punishment is 10 years or more, then it would be very difficult for the magistrate to discharge his other functions, he will be busy in taking statements of witnesses on oath only. Mallimath committee^x also suggested for a witness protection program to prevent failure of justice and to repose confidence in judiciary. However, the report did not exhaustively do much to solve the problem.

3. Challenges Faced by Witness

Some of the reasons are as follows:

- One of the most overwhelming reasons behind witness turning hostile is threat or terrorization to which they are subjected.
- Further witness undergoes a sense of insecurity due to lack of witness protection program. Since he is given no security why would he give statement against wicked people, who may injure him or his family?
- Thirdly even if he comes to give statement, the protracted judicial procedure frustrates him. It is common in India to adjourn the cases. The lawyers together with their clients through political pressure or absence of other party due to medical emergency gets their case adjourned.
- Fourthly witnesses are not treated with respect. They are made to wait under the tree, with no designated place of their own, with no proper arrangement of food, water etc.
The Mallimath Committee has expressed its opinion about such witnesses by saying, "The witness should be treated with great respects and should be considered as a guest of honour."^{xi}
- Sixthly there is no payment of allowances system followed by court officers. Sometimes witnesses come from a far away distance, and he may belong to a poor family, then also he is not compensated^{xii}.
- Witnesses get annoyed during investigation and trial because of prolonged examination and sometimes irrelevant questions, as a result of which they give a statement which pleases the court easily and this leads to acquittal of accused.

4. Importance of Witness

Witnesses carry out an important responsibility in criminal justice system. As rightly stated by Wadhwa J., "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"^{xiii}.

The statement given by the witnesses helps the court to a great extent to frame the facts and circumstances of the case. It is said that witness is weighed, they are not numbered. If a fact is fully proved by two witnesses, it is as good as if proved by a hundred^{xiv}.

There exists a responsible duty on a witness to state the truth and nothing else that is why before being examined he is put to oath. If he does not give correct answers he will be put to trial under section 190^{xv} of the Indian penal code and may be penalized under section 193-195

^{viii} Law Commission of India 198th report on witness identity protection and witness protection programs. Available at <http://lawcommissionofindia.nic.in/reports/rep198.pdf> last accessed on 22 August, 2015

^{ix} SWAPNESHWARG, Witness Protection Law Vis-a-Vis Hostile Witness, available at <http://jurisonline.in/2010/05/witness-protection-law-vis-a-vis-hostile-witness-2/> as visited on 16 August 2015

^x Dr. Justice V.S. Malimath, 'Committee on Reforms of Criminal Justice System Government of India, Ministry of Home Affairs' Report VOLUME I (March 2003), available at www.mha.nic.in/pdfs/criminal_justice_system.pdf, accessed in August 2015.

^{xi} Committee on Reforms in Criminal Justice System, Headed by Justice Mallimath, Volume I, Page 151

^{xii} "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. 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." G.S. Bakshi v. State AIR 1979 SC 569, Dr. Paramjit Kaur, 'TESTIMONY OF HOSTILE WITNESS : RECENT DEVELOPMENTS' (11/07/2009) available at lawherald.in/articlefull.php?id=8, accessed 4th September 2015

^{xiii} Wadhwa J. in Swaran Singh v. State of Punjab, (2000)5 SCC 68 at 678

^{xiv} Mr. Justice Buller in Calliand v. Vaughan, 1798; also see H.L. Menkin's Dictionary of Quotations on Historical

Principles from Ancient and Modern Sources, Collins, London and Glasgow, 1982 Edition, Page 1311, As rightly said "those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery." (R vs. Scaife (1851) 20 L.J.M.C 229)

It is true that the statement given by hostile witness loses its credibility but as a whole it is not rejected as has been held in number of cases by Supreme court, to name few of them Balu Sonba Shinde v. State of Rajasthan^{xvi}, Koli Laxman Chana Bhai v. State of Gujrat^{xvii}, Gura Singh v. State of Rajasthan^{xviii}.

5. Legal Position

Regrettably India has no law relating for the protection of witness and the term is not defined in Criminal Procedure Code. Any person may be summoned at any stage of inquiry, trial by the court or court may examine any person if his evidence appears to have some relevance the case.^{xix}

There are several provisions which protects witness from being asked indecent, scandalous, offensive questions, and questions which intend to annoy or insult them. Further once when accused is released on bail, one of the conditions is that he would not tamper the evidences or approach the witness. However, effectiveness of these provisions is highly suspicious. There are few special legislations like the Juvenile (Care and Protection of Children) Act, 2000 etc. But there are no concrete solutions of the issue of witness turning hostile or witness being murdered.

However initially provisions for protection of witness were laid down under Terrorists and Disruptive Activities (Prevention) Act, 1987 (TADA) and Prevention of Terrorism Act, 2002 (POTA)^{xx}. Under abovementioned acts the judges were authorized to keep the identity of witness secure and whosoever was found disclosing the identity was penalized. However, such provision under the act was not found to be effective.

The certain changes have been made in Penal Code, Code of Criminal Procedure and Evidence Act. By the Criminal Law (Amendment) Act, 2005 (No.2 of 2006)^{xxi} has been enforced with effect from. 16.4.2006. Section 195A^{xxii} was introduced in Indian penal code. Further under Cr.P.C. Section 195 had also undergone changes.

SECTION 154^{xxiii}: This section allows party to cross-examine his own witness like an adverse party with the permission of the court. However, the term used in the section 'put any question' does not mean cross-examining his own witness, it is asking him leading questions. This is not the same thing as cross examining.^{xxiv} After going through the section 154 of Indian evidence act, the researcher winds up that section 154 only gives the authority to court to exercise its discretion that is when the court feels that the attitude revealed by the witness does not stand in accordance with the sense of duty to speak the truth. The provision does not mention the need to declare such witness as hostile witness before being invoked. Further the provision only mentions that such questions may be asked as are asked in cross-examinations. Therefore, it can be said that while common law classifies witness as hostile and adverse for the reason of cross-examining. Indian law does not distinguish; it only provides for the revelation of truth.

Section 151^{xxv} forbids lawyers to ask indecent and scandalous questions, but there is an exception to this, if they relate to any fact in issue or is essential to bring out the truth, however in reality such provision has been misused, crooked lawyers ask such questions to witnesses which they would not like to answer, and insult them as well. Such behavior annoys the witness and he refrains from stating the truth.

Under section 161, police officer is authorized to take statements from the witness; however, such statements are not admissible in the court of law. The reason behind this is that sometimes police coerce the witness to state the things they want them to say. Hence he is required to state again in front of the magistrate and if there he retracts from his previous statement, then prosecution gets the chance to ask questions that may be asked in cross-examination. Unfortunately, such situation casts a serious doubt on the case of prosecution and loses the case.

However, section 164 lays down another option i.e. to produce the witness in front of the magistrate, so that his statement can be recorded in front of the magistrate, but such is not a substantive piece of evidence. It can only be used to corroborate the witness who made it and if it is found that he is lying or has reason to believe that what he knows is false, he can be punished for perjury.

^{xv} Section 190. Threat of injury to induce person to refrain from applying for protection to public servant: Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant legally empowered as such to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.--

^{xvi} AIR 2002 SC 3137

^{xvii} AIR 200 SC 210

^{xviii} AIR 2001 SC 330

^{xix} The Code of Criminal Procedure, 1973, s. 311.

^{xx} POTA has been repealed by the Prevention of Terrorism (Repeal) Act 2004; w.e.f. 21-12-2004

^{xxi} The Gazette of India-Extraordinary Part II-Section 3, Sub Section (ii); No.348, New Delhi, Wednesday, April 12, 2006, Ministry of Home Affairs Notification-S.O.523 (E)

^{xxii} 195A.Threatening any person to give false evidence--Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both;

^{xxiii} Article 154--Question by party to his own witness.- The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross- examination by the adverse party.

^{xxiv} Bikiam Ali v. Emperor, AIR 1931 Cal. 139, Further in Ganga Singh v. State of Rajasthan AIR 2001 SC 330 it was stated that Section 154 authorizes the court to permit the party calling the witness to ask such questions that may be asked in cross-examination.the court has to exercise such discretion in cautious manner.

^{xxv} Article 151--Indecent and scandalous questions.- The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Further there are certain provisions under Criminal Procedure Code, which provides under Section 327 for trial in open court, so that there is transparency however clause 2 of section 327 provides for in-camera trial for certain offences such as rape under section 376 of IPC and 376A to 376D of IPC. The accused has a right to cross examine the witness however under section 299 an accused may be denied the right to cross examine in open court. Further under section 173(6) if the police officer finds that any statement under section 161 need not be disclosed to the accused in public interest then he may do so.

Article 14 of the International Covenant on Civil and Political Rights, which has been ratified by India, and is now a part of the Protection of Human Rights Act (1973), recognizes the right to fair trial as a human right, however in India fair trial has become a dream.

In the USA, agencies such as The United States Marshals Service, the Office of Enforcement Operations (OEO) and the Federal Bureau of Prisons (BOP) and The U.S. Attorney General's office, are associated with the programme.^{xxvi} Under this a memorandum of association is signed by witness and his family member, the protection program is well coordinated with secrecy and the witness is given a job opportunity when he is shifted to other place. Further they are provided with identity documents on which fake names are entered for security reasons. They are given 24 hours' security when required. In India we do not have such responsible agencies to look for the protection of witnesses due to which conviction rate in India is very low as compared to US where it is 89% as per Marshal Services. Effective witness protection laws exist in US. Under Organized Crime Control Act of 1970, the Witness Protection Programme also known as WITSEC) was established which provides for the protection of witness. It also gives new identities to the witnesses who put their life into danger.

English law provides that attempt to persuade a witness to refrain from giving statement by threatening is contempt of court. Criminal Justice and Public Order Act, 1994 lays down provisions for punishment of such criminal intimidation of witnesses. Section 51 of Criminal Justice and Public Order Act, 1994 provides protection not only to the person who provides evidence before court but also to the person who is of potential help to the investigation. There is a Serious and Organised crime Act 2005, which provides that witnesses who are under a threat to life are to be provided with protection, further in addition to this police machinery may also provide protection to such witness. Further The Youth Justice and Criminal Evidence Act 1999 provides for protection of originality of the evidences. The act also authorizes the court to prohibit publication of matter which discloses identity of witness during his life time.

However, Delhi High court directed the government to draft a policy for witness protection and Delhi government took a step in the direction of witness protection under the rule of Aam Admi Party Leader and Delhi Chief Minister Mr. Kejriwal.^{xxvii} But the fact that it still lay in abeyance proves that government is not keen to come up with witness protection programme.

The Whistle-blower Bill was first introduced by Law commission in 2011, due to the awful murder of Satyendra Dubey in 2003 and Manjunath Shanmugham in 2007. Further it was amended and in the year 2014 Protected Disclosures Act 2014 became operational. It is a counterpart of the RTI Act and endows people to address corruption and malpractice. Further The Whistle-blowers Protection (Amendment) Bill, 2015 was also introduced in Lok Sabha on May 11, 2015.^{xxviii} This Bill has been introduced to give effect to the earlier amendments which could not be given effect.

The 2014 Act enables the person to disclose acts of corruption, misuse of power or criminal offence committed by public servant, but does not include maladministration as recommended by the Law Commission which is present UK, US Legislation. Further the Public servant does not include ministers so ministers are out of the purview of the Act. The Competent Authority before who the complaint can be made is the Prime Minister or Chief Minister in the case of Ministers, the Speaker or Chairman for Members of Parliament or state legislatures, the Chief Justice of the High Court for district court judges, and the Central or State Vigilance Commission for government servants.^{xxix}

The Bill provides a procedure for receiving and making an inquiry into the public disclosures against acts of corruption, abuse of power, criminal offences by public servants. However, the Bill as compared to the Act provides 10 categories in which cases no reporting can be made of the disclosure. These categories relate to sovereignty, scientific, economic interests and security of India, proceedings of the Council of Ministers, breach of privilege of legislatures, intellectual property, an investigation process, etc. Further the Act permits disclosures that are prohibited under the Official Secrets Act (OSA), 1923.^{xxx} The Bill amends the Act to prohibit the disclosure of 10 categories of information to a Competent Authority.

^{xxvi} The Marshals Service, in the USA, assist witnesses with finding employment -- however, if a witness fails to aggressively seek employment, subsistence payments will be terminated. At that point, the relocated witness can enroll in public assistance if he or she chooses. At present, in India, we do not have such public assistance programmes. Dr G V Rao Witness Protection Program : Are we ready, available at <http://www.lawyersclubindia.com/articles/Witness-Protection-Program-Are-we-ready-5036.asp#.UEiW5uGQNII> last accessed on 6th September 2012.

^{xxvii} The Delhi Witness Protection Scheme "envisages categorisation of witnesses, creation of witness protection fund, types of protection and procedure for processing such request by the competent authority," read a statement issued by the Home Department. Available at The Times of India, 15 July, 2015, <http://timesofindia.indiatimes.com/india/Deaths-continue-but-witness-protection-law-still-a-far-cry/articleshow/48077837.cms> last accessed on 19th December, 2015.

^{xxviii} The Whistle-blowers (Amendment) Bill, 2015, <http://www.prsindia.org/billtrack/the-whistle-blowers-protection-amendment-bill-2015-3784/>. Last accessed on 19th December, 2015).

^{xxix} See the Whistle Blower Protection Act 2014.

^{xxx} The Whistleblowers Protection (Amendment) Bill, 2015 Available at

[http://www.prsindia.org/uploads/media/Public%20Disclosure/Brief%20Whistleblowers%20Protection%20\(Amendment\)%20Bill%202015.pdf](http://www.prsindia.org/uploads/media/Public%20Disclosure/Brief%20Whistleblowers%20Protection%20(Amendment)%20Bill%202015.pdf) Last accessed on 19th December, 2015).

RTI Act which permits the public authority to disclose all those categories which fall under 10 other categories of prohibited information in the Act and that falls under the Official Secrets Act 1923, if disclosing it in public interest is more important than harm done to protected interests. RTI Act also excludes few security and intelligence organizations from its ambit. It also provides a two stage process to appeal against a decision; such provisions are not there in the Whistle-blower (Amendment) Bill 2015.

In the procedural aspect the bill provides that if competent authority receives a public interest disclosure that falls under any of the 10 categories, he will forward that to government authorised authority. However, the bill is silent about the qualification or the members of such authority. If the authority is not independent or is not transparent then the whole idea of coming up with the bill is shattered.

Other jurisdictions like South Africa has no exemptions which makes it a strong whistle blower protection law, USA provides exemption in case of National Defence or Foreign Affairs or is prohibited by law, UK prohibits it case of national security, if it results in breach of legal professional ethics, if the person making the disclosure commits an offence by making it. The Bill, 2015 in India provides a list of exemptions which surely puts an umbrella restriction on the disclosure which can be made by any person against any public servant.

6. Judicial Decisions

Judiciary has time and again expressed the need for witness protection law, Madras High Court in August 2014, opined the need for statutory witness protection, because of the rise in multiple instances of witness turning hostile and witness deaths.

Jessica Lal murder case was one of the most disastrous case where after a long proceeding of 7 years, Session court acquitted the accused Manu Sharma, Manu Sharma was the son of Congress Political Leader, due to lack of evidence. The prosecution could not make a strong case, the investigating authority could not gather enough evidences, the witnesses turned hostile, and overall there was an awful failure of justice delivery system. Despite of the fact that everyone knew that accused is guilty, he was acquitted, what could be more disgusting than these Procedural technicalities together with the hostile witness caused gross injustice to the victim and her family.

Another famous case is Best Bakery case (*Zahira Habibulla H. Sheikh and Another vs. State of Gujarat and Others*^{xxxi}), wherein; Human rights commission intervened and raised the issue of failure of judiciary in delivering justice. In this case as well witness turned hostile; however, we need to ask who the culprit is, is it the parties or the witness himself or the state? In reality it is the state machinery, because responsibility lies on state to efficiently deliver justice and protect witness; however, state fails to do so. Public offices are full of corrupt people. Court has also become a mockery and nothing else. In this case witness Zahira found herself in an undesirable condition; she suffered not only at the hands of accused but also prosecution. She retracted from her earlier statement to save herself, but she could not escape from the punishment for perjury for changing her statement. Thus a witness suffers because of the failure of the state to protect him, which is highly lamentable. However, in this case Supreme Court made remarks about the state administration, court said that people have lost confidence over the state administration because of the negligent manner in which they work. The court further held that there is a need to have a witness protection program to generate successful justice system

In a recent decision of the Supreme Court in *State of Maharashtra vs. Dr Praful B. Desai*^{xxxii} statement recorded through video-conference has been held to be permissible since the victim experience more comfort and feels free to answer without terror.

In the year 2003 Delhi high court issued certain guidelines^{xxxiii} to police in providing protection to witness from the accused. A bench comprising Justice Usha Mehra and Justice Pradeep Nandrajog gave decision on the petition filed by Neelam Katara, as her son was kidnapped and killed by the accused, who was son of Rajya Sabha MP DP Yadav.

However even after such effort the fact that it has not been successful shows more stringent laws and effective implementation is required as Naroda Patia carnage^{xxxiv} present a suitable case in point in this case the witness was provided with one police guard for

^{xxxi} (2004) 4 SCC 158

^{xxxii} 2003 (4 SCC 601) The court while lamenting upon the conditions of witness in *Swaran Singh v. State of Punjab* AIR 2000 S.C. 1717 said that a given case is built on the statements made by witnesses, meaning thereby that they are crucial for the proper delivery of justice, but in reality they are not given due importance. As one can easily make out that in courts that they are not treated with respect. They are expected to wait for long hours without proper arrangement for water etc. He has no place to sit further he goes through prolonged examination, all these things together make him frustrated, as a result of which people refrain from becoming witness. The major reason behind witness turning hostile is danger to which they are exposed; they are threatened by the opposite parties.

^{xxxiii} The guidelines were as follows:

- Member Secretary, Delhi Legal Services Authority would be competent authority who on, receipt of a request on a witness, decide “whether a witness requires protection, to what extent and for what duration”, the court said.
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- In deciding whether to grant protection to a particular witness, the Competent Authority “shall” take into account the nature of the risk to the security of witness emanating from the accused or his associates and the nature of probe or the criminal case.
- The authority shall also consider the importance of the witness and the value of evidence given or agreed to be given by him/her besides the cost of giving protection to him or her.
- While recording the statement of witness under Section 161 of the CrPC, it would be the duty of the investigating officer to make the witness aware of these guidelines and also the fact that in case of any threat he/she can approach the Competent authority.
- Once the competent authority decides to extend the protection to a particular witness, it “shall” be the duty of the police Commissioner to provide protection to him or her.

Nishant Gaurav Gupta, ‘REPORT ON PROTECTION OF WITNESSES’ available at, www.ccsindia.org/ccsindia/ec/ec_feb2005_gupta.pdf, accessed on 5th September 2014

protection but after he finished his duty for the day, the witness was attacked by 30 persons. It is highly lamentable that the prime witness was given only one police guard and that to only for the day.

7. Conclusion

The researcher concludes by stating that Indian criminal system consists of several lacunas which are required to be spotted and amended by the legislature. Referring to best bakery case, Jessica Lal and other cases, it is pertinent to mention that such cases makes the need for witness protection programme more necessitated. Present working of state administration, judicial system casts a serious doubt on criminal justice system. Therefore, at this time legislature must be up and doing to make laws for witness protection. Further as the society transforms, criminal attitudes, tactics implemented by lawyers and the same changes, therefore such change is also required to be made in laws so as to cope up with the criminal attitudes. Time has come when the existing criminal system is to be taken out from the hands of corrupt, unprincipled lawyers and lethargic state machinery and to be placed on proper plinth. There is a graver need to have stringent laws for the protection of witnesses and whistleblowers those justice triumphs over the inherent complexities of the adversarial judicial system.

The researcher is immensely moved by deaths of whistleblowers, who sacrifice their life knowingly that exposing the illegal activities will put him under the clouds of death. Their deaths can never be compensated with anything but effective and efficient legislation can be passed to make them feel secured. We can not afford to loose such righteous nation- oriented persons at the cost of wicked people who like parasites are eating away the nation's reputation.

While there are few provisions dealing with witness protection where it is the duty of police to protect witness however the amount of corruption that exists in administration machinery shakes the faith of a common man on police, and people do not rely on police for their protection. Police is considered to be the last person; a common man would like to approach. The police, judicial officers, they all work together to make money by hook or by crook, and ignore the fact that they have a duty to discharge their functions properly in public interest and not in their personal interest. Therefore, if witnesses continue to turn hostile and the whistle blowers are restricted to make disclosure or are killed then it will smash to smithereens the criminal justice system in India and people will loose confidence in the reliability in judiciary, legislature, police and other authorities.

8. References

- i. Zahira Habibullah Sheikh v/s State of Gujarat, 2004 AIR SCW 2325; 2004 (4) SCC 158, Sir William Shakespeare has said, "You cannot witness for me, being slain"
- ii. Law Commission of India, '185th Report on Review of the Indian Evidence Act, 1872' Part-III A (March, 2003) available at lawcommissionofindia.nic.in/reports/185thReport-PartIIIA.pdf accessed on 28th August, 2015
- iii. Rebecca Samervel, TNN Dipping conviction rate a sign of 'poor sleuthing' available at http://articles.timesofindia.indiatimes.com/2012-02-01/mumbai/31012048_1_conviction-rate-prosecution-cases-case-beyond-reasonable-doubt last accessed on 7th September 2015.
- iv. Low conviction rate, a result of poor security? TNN Jul 10, 2012, available at http://articles.timesofindia.indiatimes.com/2012-07-10/nagpur/32617550_1_district-court-security-measures-conviction-rate last accessed on 7th September 2015
- v. Garner Bryan A. (Ed), Black's Law Dictionary, West Group, St. Paul, Minnesota, 17th Ed., 1999, p. 1596
- vi. Hostile witnesses not only destruct the interest of litigating party but also the duty of the court to reach the end of justice.
- vii. The term hostile is derived from the English law. Supreme Court in Gura Singh v State of Rajasthan (AIR 2001 SC 330) defined hostile witness under the common law as one who is not wishing to tell the truth at the request of party calling him and an unfavourable witness is one who fails to prove a particular fact or proves the opposite test.
- viii. Law Commission of India 198th report on witness identity protection and witness protection programs. Available at <http://lawcommissionofindia.nic.in/reports/rep198.pdf> last accessed on 22 August, 2015
- ix. SWAPNESHARG, Witness Protection Law Vis-a-Vis Hostile Witness, available at <http://jurisonline.in/2010/05/witness-protection-law-vis-a-vis-hostile-witness-2/> as visited on 16 August 2015
- x. Dr. Justice V.S. Malimath, 'Committee on Reforms of Criminal Justice System Government of India, Ministry of Home Affairs' Report VOLUME 1(March 2003), available at www.mha.nic.in/pdfs/criminal_justice_system.pdf, accessed in August 2015.
- xi. Committee on Reforms in Criminal Justice System, Headed by Justice Mallimath, Volume I, Page 151
- xiii. "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. 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

^{xxxiv} Witness Hostility sabotaging fair trials and Frustrating the Courts in India available at <http://legalsutra.org/3243/witness-hostility-sabotaging-fair-trials-and-frustrating-the-courts-in-india/> last accessed on 4th September 2012

- harassment starts and he decides not to get the diet money at all.” G.S. Bakshi v. State AIR 1979 SC 569, Dr. Paramjit Kaur, ‘TESTIMONY OF HOSTILE WITNESS : RECENT DEVELOPMENTS’(11/07/2009) available at lawherald.in/articlefull.php?id=8, accessed 4th September 2015
- xiii. Wadhwa J. in Swaran Singh v. State of Punjab, (2000)5 SCC 68 at 678
- xiv. Mr. Justice Buller in Calliand v. Vaughan, 1798; also see H.L. Menkin’s Dictionary of Quotations on Historical Principles from Ancient and Modern Sources, Collins, London and Glasgow, 1982 Edition, Page 1311, As rightly said “those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery.” (R vs. Scaife (1851) 20 L.J.M.C 229)
- xv. Section 190. Threat of injury to induce person to refrain from applying for protection to public servant: Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant legally empowered as such to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.--
- xvi. AIR 2002 SC 3137
- xvii. AIR 200 SC 210
- xviii. AIR 2001 SC 330
- xix. The Code of Criminal Procedure, 1973, s. 311.
- xx. POTA has been repealed by the Prevention of Terrorism (Repeal) Act 2004; w.e.f. 21-12-2004
- xxi. The Gazette of India-Extraordinary Part II-Section 3, Sub Section (ii); No.348, New Delhi, Wednesday, April 12, 2006, Ministry of Home Affairs Notification-S.O.523 (E)
- xxii. 195A.Threatening any person to give false evidence--Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both;
- xxiii. Article 154--Question by party to his own witness.- The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross- examination by the adverse party.
- xxiv. Bikiam Ali v. Emperor, AIR 1931 Cal. 139, Further in Ganga Singh v. State of Rajasthan AIR 2001 SC 330 it was stated that Section 154 authorizes the court to permit the party calling the witness to ask such questions that may be asked in cross-examination.the court has to exercise such discretion in cautious manner.
- xxv. Article 151--Indecent and scandalous questions.- The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.
- xxvi. The Marshals Service, in the USA, assist witnesses with finding employment -- however, if a witness fails to aggressively seek employment, subsistence payments will be terminated. At that point, the relocated witness can enroll in public assistance if he or she chooses. At present, in India, we do not have such public assistance programmes. Dr G V Rao Witness Protection Program : Are we ready, available at <http://www.lawyersclubindia.com/articles/Witness-Protection-Program-Are-we-ready-5036.asp#.UEiW5uGQNI> last accessed on 6th September 2012.
- xxvii. The Delhi Witness Protection Scheme "envisages categorisation of witnesses, creation of witness protection fund, types of protection and procedure for processing such request by the competent authority," read a statement issued by the Home Department. Available at The Times of India, 15 July, 2015, <http://timesofindia.indiatimes.com/india/Deaths-continue-but-witness-protection-law-still-a-far-cry/articleshow/48077837.cms> last accessed on 19th December, 2015.
- xxviii. The Whistle-blowers (Amendment) Bill, 2015, <http://www.prsindia.org/billtrack/the-whistle-blowers-protection-amendment-bill-2015-3784/>. Last accessed on 19th December, 2015).
- xxix. See the Whistle Blower Protection Act 2014.
- xxx. The Whistleblowers Protection (Amendment) Bill, 2015 Available at [http://www.prsindia.org/uploads/media/Public%20Disclosure/Brief%20Whistleblowers%20Protection%20\(Amendment\)%20Bill%202015.pdf](http://www.prsindia.org/uploads/media/Public%20Disclosure/Brief%20Whistleblowers%20Protection%20(Amendment)%20Bill%202015.pdf) Last accessed on 19th December, 2015).
- xxxi. (2004) 4 SCC 158
- xxxii. 2003 (4 SCC 601) The court while lamenting upon the conditions of witness in Swaran Singh v. State of Punjab AIR 2000 S.C. 2017 said that a given case is built on the statements made by witnesses, meaning thereby that they are crucial for the proper delivery of justice, but in reality they are not given due importance. As one can easily make out that in courts that they are not treated with respect. They are expected to wait for long hours without proper arrangement for water etc. He has no place to sit further he goes through prolonged examination, all these things together make him frustrated, as a result of which people refrain from becoming witness. The major reason behind witness turning hostile is danger to which they are exposed; they are threatened by the opposite parties.

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xxxiv. Witness Hostility sabotaging fair trials and Frustrating the Courts in India available at <http://legalsutra.org/3243/witness-hostility-sabotaging-fair-trials-and-frustrating-the-courts-in-india/> last accessed on 4th September 2012