LAW COMMISSION OF INDIA

198TH REPORT

ON

WITNESS IDENTITY PROTECTION

AND

WITNESS PROTECTION PROGRAMMES

AUGUST 2006

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Dear Sh. Bhardwaj Ji,

Sub: 198th Report of the Law Commission on 'Witness Identity Protection and Witness Protection Programme".

The Supreme Court of India has recently referred to the questions of 'Witness Identity Protection' and 'Witness Protection Programmes' in a number of judgments: NHRC v. State of Gujarat: 2003 (9) SCALE 329, PUCL v. Union of India: 2003(10) SCALE 967, Zahira v. State of Gujarat: 2004(4) SCC 158, Sakshi v.Union of India:2004 (6) SCALE 15 and Zahira v. Gujarat 2006 (3) SCALE 104. In Sakshi the Court emphasized the need for legislation on witness protection. In view of these observations, the Law Commission has taken up the subject suo motu. In this Report it has confined the Witness Identity Protection procedures to cases triable by the Court of Session of Courts of equal rank.

Witness Identity Protection may require during investigation, inquiry and trial while Witness Protection Programmes apply to the physical protection of the witness outside the Court.

It is accepted today that Witness Identity Protection is necessary in the case of all serious offences wherein there is danger to witnesses and it is not confined to cases of terrorism or sexual offences.

Initially, the Law Commission prepared a Consultation Paper on "Witness Identity Protection and Witness Protection Progammes' (August 2004) and invited responses to the Questionnaire.

The Consultation Paper contained three parts: Part I – General (Chapter 1 to IV), Part II – Witness Identity Protection v. Rights of accused (Chapters V, VI) and Part III – Witness Protection Programmes (Chapter VII).

The Statutes of New Zealand and Portugal were annexed as examples of existing laws.

Questionnaire attached of Consultation Paper and Responses:

The Questionnaire attached to the Consultation Paper, 2004 contained two Parts A and B, the former dealing with Witness Identity Protection and the latter dealing with Witness Protection Programmes.

The Commission held two seminars, one in New Delhi on 9th October, 2004 and another at Hyderabad on 22nd January, 2005 where a number of Judge of the High Court, lawyers, police officers, public prosecutors, judicial officers (Magistrates and Sessions Judges) participated.

So far as written responses are concerned, a large number of responses, about 50, were received from State Governments, Directors General of Police/Inspectors General of Police, High Court Judges, international and local organizations, Judges of the subordinate judiciary, jurists, advocates and public prosecutors. These were analysed.

Final Report:

In this Final Report, the Commission has discussed the responses and given its recommendations, both in regard to Witness Identity Protection and Witness Protection Programmes. So far as the Witness Identity Protection is concerned, it has also annexed a Draft Bill as Annexure I. The Commission has not given any Draft Bill in regard to Witness Protection Programmes. The Consultation Paper (August 2004) is annexed as Annexure II.

1. Witness Identity Protection:

We shall briefly refer to our approach on Witness Identity Protection in Part I of the Final Report.

The accused in our country have a right to an open public trial in a criminal court and also a right to examination of witnesses in open court in their presence. But, these rights of the accused are not absolute and may be restricted to a reasonable extent in the interests of fair administration of justice and for ensuring that victims and witnesses depose without any fear.

The right of the accused for an open trial in his or her presence, being not absolute, the law has to balance that right of the accused as against the need for fair administration of justice in which the victims and witness depose without fear or danger to their lives or property or those of their close relatives.

There are three categories of witnesses: (i) victim-witnesses who are known to the accused; (ii) victims-witnesses not known to the accused (e.g. as in a case of indiscriminate firing by the accused) and (iii) witnesses whose identity is not known to the accused. Category (i) requires protection from trauma and categories (ii) and (iii) require protection against disclosure of identity.

In category (i) above, as the victim is known to the accused, there is no need to protect the identity of the victim but still the victim may desire that his or her examination in the Court may be allowed to be given separately and not in the immediate presence of the accused because if he or she were to depose in the physical presence of the accused, there can be tremendous trauma and it may be difficult for the witness to depose without fear or trepidation. But, in categories (ii) and (iii), victims and witnesses who are not known to the accused have a more serious problem if there is likelihood of danger to their lives or property or to the lives and properties of their close relatives, in case their identity kept secret at all stages of a criminal case, namely, investigation, inquiry and trial.

There has been debate in several countries as to how the rights of the accused and the need for witness identity protection can be balanced. Such a balance has been achieved even in USA and some other countries where confrontation of witnesses in open court is indeed a constitutional or statutory right. They have devised appropriate procedures that can be prescribed in the interest of victims and witnesses. For that purpose, in the Consultation Paper as well as in this Report, we have extensively referred to the comparative law as to how these rights are balanced in other countries.

(i) <u>At the stage of investigation:</u>

We are of the opinion that witness protection is necessary even at the stage of investigation. This can be provided by the prosecutor moving the Magistrate to a conduct a preliminary inquiry or <u>voir dire</u>,in his chambers, i.e.

in camera. The Magistrate will have to consider the material relied upon by the prosecutor for substantiating the danger to the witness or his propery or those of his relatives, and, if necessary, the Magistrate can examine the witness. The suspect is not entitled to e heard at this stage during investigation. If the Magistrate comes to the conclusion that there is likelihood of danger, he can grant identity will, however, be disclosed to the Magistrate and none else. Further, the real identity will not be reflected in the court records but the witness will beis described by a pseudonym or a letter from the alphabet. The Magistrate, which passing the order will, however, keep in mind the various matters listed in sec. 5(6) of the Bill. Such an anonymity order passed at the investigation stage will ensure only during the 'investigation' period.

(ii) <u>During inquiry and before recording evidence at the trial:</u>

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

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

The next stage is the final stage of trial in the Sessions Court. The witness, if he had already been granted anonymity by the Magistrate or Judge, as stated above, he need not apply again for anonymity.

In respect of the evidence during the trial a two-way closed-circuit television or video link and two-way audio link is proposed and these will be installed connecting two rooms.

Fortunately, after the decision of the Supreme Court in State of Maharashtra v. Dr. Praful B Desai, 2003 (4) SCC 601 and Sakshi, 2004 (6) SCALE 15, such evidence by video-link is admissible.

The trial in Supreme Court will be conducted under a very detailed procedure which we have prescribed in Chapters IX and X and in sec. 12, 13 and Schedules 1 and II of the Bill annexed to the Report. The procedure, as stated above, requires the use of a two-way closed-circuit television or video-link and two way audio system. But then there are two separate procedures, (a) Chapter IX and sec 12, Schedule 1 cover cases of victims/witnesses not known to accused who require identity protection and (b) Chapter X and sec 13, Schedule II to victims known to the accused and who are to be protected from trauma.

(a) So far as the victims and witnesses not known to the accused, whose identity has to be protected, the procedure in sec. 12 read with Schedule 1 is as follows:

In one room, (which we may call) (A), the Presiding Judge, the court-master, the stenographer, the public prosecutor, the threatened witness and the technical personnel (who will be employees of the court) will be present.

In another room, which we may call (B), the accused, his pleader and the technical persons operating the system will alone be present.

Both rooms will be connected y a two-way closed circuit television or video link coupled with a two-way audio link.

The threatened witness (i.e. victim or witness not known to the accused) will be examined by the prosecutor in Room A directly. The witness may identity the accused on the video screen in his room but the camera in Room A where the witness is present shall not be focused on the witness and therefore his image will not be visible in Room B where the accused is present.

The witness in Room A shall be cross-examined by the accused or his pleader who are in Room B, through the two-way video and audio system.

(b) So far as victims known to the accused who have only to be protected from trauma, the procedure is as per sec. 13 and Schedule II.

In Room A, the Presiding Judge, the court-master and the stenographer, the accused and the technical personnel will be present.

In this Room B, the victim, the public persecutor and the pleader for the accused and the technical persons shall be present. Only when the victim has to identity the accused, the camera in Room A will be focused on the accused, thereafter the picture of the accused will not be visible in the screen in Room B.

In this Room B, the witness will be examined or cross-examined by the prosecutor/defence lawyer.

From Room B, the Judge and the accused can see the witness who is in Room A and is being examined.

(iv) <u>Applicability</u>:

We have provided that the Act will apply to

(a) victims known to the accused the recording of whose statements at the trial in the Court of Sessions has not started at he date of commencement of this Act; and

(b) a threatened witness (i.e. including a victim-witness) whose identity has not been revealed to the suspect or the accused either during investigation or during inquiry before the Magistrate or before the recording of statement at the trial in the Court of Sessions at the date of commencement of the Act.

II. Witness Protection Progammaes:

In Part II of the Final Report, we have given our recommendations so far as "Witness Protection Programmes" are concerned. We are not providing a Bill on this subject in as much as the question of funding is and important issue. We have recommended that the Central and State Government must bear the expenditure equally.

Witness Protection Programmes refer witness protection outside the Court. At the instance of the public prosecutor, the witness can be given a new identity by a Magistrate after conducting an ex parte inquiry in his chambers. In case of likelihood of danger of his life, he is given a different identity and may, if need be, even relocated in a different place along with his dependants till be trial of the case against the accused is completed.
The expenses for maintenance of all the persons must be met by the State Legal Aid Authority through the District Legal Aid Authority. The witness has to sign an MOU which will list out the obligations of the State as well as the witness. Being admitted to the programme, the witness has an obligation to depose and the State has an obligation to protect him physically outside Court. Breach of MOU by the witness will result in his being taken out of the programme.

We have also dealt with complex situations where the witness has to prosecute or defend or be a witness in another civil or criminal case without disclosing his identity.

Under the Act, we have provided for punishment to those who violate the provisions of the Act and reveal the identity of protected witnesses.

In our recommendations, we have provided a detailed framework for Witness Identity Protection and Witness Protection Programmes. We may add a word of caution that this subject is different from the law which is now being enacted to deal with the problem of hostile witness. What we have recommended in this Report is totally different, it relates to witness identity protection during investigation and in Court; and witness protection programmes outside Court.

We hope the Bill on Witness Identity Protection will be enacted. We also hope that Witness Protection Programmes (for which we have not given a draft Bill) will be brought into force as per our recommendations and the Central and State Government will provide adequate funds for such programmes.

With regards,

Yours sincerely,

(M. Jagannadha Rao)

Shri H.R. Bhardwaj
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Chapter I

Introductory

The Consultation Paper:

The issues of 'Witness Identity Protection and Witness Protection Programmes' were taken up by the Law Commission suo motu in the light of the observations of the Supreme Court in NHRC vs. State of Gujarat 2003(9) SCALE 329, PUCL vs. Union of India: 2003(10) SCALE 967; Zahira Habibullah H Sheikh and Others vs. State of Gujarat: 2004(4) SCC 158, and Shakshi vs. Union of India : 2004(6) SCALE 15 that a law in this behalf is necessary. More recently the same view was expressed by the Supreme Court in Zahira Habibulla Sheikh vs. Gujarat: 2006(3) SCALE, 104. The Court stated in all the above cases that having regard to what is happening in important cases on the criminal side in our Courts, it is time a law is brought forward on the subject of witness identity protection and witness protection programmes.

The Law Commission of India released a Consultation Paper on 'Witness Identity Protection and Witness Protection Programmes' in August 2004. After release of the Consultation Paper, the Criminal Law Review, a leading law journal published from the United Kingdom, in its issue of February 2005 (at page 167), reviewed the Consultation Paper under the heading of 'Law Reform' as follows:

"The Law Commission of India has published a substantial Consultation Paper (pp. 337), "*Witness Identity Protection and Witness Protection Programmes"* (August 2004). As its title suggests the paper covers two broad aspects of the need for witness protection. The first addresses the questions of whether and to what extent provision ought to be made for witnesses to give evidence anonymously during criminal trials. One of the remarkable features of the paper is the breadth of the research that has been undertaken. Chapter 6 of the paper comprises a comparative study of case law on witness protection and anonymity which, in addition to common law jurisdictions, encompasses the procedures adopted by the respective International Criminal Tribunals for Yugoslavia and Rwanda, and reviews the jurisprudence of the European Court of Human Rights.

The second aspect of witness protection covered by the paper concerns "the physical and mental vulnerability of witnesses" and the need to take care of "various aspects of the welfare of witnesses which call for physical protection of witnesses at all stages of the criminal process". An extensive comparative review of witness protection programmes operating in various jurisdictions is set out Ch. 7 of the paper. The paper goes significantly beyond the traditional scope of comparative studies in criminal justice law reform documents, which is confined to practices in the more prominent common law jurisdictions. In addition to statutory schemes in Australia, South Africa, the United States, and Canada, those operating in continental jurisdictions, including France, the Netherlands, Germany, Portugal and Italy, fall within the purview of the chapter. The full text and a summary of the paper can be accessed on the Commission's website: http://lawcommissionofindia.nic.in/."

The Commonwealth Law Bulletin (2004) (Vol. 30) (pp 262 to 272) has referred to the Consultation Paper and has extracted the summary of the Consultation Paper and questions contained in the Questionnaire in Chapter VIII thereof.

Responses to the Consultation Paper:

The Law Commission circulated the Consultation Paper with a view to obtain the views of governments, police authorities, judiciary, Bar, NGOs etc. The Paper contained a Questionnaire in Chapter VIII, running into two Parts, Part A and Part B. Part A related to 'Witness Anonymity', while Part B related to 'Witness Protection Programmes'.

The Commission held two Seminars, one in New Delhi on 9th October, 2004 and another at Hyderabad on 22nd January 2005 in which a large number of Judges of the High Court, lawyers, police officers, public prosecutors, judicial officers (Magistrates and Sessions Judges) participated. The Delhi seminar was inaugurated by the Union Minister for Law and Justice Sri H.R. Bhardwaj.

A large number of responses were received by the Commission. In all there were about 50 responses out of which 12 are from State Governments and 12 are from Directors General of Police/Inspectors General of Police, 3 from High Court Judges and 3 from international and other organizations, and 2 from the Judges of the subordinate Courts and remaining 20 are from other Jurists, advocates, public prosecutors and others.

Summary of Chapters of the Consultation Paper:

We shall give a brief summary of the Chapters in the Consultation Paper. In Chapter I, we referred in detail to the observations of the Supreme Court in the judgments cited above and in other cases and in particular to the specific observation in NHRC vs. State of Gujarat 2003(9) SCALE 329 and in Zahira 2004(4) SCALE 377. In the second case, the Court observed (at p 395)

> "Legislative measures to emphasise prohibition against tampering with witnesses, victims or informants, have become imminent and inevitable need of the day".

It also added (at p 399):

> "Witness protection programmes are imperative as well as imminent in the context of alarming rate of somersaults by witnesses".

Similar observations were made by the Supreme Court in the recent decision in Zahira Habibulla Sheikh vs. Gujarat: 2006(3) SCALE 104.

In Sakshi vs. Union of India 2004(6) SCALE 15, after referring to techniques of screening and video-conferencing, the Supreme Court reiterated (at p 35):

> "We hope and trust that Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves."

After referring in Chapter 1 to the above observations of the Supreme Court, the Commission set out in Chapter II, the provisions of the existing criminal laws in India relating to right to a public trial and cross-examination of witnesses in open Court. In this connection, the Commission referred to the provisions of sec 327 of the Code of Criminal Procedure, 1973 which provides for an open trial, to sec 207 which deals with supply of copies of police report and other documents, to sec 208, which deals with supply of copies of statements and documents in cases instituted otherwise than on a police report, to sec 273 which requires evidence to be taken in the immediate presence of the accused. Sections 200 and 202 require the Magistrate to examine the complainant and the witnesses on oath. We also referred to certain exceptions to these rules mentioned in the statute. All these provisions existing in the Code ensure a fair trial to the accused.

In Chapter II, the Commission also referred to some special provisions of the Code of Criminal Procedure, 1973 where in camera proceedings are permitted – vide sec 327(2) which provides for such a procedure in case of trials regarding offence of rape under sec 376 and other sexual offences in sec 376A to 376D of the Indian Penal Code, 1860. We referred to sec 228A of the Penal Code which provides for imprisonment and fine upon any person who prints or publishes the name or any matter which may identify the person against whom rape is alleged or has been found to have been committed. We also referred to sec 21 of the Juvenile Justice (Care and Protection of Children Act, 2000), which prohibits publication of name, address or school or any other particulars calculated to lead to identification of the juvenile or the publication of the picture of a

juvenile. Reference was also made to sec 146(3) of the Indian Evidence Act, 1872 (as amended in 2002) which states that 'in a prosecution for rape or attempt to commit rape, it shall not be permissible, to put questions in the cross examination of the prosecutrix as to her general character'.

These provisions of the Code of Criminal Procedure, 1973 and the Penal Code, it was pointed out are obviously not sufficient.

In Chapter III, the Commission dealt with some special statutes which were intended to protect witness identity. These were sec 16 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and 30 of the Prevention of Terrorist Act, 2002 (POTA).

The validity of these special provisions of the TADA was upheld in Kartar Singh vs. State of Punjab 1994(3) SCC 569 and of the POTA in PUCL vs. Union of India: 2003(10) SCALE 967.

In Chapter IV, the Commission then surveyed the previous Reports of the Law Commission, namely the 14th, 154th, 172nd, 178th Reports on the question. Of course, after the 172nd Report (2000) on 'Review of Rape Laws', the Supreme Court in Sakshi vs. Union of India 2004(6) SCALE 15, made important suggestions for having 'video-taped interview', 'closed circuit television' evidence etc. That would mean that witness protection got extended to cases other than terrorist cases. But, still we have to consider the need for such procedures in cases other than those relating to terrorism or sexual offences, such as where grave offences are involved.

In Chapter V thereof, a survey of case law where some measures at witness protection were suggested by our Supreme Court, were dealt with. We do not want to refer to them in detail once again. But, we made reference to the judgment of the Delhi High Court in Ms. Neelam Katara vs. Union of India (Crl WP 247/2002) dated 14.10.2003 where certain guidelines were issued.

The Commission then referred to the view of the Supreme Court that where witness identity is protected, the principle of open trial cannot be said to have been breached.

In Chapter VI of the Consultation Paper, a very detailed comparative law analysis was made, referring to the statutes and judgments from the United Kingdom, Australia, New Zealand, Canada, The United States of America and the European Court of Human Rights and to the judgments and Rules of the International Criminal Tribunal for former Yugoslavia (ICTY) and also the Rules of the similar Tribunal for Rwanda. The Rules of these special Tribunals were examined in detail.

Then in Chapter VII, the Commission referred to the Witness Protection Programmes in Australia (Victoria, National Capital Territory, Queensland), South Africa, Hong Kong, Canada, Portugal, Philippines, USA, France, Czechoslovakia, Republic of Korea, Japan, Netherlands, Germany and Italy.

Finally, in Chapter VIII, the Commission came forward with a Questionnaire in two parts A and B, one relating to Witness Identity Protection and another dealing with Witness Protection Programmes.

Final Report:

Part I of this Report (Chapters II to X) deals with Witness Identity Protection and Part II (Chapters XI to XIII) with Witness Protection Programmes. A Bill on Witness Identity Protection is annexed. So far as Witness Protection Programmes are concerned, our recommendations are contained in Chapter XIII.

Witness Identity Protection:

In this Report, we do not propose to repeat all the literature referred to in the Consultation Paper. We propose to summarise, at various places, what we have stated in the Consultation Paper and deal with certain crucial principles of criminal jurisprudence and procedural details where witness identity protection is claimed or granted.

Discussion on Witness Identity Protection is covered in Part I, Chapters II to X.

We are annexing a Draft Bill to this Report in so far Witness Identity Protection is concerned (Annexure I).

Witness Protection Programmes:

This subject is covered in Part II, Chapters XI to XIII.

So far as Witness Protection Programmes are concerned, we are not giving a Bill but are giving our recommendations. In as much as the problem of funding is crucial, we are not incorporating provisions relating to witness protection programmes as part of the Bill. It will be for the Government of India and the States to consider our recommendations and take appropriate administrative or legislative action so far as Witness Protection Programmes are concerned.

In Chapter XIII of this Report, we shall refer to the various items in the Questionnaire so far as 'witness protection programmes' are concerned, followed by our recommendations on that subject.

The Consultation Paper is also annexed to this Report (Annexure II).

PART I
WITNESS IDENTITY PROTECTION

Chapter II

Right to Fair Public Trial in presence of the accused not absolute

In most countries governed by democratic constitutions and rule of law, the position today is that the right to an open 'public trial' in the immediate presence of the accused is fundamental but is not treated as absolute. This is revealed clearly from the survey of the legal position in the various countries referred to in our Consultation Paper.

ICCPR:

The right to public trial is specifically mentioned in Art 14(1) of the International Covenant of Civil and Political Rights' (ICCPR) to which India is a party. The ICCPR refers to the right of 'public, open, fair trial' to an accused and it also states in what manner it could be restricted. The restrictions on the rights as accepted in the ICCPR show that several competing rights require to be balanced. Such balancing provisions are incorporated in the Constitutions of some countries or are stated in detail in the respective Codes or Rules of Criminal Procedure.

Article 14 of the ICCPR reads as follows:

> "Article 14:
>
> 1. All persons shall be equal before the Courts and tribunals. In the determination of any criminal charge against him, or of his right and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent and impartial tribunal established by law".

The same article, i.e. 14(1), however, refers to the restrictions and states:

> "The press and the public may be excluded from all or part of a trial for reason of morals, public order (*ordre public)* or national security in a democratic society, or when the interests of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interest of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." (emphasis supplied)

In addition, Art 14(3) of the ICCPR specifically refers to certain minimum guarantees

> "in the determination of any criminal charge against the said person, in full equality:
>
> (a) …. …. ….

(b) …. … …

(c) … … …

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; …..

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) … … …

… … …"

So far as freedom of expression and right to information are concerned, Art 19 of the ICCPR states as follows:

"Article 19:

1. …. …. ….

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of position, either orally, in writing or in print, in the form of art, or through any other media of his choice." (emphases supplied)

But clause (3) of Art 19 permits restrictions to be imposed,

"as are necessary, for the purpose of respecting the rights or reputation of others or for protecting national security or public order (*ordre public*) or of public health or morals."

Thus, the provisions of the ICCPR require that the trial of an accused must be 'fair', should be an "open, public trial" and declares that the accused has a right to a trial conducted "in his presence and to examine or have examined, the witnesses against him". The citizens, public and press have a right to know and to publish what they know, subject to restrictions in the interests of respecting rights or reputation of others or for protecting national security or public order or public health or morals. The press and public may be excluded for the purpose of protection of the above rights, or where the interests of private lives so require, to the extent strictly necessary, in the opinion of the Court, in special circumstances where publicity would prejudice the interests of justice.

European Convention:

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms also speaks of a 'fair and public hearing' but says that the 'press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interest of justice'. (emphasis supplied)

United Kingdom:

In the United Kingdom the principle of 'open justice' has been accepted decades ago but it was also accepted that it is not absolute. This

was laid down in Scott vs. Scott: 1913 AC 417 by Viscount Haldane L.C and the scope of the exception was laid down as follows:

> "The exception must be based upon the operation of some other overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the Judge."

The Crown Court rules (Rule 27), section 8(4) of the Official Secrets Act 1920, sec 47(2) of the Children and Young Persons Act, 1933, section 4(2) and 11 of the Contempt of Courts Act, 1981 refer to certain statutory exceptions to the rule of open justice. English Courts have also developed the 'inherent power' doctrine in the Leveller Magazine case (1979 A.C. 44) and in R vs. Murphy (1989): (see para 6.2.3. and 6.2.10 of the Consultation Paper).

USA:

In US, the Sixth Amendment guarantees that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…; and to be confronted with the witnesses against him…." In addition, the First Amendment ensures the right to freedom of speech, and of the press which includes the right to information. Though in certain earlier judgments of the Supreme Court the right to open confrontation was treated as absolute, in latter judgments such as Maryland vs. Craig (1990) 497 US 836, the Court agreed that the right was not absolute and accepted evidence through closed circuit television to be given by a juvenile victim.

Position in India

(A) Constitutional Provisions and Interpretation:

The Indian Constitution does not contain any express provision that criminal trials must be open public trials nor does it contain anything like the First Amendment of the US Constitution which contains a confrontation clause. However, these crucial aspects relating to due process in criminal procedure have been derived by our Courts by way of interpretation of Art 21 of the Constitution. Art 21 reads as follows:

> "Art 21: Protection of life and personal liberty:
>
> No person shall be deprived of his life or personal liberty except according to procedure established by law."

Though earlier decisions of the Supreme Court interpreted Art 21 as requiring merely a 'procedure established by law', whatever be its fairness there was a new turn in Maneka Gandhi's case 1978(1) SCC 240 where the Supreme Court held that the Constitutional mandate in Art 21 required a procedure which was 'fair, just and reasonable'. It has since been held in a number of cases that the procedure must be fair. (Police Commissioner Delhi vs. Registrar, Delhi High Court: AIR 1997 SC 95). It has been held that the trial must be a public trial. Vineet Narain vs. Union of India : AIR 1998 SC 889.

In addition, the right to a public trial is based on the right to 'freedom and expression' which is contained in Art 19(1)(a) of the Constitution of India which has been interpreted to include the freedom of press (Express Newspapers vs. Union of India: AIR 1958 SC 578) and the right of the public to know (Dinesh Trivedi vs. Union of India: 1997(4) SCC 306 and to publish the same.

Article 22 of the Constitution guarantees that the accused has a right to consult and to be defended by a legal practitioner of his choice.

(B) Code of Criminal Procedure, 1973:

The Code of Criminal Procedure, 1973 incorporates certain provisions of the ICCPR above stated, into our domestic law, in relation to open public trial.

In fact, such provisions were also there in the Code of Criminal Procedure, 1898 and have been replaced by similar provisions in the Code of 1973.

We shall refer to some of the important provisions of the Code of Criminal Procedure, 1973 to show that while the accused has a right to open public trial in his presence, that right is, however, not absolute.

(i) Section 273 prescribes that the 'evidence must be taken in the presence of accused'. It is, however, clear that this right is not absolute. Section 273 reads as follows:

"Section 273. Evidence to be taken in presence of accused:

Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceedings shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Explanation: In this section, 'accused' includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code."

(ii) Section 327 of the Code of Criminal Procedure, 1973 bears the heading: 'Court to be open'. It reads, in so far as it is material in the present context, as follows:

"Section 327: Court to be open: (1) The place in which any criminal Court is held for the purpose of inquiry into or trying any offence shall be deemed to be an open Court, to which the public generally have access, so far as the same can conveniently contain them."

But this right to open trial is not absolute. There are a number of exceptions. Some of the exceptions are detailed below.

(a) Under the proviso to subsection (1) of sec 327 it is stated as follows:

"provided that the presiding Judge or Magistrate may, if he thinks fit, order, at any stage of any injury into or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court."

(b) Subsection (2) of sec. 327 deals with exceptions (in case of sexual offences) from the provisions of subsection (1). It is provided therein that in the case of inquiry into or trial of rape (sec. 376) and other sexual offences (ss 376A, 376B, 376C, 376D) of the Indian Penal Code, 1860 the same shall be conducted in camera and in such inquiry or trials, the Court may permit any 'particular person' to have access to, or be or remain in, the room or building used by the Court.

(c) In regard to the in camera proceedings referred to in subsection (2) of sec 327, it is declared that it shall be not lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the Court.

(d) Certain publications of identity of victim of rape punishable under the Code:

Section 228A of the Indian Penal Code, 1860 prescribes punishment if the identity of the victim of rape is published.

(e) In Shakshi vs. Union of India 2004(6) SCALE 15, the Supreme Court held that where a video screen is employed during recording of the evidence

of a victim, the provisions of sec 273 requiring evidence to be recorded in the presence of the accused is deemed to have been satisfied.

(f) Section 299 of the Code also indicates certain exceptions. It bears the heading 'Record of evidence in absence of accused'. This covers cases where accused has absconded or where there is no immediate prospect of arresting him.

(iii) Section 173(5) states that when the Police Report is filed under section 173 into the Court, the police officer shall forward to the Magistrate along with the Report -

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely, other than those already sent to the Magistrate during investigation;
(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.
But there is an exception under section 173(6).

Under sec 173(6) of the Criminal Procedure Code, 1973 which refers to the 'Report of Police officer on completion of investigation' (Charge-sheet), there are certain exceptions statutorily recognized. The subsection (6) reads as follows:

"Section 173(6): If the police officer is of opinion that any part of any such statement (i.e. statement under sec 161) is not relevant to the subject matter of the proceedings or that its disclosure to the

> accused is not essential in the interest of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request."

(iv) Under sec 317 of the Code, inquiries and trials can be held in the absence of the accused in certain cases where the Judge or the Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in the Court.

(v) Procedure for examination and cross-examination of witnesses is specified in the Code. Section 231(2) of the Code provides that at the trial in the Court of Session, the prosecution may produce its evidence on the date fixed and the defence may cross examine or the date of cross-examination may be deferred. Section 242(2) permits cross-examination by accused in cases instituted on police report and trial under warrant procedure is by magistrates. Section 246(4) provides for cross-examination of prosecution witness in trials of warrant cases by Magistrates in cases instituted otherwise than on police report. But witnesses can now be examined by video conference procedure as per the judgment of the Supreme Court in Praful Desai's case 2003 (4) SCC 601.

Summary:

Thus, the above provisions of the Code of Criminal Procedure, 1973 would show that neither the right to an open public trial nor the right of examination of the prosecution witnesses in the immediate presence of the accused are absolute. There are a good number of exceptions as shown above.

There are some other special laws in force in our country which also provide exceptions to the right of the accused for open public trial as against the right of the victim for a fair trial. The State has also an interest in the fair administration of justice. That interest of the State requires that victims and witnesses depose without fear or intimidation and that the Judge is given sufficient powers to achieve that object. This is the overriding principle referred to by Viscount Haldane in Scott vs. Scott (1913) AC 417.

In the case of special statutes concerning terrorist-trials, or unlawful activities, the Indian Parliament has already come up with some special procedures which perform the balancing Act. We shall refer to them in the next chapter (Chapter III).

Chapter III

Certain aspects of Victim and Witness Identity Protection under special statutes in India

For the first time in 1985, the legislature thought it fit to introduce the principle of 'witness identity' protection in certain special statutes, and this started with the statutes to prevent terrorist activities. We shall now refer to them.

Certain Special Statutes: Protection of Witness Identity:

(i) Terrorists and Disruptive Activities Act, 1985: (TADA) (since repealed) introduces witness anonymity for the first time.

In the year 1985, Parliament enacted the TADA to deal with terrorist activities and it rightly felt that unless sufficient protection is granted to victims and witnesses, it is not possible to curb the menace. Sec 13 of that Act provides a procedure to protect witness identity. It read as follows:

> "Section 13(1): Notwithstanding anything contained in the Code, all proceedings before a Designated Court shall be conducted in camera:
>
> Provided that where public prosecutor so applies, any proceedings or part thereof may be held in open court.
>
> (2) A Designated Court may, on an application made by a witness in any proceeding before it or by the public prosecutor in relation to a witness or on its own motion, take such measures

as it deems fit for keeping the identity and address of the witness secret.

(3) In particular and without prejudice to the generality of provisions of sub section (2), the measures which a Designated Court may take under that subsection may include –

(a) the holding of the proceedings at a protected place;

(b) the avoiding of the mention of the names and address of witnesses in its order or judgments or in any records of case accessible to public;

(c) the issuing of any directions for security that the identity and address of the witnesses are not disclosed.

(4) Any person who contravenes any direction issued under subsection (3) shall be punishable with imprisonment for a term which may extend to one year and with fine which may extend to one thousand rupees." (emphasis supplied)

(ii) The Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA 1987) continues witness anonymity subject to conditions:

The 1985 Act was replaced by the 1987 Act with some changes. We do not propose to extract the section, namely sec 16, but shall refer only to the changes introduced.

The provisions of sec 16 of this Act of 1987 were similar to those in sec 13 of the TADA, 1985 with a few changes. Under sec 16 of the new Act, it is not mandatory in all cases of trials in relation to terrorist acivities to conduct the proceedings before the Designated Court in camera. The

Court is given discretion to do so wherever the circumstances so desired. Again sec 16(3)(d) empowered the Court to take measures in public interest so as to direct that information in regard to all or any of the proceedings pending before the Court shall not be published in any manner.

The validity of sec 16 was challenged but was upheld in Kartar Singh vs. State of Punjab: 1994(3) SCC 569.

(iii) Prevention of Terrorism Act, 2002: (POTA), 2002
Continues witness anonymity with conditions: (since repealed w.e.f. 21.9.2004)

The TADA, 1987 was repealed by POTA, 2002. In the POTA, section 30 deals with the subject of in camera proceedings and witness identity protection. There are some further changes made in this Act in respect of the powers of the Court. Section 30 reads as follows:

> "Section 30: (1) Notwithstanding anything contained in the Code, the proceedings under this Act may, for reasons to be recorded in writing, be held in camera if the special Court so desires.
>
> (2) A Special Court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.

(3) In particular, and without prejudice to the generality of the provisions of subsection (2), the measures which a Special Court may take under that subsection may include –

(a) the holding of the proceedings at a place to be decided by the Special Court;

(b) the avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to public;

(c) the issuing of any directions for securing that the identity and address of the witnesses is not disclosed;

(d) a decision that it is in public interest to order that all or any of the proceedings pending before such a Court shall not be published in any manner.

(4) Any person who contravenes any decision or direction issued under sub section (3) shall be punishable with imprisonment for a term which may extend to one year and with fine which may extend to one thousand rupees."

The changes brought into POTA, 2002 as contained in the sub section (1) and (2) are

(i) that the Court has to record reasons for holding the proceedings in camera and also for coming to the conclusion that the 'life of such witness is in danger'.

(ii) an additional clause (d) was added in subsection (3) that publication of Court proceedings may be prohibited in 'public interest' too.

The validity of the provisions of sec 30 has been upheld in PUCL vs. Union of India: 2003(10) SCALE 967.

We have discussed Kartar Singh's case and PUCL case in detail in paras 5.9 and 5.16 of the Consultation Paper respectively.

The POTA has been repealed by he Prevention of Terrorism (Repeal) Act, 2004, w.e.f. 21.9.2004.

(iv) The Unlawful Activities (Prevention) Amendment Act, 2004 amended (w.e.f. 21.9.2004)

Since the publication of our Consultation Paper in August 2004, the repeal of POTA took place and amendment to the Unlawful Activities (Prevention) Act, 1967, has been made w.e.f. 21.9.2004.

The Act applies to 'unlawful activities' and also to 'terrorist acts'. Section 2(f) of the Act defines 'unlawful activities' as follows:

> "2(f) : 'Unlawful activities', in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise) –
>
> (i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of the territory of India from the Union,

or which incites any individual or group of individuals to bring about such cession or secession;

(ii) which disclaims 'questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India';

(iii) which causes or is intended to cause disaffection against India."

Section 2(k) defines 'terrorist act' and says that it has the meaning assigned to it in sec 15. Section 15 defines 'terrorist act' and is a verbatim reproduction of the definition contained in sec 3 of the POTA, with the addition of words 'or foreign country' in three places.

Section 44 (1) to (4) of the above Act bears the heading 'Protection of Witness' and is in identical language as section 30(1) to (4) of the POTA, 2002. We do not, therefore, propose to repeat them. Obviously, for the reasons stated in the Judgment of the Supreme Court in PUCL, these provisions of sec 44 must be treated as valid.

(v) Juvenile Justice (Care and Protection of Children) Act, 2000 – Protection of identity of Juvenile

The Juvenile Justice (Care and Protection of Children) Act, 2000 provides for 'prohibition of publication of name, etc. of Juvenile involved in any proceeding under the Act' in sec 21 which reads as follows:

"Section 21: (1) No report in any newspaper, magazine, news-sheet or visual made of any inquiry regarding a juvenile in

conflict with law under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the Juvenile nor shall any picture of any juvenile be published:

Provided that for reasons to be recorded in writing, the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the interest of the juvenile."

(vi) Sexual Offences and Victim 'Screening':

The 172nd Report of the Law Commission (2002) accepts 'screening' procedure:

We have referred to this Report of the Law Commission in detail in para 4.5 of the Consultation Paper.

The subject of review of rape laws (172nd Report, 2000) was undertaken by the Law Commission in pursuance of a reference by the Supreme Court in Sakshi vs. Union of India. During the course of the study, it was urged before the Law Commission by NGO Sakshi that video-taped interviews and closed-circuit television be permitted to be used while recording evidence of victims of sexual offences, especially children and minors. It was urged that the procedure for trial of such cases must include

(i) permitting use of a video-taped interview of the child's statement, in support of the child's version;

(ii) allowing a child to testify via close-circuit television or from behind a screen to obtain a full and candid account of the acts complained of;

(iii) the cross examination of the minor being carried out by the Judge be based on written questions submitted by the defence upon perusal of testimony of the minor;

(iv) that whenever a child is required to give testimony, sufficient break to be given as and when required by the child.

The Law Commission considered these suggestions but did not accept the same. It referred to sec 273 of the Code of Criminal Procedure which states "except as otherwise expressly provided, all evidence taken in the course of a trial or other proceeding, shall be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader' and the Commission agreed for a screen to be put in between the victim and the accused. It suggested insertion of a proviso to sec 273 as follows:

> "provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross examination of the accused."

(viii) Victims and Witness screening: Sakshi vs. Union of India: 2004(6) SCALE 15:

After the 172nd Report was presented to the Supreme Court, it passed judgment in Sakshi vs. Union of India : 2004(6) SCALE. 15.

The Supreme Court in Sakshi vs. Union of India: 2004(6) SCALE 15 (26.5.2004) accepted 'video conferencing' and 'written questions' in sexual and other trials in the absence of a statute.

The Court accepted three of the suggestions made by SAKSHI before the Law Commission, namely,

(i) video-conferencing procedure, and
(ii) putting written questions to the witnesses.
(iii) sufficient break to be given while recording evidence

These were in addition to the 'screening' method suggested by the Law Commission in its Report.

By the date the Supreme Court decided SAKSHI, on 26.5.2004, the Court had in another case, the State of Maharashtra vs. Dr. Praful B. Desai: 2003(4) SCC 60) (which concerned allegations as to medical negligence), permitted the evidence of a foreign medical expert to be received by video-conferencing. In that case, the Supreme Court followed Maryland vs. Craig : (1990) 497 US 836 decided by the US Supreme Court.

In Sakshi, the Supreme Court, while following Praful B. Desai case, accepted that such evidence by video conference must be treated to be in compliance with requirements of sec 273 which states that all evidence in the course of the trial or other proceedings shall be taken "in the presence of the accused" and it does not mean that the accused should have full view of the witness. The Supreme Court observed in Sakshi (p 34):

"Section 273 CrPC merely requires the evidence to be taken in the presence of the accused. The section, however, does not say that the evidence should have been recorded in such a manner that the accused should have full view of the victim or witnesses. Recording of evidence by way of video conferencing vis-à-vis sec 273 has been held to be permissible in a recent decision of this Court in State of Maharashtra vs. Dr. Praful B. Desai 2003(4) SCC 601."

The Supreme Court, after stating why the victims and witnesses should be allowed to give evidence in an uninhibited manner or by means of a screen interposed, gave the following among other directions (p 35):

"In holding trial of child sex abuse or rape:

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused.;

(ii) the question put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the presiding officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victims of child abuse or rape, while giving testimony in Court, should be allowed sufficient breaks as and when required."

It will be seen from the above directions of the Supreme Court in Sakshi that_video-conferencing and putting written questions, were accepted in addition to screening suggested by the Law Commission. It held that these procedures do not offend the provisions of sec 273 which requires a trial in the presence of the accused.

Summary:

Summing up the position, it will be seen that there are various facets of the criminal trial, namely, there is a right to open trial for the benefit of the accused and the public have a right to know about the conduct of the trial, and the accused has a right to have the trial conducted in his presence. But these rights are not absolute.

There are conflicting privacy rights of the victims of sexual offences violation of which by the media or others are subject to punishment. There are provisions for keeping identity of witnesses confidential when the police files its charge sheet in the Court. There are special statutes relating to trial of terrorists which contain provisions for protection of identity of witnesses, whose identity must be kept secret during inquiries as well as trials. There are recommendations of the Law Commission that in cases of sexual offences, a screen may be put between a victim (while the victim deposes) and the accused, so that the victim is more free and uninhibited while giving evidence. Finally the Supreme Court, in its Sakshi judgment, extended the procedures involving video-conferencing (a video circuit system) and the giving of a list of questions to the victims or witnesses, and stated that these

procedures do not violate the principle of the accused's right to an open trial in his immediate presence.

Barring the above special offences, the law as far as witness protection and victim identity protection is concerned, has not yet been extended to cover the cases of other serious offences where lives of witnesses or their close relatives or their properties may be equally in danger. So far such protection is confined to special cases of terrorism and sexual offences etc. Question is about extending such protection to cases of inquiries and trails of other serious offences. In fact, the extension of witness identity protection to other cases of serious offences was part of Question No.3 in the Questionnaire attached to the Consultation Paper.

Before considering the question of extending witness protection to witnesses in other cases relating to serious offences, we shall refer to the various responses received to the questions in the Questionnaire annexed to the Consultation Paper.

Chapter IV

Questionnaire in Chapter VIII of Consultation Paper: Responses

Before we take up discussion of the important issues, as already stated, it is necessary to analyse the responses to the Consultation Paper.

Responses to the Consultation Paper

We may state that the subject matter of Witness Anonymity and Witness Protection Programmes is directly connected with the procedural aspects of due process in the criminal justice system. Therefore, the Law Commission felt it necessary to obtain views and suggestions of all the important players in the criminal justice system. In order to elicit responses from all important agencies and persons on the relevant issues, the Commission circulated an exhaustive Consultation Paper along with its summary and questionnaire, in August 2004 and it was sent to the Union Government and all the State Governments, Directors General of Police of all States, Judges of Supreme Court and High Courts, Bar Associations, Human Right Commission of Union and States. Consultation Paper was also placed on Law Commission's website.

The Consultation Paper received widespread recognition not only within the country but outside the country also. Apart from the views expressed in various seminars, the Commission received fifty two responses in writing. Among the respondents, 11 were from the State Governments, 1 from State Law Commission, 12 from Directors General/Inspectors General

of Police, 3 from Judges of High Court and 2 from Judges of subordinate courts, 3 from International and other organizations, remaining 20 from Jurists, advocates, public prosecutors and other legal persons. More than 40 respondents have sent their reply to the questionnaire, while rest have sent their views/suggestions in a general fashion. Answers on each question given by the respondents are discussed below.

(Q) 1. Should witness anonymity be maintained in all the three stages of investigation, inquiry, trial and even at stage of appeal in a criminal case?

As we all know, criminal cases passes through three stages, i.e. investigation, inquiry and trial. After the conclusion of trial, the court pronounces the order/ judgment, and thereafter the stage of appeal/revision starts. If, in respect of a witness, anonymity is required to be maintained, the question arises whether it should be maintained at all the stages mentioned above or whether it should be only for a particular stage?

Most of the respondents (36 out of 43) have opined that anonymity should be maintained in all the three stages including the appellate stage. Not only this, among them 3 were of the view that anonymity should be maintained forever, i.e. even after the case is finally over. However, some of the respondents have suggested that anonymity should be maintained only in exceptional cases.

Justice Anoop V. Mohta of Bombay High Court is of the view that anonymity of witness is required only up-to trial stage and there is no need

of maintaining anonymity at the appellate stage. Same is the view of one Public Prosecutor from Hyderabad.

Lt. Col. S.K. Agarwal from Judge Advocate General branch has opined that anonymity should be maintained only during investigation, inquiry and at stage of committal proceedings, if any. But anonymity cannot be effectively maintained once the trial starts. Same is the view of an advocate from Hyderabad.

An Advocate from Tamil Nadu is of the view that anonymity can be maintained only during investigation stage and thereafter maintaining anonymity will affect free and fair trial. Contrary to it an Advocate from Maharashtra is of the view that anonymity can be maintained during inquiry and trial and appeal stage, but should not be maintained during investigation stage, as it will give undue power to police.

Another Advocate from Maharashtra, who is also member of Maharashtra State Law Commission is of the view that considering the social structure in India and the criminal judicial set up, practically it would not be possible to maintain anonymity at any stage of a case.

(Q) 2. Do you think witness anonymity should be confined to criminal cases or should anonymity be provided in civil case as well? Should it be extended to defence witnesses also, as done under some statutes in other countries?

In some countries, apart from the prosecution witnesses, defence witnesses can also seek anonymity. Similarly even witnesses in civil cases

in certain circumstances are also entitled to seek anonymity. Now the question arises whether in India also, defence witnesses and witnesses in civil cases be allowed to seek anonymity?

On the issue of extending the scope of witness anonymity to the defence witnesses as well as to witnesses in civil cases, opinion of respondents is divided.

Out of 41 responses, 24 are in favor that anonymity may be given to defence witnesses also while 17 respondents have opposed the idea of giving anonymity to defence witnesses. Among those 24, who have supported the idea, 6 are from State Governments, 7 are senior police officers (D.G. Police/ I.G. Police), and 3 are Judges, and 8 are others. Among 17 respondents, who have not favoured giving anonymity to defence witnesses, 4 are from State Governments, 4 are senior Police Officers, and 9 are others.

In respect of providing anonymity to witnesses in civil cases, only 19 respondents out of 41 have agreed while 22 respondents have opposed the idea of giving anonymity to witnesses in civil cases. Among those 19 respondents, who have agreed to the proposal, 5 are from State Governments, 5 are Senior Police Officials, and 2 are Judges and 7 are others. Among 23 respondents, who have not agreed to the proposal, 5 are from State Governments, 6 are from Senior Police Officials, and 1 is a Judge and remaining 13 are others.

(Q) 3. Can the provisions of sub-section (3) of section 16 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 or section 30 of the Prevention of Terrorism Act, 2002, which permit the Court to pass an order; -
avoiding the mentioning of the names and addresses of the witnesses in its orders or judgments or in any records of the cases accessible to public,
issuing directions for securing that the identity and addresses of the witnesses are not disclosed, or;
direct that, in public interest, the proceedings pending before the Court be not published in any manner, -
be made applicable to cases involving other grave offences where the Court is satisfied that there is material which prima facie shows danger to the life of the witness or to his relations or to their property?

Section 16 of the TADA, 1987 and section 30 of the POTA, 2002 permit the Court to pass an order for maintaining anonymity of witnesses and also for prohibiting publication of proceedings of the Court. Though both these enactments have been repealed, similar provisions have been brought into the Unlawful Activities (Prevention) Act, 1967 as section 44 vide amendments made in the year 2004.

Now question is whether similar provisions have to be made applicable in respect of cases involving grave offences, where even it is necessary to do so?

In all the responses (except one), it was opined that provisions similar to TADA 1987 & POTA, 2002, should also be made applicable in respect of cases involving grave offences, where there is danger to the life or property of witness or his relatives. However, DIG Police H.Q. Madhya Pradesh is

not in favour of such a provision. He has not given any reason in support of his answer.

(Q) 4. Do you agree that the existing safeguards for protection of victims of sexual offences and child abuse such as *in camera* proceedings and ban on publishing of any material relating to such proceeding under sec.327 of the Code of Criminal Procedure, 1973 are not sufficient and do you suggest any other methods for their protection?

Section 327 of the Code of Criminal Procedure, 1973 empowers the court to conduct the trial of sexual offences in camera. Court can also order prohibiting publication of any material in respect of such cases. Question is whether these and other existing safeguards are sufficient to protect the victims of sexual offences and child abuse?

Opinion on the issue as to whether existing safeguards available to the victims of sexual offences and child abuse are sufficient or not, is again divided. 22 out of 42 respondents are of the view that existing safeguards are sufficient. Among them 5 responses are from State Governments, 3 are from Judges, 5 are from senior Police Officers and remaining 9 are others. Rest of the respondents (20) are either are not satisfied with the existing safeguards, or have given further suggestion to improve the conditions of victims of sexual offences. Among these 20 responses, 5 are from State Governments, 6 are from senior Police Officers, and remaining 9 are others.

State Government of Jharkhand has given many suggestions for improving the conditions of victims, such as maintaining anonymity of victims of sexual offences and child abuse, providing adequate police

protection to them, shifting them from their place of residence to some other safe place, allowing video tape interview of such persons, testifying in court via closed circuit television or erecting a screen between victim and accused, cross examination by Presiding Officer on the basis of questions already given by the accused, and that giving threat or intimidation to victims or her relatives by the accused be made an offence punishable to seven years imprisonment, creating a separate directorate with proper infrastructure for securing the object of giving protection to these victims.

State Government of Orissa has suggested that observations and directions of the Supreme Court made in Sakshi vs Union of India (2004) 6 SCALE, 15 may be taken into consideration for protection of these victims and that section 273 of the Cr.P.C., 1973 be suitably amended.

Government of National Capital Territory of Delhi has suggested that the prosecutrix should be protected from the direct view of the accused as well as his counsel, questions should be submitted to the Judge, who in turn will ask the questions from the prosecutrix, and the statements should be recorded in the local language of the prosecutrix.

State Government of Bihar is of the view that in such cases, the trial Judge, and the advocates for the prosecution and defence should be female, so that victim may speak with comparative ease. As the victim would narrate the occurrence with ease, she would not consider the ordeal of facing cross-examination to be even worse than rape itself.

State Government of Manipur has suggested that besides the existing safeguards, system of witness anonymity and Witness Protection Programmes should be applied in such proceedings.

D.G. Police of Manipur has suggested that directions given by the Supreme Court in *Sakshi* case should be incorporated in the Cr.P.C. itself.

D.G. Police of Haryana State, has suggested that victims of sexual offences should be provided psychological treatment at State expense in order to make them mentally and physically fit.

An Advocate who is also member of Maharashtra State Law Commission has suggested that at the stage of investigation of such matter, judicial supervision should be there so that guilty may be punished. Such type of law is in existence in the country of Kosovo.

Legal Adviser/PP, Intelligence Dept A.P. is also of the view that directions issued by the Supreme Court in Sakshi case be incorporated in Sec. 327 of Cr.P.C., 1973.

South Asia Regional Initiative/Equity Support Program, an organization has sent a draft of Victim/Witness Protection Protocol, which is drafted by an expert group.

(Q)5. Would it be sufficient if the Commissioner of Police or Superintendent of Police seeks anonymity for the witness by certifying the danger to the life or property of the witness or his relations or should it be for the Judge to decide, on the basis of evidence placed

before him, that the life or property of the witness or relation is in danger?

Anonymity to the witnesses can only be provided when there is danger to life or property of the witness or his relations. Now the question is, whether the existence of danger certified by higher police official like Commissioner or Superintendent of Police should be sufficient or the Judge himself should decide this issue on the basis of material placed before him?

There is no unanimity on this issue as well. 19 respondents (3 Judges, 6 State Governments, 3 Police Officers, and 7 others) are of the view that this issue should be decided by the Judge himself on the basis of material placed before him, while 17 respondents (6 Police Officers, 2 State Governments and 9 others) are of view that certificate given by the Senior Police Officers are sufficient.

Three respondents (Union Territory of Lakshadweep, D.G. Police Gujarat State and an Advocate) however, are of the view that Judge as well as Police Officers both can decide this issue.

In contrast to it, two respondents, (State Government of Punjab and an Advocate) have opined that this issue should be referred to an independent committee, and should not be decided either by Judge or Police Officers.

(Q)6. Should there be a preliminary inquiry by the Judge on the question whether the case of a witness is a fit one where anonymity should be granted or not? In such a preliminary inquiry should the

identity and address of the witness be kept secret? Should the accused or his lawyer be heard at that stage on the question of danger to life or property of the witness or relatives or, should it be an ex parte inquiry in camera? Will it serve any useful purpose in giving opportunity to the accused/defence lawyer, particularly where the identity and address cannot be revealed in such preliminary inquiry?

As stated above, anonymity to a witness can only be given when there is danger to the life or property of witness or his relations. In order to determine the need of anonymity and existence of such a danger question is whether Judge should hold a preliminary inquiry? And if so, whether accused or his lawyer be heard or it should be an ex parte inquiry in camera?

Among the 40 responses, which the Commission has received on this issue, 24 (7 Senior Police Officers, 5 State Governments 3 Judges and 9 others) are of the view that there should be a preliminary inquiry by the Judge. State Governments of Manipur, and Meghalaya, D.G. Police Manipur and also of Punjab are of the view that such preliminary inquiry is needed only in exceptional cases, and not in all cases. State Governments of Punjab and also of Orissa have opined that such preliminary inquiry be done by Police Officers and not by the Judge.

However, 10 respondents (State Government of Jharkhand, D.G. Police of Gujarat State and 8 others) are not in favour of any such preliminary inquiry.

Most of the respondents who are in favour of holding such preliminary inquiry are of the view that in such inquiry, identity of the witness should be kept secret and it should be done *ex parte in camera.*

(Q) 7. Should the witness satisfy the Judge, in the said preliminary inquiry, that his life or that his relations or their property is in serious danger or is it sufficient for him to show that there is 'likelihood' of such danger? Is his mere ipse dixit on the question of danger sufficient to deny the accused the right for an open trial in the physical presence of the witness?

Here the question is, whether in the preliminary inquiry (mentioned in Q. 6) the witness should satisfy the Judge about existence of danger to his life or property, or that of his relatives or is it sufficient for the witness to show 'likelihood' of such danger?

In all, 32 respondents, have given their opinion on this issue. Among them 20 (7 Senior Police Officials, 5 State Governments, 1 Judge, and 7 others) are of the view that in the said preliminary inquiry, the witness should satisfy the Judge about danger to his or his relations life or their property. Mere likelihood of danger is not sufficient to seek anonymity.

12 respondents (1 Police Officials, 4 State Governments, 2 Judges and 5 others) however, are of the view that the witness may only be required to show likelihood of danger to life or property of himself and that of his relations. There is no need for him to satisfy the Judge about actual existence of such a danger.

7 respondents have not given any opinion on this issue, as they are not in favour of holding such a preliminary inquiry at all.

(Q) 8. Should the complainant or the prosecution be required to file an application before the trial judge for non-disclosure of identity and address of the witness prior to the stage when copies/the documents are supplied to the accused under sections 207, 208 of the Code of Criminal Procedure, 1973?

As per sections 207 and 208 of the Code of Criminal Procedure, 1973, the Magistrate is required to supply free of cost to the accused, copies of police report and other documents, or copy of complaint and statement of witnesses. These documents necessarily contain name and address of witnesses. And if once accused get these copies, he will definitely know who the witnesses are? In such a situation, an order of anonymity will be of little use. In this regard, the question is, should prosecution or the complainant be required to file an application for non-disclosure of identity of witnesses, prior to the stage of supply of such copies to the accused.

All the respondents, except three advocates, have opined that complainant or prosecution be required to file an application before the trial judge for non disclosure of identity of witnesses, prior to the stage of supply of copies of documents to accused under sections 207 and 208 Code of Criminal Procedure, 1973.

(Q) 9. Should the Court, if it accepts the request for anonymity, direct that the identity and address of the witness be not reflected in the documents to be given to the accused and should it direct that the original documents containing the identity and address be kept in its safe custody and further direct that the Court proceedings should not reflect the identity and address of the witness?

Documents, which are required to be given to the accused, contain name and address of witness. If the Court accepts the request for anonymity, it is necessary that their names and addresses should not be reflected in the said documents, otherwise the purpose of anonymity will be frustrated. For this purpose, an order of the Court will be required. Further, the original documents, which contain the identity of witness are, also required to be kept in safe custody.

All the respondents, except one lawyer, were of the view that if the Court accepts the request for anonymity, it should direct that identity of witness should not be reflected in the documents to be supplied to the accused. Further, the Court should also direct that original documents, containing the identity of witnesses should be kept in safe custody. Further, the Court should also ensure that identity of such witness should not be reflected in Court proceedings.

(Q) 10. At the trial, if the Judge is satisfied about the danger to the witness, should the recording of statement of the witness be made in such a manner that the witness and the accused do not see each other and the Judge, the prosecutor and the defence counsel alone see him (using two cameras)? Should the witness who is shown on the video-screen be visible only to the Judge, prosecutor and the defence counsel? Should the taking of photographs in Court by others be banned?

As per section 273 of the Cr.P.C., 1973, trial is to be conducted in the presence of the accused. When a witness is granted anonymity, and he is asked to depose in the presence of accused, his identity will be known to the accused. Therefore, it is necessary that in such cases the statement of the witness is recorded in such a manner that the witness and the accused do not

see each other. For this purpose either a screen may be erected or video conferencing facility may be followed.

Most of the respondents, except a few, are in favour of the proposals made in this question.

One Judge of A.P. High Court, has stated that ours is a poor country and cannot afford the luxury of engaging cameras and video-screen in each and every case where a witness expresses danger to his life. He further states that the time is not ripe in the Indian conditions to show the witness on video screen only to the Judge, prosecutor and defence counsel.

An Advocate who is also a member of the Maharashtra State Law Commission, has opined that recording of statement of a witness, in the absence of the accused or through video screen is not practicable in India and the existing system is to be continued. However, in certain circumstances, the place of trial can be fixed where danger to the life and property of the witness is less. In certain circumstances, statement of a witness can be recorded in the presence of defence lawyer only and the accused be not permitted to attend the same.

Another Advocate from Hyderabad has stated that at the time of trial the witness, the accused should be visible to each other, otherwise it will be violation of section 273 of the Cr.P.C.

(Q)11. In the above context, should the witness depose from a different room or different place, and should there be another judicial officer in that room to ensure that the witness is free while giving his evidence?

In order to conceal the identity of witness, he may be asked to depose from a different room or place where the accused is not present. It may be through video conferencing. In such a situation, it is also necessary that witness should depose freely. To ensure this, another judicial officer may remain present in the room or place from where the witness is deposing. Such a provision exists in Portuguese legislation no. 93/99 of 14th July 1999.

26 respondents (out of 41) have supported the proposal that the witness should depose from a different room or different place, and there should be another judicial officer present in that room to ensure that the witness is free while giving evidence. Among these 26 responses, 8 are from State Governments, 6 are from Police Officers, 2 are from Judges and remaining 10 are others.

5 respondents (a Judge from A.P. High Court, State Government of Manipur, I.G. Police Sikkim, and 2 advocates) are of the view that the witness should depose from a different room, but there is no need of another judicial officer in that room.

D.G. Police, Manipur has opined that either a screen may be provided or arrangement may be made where the witness does not see the body or face of the accused so that the witness is able to depose about the entire incident in a free atmosphere without any hesitation and fear.

I.G. Police Assam is of the view that the Judge may record the statement of the witness in his office chamber instead of the court.

However, 7 respondents (State Governments of Bihar and Meghalaya, D.G. Police Mizoram, and 4 others) are not in favour of the proposal altogether. However, the State Govt. of Bihar in its response has stated that the proposal is impracticable. It stated that there is already an acute shortage of judicial officers. It will be a complicated affair and expensive too.

(Q)12. Should the public and media be allowed at such trials subject to prohibition against publication? What should be the quantum of punishment for breach of this condition?

As per sec. 327 (1) of the Code of Criminal Procedure, 1973, all criminal trials are to be held in open court, where any person can have access to the room or building where the trial is being conducted. But the proviso below this sub-section empowers the Magistrate or the Judge, to prohibit public generally, or any person from access to the place of trial. Now the question is, whether public and media be allowed in such trials where anonymity to witness is granted; or whether they should be prohibited? Another point is, if the media and public are allowed, whether there should be prohibition against publication of court proceedings?

Out of 40 responses, 28 (7 State Governments, 3 Judges, 7 senior police officials and 11 others) are of the view that in cases where anonymity to witnesses is granted, public and media should not be allowed to remain present during the trial.

Remaining 12 (3 State Governments, 3 police officials and 6 others) are of the view that media and public may be allowed to remain present in such trials. However, Govt. of NCT Delhi has opined that there should be prohibition to carry cameras, in such trials. State Government of Bihar is of the view that only public should be allowed and not media. In respect of prohibition from publication of court proceedings, all respondents are of the view that there should be prohibition in respect of publication of court proceedings.

Most of the respondents are of the view that there should be severe punishment for breach of condition. In respect of quantum of punishment, there is no unanimity. Each respondent has suggested different quantum of punishment.

(Q)13. Should the Court appoint an amicus curiae in every such case, where witness protection is to be or likely to be granted, to assist the Court independently both at the preliminary hearing referred to above and at the trial?

This is regarding appointment of *amicus curiae* in cases where witness protection is to be or likely to be granted. Here, question is whether it should be appointed in every case or not?

In all 23 out of 39 respondents (3 State Governments, 8 Senior Police Officials and 12 others) have opined that *amicus curiae* should be appointed in each case where witness protection is to be or likely to be granted, to assist the court independently both at the preliminary hearing and at trial.

In 7 responses (4 from State Governments, 2 others and one Judge of High Court), it is suggested that *amicus curiae* may be appointed only in exceptional cases, and not in all cases.

However, in 9 responses (3 from State Governments, 1 from Police official, 2 from Judges and 3 others) it is stated that there is no need to appoint *amicus curiae* in any case.

(Q)14. Should the method of distorting the facial image and voice of the witness be followed while recording evidence through video-link, in such cases?

In some countries, for example Portugal, there is a provision that where evidence is recorded through video-link, the facial image and voice of the witness may be distorted so that his identity may be kept secret. Whether such a kind of provision is necessary in our country or not?

26 respondents have supported the idea that method of distorting facial image and voice of the witness should be followed while recording evidence through video-link. Among these 26 responses, 5 are from the State Governments, 9 are from senior police officials, 2 are from Judges and 10 are from others. State Governments of the NCT Delhi, while agreeing with the proposal, has also suggested that it should be done in the presence of experts and the experts should be cited as witnesses. The Judge concerned should verify the presence of the witness deposing. An NGO, namely SARI has opined that it is important that the victim/witness be able to effectively identify the accused persons during trial. After the

identification, for the rest of the testimony, victim/witness should be screened from the accused persons. Distorting of facial image/voice distortion could be resorted to at the discretion of the judge on case-to-case basis.

The State Government of Bihar is of the view that method of distorting the facial image or voice distortion of the witness may not be practicable in all such cases where evidence is recorded through video-link. Such a method may be followed rarely.

The State Government of Tripura is also of the view that such method may be adopted in exceptional cases of grave nature.

13 respondents, (3 State Governments, 1 Judge of High Court, 1 Police Official and 8 others) however, are of the view that such a method of distortion of facial image and voice distortion of the witness should not be followed.

(Q.)15. Should the identity and address of the witness be kept confidential throughout the inquiry and trial (or after trial too) and in all the Court proceedings upto the stage of judgment or should they be disclosed just at the commencement of the examination of the witness? If it is just at the commencement of evidence then, in case the evidence is not completed in one hearing, is there not the chance of the witness being threatened by the date of next or subsequent hearing?

Here the question is that upto what stage identity and address of witness should be kept secret? Whether it should be kept secret upto the stage of judgment or it can be revealed just before beginning of examination

of witness in the court? But if identity and address is disclosed just before examination of witness is to begin, then a problem may arise in cases where examination is not completed on that particular date, and the witness may be threatened by the date of next hearing. In this context what should be the stage where identity may be disclosed?

In response to this question, most of the respondents (34 out of 40) have opined that, identity of the witness should be kept confidential in all the stages of case. It should not be disclosed at the time of examination of such witness. Not only this, some respondents have also suggested that identity should be kept secret even after judgment is pronounced. Among these 34 respondents, 8 are from the State Governments, 10 are from higher Police Officials, 2 are from Judges and 14 are from others.

Spl. Commissioner of Police, Intelligence & Operations, Police H.Q., New Dehi is of the view that in some cases keeping the anonymity of the witness is not much relevant after he has been examined in the court and his identity may be made known after his deposition including cross examination is over. However, in some cases permanent witness anonymity may be needed.

5 respondents, however, have opined that identity of witness should be disclosed before his examination in court begins. Among these 5responses, 1 is from State Government, one from a High Court Judge, and three are from others.

(Q)16. Instead of examining the witness through the video-link procedure, will it be sufficient if a list of questions is handed over to the Court with a request to the Court to put those questions to the witness? Will it preclude fair and effective cross-examination, if the accused or his counsel is thus confined to a set list of questions and without the normal advantage of putting questions arising out of the answers of the witness to particular questions?

In a normal trial, it is the practice that during examination of a witness in court, the prosecutor and the defence counsel put questions to the witness for answer. But in order to preclude the accused and his counsel from seeing the witness, it is sometimes suggested that a list of questions may be handed over to the Court with a request that the Court may put those questions to the witness. Here the question arises whether such a procedure will be able to qualify the test of 'fair trial' which requires effective cross examination? Because in this procedure, the defence may not be able to put all those questions which may arise out of the answers given by the witness.

Most of the respondents are not in favour that a list of questions be handed over to the Court. Such a procedure, as stated by respondents, will adversely affect right of accused to effectively cross examine the witness.

Only 5 respondents (2 Police Officials, 1 Judge and 2 others) are in favour that list of questions may be given to the Court and the Court may put these questions to the witness.

On the other hand, 28 respondents (6 State Governments, 8 Police Officials, 2 Judges of High Court, and 12 others) have opposed the idea of submitting list of questions to the Court.

7 respondents, however, are of the view that such a procedure can be adopted only in a few cases, like offences against women and child, or other serious offences, and not as a routine course. Among these 8 responses, 2 are from State of Governments, 3 are from Police Officers, and 2 are from others.

(Q)17. Merely because the Court has refused to grant anonymity at preliminary hearing referred to above, is the witness to be precluded subsequently from seeking anonymity or protection at the trial, even if there are fresh circumstances warranting an order in his favour?

There may be cases where at the time of preliminary hearing, there may not be sufficient material before the court for making order of anonymity or protection to witness. But, subsequently if fresh circumstances warrant anonymity or protection, question arises whether witness should be allowed to seek anonymity or protection due to changed circumstances?

All the respondents are of the view that if fresh circumstances warrant, witness should not be precluded from seeking anonymity or protection subsequently.

The State Government of West Bengal, however, stated that there will not be any use of seeking anonymity protection at the trial stage if the identity of the witness is already disclosed earlier.

One Lt. Col. from the JAGs Department, Army, is also of the view that granting anonymity at later stage of trial will serve no useful purpose, however, the witness may be granted protection at later stage also.

(Q)18. Can the defence be allowed to contend that the prosecution witness who is given anonymity is a stock witness?

Normally, the defence is entitled to contend that a particular prosecution witness is a stock witness. But, when a prosecution witness is given anonymity, the defence may not be able to know the actual identity of such witness. In such cases, whether the defence be allowed to contend that such prosecution witness (who is given anonymity) is a stock witness?

There are mixed responses on this issue. In all 17 respondents have opined that the defence be allowed to contend that the prosecution witness who is given anonymity is a stock witness. Among them, 5 responses are from senior police officials, 2 are from State Governments, 1 from a Judge, and 9 are from others. Apart from this, 4 respondents (all are others) are of the view that though the defence may be allowed to contend that the witness is a stock witness, but the burden should be on the defence to prove that such witness is a stock witness. Further, 3 respondents (1 Judge of a High Court, 1 Police Official and 1 State Government) have opined that the defence may be allowed only if in a given case, circumstances warrant to allow the defence to contend that the witness is a stock witness.

15 respondents (4 Police Officials, 6 State Governments, 1 Judge and 4 others) are of the view that the defence should not be allowed to contend that the prosecution witness who is given anonymity is a stock witness.

2 respondents (1 senior police official and 1 State Government), however, are of the view that the court itself should decide this issue.

(Q)19. Should the tele-link and display on video be conducted only by a technical officer of the judicial branch and not by a police officer or other public servant and not by outsourcing to a private contractor?

As stated in questions number 10, 11 and 14, in certain circumstances, the statement of a witness may be recorded by video conferencing. This facility certainly requires services of technical personnel. Now question is, whether these technical personnel should only be from the judicial branch or they may be other public servants or police officers? Further, whether these technical personnel may be outsourced from a private contractor? This aspect is important because it may affect the impartiality and fairness in the trial.

Majority of the responses (28 in number) suggest that only technical officer of the judicial branch and not any other police officer or public servant should conduct tele-link and display on video. Among these 28 responses, 8 are from the police officials, 6 are from the State Government, 3 are from the Judges and 11 are from others.

Two State Governments and one other person have opined that these technical staff may be either from the judicial branch or they may be other

public servants. However, two other State Governments are of the view that technical staff should be under the control of the judiciary.

One police officer has stated that the tele-link and video display should be conducted in such a way to ensure that the identity of the witness is not compromised whosoever may be conducting the same. Three other persons are also of the view that it can be conducted by anyone.

Two police officers and two other persons have simply stated that it should be conducted only by technical persons.

(Q)20. Should these technical staff be located at one place in each State and move to the concerned Court whenever there is request, as it is not possible to provide such facilities for each Court or group of Courts in the districts?

As stated above, technical staff will be required to conduct tele linking and video display. Each State consist of many districts and divisions, and in each district or division, there may be number of courts. As it may not be possible to have separate technical staff for each Court or group of Courts, it is suggested that these technical staff may be located at one place in each State, and they may move to the concerned Court as and when there is a request from such Court.

More then fifty percent responded (22 in number) are in favour of the suggestion that these technical staff may be located at one place in each State. Among them, 6 responses are from the State Governments, 8 are from police officers, 2 are from Judges and 6 are from others.

15 respondents are of the view that these technical staff should be located at district /divisional head quarter. Even among them some (3) are of the view that there should be separate technical staff for each court or group of courts. Among these 15 responses, 4 are from the State Governments, 2 are from police officers, 1 is from a Judge and 8 are from others.

One Police Officer has suggested that the High Court of the State may decide where these technical staff is to be located.

Two advocates have opined that there is a need to recruit Judicial Officers who are experts in technology or to give training to them.

(Q)21. Should the order as to witness anonymity, for the purpose of preliminary inquiry, be passed only by Sessions Court and not by any other Court subordinate thereto?

This relates to the issue as to which Court should have power to pass an order as to witness anonymity. Whether the Sessions Court should alone have power and whether other Courts subordinate to Sessions Court should not have such power?

In all 24 respondents (5 State Governments, 6 Police Officials, 1 Judge and 12 others) are in favour that only Sessions Court should have power to pass the order as to witness anonymity and no other court subordinate to Sessions Court should have such a power.

15 respondents (4 State Governments, 5 Police Officials 2 Judges and 4 others) however are not in favour that only Sessions Court should have such power to order as to witness anonymity. Among them, 9 respondents are of the view that concerned trial court should have such power to order witness anonymity. Remaining 6 respondents are of the view that each court should have such a power.

State Government of Punjab has opined that an independent agency should decide the issue. 2 other respondents have suggested that senior police officers preferably with consultation of Sessions Judge should have such a power.

(Q)22. Against the order granting anonymity to a witness, should the law provide a right of appeal to the High Court fixing a time frame of one month from the date of service, for disposal of the appeal?

This is regarding whether the law should provide a right of appeal to the High Court against the order of granting anonymity to a witness? Further whether there should be a time frame of one month for disposal of such appeal.

Majority of the respondents (28 in number) are in favour of providing such a right of appeal to the High Court with a time frame of one month for disposal of appeal. Among them 5 are State Governments, 8 are Police Officers, 2 are Judges and 13 are others. However, one High Court Judge and an advocate are of the view that instead of appeal there should be a right of revision.

14 respondents (5 State Governments, 3 Police Officers, 1 Judge and 5 others are not in favour of providing any right of appeal.

(Q)23. Any other suggestions not covered by the above?

Respondents were asked to give their some other suggestions, if any, relating to witness anonymity on the points, which are not already covered in the questionnaire. Many respondents have submitted their suggestions. Some of the important suggestions/views are stated below.

Justice Anoop V. Mohta, Judge, High Court of Bombay stated that the Criminal Procedure Code, 1973 provides the procedure, whereby, on an application of the prosecution or of the defence, the Judge/Magistrate may issue summons to any witness directing him to attend or produce any document or thing. According to Justice Mohta, the list of witnesses to whom summons are required to be issued, should be submitted secretly before the commencement of trial. If it is submitted openly, the purpose of providing anonymity would be frustrated. The Judge/ Magistrate after considering the issue of anonymity, may issue summons secretly and direct the concerned witness to attend the Court on a fixed date. He has stated that if we want to protect the witness and his family from intimidation and/or threats, care has to be taken at the initial stage of submitting the list of witnesses. He further states that list of witnesses or the names of witnesses may be disclosed to the accused only on the date when the trial is fixed.

Justice Mohta is also of the view that if in respect of a witness, a case for keeping anonymity is made out, his statement under section 161 or 164

Cr.P.C. may be recorded in the presence of a Magistrate and may be kept that statement secret. Such statement may be disclosed or opened only just before the commencement of the trial.

Justice Ch. S.R.K. Prasad, Judge High Court of A.P. stated that the statute cannot into account every circumstance that arises for application of anonymity. It should always be left to the discretion of the courts. He further says that before implementing any programme, necessary infrastructure and wherewithal has to be furnished. Simply passing legislation will not deliver the necessary results.

State Government of Orissa through its Law Department has opined that in respect of anonymity there should not be any general provision viz., where punishment is more than seven years, such type of offence will come under the purview of the proposed law. Anonymity or protection should be extended to the cases involving drugs, elections, smuggling etc. where interest of community at large is involved. It is further stated that the Supreme Court has upheld the validity of section 30 of the POTA since that Act is special one.

Director General of Police, Punjab has suggested that in cases where witnesses have been given anonymity or protection, it should be ensured that their statements are recorded on the date when they are summoned and no adjournment should be granted since repeated adjournments may at some stage lead to disclosure of the identity of the witness.

D.G. & I.G. of Police, Gujarat State is of the view that where a witness feels that his religion, cast or creed will be viewed adversely by the Prosecution lawyer appointed by the State or the credibility of the prosecution lawyer appointed by the State is doubtful and also where the State has a fundamentalist party heading its governance, the witness should have a right to fetch his own lawyer (to be paid by the State Government- and this fund should be at the disposal of the judiciary).

South Asia Regional Initiative/Equity Support Program (NGO) has submitted a victim/witness protocol to prevent and combat trafficking of women and children in India. According to it the custody/identity/location of victims of trafficking should not be handed over or made public until an effective home study has been submitted by the Child Welfare Committee. Further, the identity and location of decoy customer should remain confidential and should not be disclosed by the investigating officer. The victim should not be taken/ transported in the same vehicle in which accused is taken.

An advocate from Aurangabad (Maharashtra) has suggested that there should be some provision for “habitual anonymous witness”. Witnesses who comes forward to depose as an anonymous witness, once or twice often against the same accused in different cases, or where the said witness comes repeatedly on behalf of one and same police station, he may be treated as “habitual anonymous witness”. In these cases, an undertaking should be taken from such witness that he does not possess any ill-will or enmity against the accused.

Chapter V

Need for extension of Victim Identity Protection generally to cases of serious offences triable by Court of Session

Having referred to the responses to the Questionnaire, we shall now deal with some of the important issues.

The subject of this chapter is important and is part of Question No.3 of the Questionnaire.

In Chapters II and III, we have traced the development of the procedure in criminal law in relation to inquiries and trials in Courts. We have seen that while there are some general provisions with regard to open public trial and the right of the accused to have the witnesses against him or her examined in his or her presence, these rights of the accused are not treated as absolute. There are indeed specific types of special cases of protection to (a) victims in sexual offences against publicity, (b) victims and witnesses in cases of terrorist acts, in respect of their identity during inquiries and trials. In the case of sexual offences, the Supreme Court in Sakshi agreed that using video-screens cannot be treated as diluting the right of the accused for examination of witnesses in the presence of the accused.

But barring these special provisions, the legislature has not so far actively considered the problems of victim protection and witness identity protection during inquiries and trial in the case of witnesses deposing in

'serious offences' such as murder, dowry deaths, rape, offences against the State, kidnapping, abduction, mischief by fire or explosives, dacoity, etc. falling within the Indian Penal Code, 1860 which are triable by Courts of Session where their lives or property may be equally in danger.

It appears to be accepted today that such protection to victims and witnesses can no longer be confined to special cases of terrorists or sexual offences against women and juveniles because even in the case of grave offences like murder, dowry-deaths, rape, dacoity, kidnapping and abduction etc., there can be serious problems for victims and witnesses who give evidence in inquiries or trials.

Serious offences: Need for protection of victims and identity of witnesses

Such a need for protection of identity of victims and identity of witnesses in the case of serious offences has been felt in several countries and the protection has been extended to inquiries and trials of serious offences under the ordinary penal codes. Witnesses turning hostile on account of threats having increased in the cases of such crimes, protection appears to have become necessary.

(i) Consultation Paper

In para 3.7 of the Consultation Paper, it was stated by us as follows:

"In recent times, the cases where witnesses are turning hostile at trial due to threats, is no longer confined to cases of terrorism. Even in

other types of offences falling under the Indian Penal Code or other statutes, this phenomenon has reached alarming proportions. There is, therefore, need, as in other countries, to generally empower the Court in such cases – where muscle power, political power, money power or other methods employed against witnesses and victims – for the purposes of protecting witnesses so that witnesses could give evidence without any fear of reprisals and witnesses do not turn hostile on account of threats of witnesses. That indeed is the purpose of this Consultation Paper."

(ii) Several judgments of Courts have applied protection principle to witnesses in serious offences who suffer from fear or threats:

There are several judgments of Courts visualizing the need for protection of victims and witnesses generally in the case of serious offences which do not belong to the above special categories referred to in the earlier chapters.

The Supreme Court of India stated, as long back as 1952 in Gurbachan Singh v. State of Bombay (AIR 1952 SC 221), while ordering externment of the accused and directing him to be shifted to a different place (viz.) Amritsar (later modified for being shifted to Kalyan), observed that such an order was permissible under sec. 27 of the Bombay Police Act, 1902. In respect of offences in Chapters XII, XVI or XVII of the Indian Penal Code, 1860, or abetment of such offences, where 'witnesses are not willing to come forward to give evidence in public on account of apprehension for 'safety of their person or property', it was permissible to

pass such orders under that Act. The Court said: "Such orders could be passed in the interest of the general public and to protect them against dangerous and bad characters whose presence in a particular locality may jeopardize the peace and safety of the citizens". This was a general case and not a case relating to terrorists or sexual offences.

In Talab Haji Hussain v. Madhukar Purushottam Mondka: AIR 1958 SC 374, the Supreme Court observed that 'witnesses should be able to give evidence without inducement or threat either from the prosecutor or the defence'. If 'any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the High Court to secure ends of justice' to prevent suborning or intimidation of witnesses or obstruction of a fair trial'. The Court based the principle on the 'inherent powers' of the High Court. This too was a general case not concerned with terrorism or sexual offences.

Even though Kartar Singh v. State of Punjab 1994 (3) SCC 569 related to trial of terrorists (TADA), there are general observations of the Supreme Court in regard to 'fear of harassment' of witnesses which needs to be prevented.

In Swaran Singh v. State of Punjab: AIR 2000 SC 2017, the Supreme Court described the plight of witnesses who were not only threatened but are maimed, or are done away with or even bribed. This was again a general case.

Likewise, though PUCL v. Union of India 2003 (10) SCALE 967 was dealing with the terrorist (POTA), there are general observations as to the protection of victims and witnesses so that they can give evidence without fear.

The concept of a fair trial was explained in NHRC v. State of Gujarat: 2003 (9) SCALE 329 to mean that the trial must be fair not only to the accused but also to the victims. Protection of victims and witnesses becomes necessary in several cases. (The above case was a case of a serious offence under the Indian Penal Code).

The Delhi High Court in Ms Neelam Katara v. Union of India (Crl. WP 247 of 2002) (dated 14.10.2003) issued guidelines for witness protection in a case relating to alleged murder. In the guidelines framed, the word 'accused' was defined as follows:

> "Accused means a person charged with or suspected with the commission of crime punishable with death or life imprisonment"

We have referred to the detailed guidelines laid down by the Delhi High Court to the above case in para 5.14 of the Consultation Paper and do not propose to repeat them.

It is clear that the Delhi High Court felt that if the offences were such that they attracted a maximum punishment of death or life sentence, witness protection may become necessary.

A recent case relating to serious offences under the Indian Penal Code, 1860 where the Supreme Court emphasised the need for protection of witnesses is the one in Zahira's case 2004 (4) SCALE 373.

(iii) Provisions in other jurisdictions which generally deal with witness protection:

(a) To start with, Art. 14(1) of the ICCPR and Art. 6(1) of the European Convention permit restrictions in case there is 'prejudice' to administration of justice. Impliedly, they permit witness protection as an exception. In our view, the scope for the said protection applies both to special offences as well as general ones provided there is proof of 'prejudice' to the administration of justice.

The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Indian Penal code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no

reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Indian Penal Code, 1860. It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several general statutes in other countries provide for victim and witness protection.

(b) The best example of general protection is the New Zealand Evidence Act, 1908 as amended by the Evidence (Witness Anonymity) Amendment Act, 1997. The protection that sec. 13B to 13J visualize, is applicable to all indictable offences and is, therefore, not offence specific but is witness specific (see sec. 13B and sec. 13C). Sec. 13C(4) of the above Act states that the Judge may, make an anonymity order, if he is satisfied that:

> "(a) the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to the property, if the witness's identity is disclosed; and
>
> (b) either
>
> (i) there is no reason to believe that the witness has a motive to be untruthful having regard (where applicable) to the witness's previous convictions or the witness's relationship with the accused or any associates of the accused; or
>
> (ii) the witness's credibility can be tested properly without the disclosure of the witness's identity; and
>
> (c) the making of the order would not deprive the accused of a fair trial"

(c) On the same lines, the Portuguese Act No.93 of 1999 speaks of 'witness protection' and sec. 16 thereof requires that identity of witnesses may not be disclosed if the witnesses or their relatives or other persons in close contact with them 'face serious danger of attempt to their lives, physical integrity, freedom or property of considerable high value' where the offences attract a sentence of imprisonment of 8 years or more, or under ss. 169, 299, 300, 301 of the Criminal Code and sec. 28 of the Cabinet Order No.15/93 dated 22nd January. The section requires that the witness' credibility is beyond reasonable doubt and has probative value.

(d) The provisions of sec. 2A(1)(b) of the Australian Evidence Act, 1989 deals with 'special witnesses' who are described as persons suffering from trauma or are likely to be intimidated or to be disadvantaged as witnesses. Special arrangements can be made by the court in their favour including exclusion of public or the accused from the Court. Video-taped evidence can also be allowed.

(e) We shall refer to a few cases decided in other countries dealing with victim protection and witness identity protection generally.

In England, such a general principle of administration of justice was laid down in Marks v. Beysus: (1890) 25 QBD 494.

In Cain v. Glass: (NUL) (1985) NSWLQ 230 McHugh JA said that the principle of anonymity was applicable not only to police informers but that the said principle applied even to persons other than registered informers.

The Supreme Court of Victoria (Australia), in Jarvie & Another v. The Magistrate's Court of Victoria at Brunswick: 1995 (1) VR 84 held that the Magistrate had the 'jurisdiction' to pass anonymity order in favour of all witnesses and that the power was not confined to undercover police officers. It applied

> "to other witnesses whose personal safety may be endangered by the disclosure of their identity"

The Court laid down four propositions of which proposition (2) reads as follows:

> "(2) the same policies which justify the protection of informers as an aspect of public immunity also justify the protection of undercover police officers. However, the claim to anonymity can also extend to other witnesses whose personal safety is endangered by disclosure of their identity."

Summary and conclusion:

Thus, while it is the common law rule that the accused has a right to know the names and addresses of prosecution witnesses so that he may inquire whether the witnesses were competent to give evidence in regard to the offence and so that he may exercise his right of cross-examination, the said right is not absolute. It has to be balanced against the rights of the victim and other prosecution witnesses so that they can depose without any

fear or danger to their lives or property or to the lives or property of their close relatives. In such cases, the victim can be permitted to depose with an intervening screen or through video-link so that he need not face the accused; and the prosecution witnesses may depose by an arrangement under which the accused will not be able to see them and their identity will not be disclosed to the accused or his lawyer. In either case, the Judge will be enabled to see the victim or the prosecution witness while they are deposing.

We may reiterate that today it is accepted that the need for protection of victims and witnesses is not necessarily confined to cases of terrorism, or sexual offences against women or children in respect of whom special statutes exist so that they may give evidence without fear and the prosecution witnesses may also depose without fear. The principle has been extended generally to cases of serious offences where the Court is satisfied that there is evidence about the likelihood of danger to the lives or property of the victim or to their relatives or to the lives or property of the witnesses or of their relatives. No doubt, it is also accepted that this procedure must be resorted only in exceptional circumstances and provided further the Court is satisfied that the victim or witness's evidence is credible. It must be further assured that the Judge while deciding about the guilt of the accused must not be weighed against the accused merely because an anonymity order is passed or a victim is given protection.

The Judge must be satisfied, as held in Accused (CA 60/97) (1997) 15 CRNZ 148 (at 156) (NZ) (CA) that

(1) a substantial risk of serious harm to a witness exists;

(2) the risk should not be undertaken; and

(3) there is no reasonably practicable alternative means of avoiding the risk or lessening it to an acceptable level.

Factors (2) and (3) require "assessment bearing in mind any possible detrimental effect which may result to an accused … by the particular order envisaged". The right to a fair trial to the accused must be treated as relevant when the Judge exercises his jurisdiction to pass such orders in a criminal case. It is also necessary to bear in mind that the fears or dangers to the victims or witnesses or to their relatives or property must be proved in the individual facts of each case.

We have stated that victim and witness protection must be available to all cases where offences are 'serious'. What is the meaning of the words 'serious offences'. We propose to describe them as offences triable by Court of Sessions. The criterion obviously is the nature of the offence and the procedure for the trial.

The Code of Criminal Procedure provides for four types of procedures. They are

(a) Trial before a Court of Session (Ch XVIII);

(b) Trial of warrant cases by a Magistrate (Ch XIX);

(c) Trial of summon cases by a Magistrate (Ch XX);

(d) Summary trials (Ch XXI).

Schedule 1 of the Code classifies cases according to the Court by which they are triable. The Court of Session is the highest Court on the criminal side. Obviously, cases relating to offences which are serious are classified as triable by Courts of Sessions.

There may also be Courts equivalent in rank as Sessions Courts and also Special Courts dealing with serious offences.

Therefore, in our view, all criminal cases relating to offences under the Indian Penal Code, 1860 or under special laws, if they are exclusively triable by a Courts of Session, or by Courts equivalent in rank to Courts of Session or by Special Courts trying serious offences, then they must be treated as ‘serious’ cases for purposes of victim and witness protection.

Chapter VI

Inherent power of the Criminal Court to protect Victims and witnesses & Position in India

One of the other important issues relates to the power of the Criminal Courts to grant victim or witness identity protection. It is based on the 'inherent power' of the Court to pass orders as to such protection or whether such a power has to be conferred by statute?

We shall refer to the relevant case law on the subject.

(a) UK:

The House of Lords in Attorney General v. Leveller Magazine 1979 AC 440 clarified that the Court can pass anonymity orders in respect of witnesses under its 'inherent power'. The Court described the prosecution witness not by his name but as 'Colonel B'. It was held that there can be exceptions to the rule of open trial, because the rule as well as the exceptions were both in the interests of administration of justice. Though the Court could pass orders as to anonymity without legislation or rules made therefor, the legislature could also legislate on the subject. Lord Diplock stated (at p. 450) as follows:

> "However, since the purpose of the general rule is to serve the ends of justice, it may be necessary to depart from it where the nature or circumstances of the particular proceedings are such that the

application of the general rule in its entirety would frustrate or render impracticable, the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rules. Apart from statutory exceptions, however, where a Court in the exercise of its inherent power to control the conduct of proceedings before it departs in anyway from the general rule, the departure is justified to the extent and to no more than the extent that the Court reasonably believes it to be necessary in order to serve the ends of justice" (emphasis supplied)

In the course of the judgment, Lord Diplock referred to the decision of the Court of Appeal, New Zealand in Taylor v. Attorney General: 1975 (2) NZLR 675 to the effect that the Court had inherent power to make an order directing to what extent the proceedings should or should not be published outside Court.

'Inherent power of Court' was also emphasized in R vs. Murphy (1980) (see para 6.2.10 of the Consultation Paper)

(b) Australia:

In Australia, the principle of 'inherent power' appears to be the basis of the orders passed by Courts as to 'anonymity' of witnesses. This is clear from the fact that these orders were passed in the absence of statutory powers. In the Consultation Paper (see para 6.3.7), we summarized the Australian position as follows:

> "Summarising the position, the Courts in Australia have agreed that in cases where there is evidence of likelihood of danger or harm to the witnesses, or their families, the Court has inherent power to grant orders as to anonymity and this procedure is not confined to serious cases of terrorism or police informers or extortion or police undercover agents. What is material is the proof of reasonable likelihood of danger to the witness. Such a procedure for screening and anonymity is held to be consistent with the right of the accused for fair trial. Video taped evidence is also admissible"

The Supreme Court of Victoria in Jarvie & Another v. The Magistrate's Court of Victoria at Brunswick and others: 1995 (1) VR 84 declined to follow the Queensland decision in R vs. The Stipendiary Magistrate a Southport ex parte Gibson: 1993(2) Qd. R. 687. The Court held that it could grant anonymity orders to two undercover police officers at the stage of committal proceedings under inherent powers. It was held that though, on facts, the trial Court did not grant such an order, nevertheless the Court did have the 'jurisdiction' to make such orders. The Court's order was applicable at the stage of committal proceedings as well as trial. The Supreme Court held that the principle was not limited to undercover police officers. It applied also to:

> 'other witnesses whose personal safety may be endangered by the disclosure of identity'

In Witness v. Mausden & Another: 2000 NSW (CA) 52, in a defamation action, the Court of Appeal (Heydon JA, Mason P and Priestly

JA) set aside an order of the trial Court and granted anonymity holding that the right to open trial can be subjected to a 'minimalist interference' by granting anonymity orders.

(c) New Zealand:

In their commentary on New Zealand Bill of Rights, authors Paul Rishworth, et al (Oxford Univ Press, 2003) state (p. 697):

> "The traditional requirement that witnesses testify in the Courtroom and in sight of the accused has been modified both by statute and by the exercise of a trial Judge's inherent jurisdiction at common law"

But, the law in New Zealand, initially was the other way, the courts taking the view that it was for the legislature and not for the courts to create exceptions to the principle of open justice. In respect of undercover police officers, Richardson J stated in R v. Hughes: 1986 (2) NZLR 129 (CA) that any relaxation would be a 'slippery slope' and the right to open trial would be 'emasculated' as held by the US Supreme Court in Smith v. Illinois: (1968) 390 US 129. But the minority judgment delivered by Cook P and Mc Mullen JJ took the opposite view and based it on the 'inherent jurisdiction' of the Court.

The legislature, in deference to the views of the minority introduced sec. 13A into the New Zealand Evidence Act, 1908 by sec. 2 of the Evidence (Amendment) Act, 1986 giving powers to the Courts in two types of cases – those involving drug offences under the Misuse of Drugs Act

(1975) (exceptions 7 and 13) and offences tried on indictment where sentence could be more than 7 years imprisonment.

When the question of witnesses other than police informers came up in R v. Coleman and others (1990) 14 CRNZ (2002) 258, Bargavanath J followed the spirit of the 1986 Amendment, in a pre-trial decision, following the UK cases in R v. DJX, CCY, GGZ (1990) 91 Cr. App Rep 36 and R v. Watford Magistrates ex-parte Lehman (1993) Crl LR 253. In Coleman's case, at the time of trial, Robertson J followed Bargawanath J. But thereafter, in R v. Hines: (1997) 15 CRNZ 158, the Court of Appeal refused to relax the view it took earlier in R v. Hughes and stated that it was for the legislature and not for the Courts. Gault and Thomas JJ dissented and observed that the right to grant anonymity was part of the 'inherent power' of the Courts.

Meanwhile, the New Zealand Bill of Rights, 1990 came in stating in sec. 25(f) about the right of cross-examination is a 'basic right'. Art. 25(f) refers to:

> "The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution"

In a rape case, the Court of Appeal clarified in R v. L (1994) (2) NZLR 54 that the right to cross-examination was not absolute and an earlier deposition of the rape victim (who died) could be put against the accused.

In order to resolve the problem created by R vs. Hines, the Legislature enacted ss. 13B to 13J into the Evidence Act, 1908 by the Evidence (Witness Anonymity) Amendment Act, 1997 making the protection applicable to all witnesses whose lives were 'likely' to be endangered.

After the amendment of 1997 in R v. Atkins 2000 (2) NZLR 46 (CA), the provision of the ss. 13B to 13J introduced in 1997 came up for consideration and the provisions of the Amendment were explained. We have referred extensively to this judgment in para 6.4.7 of the Consultation Paper. This is the position in New Zealand.

(d) Canada:

The Canadian Courts have laid down the principle of "innocence at stake" as part of the 'inherent power' jurisdiction. The Canadian Constitution Act, 1982 contains the Charter of Rights and Freedoms in Part I. Sec. 7 speaks of personal integrity, and states:

> "Sec. 7: Personal Integrity: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"

Sec. 11(d) speaks of 'fair public hearing':

> Sec. 11: Fair trial: Every person is
> (a) … … …

(b) … … …

(c) … … …

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal"

The principles laid down by the Canadian Supreme Court in R vs. Dunette 1994(1) SCR 469 appear again to be based on 'inherent power' of the Courts. The Supreme Court held that the right to fair public trial was not treated as absolute. Relaxation was permissible in favour of granting anonymity only if the Crown showed that disclosure of identity would prejudice the interests of informants, or of innocent persons or of the law-enforcement authorities and also showed that such prejudice outweighed the interests of the accused.

In R v. Khela: 1995 (4) SCR 201, it was the case of identity of a police informer. Sec. 24(1) of the Charter was relied on for the accused. Sec. 24(1) deals with 'access to Courts' and sec. 24(2) says that 'where in proceedings under sec. 24(1), a Court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The question in the above case was about the denial of cross-examination of an 'approver' and at the time of cross-examination, the witness wore a 'hood' to ensure his safety. The Supreme Court held that if there was danger to the person's life, his name and address need not be

disclosed till just before trial. In the first round that went upto the Supreme Court, the Court passed an order directing disclosure of anonymity of the witnesses. In the second round, the Supreme Court held that the earlier order had to be implemented or the Crown must seek modification of the earlier order of the Supreme Court if it had fresh material to say that the life of the informant was endangered.

In R v. Leipert: 1997 (1) SCR 281, the Supreme Court held that the accused who sought to establish that a search warrant was not supported by reasonable grounds, was entitled to the information pertaining to the identity of the informer if the information was 'absolutely essential'. The accused had to establish that 'innocence was at stake'. Otherwise, the informer's identity must be protected in as much as certain schemes enabling voluntary submission of information would fail if the informers were not granted anonymity. On the facts of the case, the Supreme Court granted anonymity as the accused failed to prove that informer's identity was essential to prove his innocence.

In R v. Mentuck: 2001 (3) SCR 442, the Supreme Court allowed anonymity of the undercover police officers to prevent 'serious risk' to the 'proper administration of justice'. However, the Court refused to ban disclosure of the operational matters used in the investigation of the accused.

The above case law from Canada and the absence of any statute in this area, shows that the Supreme Court was indeed enunciating that anonymity orders could be passed under the inherent power of the Courts.

(e) South Africa:

In South Africa, sec. 153 of the Criminal Procedure Code permits in camera proceedings at the discretion of the Court and sec. 154 permits prohibition of publication of certain information relating to criminal proceedings. The South African Law Commission has published Discussion Paper 90 (2000) Project 101 which deals with these aspects. The right of cross-examination is basic in South Africa but the Courts are of the view that it is not absolute either under the common law or statute law. In S v. Leepile: 1986 (4) SA 187 (W), the Court permitted witnesses to give evidence from behind closed doors. In S v. Pastoors 1986 (4) SA 222 (W), the Court allowed witness identity to be kept confidential as there was a 'real risk'. In the absence of a statute, obviously such orders were being granted under 'inherent power' of the Courts.

(f) USA:

In USA, the dissenting view of White J in Smith v. Illinois: (1968) 390 US 129 that 'it is appropriate to excuse a witness from answering questions about his or her identity, if the witness's personal safety was endangered', slowly became the law in latter cases starting with Maryland v. Craig: (1990) 497 US 836, where evidence by way of close-circuit television was accepted as valid. It was held nonetheless that the right to confront accusatory witnesses may be satisfied, absent a physical, face-to-face confrontation or trial only where denial of such confrontation is

'necessary to further an important public policy' and only where the testimony's reliability was otherwise answered. The case related to child-abuse and to the victim's evidence. Obviously, such orders were passed under 'inherent powers'.

(g) European Courts of Human Rights:

The European Court of Human Rights too felt in the cases of Kostovski (1989), Vissier (2002) and Fitt (2000) that if the national Courts felt that anonymity was necessary, the European Court would not interfere. (see para 6.8 of the Consultation Paper)

Summary:

The above case law of various countries, in our view, clearly establishes that the Court has 'inherent power' to pass orders of anonymity in the larger interests of administration of justice. Either the Courts declared they were exercising 'inherent power' or they were otherwise passing such orders presumably under inherent powers. That was on the basis that the Court has inherent power to regulate its proceedings in such a way that administration of justice does not suffer and that as part of that policy, the Court has to balance the right of the accused for open public trial and the right of the accused for cross-examination, in the interests of the victim or accused. No doubt, the Courts should not easily breach the rights of the accused unless it felt that the interests of the victim or witnesses required that identity or face-to-face confrontation needed to be protected. Though the liberty of the accused and due process are basic, still the rights

of the accused are always liable to be balanced against the need for protection of the interests of the victim and witnesses for a fair trial. For that purpose the Court may, under its inherent powers, grant protection to the identity of witnesses, or allow the victim to depose behind a screen or impose a ban on publication of identity of witnesses against the press and media. The Court may permit the accused to watch the victim while deposing but may screen the accused from the victim. It may allow the witnesses who require protection to depose by closed circuit television so that the Judge and the defence counsel may observe the demeanour of the witnesses. No doubt, in a preliminary inquiry, it has to be proved that such a special order is necessary for protecting the life and property of the victim, witnesses or their close relatives.

INDIA:

Peculiar Position in India: Under the Code of Criminal Procedure, 1973, trial courts have no inherent jurisdiction: Only High Court has inherent powers:

In this context, we may state that under sec 482 of the Code of Criminal Procedure, 1973, it is declared that, nothing in the Code, shall be deemed to limit or affect the inherent powers of the High Court. This is an obvious declaration that in criminal matters, the High Court has inherent jurisdiction. But, curiously the position of the other criminal courts like the Magistrate's Courts and the Courts of Session is different.

The absence of such a provision in the Code saving the inherent power in so far as Sessions Courts and Magistrates' Courts are concerned, has led the Supreme Court to conclude that these subordinate Courts do not

have inherent powers. This position was made clear by the Supreme Court in Bindeswari Prasad Singh vs. Kali Singh: AIR 1977 SC 2432.

Therefore, whatever be the position in other countries, criminal Courts at the trial stage, like the Magistrates' Courts and Sessions Courts in our country cannot pass orders as to 'anonymity' of witnesses under inherent powers. Therefore, legislation is necessary to confer powers on these Courts to pass 'anonymity' orders.

While it is true that Courts whose inherent powers are accepted or recognized can pass witness anonymity orders under those inherent powers, the Courts of Sessions and Courts of Magistrates in our country cannot pass 'anonymity' orders unless such powers are conferred by the legislature.

Chapter VII

Procedure for deciding on anonymity of witnesses in India – (i) during investigation and at inquiry; and (ii) during trial

As stated earlier, it is essential that there should be a procedure for granting anonymity (i) during investigation and (ii) during inquiry and (iii) also during trial. But we are, however, confining ourselves with cases triable by a Sessions Court and other equivalent special Courts in which witness anonymity may be necessary.

Before we refer to the procedure (see under (D) below), we shall first refer to the existing procedure under some special statutes and the procedure and certain case law in other countries on the subject.

(A) Procedure under earlier special statutes in India

Though sec 16(2) and (3) of the TADA (1987) and sec 30 of the POTA, 2002 and sec 44 of the Unlawful Activities (Prevention)Act, 1967 (as amended in 2004) contain certain provisions for granting witness anonymity, the threshold procedure was with Designated Court or Special Court under these respective Acts.

But as we are now dealing with offences to be tried exclusively by the Sessions Court and other equivalent special Courts, we have to ensure that there is a procedure at the three stages mentioned above, so that, where

necessary, the identity of the witnesses can be directed to be kept confidential.

We have already stated in Chapter III that the POTA provisions of 2002 were an improvement on the TADA provisions of 1987. In the POTA, 2002, sec 30 laid down the witness anonymity procedure as follows:

> "Section 30: Protection of Witnesses: (1) Notwithstanding anything contained in the Code, the proceedings under this Act may, for reasons to be recorded in writing, be held in camera if the Special Court so desires.
>
> (2) A Special Court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.
>
> (3) In particular, and without prejudice to the generality of the provisions sub section (2), the measures which a Special Court may take under that sub section may include:
>
> (a) the holding of the proceedings at a place to be decided by the Special Court;

(b) the avoiding of the mention of the names and addresses in its order or judgment or in any record of the case accessible to the public;

(c) the issuing of any directions for securing that the identity and address of the witnesses are not disclosed;

(d) a decision that it is in the public interest to order that all or any of the proceedings pending before such a Court shall not be published in any manner.

(4) Any person who contravenes any decision or direction issued under sub section (3) shall be punishable with imprisonment for a term which may extend to one year and with fine which may extend to one thousand rupees."

On repeal of POTA, these provisions have now been incorporated in the Unlawful Activities (Prevention) Act, 1967 by the amendments of 2004.

There are some drawbacks in the procedure formulated in the above special Acts. The provisions do not refer to the danger to the life of the witness's relatives or to danger to property of witness or relatives. They do not contemplate the passing of an order by the Court but state that reasons for granting anonymity should be "recorded" in writing. There is, therefore, need for specific provisions that a witness anonymity order be passed where the life or property of the witness or the life or property of his or her relatives are in danger. It is necessary that an order of the Court be passed in as much as it is not sufficient if the Court merely "records" its reasons in its file. Care must be taken while drafting the order that the

identity of the witness to whom anonymity is granted is not disclosed in the order of the Court.

(B) Procedure in other countries: (UK, Australia, New Zealand)

We shall now refer to a few decisions from other countries in this context which deal with the procedural aspects.

In R vs. David, Johnson and Rowe : 1993(1) WLR 613, it was held that the non-disclosure can be permitted in ex parte proceedings.

In Jarvie & Another vs. The Magistrate's Court of Victoria at Brumwick and Others : (1995)1 V.R. 84 (Victoria, Australia), the Court held that the trial Courts order was applicable at the stage of committal as well as the trial.

In New Zealand in R vs. Hines: (1997)15 CRNZ 158, the majority, as already stated, felt that if witness anonymity was to be given, it was a matter for legislation. But, Gault and Thomas JJ dissented and held that there was no need for legislation and that the Court could grant anonymity under inherent powers. They, however, stated that the Court must grant anonymity except where the witness's credibility was 'reasonably in issue'. They felt that the witness's fear must be real and justified and that the accused is not to be easily deprived of a fair trial. The need for granting anonymity must be decided in a 'voir dire' proceeding.

We have already stated that the New Zealand Parliament enacted sections 13B to 13J under the Evidence (Witness Anonymity) Amendment Act, 1997. This Act provided for a preliminary or rather voir dire proceeding for dealing with the issue. These provisions, in our view, contain a fair balancing of rights of witnesses and victims on the one hand and the rights of the accused on the other, and can be a model on the basis of which we can suggest changes to suit our conditions.

The New Zealand provisions provided for an anonymity order to be passed at the pre-trial stage (sec 13B), and at the stage of trial (sec 13(C). We shall first refer to these provisions before we suggest the modifications.

(1) Section 13B, which related to the pre-trial anonymity stated in sub section (2) as follows:

> "Sec 13B(1): ……
>
> ……..
>
> (2) At any time after the person is charged, the prosecutor or defendant may apply to a Judge for an order
>
> (a) Excusing the applicant from disclosing to the other party prior to the preliminary hearing the name, address and occupation of any witness (except with the leave of the Judge), any other particulars likely to lead to the witness's identification; and
>
> (b) Excusing the witness from stating at the preliminary hearing his or her name, address and occupation and (except with leave of the Judge) any other particulars likely to lead to the witness's identification.

Further, at the pre-trial stage, section 13B(3) states that the hearing must be in chambers and the Court must hear both sides and the identity shall, of course, be disclosed to the Judge. Sec 13B(3) states as follows:

> "Section 13B(3) The Judge must hear and determine the application in Chambers, and
>
> (a) The Judge must give each party an opportunity to be heard on the application; and
>
> (b) Neither the party supporting the application nor the witness need disclose any information that might disclose the witness's identity to any person (other than the Judge) before the application is dealt with.

(2) Section 13C, at the stage of trial, is on the same lines as sec 13B and we need not again extract the provisions of sec 13C.

Analysing the same, it is clear that in New Zealand, the procedure at the pre-trial stage, (i.e. after the accused is charged of the offence), required that an application for anonymity be filed by the prosecutor for granting anonymity prior to the preliminary hearing and also for exempting the witness from stating his identity at the preliminary hearing. The Judge has to hear the matter in chambers and give an opportunity to the applicant (prosecution) as well as to the accused. The prosecutor and the witness need disclose identity of witnesses only to the Judge and none others. The section as it is drafted there applies even to an application for anonymity of a defence witness. If the prosecution files an application for grant of anonymity in respect of a witness at the pre-trial stage, it is obvious that

before the application is taken up for hearing in chambers, the witness's identity must not be disclosed to the accused. Otherwise, the very purpose of the application is lost. Once the Judge deals with the application of the prosecution in chambers as above stated, he has to pass an order under sec 13B(4) if the Judge believes that there are 'reasonable' grounds that

> "(a) the safety of the witness or of any other person is likely to be endangered or there is likely to be serious damage to property, if the witness's identity is disclosed prior to trial; and
>
> (b) withholding the witness's identity until the trial would not be contrary to the interests of justice."

This in New Zealand is the role of the Judge at the pre-trial preliminary hearing application filed by the prosecution. But the Judge has some more duties. The Judge, as stated in sec 13B(5), has to have regard to six other factors:

(a) the general right of an accused to know the identity of witnesses; and

(b) the principle that witness anonymity orders are justified only in exceptional circumstances; and

(c) the gravity of the offence; and

(d) the importance of the witness's evidence to the case of the party who wishes to call the witness; and

(e) whether it is practical for the witness to be protected prior to the trial by any other means; and

(f) whether there is other evidence which corroborates the witness's evidence."

If the Court at the pre-trial stage grants anonymity, then under sec 13B (6), the following consequences follow, namely:

"(a) the prosecution must give the Judge the name, address and occupation of the witness; and

(b) the witness may not be required to state in Court his or her name, address or occupation; and

(c) during the course of the preliminary hearing –

(i) no oral evidence may be given, and no question shall be put to any witness, if the evidence or question relates to the name, address, or occupation of the witness who is subject to the order; and

(ii) except with leave of the Judge, no oral evidence may be given, and no question may be put to any witness, if the evidence relates to any other particulars likely to lead to the identification of the witness who is subject to the order; and

(d) No person may publish in any report or account relating to the proceeding, the name, address or occupation of the witness or any particulars likely to lead to the witness's identification.

Similarly, in New Zealand, sec 13C provides for an order at the trial and virtually the same procedure under sec 13B is incorporated in sec 13C also. We do not propose to extract sec 13C provisions again.

It will be clear that subsection (6) of sec 13B and subsection (6) of sec 13C ensure that, even after trial, the anonymity continues.

Section 13J creates offences for intentional breach of the provision of sec 13B and 13C and we recommend the same to be adopted.

Chapter VIII

Stage at which identity of witness has to be protected – investigation, pre-trial or trial and post-trial

The next important question that has to be considered is as to the stage at which the witness identity protection is to be granted in our country. We must make it clear that our proposals in this Report deal only with 'serious offences', namely, those triable by a Sessions Court or equivalent designated/Special Court.

There is some distinction between protection to victims on the one hand and witnesses on the other.

(a) In several cases, the victims may be known to the accused but this is not an absolute rule. There may be cases where the victim may not be known to the accused such as a case in which there is an indiscriminate firing by the accused. There may be several such situations. There may also be cases where the victim and the accused are known to each other.

(b) So far as witnesses other than victims are concerned, it is possible in most cases, that the accused does not know the witness. Barring close associates or eye-witnesses to the offence who may sometimes be known to the accused, most of the prosecution witnesses may generally be not known to the accused. It can also

> happen that in the matter of serious offences, not only the life but the property of the witnesses or their relatives may be in grave danger if the witness identity becomes known to the accused during investigation or during the inquiry or before the commencement of trial.

It is, therefore, necessary to deal separately with the stages of (A) investigation; (B) inquiry; (C) trial; and (D) post trial.

(A) Investigation:

This is the first stage. We are of the view that witness identity protection is necessary at the stage of investigation also. In fact, in the responses to the Questionnaire issued along with the Consultation Paper, it was stated in 36 responses out of 43 that such protection is necessary even at the stage of investigation.

There are certain stages of the investigation at which point the witness identity may get revealed to the accused and it is there that witness identity protection is necessary. We shall refer to the relevant steps in the investigation where such anonymity is necessary.

(1) Chapter XII of the Code of 1973 deals with 'Information to Police and their power to investigate'. (ss 154 to 176) Section 173 deals with the 'Report of Police Officer on Completion of Investigation'.

Section 173(1) states that the Report must contain

(a) name of the parties;

(b) nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case.

……

and sec 173(5) states that

(e) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(f) the statement recorded under sec 161 of all the persons whom the prosecution proposes to examine as its witnesses;

be filed along with the Report.

Further sub-section (6) states as follows:

"Sec. 173(6): If the police officer is of opinion that any part of any such statement is not relevant to the subject matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating the reasons for making such request."

(2) Again, under sec 164(6), the Magistrate recording a confession of the accused or statement of a witness shall forward the same to the Magistrate who inquires or tries the case.

Therefore, these provisions relating to certain stages of investigation show that the identity of witnesses may, unless protected, become known to the accused i.e. at the stage of recording statements under sec 161 or sec 164 or at the stage of filing of the charge-sheet under sec 173 into the Magistrate's Court. At these stages of investigation, protection of identity may become necessary in some cases.

The copies of the charge sheet, FIR, sec. 161 and 164 statements of the persons and other documents, as stated above, have to be given to the accused under sec 207 except where the Police under sec. 173(6) may request that those portions of the statements which disclose the identity of the witnesses be not granted. There may be a large number of cases where the police officer has not made a request under sec. 173(6).

As we propose to grant protection to witnesses in the cases of serious offences, namely, offences triable by the Sessions Court, it is obvious that even at the above stages of investigation adequate safeguards as to the non-disclosure of identity of the witnesses has to be considered and granted by the Magistrate. We have to devise a procedure and confer statutory power on these courts.

Procedure for 'Preliminary inquiry' for granting anonymity during Investigation:

(i) Where a police officer, before recording statements of witnesses under sec 161, feels that witness identity has to be protected, he must have the liberty to apply before the Magistrate concerned seeking permission to record the statement under a pseudonym subject to making the identity known only to the Magistrate.

(ii) However, where the identity is not kept confidential at the stage of recording the statement of witnesses as stated in (i) above but where the prosecution feels later during investigation, that it has to be kept confidential when copies of charge sheet and sec 161 statements etc. will be granted under sec 207, the police must be at liberty to apply to the Magistrate for such protection before the Magistrate takes cognizance of the offence.

(iii) There should be a preliminary inquiry, in camera, and at the stage of investigation, there is no need to hear the accused or giving him an opportunity.

We are proposing to provide such a procedure for seeking witness identity protection at the stage of investigation, by way of an application to be presented to the Magistrate under sections 4, 5 and 6 of the Draft Bill attached to this Report. This is so far as investigation is concerned.

(B) Preliminary inquiry during Inquiry as provided in Ch. 14 to Ch. 16 before the Magistrate:

(a) Chapter XVI of the Code of Criminal Procedure, 1973 is titled 'Commencement of Proceedings before Magistrates'. There are some sections in this chapter which are relevant on the question of identity of witnesses. Sec. 207, as stated above, deals with 'Supply of police report by the police and other documents'. The documents referred to in sec 207 are:

(i) the police report;
(ii) the first information report recorded under sec. 154;
(iii) the statement recorded under subsection (3) of sec. 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under subsection (6) of sec. 173;
(iv) confessions and statements, if any, recorded under sec. 164;
(v) any other documents or relevant extract thereof forwarded to the Magistrate with the police report under subsection (5) of sec. 173.

Section 208 likewise refers to supply of copies of statements and documents to accused in other cases triable by a Court of Session.

(b) A preliminary hearing has to be conducted by the Magistrate or the Session Judge, in camera, but it will be necessary to hear the accused. We

are proposing that the accused may be heard separately and not in the presence of the victim or witness who are not known to the accused.

(c) In as much as, during the course of investigation, when the Police applies through the public prosecutor before the Magistrate for a preliminary order granting anonymity, the accused is not given a hearing, it is necessary, in our opinion, that at the stage of inquiry, there should be a fresh preliminary hearing, even in respect of the same witness, for the purpose of granting anonymity at the stage the witness gives evidence at the regular trial. This is because, in the preliminary inquiry now conducted (i.e. the preliminary inquiry after investigation), the accused will have to be heard on the question of granting anonymity to the witness.

Whenever such an application is made after commencement of inquiry, the Magistrate has to conduct a preliminary or voir dire inquiry as to whether the witness's life or property or that of his relatives is in danger. An in camera hearing is necessary. As to how this will be conducted will be explained in the next chapter.

Where during Inquiry, the Magistrate grants an anonymity order, it will ensure for the subsequent stages including trial and thereafter.

We are providing the procedure in sections 8 to 11 which covers the preliminary inquiry procedure at the stage of Inquiry and before commencement of recording evidence at the trial.

(C) Preliminary inquiry before the Sessions Judge before commencement of recording statement of witnesses in Sessions Court:

In respect of other witnesses whose identity protection has not been sought at the stage of sec 161, 164 or 207, i.e. during investigation or inquiry but where it is still considered necessary and in the case of fresh witnesses to be examined at the trial, there must again be an opportunity to the prosecution to apply for maintaining anonymity during the trial and, if need be, thereafter. Such power has again to be conferred on the Sessions Court.

In this connection, we may refer to the judgment of the Supreme Court in Kartar Singh's case 1994 (3) SCC 569 under the TADA where in relation to sec. 16 of that Act, the Supreme Court stated (at p. 290) that the 'identity, names and addresses of the witnesses may be disclosed before the trial commences' as was held by the Full Bench of the Punjab and Haryana High Court in Bimal Kaur's case (AIR 1988 P&H p.95 (FB)).

We may also refer in this connection to the judgment of the Canadian Supreme Court in R v. Khela: 1995 (4) SCR 201 where the said Court too stated that if there was danger to the witness's life, the name and address need not be disclosed till 'just before the trial'.

But in our opinion, the view expressed in these judgments for grant of identity protection to witness at a stage just before the starting of the trial, would in most cases frustrate the very object for protection. There are today not many cases coming before the Sessions Court in which the trial is

completed in respect of all witnesses nor even of a single prosecution witness in a single day . Hence, in our view, the protection granted by the Magistrate or by the Sessions Court must last till the completion of the trial in the Sessions Court and cannot be confined to a stage just before the trial.

(D) Procedure for recording statement of such witnesses at the Regular trial in Sessions Court and beyond:

(i) So far as the identity protection at the trial is concerned, if indeed the witnesses have been given a pseudonym during the investigation or inquiry or before commencement of trial, there can be no difficulty in allowing the further proceedings at the trial to be held on the basis of the same pseudonym. Here, we are proposing (see Ch. IX) a two-way television or video link and two-way audio link for recording evidence of victims and witnesses not known to the accused and for whom anonymity is considered necessary.

(ii) After the trial, in appeals and even after the conviction or acquittal the said pseudonym will continue. We do not see any advantage to the accused in the Court proceedings if the identity is not disclosed after trial. If the disclosure of the identity of the witnesses is not going to be of any advantage to the accused then, in our view, in the further proceedings like appeal etc., or after the conviction has become final, or even if he is acquitted, the anonymity may still be continued. If that is done, the life and property of the witness or relatives can remain out of any danger during the further proceedings also.

The procedure at the trial is proposed in sec. 12 and Schedule 1of the proposed Bill.

(iii) So far as victims who are known to the accused and who have not sought anonymity and victims who have been refused a protection order, but whose trauma has to be taken care of, the evidence at the trial will be by use of a two-way close-circuit television or video-link and two-way audio system so that the victim need not depose in the immediate presence of the accused for otherwise he may face trauma.

This procedure is proposed in sec. 13 read with Schedule 2 of the proposed Bill.

Chapter IX

Two-way closed-circuit television for examining the victim and witnesses during trial in the Sessions Court

We shall now refer to the procedure of closed circuit television or video link, to which we have referred to earlier. That procedure can be followed at the trial by the Sessions Court in respect of witnesses or victims who have earlier obtained witness protection orders during investigation or inquiry or before commencement of recording of evidence at the trial.

So far 'screening or closed-circuit television' is not part of the Code of Criminal Procedure, 1973 or special Acts:

Screening or closed-circuit television methods are not contained in the Code of Criminal Procedure, 1973 nor in the special Acts referred to in the earlier chapters.

We have noticed in Chapter III that the TADA 1987 did deal with procedure for witness protection in sec. 16. Neither 'screening' nor 'closed circuit television' were mentioned in sec. 16. Sec. 16 mentioned in camera proceedings. Sec. 16(3)(c) merely stated that the Court may issue 'any directions for securing that the identity and addresses of the witnesses are not disclosed'.

In the POTA 2002, sec. 30(1) referred to 'in camera' proceedings and sec. 30(2)(c) was in the same language as sec. 16(3)(c).

In Kartar Singh's case (1994) (3) SCC 569 which dealt with sec. 16 of the TADA, there is no reference to 'screening' or 'closed-circuit television'.

In PUCL v. Union of India, 2003 (10) SCALE 967, which dealt with sec. 30 of the POTA, the Supreme Court observed (para 62) (at p. 994):

> "It is not feasible for us to suggest the procedure that has to be adopted by the Special Courts for keeping the identity of the witness secret."

For the first time, before the Law Commission when it was preparing the 172nd Report (2000) (as stated earlier) in the case of child abuse or sexual offences there was a request for incorporating provisions such as

(i) video taped interview of the child,

(ii) via closed-circuit television testimony or giving evidence from behind a screen.

But the Law Commission accepted the 'screening' method. In the draft amendment, it however, did not use the word 'screening' but proposed insertion of a general proviso in sec. 273 which stated:

> "Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may take appropriate measures to ensure that such person is not confronted by the accused

at the same time ensuring the right of cross-examination of the accused."

When the 172nd Report came up before the Supreme Court in Sakshi v. Union of India, 2004 (6) SCALE 15, the Supreme Court referred to the argument of the NGO, (Sakshi) before the Law Commission as stated earlier. The Supreme Court accepted as admissible video-conferencing method for purpose of hearing the victim or witnesses. Recording by way of video-conferencing was accepted in view of the earlier judgment of the Supreme Court in State of Maharashtra v. Dr. Praful B. Desai: 2003 (4) SCC 601(see para 31). It was stated that this was consistent with sec. 273 of the Code. However, in the final directions, the Supreme Court suggested the method of using a 'screen' or 'some such arrangement' (see para 32). The Court also referred to the need for in camera proceedings as stated in sec. 327 of the Code.

Praful B. Desai's case was not a criminal case but was a civil case in which one party wanted to examine a foreign medical expert. While permitting video-conferencing, the Supreme Court relied upon Maryland v. Craig (1990) 497 US 836 (which was a criminal case) to say that video-conferencing evidence is admissible in evidence.

In a case arising under the Consumer (Protection) Act, 1986 the Supreme Court in J.J. Merchant v. Shrinath Chaturvedi: AIR 2002 SC 2931 stated that under that Act, the Commission could examine witnesses on commission under sec. 13(4)(v) and that cross-examination could take place

by video-conferencing. The Supreme Court stated that affidavits could be initially filed and,

> "if the cross-examination is sought for by the other side and the Commission finds it proper, it can easily evolve a procedure permitting the party who intends to cross-examine by putting certain questions in writing and those questions also could be replied by experts including doctors on affidavits. In case where stakes are very high and still party intends to cross-examine such doctors or experts, there can be video-conferences or asking questions by arranging telephone conference and at the initial stage, this cost should be borne by the person who claims the video-conference. Further cross-examination can be taken by the Commissioner appointed by it at the working place of such experts at a fixed time."

In sum, so far as the criminal jurisdiction is concerned, there is, at the moment, no provision in the Code of Criminal Procedure, 1973 which permits 'screening' or 'closed-circuit television'. In Sakshi, the Supreme Court referred to screening and video-conferencing as acceptable procedures but in the ultimate directions given by it, it used the words 'screening' or 'some other arrangement' and followed Praful B. Desai case. Praful B. Desai followed Maryland v. Craig.

The Maryland Rules on closed-circuit television:

As the Supreme Court in Praful Desai's case referred to Maryland v. Craig: (1990) 497 US 836, we shall refer to the Rules applicable to

Maryland Courts which were interpreted in Maryland v. Craig. There, under the procedure contained in the Maryland Courts & Judicial Procedure Code, 1989 (section 9-102(a)(i)(ii)) the child aged six years, who was allegedly sexually abused would be at a distant place and would be examined in chief and also cross-examined while the Judge, Jury and the accused would remain in the Courtroom, where the testimony would be displayed on a video-screen by using a closed-circuit television. In Maryland v. Craig, the Supreme Court rejected Craig's objection that the use of one-way closed-circuit procedure violated the confrontation clause contained in the Sixth Amendment. The Court held that if there was direct confrontation between them in the Courtroom, the child victim and other witnesses would suffer serious emotional distress which they would not be able to express.

The Supreme Court held that the purpose of the Sixth Amendment was to ensure the reliability of the evidence against an accused by subjecting the witness to rigorous testing in an adversarial proceeding before the trial Court and that purpose is served by the combined effects of confrontation, physical presence, oath, cross-examination and observation of demeanour by the trial Court. Although face to face confrontation formed the core of the Sixth Amendment, it was not an indispensable element of the confrontation right. If it were, the Sixth Amendment would abrogate virtually every hearsay exception, a result rejected as unintended and too extreme (Ohio v. Roberts) (448 US 50). The Amendment must be interpreted in a manner sensitive to its purpose and to the necessities of trial and adversary process (Kirby v. US: 174 US 47). Nonetheless, the right to confront accusatory witnesses may be satisfied absent a physical, face to

face confrontation or trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise answered (Coy v. Iowa). A State's interest in the physical and psychological well-being of child-abuse victims may be sufficiently important to outweigh, at least in some cases, an accused's right to face his or her accusers in Court. The Court will use the video-procedure only if it is satisfied that the child would otherwise be traumatized. Maryland v. Craig has been approved by our Supreme Court in Praful B. Desai's case (2003 (4) SCC 601).

The same reasoning applies to cases of witnesses who, in the case of serious offences, are likely to suffer danger to their lives or properties, or where victims suffer emotional distress and the need to allow them to give evidence fearlessly outweighs the rights of the accused for face to face cross-examination.

Victim's evidence procedure under Maryland Rules:

Maryland's rule deals with child abuse cases and procedure at trial and Title 11, dealing with 'Victims and Witnesses' and sec. 11.303, is in 4 clauses:

(a) scope of section;
(b) in general;
(c) preliminary determination by Court (whether to allow the child victim to testify by closed circuit television);
(d) procedure during testimony.

It contemplates a preliminary hearing before regular trial.

As to (a), scope of section, it is said that the section applies to a case of child-abuse under Title 5, Subtitle 7 of the Family Law Article or sec. 3.601 or sec. 3.602 of the Criminal Law Code.

As to (b), 'in general', it refers (i) to the preliminary hearing i.e. when a Court decides if evidence in Court can result in the victim suffering such emotional distress which will make the victim not reasonably communicate and (ii) to the evidence taken during the proceedings (i.e. regular proceeding).

Clause (c) is important. It refers to 'determination by Court' i.e. the preliminary hearing procedure. It contains sub-clause (1)(i) and (ii) and sub-clause (2)(i) and (ii). Under sub-clause (1)(i), the Court may observe and question the child victim inside or outside Courtroom and under sub-clause (1)(ii), the Court may hear testimony of a parent or guardian and the person who has dealt with the child in a therapeutic setting. Under sub-clause (2), it is stated that when the Court decides the issue 'whether to allow a child victim to testify by closed-circuit television, (i) each accused can have one attorney in the Court along with the victims' attorney and the prosecuting agency (i.e. neither victim nor the accused), and (ii) if the Court decides to observe or question the child victim, the Court may not allow the accused but the counsel for accused and the prosecuting agency and one attorney for the victim will be present.

Hence, under those Rules, at the preliminary hearing, the accused will not be physically present though the counsel for accused will be present, wherever the Court wants to observe or question the child victim. If the Court decides in the preliminary hearing to use of closed-circuit television, then under (d), the following procedure had to be followed:

(1) Where the victim is present, the prosecutor, the attorney for accused and attorney for victim and the operators of the closed-circuit equipment, and any other person whose presence, according to the Court, contributes to the well-being of the child, including the person who dealt with the child in therapeutic setting shall be present.

(2) In the Courtroom, the Judge, the accused shall be present.

In addition, there would be a two-way audio connection between the room where the victim and lawyers are stationed and the Courtroom where the Judge and accused are present.

INDIA:

Closed circuit television procedure at the trial in the Sessions Court:

We have already referred to the in camera examination of the witness before the Magistrate at the stage of investigation for purpose of deciding anonymity during investigation. Here the accused is not heard.

We have also referred to the preliminary inquiry procedure before the Magistrate during inquiry or before the Sessions Judge before the commencement of recording of evidence at the regular trial. In these preliminary inquiries, the accused is separately heard. Therefore, there is no need to go in for a two-way television or video link procedure.

Such a need, as stated below, arises only at the stage of recording evidence at the regular trial before the Sessions Judge.

At the trial, if a witness or victim has not sought for anonymity earlier or had sought and the request was rejected, there is no need for a closed circuit television or video link procedure. But where the witness or victim had applied at the stage of inquiry before the Magistrate or before the stage of recording evidence at trial before the Sessions Court and where those Courts have granted anonymity, there is need for closed circuit television procedure to be followed at the trial. The following situations may arise:

(i) There may be a case in which a victim's identity is known to the accused and vice-versa,

(ii) There may also be cases where the victim is not known to the accused such as where an accused fires with his pistol at random. In such cases, a victim may need anonymity,

(iii) There are cases where the witness's identity is not known to the accused and the witness may need identity protection.

It is obvious that a common procedure can be evolved for (ii) and (iii) where victims as well as witnesses are not known to the accused and a

separate procedure can be prescribed for (i) where victim is known to the accused.

(i) Victim known to the accused:

So far as cases under (i) are concerned, where a victim is known to the accused, there is no need to prevent the accused from seeing the victim. But the witness has to be permitted to give evidence without facing the accused if he claims trauma. Here, the only need is to prevent trauma for the victim-witness which he or she will suffer if there is face to face confrontation with accused and there is no need for victim identity protection. As we shall discuss presently, even here two-way television or video link is necessary but is limited to victim deposing without seeing the accused physically or on the video screen, so as to prevent trauma.

(ii) Victim and witness not known to the accused:

(a) So far as (ii) victims whose identity is not known to the accused are concerned and so far as (iii) other witnesses whose identity is not known to the accused, prosecution may seek and that the Court may grant identity protection after conducting a preliminary hearing. Here the victim or witness cannot be allowed to be seen by the accused. A two-way television or video link is necessary for achieving that object.

(b) In the Draft Bill, we propose to define ‘witness’ as including a victim also, so that the same procedure for securing a ‘identity’ protection order

may be applicable (a) both at the stage of investigation and (b) also at subsequent stages i.e. inquiry and trial.

(c) It is obvious that a victim who is not known to the accused – such as where the accused has indiscriminately fired at several persons, and who fears danger to his life or property or to those of his close relatives is in the same position of a witness not known to the accused who has similar apprehensions.

(d) It is equally obvious that where the prosecution or a victim feels that his or her identity is known to the accused, the prosecution or the victim will not apply for identity protection and such victims may apply only for an order that they may not be required to depose in the immediate physical presence of the accused or they may not even like to see the accused on the video screen while deposing.

We propose two separate sections in the Draft Bill to deal with (1) victims and witnesses not known to the accused, who have obtained a protection order before trial and (2) victims known to the accused who found no need to obtain any such protection order before trial.

Procedure: (Trial stage):

(i) Victim-witnesses who have not sought identity protection as they are known to the accused (protection from trauma):

Where the victim-witness is known to the accused, though the victim had not sought identity protection earlier, he may, as already stated, not like, during trial, to suffer from any trauma by deposing to the details of the crime while physically facing the accused. The mechanism by which this can be achieved is not difficult to prescribe.

We can have an arrangement where the victim-witness does not, while deposing, see the accused but the accused is able to see the victim-witness. This is, however, subject to one exception. The victim must face the accused at least once for the purpose of identifying the accused as the person who is guilty of the crime and for that purpose also, the arrangement can provide a mechanism.

The Supreme Court has, no doubt, made an observation in Sakshi case that a screen may be erected to preclude the victim seeing the accused. But, in our view, psychologically, a victim is not free if the accused is in the same room and they are merely separated by a screen.

In our view, if the victim is in a different room, he or she will be more free to depose without any trauma. We, therefore, propose a two-way television or video link coupled with a two-way audio system connecting two rooms.

We can have a two-way closed-circuit television with a video screen in each of two different rooms. The victim-witness will be present in a room and in that room, the prosecutor, the defence lawyer and the technical personnel who operate the close-circuit television will also be present. The

Judge and the accused, the technical personnel, the courtmaster and stenographer, will be in the Courtroom.

There will be a video screen in the Courtroom so that the Judge and the accused can watch the victim-witness, the prosecutor and the defence lawyer examining the victim-witness. In the other room where the victim and the two lawyers are present, there can be another screen which will be used only at the initial stage when the victim has to identify the accused. After that is done, that video camera in the room where the accused is stationed, will not be focussed on the accused. While the victim deposes thereafter in chief or cross-examination, he will not be seeing the accused in the screen in his room any longer. The defence lawyer sees the victim directly in his room and can examine his or her demeanour. The Judge and the accused can see the victim on the screen in their room and watch his or her demeanour. The courtmaster and the stenographer can also be in the room where the Judge is sitting.

There will be a two-way audio mechanism by which the persons in each room can talk to the others in another room.

(ii) & (iii) Victim and witnesses who have sought identity protection:

Where the victim-witness or other witnesses seek identity protection at the trial, it is necessary to protect their identity at the stage of investigation, inquiry and before trial – as per the procedure already candi____ - provided danger to the life or property of such victim or witness or of their relatives is proved. (We have already stated that there may be

victims – such as those injured in an indiscriminate firing by an accused – who may not be known to the accused.)

Question is as to the mechanism by which this can be achieved in cases where identity protection has been granted to witnesses, including victims who have to finally depose at the trial.

Where victim/witness has been granted identity protection earlier and he is giving evidence at the trial, it is essential that the accused as well as the counsel for accused must be precluded from identifying the victim/witness concerned. But, here too, - in the case of both the victim-witness or the witness, - who are, in both cases, not known to the accused -, they may have to first identify the accused as the person guilty of the crime. Therefore, there must be a two-way closed circuit television with screens in the room where such victim-witnesses are present and give evidence. Both the accused and defence lawyer must be in a separate room, in as much as both of them should not see the victim-witness or witness concerned, who will be in another room. If such victim-witness or witnesses seeking protection is in another room and the public prosecutor also is in that room, there can be allegations of the victim/witness for prosecution being prompted invisibly by the prosecutor. Therefore, it is advisable that the Judge also must be in that room wherefrom the victim-witness or witness deposes.

Thus, the arrangement must be that the victim/witness who seeks protection of identity, the public prosecutor and the Judge, his courtmaster and stenographer and the technical personnel will be in the Courtroom while

the accused and the defence lawyer will be in another room. There will be a video-screen in each room. The camera in the room of the victim/witness, Prosecutor and Judge will not be focussed on the victim/witness whose identity is to be kept confidential. It will be focussed on the Judge and the prosecutor who are in the Courtroom. The Judge and the prosecutor over whom the camera is focussed will be seen on the screen which is kept in the room of the accused and the defence lawyer.

There will have to be a two-way audio system also connecting both rooms.

We are providing these procedures in Schedule 1 and Schedule 2 of the proposed Bill.

The courtmaster, the stenographer and the technical personnel must take an oath that they will not disclose the identity of the witness-victim (who has earlier obtained protection order) who is giving evidence at the trial. Breach of the oath can be visited by proceedings for contempt of court, in accordance with law.

Chapter X

Consideration of Responses to the Questionnaire and Recommendations on the Question of Witness Anonymity

It will be seen that most of the questions contained in the Questionnaire in Chapter VIII of the Consultation Paper have been answered in sufficient detail in the preceding Chapters V to IX of this Report. It is, however, necessary to summarise the answers to the questions in the form of our recommendations. The questions posed in Chapter VIII of the Consultation Paper will now be answered seriatum. (As we are proposing witness anonymity only in relation to offences triable by Courts of Session, the undermentioned discussion will be understood in that sense.)

(1) Should witness anonymity be maintained in all three stages of investigation, inquiry, trial and even at the stage of appeal in a criminal case?

(i) So far as the stage of "investigation" is concerned, we think that a provision is necessary to deal with witness anonymity at that stage. As stated in Chapters VII and VIII, it may be that the Police may consider that witness anonymity is necessary in certain cases during investigation. Therefore, whether it is at the stage of recording of statements under sec. 161 or sec. 164 or forwarding copies given under sec. 164(6), or when chargesheet and documents are filed under sec. 173 and copies thereof are supplied under sections 207 and 208, it is necessary to have provision to enable the Police to move the concerned Magistrate through the public prosecutor, seeking anonymity in respect of the witness concerned.

Witnesses will, if the Magistrate grants an identity protection order, be described by a pseudonym or by a letter in the English alphabet, though the real identity will be disclosed to the Magistrate.

(ii) We are also of the view, as stated in Chapter VIII, that there must be provisions permitting anonymity to witnesses at the stage of inquiry. Witnesses will be described by letters from English alphabets. If an order of anonymity is granted, it will enure during inquiry and extend to the trial upto conviction or acquittal and beyond.

(iii) We are also of the view that there must be witness identity protection just before the stage of the Sessions trial i.e. before recording evidence of witnesses at the trial, so that protection is available to witnesses in respect of whom no orders were sought or passed during the earlier stages of investigation or inquiry. The witnesses will again have to be described by pseudonym or English alphabets. We are of the view that, at the trial and after the trial, in the judgment of the Sessions Court, the anonymity must be reflected and continued.

(iv) After the judgment in the Sessions Court too, the anonymity must be continued in all appellate proceedings. Even in and after the judgment of the High Court or Supreme Court, as the came may be, the pseudonym or alphabet alone has to be mentioned. Even in the law reports or newspaper publications, the pseudonym or alphabet alone must be used.

We recommend that witness anonymity must be maintained at all the stages, investigation, inquiry, trial and even at the appeal and thereafter also.

(2) **Question is whether anonymity must be confined to criminal cases or should also be extended to civil cases as well? Should it be extended to defence witnesses also as done under the statutes in some other countries?**

In our view, anonymity, for the present be confined to criminal cases only and to prosecution witnesses, where it is more needed. No doubt there are anonymity procedures even for defence witnesses also in some countries such as in sec. 13B(2) of the New Zealand Evidence Act, 1908 as amended in 1997 (see the Annexure to the Consultation Paper).

But, for the present, we are of the view that anonymity procedure be confined to prosecution witnesses in criminal cases.

(3) **The question is whether the anonymity provisions which were till recently confined to TADA and POTA (terrorist cases) and now to trials under the Unlawful Activities Act, 1967 (as amended in 2004) should be extended to trials of all other serious offences triable by Sessions Courts (or Court equivalent thereto) provided the conditions required for granting anonymity are satisfied?**

We have dealt with this aspect elaborately in Chapter V of this Report. In our view, in all cases triable by Courts of Session and Courts of equal designation or Special Courts, wherever there is proof of danger to the life or property of the witness or of his or her relatives, witness protection must be available. It is not necessary that witness protection be confined only to cases of terrorism and sexual offences.

While the class of cases where anonymity will be given will be those triable by Courts of Sessions, it will be a matter for decision in each case,

having regard to the nature of the offence and the facts of the case. Even in the case of an individual trial, it has to be extended only to prosecution witnesses in respect of whom there is adequate proof of danger to the life or property of the witnesses or of their close relatives. In other words, the case of each prosecution witness in respect of whom application is made, has to be separately taken up and decided. In fact, it is witness specific in all cases triable by Courts of Session.

The witness identity protection is a must in all cases triable by Sessions Court where there is danger to the witnesses to his properties or to whose of his close relatives. So far other cases are concerned, we further recommend that after the experience in cases triable by Sessions Courts, the Government may consider extending the procedure to other cases as well by appropriate statutory provisions.

(4) **The question is whether the existing safeguards for protection of victims of sexual offences and child abuse – such as in camera proceedings and ban on publishing any material relating to such proceeding while under sec. 327 of the Code of Criminal Procedure, 1973 are sufficient and whether we would suggest any more measures.**

This aspect has been elaborated in Chapter III. We have shown that when the 172nd Report was submitted upon a reference by the Supreme Court in Sakshi case, it was urged before the Law Commission that in addition to the above, - screening of victim, close-circuit television, listing of questions to be answered by the victim should be brought into the statute.

But in the 172nd Report, the method of 'screening' the victim was alone recommended.

After the Report was placed before the Supreme Court, in the judgment in Sakshi 2004 (6) SCALE 15, the Supreme Court accepted not only "screening" but also "video-conference" procedure and suggested that a list of questions can be prepared and given to the Court to be put to the victim or witnesses. But, in the ultimate directions, however, the Court merely directed 'screening' or 'some such arrangement', obviously referring to video-conferencing procedure.

In our view, the procedures referred to in the question are not sufficient and in addition to the existing provisions concerning victims of sexual offences including children, the procedure of using "two-way closed-circuit television or video-link" and 'two-way audio link' must also be introduced. These provisions should apply to victims and also witnesses who seek identity protection. It must also apply to victims who have not applied for identity protection but have requested that they may be permitted to depose not in the immediate presence of the accused on the ground of trauma.

This is provided in sec 12 of the Draft Bill.

(5) **Question is whether it would be sufficient if the Commissioner of Police or Superintendent of Police seeks anonymity on behalf of the witness by certifying danger to the life and property of the witness or his relatives or should it be for the Judge to decide, on the basis of evidence placed before him, that the life or property of the witness or relatives is in danger.**

As stated in para 7.1 of the Consultation Paper, in Australia, the Commissioner of Police certifies and there is a similar procedure in Victoria, National Capital Territory, Queensland. In fact, sec. 21F of the Evidence (Witness Anonymity) Amendment Act, 2000 mentions the 'Effect of Witness Anonymity Certificate'. Upon such a certificate, the witness gets anonymity.

We shall refer to the procedure in New Zealand and some case law in this behalf.

In the New Zealand Evidence Act, 1908 (as amended in 1997) sec. 13B(3) reads as follows:

> "13B(3): The Judge must hear and determine the application in chambers, and –
> (a) The Judge must give each party an opportunity to be heard on the application; and
> (b) Neither the party supporting the application nor the witness need disclose any information that might disclose the witness's identity to any person (other than the Judge) before the application is dealt with."

Evidence may relate to previous conduct of the accused against other witnesses in some other cases. Evidence may be about his conduct towards this very witness. Evidence may be about the fact that the accused is powerful and is part of a mafia.

If the Judge has to decide on certain facts and circumstances about the danger to the life or property of the witness or of his relatives which are not disclosed to the accused, it cannot be said that there is no fair trial. As stated in Scott v. Scott 1913 AC 417, there can be other overriding principles relating to administration of justice such asgiving assurance to witnesses that they can depose without fear, – which require some relaxation of the rule of open trial. In R v. Atkins: 2000 (2) NZLR 46 (CA), the NZ Court of Appeal observed (see para 6.4.8 of the Consultation Paper):

> "We are mindful of the fact that the matters deposed to, have not been tested by cross-examination and that there has been no opportunity to present contradictory evidence in respect of the non-disclosed assertions. But, in applications of this nature, the Court will necessarily be called upon to consider untested evidence, and to evaluate evidence some of which could be classed as hearsay. We accept Mr. Calver's submission that in such an exercise, care must be taken in making the evaluation and in drawing conclusions, and is to be exceptional. But we do not accept the proposition that unless the evidence was sufficient to warrant prosecution for a normal offence, it should not be acted upon. The weight to be given to any particular assertion will depend upon many differing factors, including source, reliability and the existence or absence of supporting material. This aspect is dealt with admirably on a sec. 13C application in R v. Dunnil: 1998 (2) NZLR 341.

> …. The starting point must be the legislation's recognition that ensuring the anonymity of witness does not necessarily negate the concept of a fair trial."

The Court in Atkins pointed out that sec. 13C(6) does not expressly prohibit questions other than those which can properly be said are likely to lead to identification of the witness – that there is a real or substantial risk of that resulting (in identification). Secondly, the trial Judge has a residual power to allow such questions, which power would be exercised having regard to all the circumstances including the relative substantiality of the risk and the importance of the question. These are very much matters under judicial control at trial.

But, in our view, in India, it will be necessary for the Court to require the passing of an order granting 'anonymity' to the witness in regard to whom the prosecution wants anonymity, whether at the stage of investigation, inquiry or trial. The subjective satisfaction of the Commissioner of Police or of the senior Police Officer is not sufficient. It is a matter for a judicial order by a Court and not a matter for a police authority to pass an administrative order. Not only is the certificate not sufficient but it will lead to complex problems and it may also result in the police officer's certificate being challenged in parallel proceedings under Art. 226 of the Constitution of India and this will delay the proceedings.

We, therefore, recommend that wherever anonymity is sought by the prosecution in respect of anonymity, the certificate by the Police Commissioner or other senior police officer is not sufficient. The matter

requires an order of the Court by way of a judicial order. However, such certificate may be a piece of evidence which the Court shall have to consider while deciding whether to grant anonymity or not.

(6) **Should there be a preliminary inquiry by the Judge/Magistrate? In such preliminary inquiry, should the identity of the witness be kept secret? Should the accused or his lawyer be heard or should it be an ex parte inquiry? Should the inquiry be <u>in camera</u>?**

We have discussed these aspects in detail in Chapter VII.

In our view, there should be a preliminary inquiry before the Magistrate for purposes of deciding the issue whether anonymity is necessary. At the stage of investigation, an application can be moved by the Police that in respect of the particular witness anonymity is necessary while recording statements under sec. 161 or sec. 164 of the Code of Criminal Procedure. A decision here will enure only for the period upto the filing of chargesheet.

Again, before the starting of the inquiry before the Magistrate, there should be an enabling provision for preliminary inquiry if anonymity is required for same witness or other witnesses for purposes of inquiry and trial and if granted, such orders will enure beyond the judgment of the Sessions Court and for purposes of appeal or revision and thereafter.

There should also be a provision for grant of anonymity before the Court of Session before it actually starts recording evidence at the trial, if anonymity is necessary in respect of some fresh witnesses or in respect of

witnesses for whom anonymity was not sought earlier or was refused. Here a preliminary order will have to be passed in respect of such witnesses by the Sessions Court before recording evidence relating to the trial. The anonymity granted by the Session Court must continue till trial is completed and thereafter also.

At the stage of inquiry and trial, such application can be filed by the prosecutor or even by the witness. At the stage of investigation, only the police can file such application.

In all these preliminary inquiries, the identity of the witness will have to be kept secret and the prosecution must place the necessary material before the Magistrate or Sessions Judge as to why there should be an anonymity order.

The Police may file the certificate of a senior police officer of the rank of Commissioner or District Superintendent of Police and in addition place other material before the Court.

In the preliminary inquiry during investigation, it is not necessary to hear the suspect. The Magistrate may personally question and examine the witness in his chambers in the presence of the prosecutor.

In the preliminary inquiry by the Magistrate during inquiry or by the Sessions Judge before recording evidence at the trial, they shall hear the defence lawyer or the accused separately on the question without divulging facts which may enable the defence lawyer or accused to know about the

identity of the witness. It is necessary to give an opportunity to the defence lawyer/accused by hearing them separately in cases where anonymity is claimed for witnesses during inquiry and before recording evidence at the trial.

The proceedings before the Magistrate/Sessions Court must be in camera.

In the above preliminary inquiries by the Magistrate or Judge, as already stated, there is no need to use the closed circuit television or video link methods. Such a procedure we are recommending only for examination of protected witnesses or victims when they depose at the stage of trial in Sessions Court.

Thus, there should be a preliminary inquiry by the Magistrate or Sessions Judge. In such preliminary inquiry, the identity of the witness has to be kept secret and the accused or his lawyer can be heard separately. The inquiry will be in camera. But at the stage of investigation, in any such preliminary inquiry, the accused need not be heard.

(7) **In the application for granting anonymity before the Magistrate or Court of Session, - should the Judge be satisfied that the life or property of the witness or his relation "is" in serious danger or is it sufficient to show that there is 'likelihood' of such danger? Is the mere ipse dixit of the witness sufficient?**

It is obvious that it is neither necessary nor is it possible for the prosecution to prove that life or property of himself or his relatives "is"

actually in danger. All that is possible for the prosecution is to prove that there is 'likelihood' of such danger, having regard to either previous attempts of the accused or his associates or having regard to the incidents with which the accused or his associates are notoriously involved etc.

The meaning of the words 'likely' used in sec. 13C(4)(a) of the New Zealand statute has been discussed in para 6.4.7 of the Consultation Paper. The Court in Atkins (see para 6.4.8 of the Consultation Paper) referred to the meaning of the word 'likely' given in other cases. It observed:

> "In its context, the word 'likely' bears a common meaning – a real risk that the event may happen – a distinct or significant possibility. As Cook P observed in Commissioner of Police v. Ombudsman: 1988 (1) NZLR 385 (391) in construing the Official Information Act, 1982 which protected information 'likely to produce a fair trial': to require a threat to be established as more likely to eventuate than not, would be unreal. It must be enough if there is a serious or real and substantial risk to a protected interest, a risk that might well eventuate. This Court has given 'likely' that sense in a line of criminal cases, a recent example of which is R v. Piri (1987) (1) NZLR 66. It is a test familiar in other branches of the law also (see for instance the House of Lords case R v. Secretary of State for the Home Department, ex parte Sivakumaran, 1988 (1) All ER 193)…..
> … It is the existence, in a real sense, of danger to safety (or serious danger) which can, not will, give rise to an order. What is being considered is a threshold, one which is directed to persons who, as part of their civil duty, are being required to take part in the Court

> process, and their personal safety, or the well-being of their property, which may be affected by reason of their participation……..
> … This approach is consistent with that adopted by the English Court of Appeal in R v. Lord Saville of Newdigate: 1999 (4) All ER 860…. Lord Woolf MR, giving the judgment for the Court said that the issue was not to be determined by the onus of proof, and approved the dictum of Lord Diplock in Fernandez v. Government of Singapore 1971 (2) All ER 691….. Prejudice involving a risk of inappropriate trial or punishment was there at issue. Lord Diplock said at p. 647: "My Lords, bearing in mind, the relative gravity of the consequences of the Court's expectation being falsified in one way or in the other, I do not think that the test of applicability of para (c) is that the Court must be satisfied that it is more likely than not that the figutive will be detained or restricted if he is returned. A lesser degree of likelihood is in my view, sufficient; and I would not quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed by the Divisional Court "A reasonable chance" or 'substantial ground for thinking' or 'a serious possibility'."

That is also our view as to the meaning of the word 'likelihood' of danger.

The ipse dixit of the witness about danger to himself or to his relatives or to their property can be accepted only if the Court finds the material produced by the prosecution or the evidence of the witness 'reliable'. In Maryland v. Craig: (1990) 497 US 836 the US Supreme Court said that the reliability of the testimony is to be judged. Sec. 13C(4) of the

New Zealand Evidence Act, 1908 (as amended in 1997) requires in Cl.(b) that the Court must be satisfied, in the case of anonymity of defence witnesses, that (i) there is no reason to believe that the witness has a motive or tendency to be untruthful having regard (where applicable) to the witness's previous conviction or the witness's relationship with the accused or any associate of the accused; or (ii) the witness's credibility can be tested properly without the disclosure of the witnesses' identity.

Further, 13C(5)(f) requires the Judge to consider 'whether there is other evidence which corroborates the witness's evidence'.

Likewise, sec. 17 of the Portuguese Act (see para 6.9 of the Consultation Paper), subclause (c) refers to the credibility of the witness being beyond reasonable doubt.

We are proposing a definition of 'threatened witness' which includes victims who seek anonymity orders and we have used the word 'likelihood' of danger to the life or property of the witness or of his close relatives in that definition. We have also proposed a definition of 'close relatives'.

Therefore, we recommend that there need be no proof of actual 'danger' to the life of the witness or his relatives or their property but proof of 'likelihood' is sufficient. The material or evidence placed for the purpose must be reliable.

(8) **The question is whether the complainant (in the case of a private complaint) or the prosecution should file an application before the Magistrate seeking non-disclosure of identity of the witness,**

before the stage of sec. 207, 208 of the Code of Criminal Procedure, 1973.

As discussed in Chapter VII, the stage at which anonymity may be claimed during investigation is the stage when sec. 161 or sec. 164(6) statements are recorded. Anonymity may also be claimed before copies of documents are issued to the accused under ss 207, 208.

(9) **What should be the consequence of an anonymity order passed during the stage of investigation or inquiry? Should the identity and address of the witness be directed to be not reflected in the documents to be given to the accused and should the original documents be kept in safe custody? Should it direct that the Court proceedings (before actual trial) not also reflect the identity?**

(A) At the stage of investigation/inquiry, if the Magistrate comes to the conclusion that witness anonymity order has to be passed, he shall have to direct that in all documents which contain references to identity, including the 161 statements or sec. 164 statements, the chargesheet of which a copy has to be given to the accused, the name and address and other information that may lead to the identification of the witness should not be reflected.

In the POTA (which has since been repealed in 2004 and which provisions have been brought into sec. 44 of the Unlawful Activities (Prevention) Act, 1967) it was stated in sec. 30(3)(b) and (c) that the Special Court may direct as follows:

"(b) the avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records accurible to the public;

(c) the issuing of any directions for securing that the identity and address of the witnesses are not disclosed;

(d) … … …"

For example, Rule 75 of the Rules of the Trial Chamber International Criminal Tribunal for former Yugoslavia (ICTY) requires in clause (B)(a) the

"(a) expunging names and identifying information from the Chamber's public records;

(b) non-disclosure to the public of any records identifying the victim;

(c) … … …

(d) assignment of a pseudonym.

Such a procedure must be followed. We do not find any such rule in the New Zealand Evidence Act, 1908 as amended in 1997. The above provision of ICTY must, therefore, be incorporated.

(B) Likewise, when an application claiming anonymity is filed before the trial, similar provisions are necessary.

We recommend that as a consequence of the anonymity order, the identity and address should not be reflected in the document to be given to

the accused and the original documents should be kept in safe custody. The above details should not be reflected in the Court proceedings also.

We have, in fact, made provisions in this behalf in sections 6, 10, 12 of the Draft Bill annexed hereto.

(10) **At the trial, if the Judge is satisfied about the danger to the witness, should the recording of statement of the witness be made in such a manner that the witness and the accused do not see each other and the Judge, the prosecutor and the defence counsel alone see him (using two cameras)? Should the witness who is shown on the video-screen be visible only to the Judge, prosecutor and the defence counsel? Should the taking of photographs in Court by others be banned?**

(11) **In the above context, should the witness depose from a different room or different place, and should there be another judicial officer in that room to ensure that the witness is free while giving his evidence?**

So far as question 10 is concerned, as already stated, there are again two types of cases (1) where victim is known to the accused who does not want identity protection but only does not want to face the accused physically; and (2) where victim and witnesses are not known to the accused and want an identity protection order. Hence, separate procedures must be adopted in such cases as stated in detail in Chapter IX.

Question 11 deals with the aspect as to who will be present in the room from where the witness is deposing.

In Chapter IX, we have separately detailed the procedure as to how two-way closed circuit television should be used in the case of victim-witness known to the accused and to the cases of victims and witnesses not known to the accused.

We recommend two-way close circuit television or video link along with two way audio link procedure as indicated in detail in Chapter IX and these are contained in the Draft Bill in sec. 12 read with Schedule I and sec. 13 read with Schedule II, the former covering threatened witnesses and victims who have been granted anonymity and the latter covering victims who are known to the accused and who merely want that they should not face the accused physically while deposing.

(12) **Extract from page 51**

So far as the victim-witness known to the accused is concerned, who gives evidence from a different room through closed-circuit television is concerned, there is no need to exclude the public or media inasmuch there is no question of witness anonymity involved. The accused knows the victim. Of course in the case of sexual offences sec. 327 requires in camera hearing and in the case of juveniles, the statute require in camera proceedings. Barring such cases where the victim is known to the accused, it is not necessary to exclude the public or the media.

We recommend, in the case of victims/witnesses not known to the accused, in as much as question of witness identity is involved, it is necessary to exclude the public and media from both the witness-room as

well as the Courtroom. Such exclusion in the interests of administration of justice and preserving the privacy of witnesses and protecting them from danger to their life or property, will be valid and not hit by Art. 14 or Art. 19 (1) of the Constitution of India. In case of victims not known to the accused, it is not necessary to exclude the public or the media.

Such exclusion is provided in sec. 12(3) of the Draft Bill dealing with evidence at trial of witnesses and victims who are granted anonymity. There is no need for such a provision in sec. 13 which deals with evidence at trial.

(13) Copy from page 52**.**

Several statutes in other countries (see for example the New Zealand statute referred to in the Consultation Paper) provide for appointment of an amicus.

But, in our view, there is no need to allow a separate counsel or amicus curiae.

(14) Copy from page 53**.**

In the case of victim/witness not known to the accused, we have stated in Chapter IX that the camera will not be focussed on such persons and hence there is no need for distorting the image. So far as the voice is concerned, it may be distorted by an audio-device.

This is provided at the trial stage in sec. 12 of the Draft Bill so far as witnesses and victims who have a protection order in their favour.

We recommend accordingly.

(15) Copy from page 54

This aspect has been discussed earlier. In the judgment of the Supreme Court in Kartar Singh's case 1994 (3) SCC 569 (para 290) it was stated that as suggested by the Full Bench of the Punjab and Haryana High Court in Bimal Kaur's case (AIR 1998 P&H 95) (FB)

> 'the identity, names and addresses of the witnesses may be disclosed before the trial commences'

In the Canadian case in R v. Khela: 1995 (4) SCR 201 (see para 6.5.2 of the Consultation Paper) also, it was suggested that the identity of the approver be revealed to the accused 'just before the trial'.

But, as stated earlier, such a procedure is not generally accepted in other countries. There is good reason for not doing so because it is common that trial is not completed in one day, not even the evidence of a protected witness may be completed in a day.

Further, it is, in our view, necessary that the identity should be kept confidential, throughout, and after judgment and in further proceedings.

It is so provided in the Draft Bill in sec. 10.

We recommend that it is not sufficient to reveal the identity of witnesses just before commencement of the trial. The confidentiality must be maintained even during the trial also and later.

(16) copy from page 55

This question refers to the procedure at the trial.

In this final Report, we have suggested that at the stage of preliminary inquiry during Investigation, accused need not be heard; and at the stage of preliminary Inquiry during inquiry and before recording evidence at the Trial, the accused is to be heard separately. We have provided in sec. 9(4) that in the latter type of situations, a list of questions can be given by or on behalf of the accused but not those which may lead to the identity of the witness.

In our view, it is not an effective alternative to closed-circuit TV with audio facility added. In the closed circuit TV, there is a semblance of a regular hearing though identity is not disclosed. Further the great advantage is that the defence lawyer can put further questions which arise out of the answers given by the witnesses. If a list of questions alone is given to the witness, the defence lawyer is confined to those questions and cannot put any further questions arising out of the answers of the witness.

There is no question of furnishing a list of questions at the regular trial. The two-way television or video link procedure will be followed and under that procedure, questions can be put via audio and video.

We, therefore, prefer to two-way closed-circuit television with two-way audio facility rather than the procedure of listed questions.

(17) **copy from page 57**

On the question, all the respondents answered in favour of granting fresh opportunity.

In our view, it should be permissible to the same witness to apply again if he or she has either not applied earlier or such application has been refused.

(18) copy from page 58

The question, as posed, arises at the trial. The responses in this behalf were divided, some in favour of permitting such a contention, some against it and some stating that it may depend upon circumstances and burden must be placed on the accused.

From a practical point of view, though the accused may contend that the witness is a stock witness, he shall have to substantiate the contention by material or circumstances which do not identify the witness. Thus, though

it is technically permissible to raise such a contention, it appears to impose a very heavy burden on the accused.

This can be best left to be decided by the Judge and hence no separate provision in the Bill is necessary.

(19) copy from page 60

The majority of the responses were that the technical staff must be employees of the judicial branch.

We have made provision in this behalf in Schedule I and Schedule II of the Bill where, while describing these technical persons, we have described them as employees of the court.

(20) copy from page 60

We have confined the use of the two-way television or video link and audio systems to the actual trial in the Courts of Session or equivalent Courts or Special Courts. Even so, we are of the view that it may not be necessary to provide the systems for each Sessions Court. This aspect can be left to the High Court while making Rules under sec. 16 as to the places where the infrastructure in this behalf may be provided.

(21) copy from page 61

24 respondents stated that the anonymity order be passed only by Sessions Courts while 15 stated they may be passed even by Magistrates. Some suggested an independent agency.

We recommend that during Investigation, the orders will be passed by Magistrates in a preliminary inquiry and this suits local convenience also. At the stage of Inquiry, it will be again be in a preliminary inquiry by Magistrates. But where application is filed before recording of evidence at the Trial, the application will be filed before the Sessions Court and will have to be decided before the recording of the regular evidence of the trial commences.

(22) copy from page 62

A majority of respondents favoured appeal to High court and a time frame of one month.

We recommend that so far as an order by the Magistrate at the stage of investigation is concerned (see sec. 6 of the Draft Bill), there need be no appeal by the prosecution or the witness if the application is refused by the Magistrate because an appeal can delay the investigation which is time bound.

There is no question of the suspect filing any appeal against an order under sec. 6.

But, so far as an order in a preliminary inquiry during Inquiry proceedings passed by the Magistrate or by the Sessions Judge before commencement of recording evidence, it is necessary to provide an appeal – whether the application is granted or refused. The appeal must be to the High Court against an order granting anonymity or refuses anonymity and the time frame must, as far as possible, be one month from the date of service of notice on the respondents in the appeal.

Part II

WITNESS PROTECTION PROGRAMMES

Chapter XI

The Consultation Paper and Responses:

The Consultation Paper was published in August 2004 and it invited responses from various quarters. Part III and IV of the said Paper dealt with Witness Protection Programmes. Each of these Parts contained a single chapter. Chapter VII in Part III dealt with the details of programmes in force in Australia, South Africa, Canada, United States of America, Philippines, Hong Kong and also in Portugal, France, Czechoslovakia, Republic of Korea, Japan, Netherlands, Germany and Italy. Chapter VIII in Part IV contained the Questionnaire both in relation to Witness-Identity Protection and Witness Protection Programmes, separately. There were 14 questions on this subject of Witness Protection Programmes in Chapter VIII. At the end of the Consultation Paper, the rules relating to the programmes in Portugal were appended as a model.

Forty responses to the Consultation Paper on this subject supported the need for Witness Protection Programmes in our country. Among the 40, there were 10 from State Governments, 10 from Senior Police Officials, 3 from Judges, 17 from lawyers, Jurists and others.

We do not propose to repeat, in this final Report, all the literature containing Witness Protection Programmes to which we have referred in

Chapter VII of the Consultation Paper. We shall, however, try to summarise the basic features common to the various programmes in other countries.

Basic features of Witness Protection Programmes in other countries

At present, we do not have any Witness Protection Programmes in our country which deal with the protection to victims and witnesses, outside Court proceedings.

From the various programmes in force in several countries, as referred in the Consultation Paper, certain basic features can be gathered. They are as follows:

(1) There is a determination, initially, either by a Senior Police Officer or by a Court that a victim witness or other witnesses requires protection (i.e. protection outside Court);

(2) The protection is generally granted in the case of witnesses who have to depose in trials relating to 'serious' crimes.

(3) The protection is granted at the stage of investigation, and is continued thereafter till the trial is completed;

(4) The State/Police in charge of protection programmes and the victim-witness or other witnesses have to enter into an MOU which specifies the mutual obligations of both sides;

(5) Among the types of protection, the most important are those relating to (a) giving the witness a 'new identity' and/or (b) relocation in a different place;

(6) As a consequence of the MOU, the witness agrees to give evidence as required in the proceedings while the State has to bear the expenses of relocation, custody and maintenance of children, tax obligations of the victim-witnesses or other witnesses;

(7) The witness may be granted accommodation in the Court or police premises subject to surveillance and security;

(8) Protection may be extended in addition to physical protection of relatives;

(9) There can be change in the physiognomy or the body of the protected person;

(10) No person is allowed to disclose the name of the witness admitted to the programme or of his identity in any manner whatsoever, nor draw any picture, illustration or painting or photograph, pamphlet, poster etc. of the witness;

(11) (a) In respect of other civil proceedings to which a protected person is a party or in which he is a witness, if it appears to a Superior Court that if the protected person is to file or defend a civil case or be a witness therein, his safety is likely to be endangered when he initiates, defends or continues the civil proceedings, the Court may make an appropriate order with regard to allowing him to file the case, defend or continue it under his new identity or the Court may stay the proceedings. The purpose of the stay order is to prevent disclosure of the new identity or relocation of the said protected person. The Court may take steps to ensure on the one hand that the rights or obligations of the

protected person are not unduly restricted while on the other hand, it may direct his identity or relocation be kept secret;

(b) If the protected person has to file a criminal case, he may do so under his new identity and such stay thereof. If he is an accused or a witness in a criminal case, after disclosing his real identity to the Court, the proceeding has to be stayed.

(12) The identity and relocation will not be published in any Court proceedings or documents nor given publicity outside court or in the media;

(13) Breach of MOU by the prosecution witness would enable the State to terminate the MOU.

These are the general features contained in the witness protection programmes of various countries.

The question is as to the procedure to be followed in our country in respect of witness protection programmes.

In the next chapter (Chapter XII), we shall set out the responses to the Questionnaire contained in the Consultation Paper, in relation to Witness Protection Programmes.

In the chapter thereafter (Chapter XIII), we shall consider the responses and give our recommendations.

Chapter XII

Analysis of responses to Questionnaire

WITNESS PROTECTION PROGRAMME

(Q.) 1. Do you support the view that a Witness Protection Programme should be established to protect the safety, welfare and the interests of the witnesses? Such Programmes are already in existence in various countries like Australia, Canada, South Africa, Portugal, Netherlands, Philippines, New Zealand.

In order to protect the safety, welfare and interests of the witnesses, many countries, for example, Australia, Canada, South Africa, Portugal, Netherlands, Philippines, and New Zealand are having Witness Protection Programmes. Now question is, whether such kind of Witness Protection Programmes should be established in India, so that safety and interests of the witness and his family may be ensured?

Most of the respondents (40 out of 42) have supported the view that in India also a Witness Protection Programme should be established. Among the 40 respondents who have supported the view, 10 are from the State Governments, 10 are from the senior Police Officials, 3 are from Judges and 17 from others. The State Government of Punjab though supported the view that such a Programme should be established, but has stated that benefit of it should be given in very rare cases. The State Government of Tripura has expressed their view that as the implementation of such a Protection Programme will involve a lot of expenditure,

it should be funded entirely by the Central Government. An Advocate from Tamil Nadu has opined that though Witness Protection Programme is essential but we can not copy the Programmes in this regard existing in other countries if implemented in our country, there will be chaos and it will be bad to our society.

Only 2 respondents are not in favour of having such kind of Witness Protection Programe. D.I.G. Police, from Police H.Q. (Crime Investigation Dept.) Madhya Pradesh, has stated that instead of the Programme, general security should be strengthened by making preventive action more effectively. Shri Vepa P. Sarathi has opined that witnesses should certainly be protected, but the programmes possible in the various countries will not work in India.

(Q.)2 Apart from the change of identity, should other measures for the protection of witnesses be also provided. For example,

(a) mention in the proceeding of an address different from one he uses or which does not coincide with the domicile location provided by the civil law;

(b) being granted a transportation in a State vehicle for purposes of intervention in the procedural act;

(c) being granted a room, eventually put under surveillance and security located in the court or the police premises;

(d) benefiting from police protection extended to his relatives or other persons in close contact with him;

(e) benefiting from inmate regimen which allow him to remain isolated from others and to be transported in a separate vehicle;

(f) delivery of documents officially issued;

(g) changes in the physiognomy or the body of the beneficiary;

(h) granting of a new place to live in the country or abroad, for a period to be determined;

(i) free transportation of the beneficiary, his close relatives and the respective property, to the new place of living;

(j) implementation of conditions for the obtaining of means of maintenance;

(k) granting of a survival allowance for a specific period of time.

Apart from the change of identity, there are many other measures, which may be provided in the Witness Protection Programme. These measures (eleven in number) are mentioned in the question. Now question is, whether all or any of these measures should be included in our Witness Protection Programme?

Most of the respondents (39 out of 41) have opined that apart from the change of identity, other measures should also be included in Witness Protection Programme. Among these 39 respondents (10 State Governments, 9 Police Officers, 3 Judges and 17 others) 27 are of the view that all 11 measures (a to k) suggested in the question should be included in the Programme, while 12 respondents are of the view that some of these measures be included.

Justice Ch. S.R.K. Prasad, Judge, A.P. High Court has opined that all these things can be provided at the State expenses, but it should be extended to grave offences only, which are punishable with 10 years imprisonment or more.

The State Government of Jharkhand is not in favour of extending benefit of changes in physiognomy or the body of beneficiary.

The State Government of Punjab has suggested that whenever an order for witness protection by changing his place of residence or facial identity of the witness is made, then it has to be ensured first, that such person does nor have any civil or criminal litigation. If there is any such matter, then some how it be disposed off before such protection is given otherwise whole purpose shall be frustrated.

Special Commissioner of Police, New Delhi has suggested that these suggested measures requires big infrastructure to implement them. These infrastructures should be in place before we go for it.

Punjab State Law Commission is of the view that ordinarily change of identity may be sufficient for the protection of witness but in a given case, the court may provide any of the protection enumerated in the question, depending upon the facts and circumstances of each case.

Shri Venkat Bedre, Advocate and Member Maharashtra State Law Commission has opined that all these schemes are too expensive, therefore, it is to be provided only in organized crimes against the State or society.

I.G. Police H.Q. of Assam is of the view that only change of identity is sufficient.

Shri Vepa P. Sarathi has stated that every one of the suggestions is impractical in our country.

(Q.)3 Who among the following should be made in-charge of the implementation of the entire Witness Protection Programme:

(a) Judicial Officer (b) Police Officer (c) Government Department (d) Autonomous body.

Here question is who should be made in-charge of the entire Witness Protection Programme? Whether he should be a judicial officer or police officer or it should be implemented by a Government Department or by an autonomous body?

There is no unanimity amongst the respondents on this issue. However, majority (15 in number) are in favour that Judicial Officer should be made in-charge of this Witness Protection Programme. Among these 15 respondents, 4 are Police Officials, 1 from a State Government, 1 from a High Court Judge, and 9 are from others.

11 respondents (6 State Governments, 2 Police Officers and 3 others) are of the view that Government Department be made in-charge of this Programme.

8 respondents (2 Police Officers, 1 State Government, 1 High Court Judge and 4 others) are in favour that an Autonomous Body should be made in-charge of Witness Protection Programme.

Only 6 respondents (2 State Governments, 3 Police Officers, and 1 Judge of a subordinate court) have opined that a Police Officer be made in-charge of the Programme.

(Q.)4. Should apart from prosecution witness, a defence witness be also eligible to be admitted into the Witness Protection Programm, if danger to his life or property exists due to his being a witness?

So far as a prosecution witness is concerned, he is certainly eligible to be admitted into the Witness Protection Programme, if danger to his life or property exists due to his being such a witness. But, here question is, whether a defence witness should also be also eligible to be admitted into such Programme, if danger to life or property to such witness exists due to his being a witness? In some cases danger to life or property of defence witness may also exist. Every witness whether he is a prosecution witness or defence witness, is important for fair adjudication of a criminal case.

27 respondents out of 40 are in favour that a defence witness be also eligible to be admitted into the Witness Protection Programme, if danger to his life or property exists due to his being a witness. Among these 27 responses, 6 are from State Governments, 6 are from senior Police Officers, 3 are from Judges and 12 are from others.

However, 13 respondents (3 State Governments, 4 Police Officers and 6 others) are not in favour of extending the benefit of Witness Protection Programme to the defence witnesses.

(Q.)5 Should the Superintendent of Police/ Commissioner of Police be empowered to certify whether a particular person or victim or witness is in danger and entitled to be admitted to the Witness Protection Programme? Should such certificate be further reviewed by the trial

Judge before making an order of witness protection? Should such proceedings in court be held in camera?

A particular witness or victim can be admitted into the Witness Protection Programme, if there is danger to his life or property exists due to his being a witness or victim. Now, question is, who has to certify that such a danger exists and that the witness is entitled to be admitted into the Programme? Whether senior police officers like Superintendent of Police or Commissioner of Police be empowered to certify about the existence of danger and also to certify that particular person is entitled to be admitted into such Witness Protection Programme? Another point is that whether such certificate is itself sufficient for admitting a person into the Programme or it should be further reviewed by the trial judge before making an order of witness protection? Whether reviewing proceedings in the court should be held *in camera.*

Most of the respondents (33 out of 40) are of the view that senior police officers like Superintendent of Police or Commissioner of Police should be empowered to certify whether a particular person or victim or witness is in danger and is entitled to be admitted into the Witness Protection Programme. Among these 33 respondents, 8 are from the State Governments, 10 are from Police Officials, 3 are from the Judges and 12 are from others. Among these respondents, 15 respondents have further opined that such certificate of Police Officers should, further be reviewed by the trial judge, while 8 respondents are of the view that there is no need of further reviewing by the trial judge. Among these 15 respondents, 7 are also of the view that such reviewing proceedings in the court should be held *in camera*.

Only 7 respondents (1 State Government and 6 others) are of the view that S.P. or Commissioner of Police should not be empowered to certify whether a particular person is in danger and is entitled to be admitted into the Programme.

(Q.) 6. Whether protection under the Programme should also be extended to the family members, close relatives and friends of the threatened witness? If so, who should be included in the list of such persons?

It is often seen that apart from the witness, his family members, close relatives and even sometime friends, are also threatened by opposite party. Further, family members of witness are dependent upon him. Question arises that whether protection under the Witness Protection Programme should also be extended to the family members, close relatives and friends of the witness? And who should be included in the list of such persons?

Most of the respondents (38 out of 40) have supported the view that Protection under the Witness Protection Programme should be extended to family members, close relatives etc. Among these 38 responses, 8 are from the State Governments, 10 are from the Police Officers, 3 are from the Judges and 17 are others.

Only State Government of Delhi and one other respondent have opposed the view.

In respect of question that who should be included in the list, there is no uniformity in the responses. Some have suggested that depending upon the facts of

each case, such protection may be extended to family members, close relatives and friends. Some have opined that parents, siblings, sons and daughters, spouse may be included in the list.

(Q.)7. Should necessary funds be provided by both the Central and State Governments for implementation of the Witness Protection Programme?

For the purpose of implementation of the Witness Protection Programme, a lot of funds may be required. In such a situation it is suggested that both the Central as well as State Governments should provide necessary funds for the purpose of implementation of the Witness Protection Programme. As the "Administration of Justice" falls under entry 11A of the concurrent list of the 7th Schedule of the Constitution of India, it is the responsibility of both the Central as well as State Governments.

31 out of 40 respondents have agreed that for the purpose of implementation of Witness Protection Programme, necessary funds should be provided by both the Central as well as State Government concerned. Among these 31 respondents, 6 are State Governments, 8 are Police Officials, 3 are Judges and 14 are others. State Government of Bihar and Administraton of Union Territory of Lakshadwep have suggested that the Central Government should meet 75 % expenditure of the Programme.

State Governments of Orissa, West Bengal and Tripura are of the view that the Central Government should provide entire funds. Similar view is expressed by the Director General of Police of Punjab State and of Manipur.

Contrary to it, 4 respondents have suggested that it should be funded by the State Government concerned.

(Q.)8. Should a witness who is being admitted into the Programme be required to enter into a memorandum of understanding with the in-charge of the Programme setting out his rights, obligations, restrictions as well as of the person in-charge of the Programme? What are the means of enforcing such rights and obligations?

In most of the countries, where the Witness Protection Programmes exists, there is provision that the witness who is admitted into the Programe, is required to enter into a Memorandum of Understanding (MOU) with the in-charge of the Programme. The said MOU contains the rights, obligations and restrictions of the witness as well as of the in-charge of the Programme. Whether in our country a witness who is being admitted into the Programme should be required to enter into such kind of MOU? Further, what should be the means for enforcing such rights and obligations?

Most of the respondents (29 out of 37) have supported the view that a witness who is being admitted into the Witness Protection Programme should be required to enter into a MOU with the in-charge of the Programme setting out his rights, obligations and restrictions as well as of the person in-charge of the

Programme. Among them 6 responses are from the State Governments, 9 are from the Police Officers, 3 are from the Judges and 11 are from others.

In respect of the question that how these rights and obligations can be enforced, various options have been suggested. The State Government of Jharkhand has suggested that a special Act may be enacted making provision for penal clause in case of violation of MOU: D.G.Police, Gujarat is of the view that the Police under a special statute can enforce it. D.G.Police, Haryana, has suggested that some security in shape of documents, title to property may be taken from the person admitted into the Programme. Such person may enforce his rights through court of law. D.G. Police Goa, is of the view that some rules have to be formulated for enforcing such rights & obligations. D.G. Police, Punjab has suggested that for the purpose of enforcement of such rights and obligations, Criminal Procedure Code, 1973 may be amended. Shri Justice Anoop V. Mohta, Judge, Bombay High Court is of the view that heavy penalty should be imposed in case of violations of restrictions and obligations. A retired D.G.Police of M.P. suggests amendment in Section 446 Cr.P.C.

Only 8 respondents (2 State Governments, 1 Police Officer and 5 others) are not in favour of requirement of entering into a MOU by the person admitted into the Witness Protection Programme.

(Q.)9. When the identity of a person is changed, and he later becomes a party as plaintiff or defendant or a witness in any other civil proceedings, then should such proceeding be allowed to be suspended temporarily and be subject to order of the Court regarding institution, trial or judgment in such proceedings?

This is an important issue. When the Court grants anonymity to a person and thereby his identity is changed, and later on if he becomes a party or a witness in any other civil proceedings, question arises how he should be identified in such later civil proceedings. If his actual identity is made known, then the whole purpose of giving anonymity to him would be frustrated. It is suggested that the later civil proceeding may be allowed to be suspended temporarily and the civil court may pass order regarding institution, trial or judgment in such proceedings. Similar kind of provision exists in Section 15 of the Witness Protection Act, 1998, of South Africa. It provides that any civil proceedings in which a protected person is a party or witness may be proceeded as per the order of the High Court in an *ex parte* application made to him in chamber. The High Court may make an appropriate order with regard to the institution, prosecution or postponement of those civil proceeding.

30 out of 37 respondents have agreed that such later civil proceedings be allowed to be suspended temporarily and should be subject to the order of the court regarding institution, trial or judgment in such proceedings. Among these 30 respondents, 7 are State Governments, 9 are Police Officers, 1 is Judge and remaining 13 are others.

State govt. of West Bengal is of the view that in such cases the witness may sue or be sued in his actual name.

Special Commissioner of Police, H.Q. New Delhi has suggested that for those persons there is no need of any witness protection.

Shri Justice C.R.K. Prasad, Judge A.P. High Court has suggested that such civil proceedings be conducted in camera.

Shri Justice Anoop V. Mohta is of the view that normally such civil proceeding should not be suspended. But in exceptional circumstances only such proceeding may be suspended under the order of the Court.

3 respondents (1 State Govt. of Bihar and 2 others), however are not in favour of suspension of civil proceedings.

(Q.)10. When the identity of a person is changed, and he is an accused or a witness in any other criminal proceeding under his former identity, should the person in-charge of Protection Programme be authorized to disclose his identity to the prosecutor, judge or magistrate and or to defence lawyer in such cases?

This is also an important issue. It relates to a situation where the identity of a person is changed, and such person is an accused or witness in any other criminal proceeding under his former identity. In such cases, whether the in-charge of Witness Protection Programme should be authorized to disclose the identity of protected person to the prosecutor, Judge/ magistrate and/or to the defence lawyer? As per Section 17 (5) of the Witness Protection Act, 1998 of South Africa, the Director of Witness Protection Programme is authorized to disclose the identity of a protected person in any criminal proceeding. Similar kind of provision exists in the Witness Protection Act, 1996 of National Capital Territory of Australia.

26 out of 38 respondents have agreed with the suggestion that the person in-charge of the Witness Protection Programme may be authorized to disclose the identity of the protected person if such protected person is an accused or a witness in any other criminal proceeding under his former identity. However, many respondents are of the view that identity may be disclosed to the judge or magistrate concerned but should not be disclosed to the defence lawyer. Among those 26 responses which have favoured the above suggestion, 7 are from the State Governments, 7 are from senior Police Officials, 1 response is from a Judge of High Court and remaining 11 are from others.

Special Commissioner Police, New Delhi is of the view that in such cases, no protection should be given to such persons.

11 respondents (2 State Governments, 2 Police Officers, 2 Judges and 5 others) are not in favour of giving power to the person in-charge of the Programme to disclose the identity of protected person if such person is accused or witness in any other criminal proceeding.

(Q.)11. Should a person be held liable to punishment if he discloses the identity of any protected person without the authorization of the Court that granted the protection? If so, what punishment should be prescribed?

This is regarding the liability of a person who discloses the identity of a protected person without any authorization of court. Whether such person if discloses the identity, should be punished? And if so, what should be the quantum of punishment?

All the 40 respondents, who have given their answer to this question, have agreed that if any person discloses the identity of a protected person without any authorization of the Court, he should be held criminally liable for such disclosure. In regard to quantum of punishment, most responses have suggested that penalty should be severe and stringent. There is no unanimity in respect of period of imprisonment and amount of fine, which is to be prescribed. It starts from 3 months imprisonment and goes upto 7 years. Similarly amount of fine suggested by the respondents' starts from Rs. 5000/- to 50,000/-.

(Q.)12. Do you support the view that where a witness who is admitted to the Programme fails or refuses to testify without any just cause, he should be prosecuted for contempt of court and the protection order be cancelled?

The main purpose of having a Witness Protection Programme is to protect the witnesses so that they may come forward to testify in the Court. Their testimony may be necessary for rendering justice in the case. If such a witness fails or refuses to testify without any just cause, should he not be prosecuted for contempt of court? Should his protection order be not cancelled?

32 out of 40 respondents (7 State Governments, 7 Police Officers 2 Judges and 17 others) have supported the view that where a witness who has admitted into the Witness Protection Programme fails to testify without any just cause, he should be prosecuted for contempt of court and his protection order should also be cancelled.

2 State Governments, 2 police officials and one Judge of a High Court are of the view that in such a situation only the protection order should be cancelled and there is no need to prosecute such witness for contempt of court.

2 respondents, however have not supported the above view altogether.

(Q.)13. Should the decision either admitting or refusing to admit a person to the Witness Protection Programme, be made appealable? To avoid delays, should such appeal lie directly to the High Court?

This is about the question that whether there should be right to appeal against the order of admitting or refusing to admit a person to the Witness Protection Programme? If there is need to have right to appeal, to which Court should such appeal lie? In order to avoid delay it is suggested that such an appeal may go directly to the High Court.

27 respondents (out of 38) are of the view that there should be right to appeal against the order of admitting or refusing to admit a person to the Witness Protection Programme. Except the State Govt. of West Bengal all others have agreed that such appeal may lie to the High Court. Many respondents have opined that such appeal should be disposed off in a fixed time period. Among these 27 responses, 5 are from State Governments, 8 are from Police Officers, 2 from Judges and 12 are from others.

State Governments of Orissa and of Manipur, and organization (SARI) have opined that there should be right of appeal only against order of refusal to admit into the Programme and not against the order for admitting into the Programme.

8 respondents (2 State Governments, 2 Police Officer, a Judge of a High Court and 3 others are not in favour of providing any appeal against the order of admitting or refusing to admit into the Programme.

(Q.)14. Do you have any other suggestions in respect of Witness Protection Programme?

Many respondents have given their suggestions. But there is no much substance in them. Therefore, these are not discussed here.

Chapter - XIII

Questionnaire – Discussion of responses – Recommendations

We have analysed the responses to the 14 Questions dealing with Witness Protection Programmes in the Questionnaire extensively in our Summary in Chapter XI. In this chapter we propose to discuss the responses and give our recommendations.

1) The question is whether Witness Protection Programmes should be established to protect witnesses outside Court.

As stated in the last Chapter, almost all those who responded, (except two) supported the introduction of Witness Protection Programmes. Some of the respondents suggested that while all those measures which are in force in other countries are not feasible in our country, at least some of the important measures could be introduced. At any rate, the programmes must be confined to cases of 'serious' offences, it was suggested.

Answer:

In our view, Witness Protection Programmes are necessary in our country and may be limited to cases of 'serious' offences and must apply to victims and prosecution witnesses alike. They can be confined, in our view, to cases triable by Sessions Courts or Courts of equal rank and Special Courts where, witness protection outside the Court is felt necessary. Such a determination must be made in the Court of a Magistrate on an application by the investigation agency or the public prosecutor. It is

obvious that Witness Protection Programmes require finances and unless the Central/State Governments come forward to meet the expenditure, the programmes cannot be introduced.

Of course, only if identity protection is given and not other types of protection (referred to in Question 2) expenditure may be listed.

We have stated in para 7.7.5 of the Consultation Paper that in USA, after the introduction of the programmes, "it has obtained an overall conviction rate of 89% as a result of protected witness's testimony". If the Union and State Governments want better conviction rates, they must come forward and allocate the necessary finances for Witness Protection Programmes.

(Q.)2 Apart from the change of identity, should other measures for the protection of witnesses be also provided. For example,

(a) mention in the proceeding of an address different from one he uses or which does not coincide with the domicile location provided by the civil law;

(b) being granted a transportation in a State vehicle for purposes of intervention in the procedural act;

(c) being granted a room, eventually put under surveillance and security located in the court or the police premises;

(d) benefiting from police protection extended to his relatives or other persons in close contact with him;

(e) benefiting from inmate regimen which allow him to remain isolated from others and to be transported in a separate vehicle;

(f) delivery of documents officially issued;

(g) changes in the physiognomy or the body of the beneficiary;

(h) granting of a new place to live in the country or abroad, for a period to be determined;

(i) free transportation of the beneficiary, his close relatives and the respective property, to the new place of living;

(j) implementation of conditions for the obtaining of means of maintenance;

(k) granting of a survival allowance for a specific period of time.

In respect of the above measures, the responses were that change of identity is sufficient but that other measures (a) to (k) may be taken wherever the circumstances require. Of course, as stated above, it is agreed that the programme should be confined to exceptional cases where the offences are triable by Courts of Session. We have examined these responses in detail.

(A) In our view, the concerned witness may be given a different identity, (say) he or she may be described by a letter in the English alphabet, and his or her address may be kept secret. If any statement is recorded from the witness, the name and address should not be disclosed except to the investigation agency, and to the Magistrate who hears the application for grant of the protection under the programme.

If the Witness Protection Programme offers no more than identity protection, such protection is not very expensive and no heavy allocation of funds is necessary. The only difference between such protection and witness identity protection discussed in Part I of this Report is that identity protection given under the programme is intended for purposes outside Court in various situations whereas identity protection dealt with in Part I deals with protection during investigation before Police and inquiry and

trial in the Court. The witness moves in society under a different name or identity under the witness protection programme.

The Magistrate while granting such identity protection under the programme, need not to give any notice to the accused. The Police may place the relevant material before the Magistrate or the Magistrate may record the statement of the witness – keeping his or her identity confidential – and he may pass an order in that behalf and the new identity will apply in all transactions or proceedings outside Court also.

(B) It is only where the other measures such as re-location, maintenance, providing accommodation, transport etc. are given, apart from identity protection, that it will be effective but it then becomes necessary for the Union/State Governments to make adequate funds available under the programme.

There may indeed be a few grave cases where apart from giving identity protection, the other measures (a) to (k) referred to above, may be necessary. It cannot be suggested that there will be no cases requiring some of the other measures (a) to (k) to be given.

Therefore, in our view, it is implicit that the programme must contemplate other measures, in addition to identity protection, to be taken wherever necessary even though such measures will be confined to extraordinary cases among the class of cases of serious offences triable by Courts of Session.

It is, therefore, not possible to deny the benefit of other measures absolutely at least in deserving cases, however small in number they may be.

We, therefore, recommend that the various measures (a) to (k) referred to above, must be part of the programme and adequate funds must be allocated by the Union and State Governments.

(Q.)3 Who among the following should be made in-charge of the implementation of the entire Witness Protection Programme:

(a) Judicial Officer (b) Police Officer (c) Government Department (d) Autonomous body.

In the responses received to this question, there was no unanimity. 15 responses, however, suggested that the implementation should be with the Judicial Officer. Among these 15 were 4 Police officers, a State Government, a High Court Judge and 9 others; 6 State Governments, 2 Police Officers and 3 others suggested that a Government Department must be in charge. 8 persons, including 2 Police Officers, a State Government and a High Court Judge and 4 others) suggested it should be under an autonomous body. Six respondents (including 2 State Governments, 3 Police Officers, a trial Judge) suggested that a Police Officer be in charge.

In the Witness Protection Programme, the control ultimately must be with Judicial officers. The Police may decide which witness requires to be placed under the Witness Protection Programme but it must be for the Magistrate to decide whether a witness has to be admitted to the programme. The expenditure incurred for the grant of different identity, relocation, maintenance, transport, accommodation etc. must be met by the Union and the State Governments jointly, because we are dealing with serious crimes listed in the Indian Penal Code, 1860 which is a Central statute though the offence is committed within the territories of a State.

The Chief Justice of the State High Court must be the Patron-in-chief of the Witness Protection Programme and he may administer the fund through the State Legal Aid Authority, which is constituted for each High Court and which is headed by a High Court Judge. Whenever a Magistrate, upon an application by the District Superintendent of Police or Commissioner of Police or the Public Prosecutor, passes an order admitting a witness to the Witness Protection Programme, the order should be communicated to the State Legal Aid Authority and the latter should issue appropriate directions to the District Legal Services Authority, for release of funds for the purpose of implementing the order. Out of the amount allocated to the State Legal Aid Authority, a certain amount must, therefore, be set apart for funding the witness Protection Programmes.

For this purpose, if necessary, an amendment may be carried into the Legal Services Authorities Act, 1987 to say that the Chief Justice of the High Court shall be the Patron-in-chief of the Programme that the State Legal Aid Authority and the District Legal Aid Authority shall exercise the powers and perform duties assigned to them under the Witness Protection Programmes, including the administration of funds allocated for that purpose by the said Governments.

(Q.)4. Should apart from prosecution witness, a defence witness be also eligible to be admitted into the Witness Protection Programm, if danger to his life or property exists due to his being a witness?

Over 27 respondents out of 40 are in favour of defence witnesses also being admitted to the programmes if danger to their life or property exists.

Of these 6 are State Governments, 6 are police officers and 3 are from Judges and 12 others. Others are not in favour.

The benefit of the programme could be extended to defence witnesses also because the basis of extending the programme to defence witnesses is that their life and property is in danger.

But, as the question of funding the programme may have some constraints, for the present, the programme may be confined to prosecution witnesses and victims in the matter of crimes triable by a Court of Session.

(Q.)5 Should the Superintendent of Police/ Commissioner of Police be empowered to certify whether a particular person or victim or witness is in danger and entitled to be admitted to the Witness Protection Programme? Should such certificate be further reviewed by the trial Judge before making an order of witness protection? Should such proceedings in court be held in camera?

In the responses, 33 out of 40 were of the view that a senior police officer like the Superintendent of Police/Commissioner of Police should be empowered to certify about the need for protection and 15 of them further stated that the decision of the Police Officer must be reviewed by a Judge.

First, the police must be satisfied that a victim or a witness's life is "likely" to be in serious danger. Such a decision must be taken by a senior police officer of the rank of Superintendent of Police/Commissioner of Police and he must, after recording his reasons for coming to such a conclusion, certify about his satisfaction. But, this alone, without a further order of Court, is not sufficient.

The police or the public prosecutor must then move the Court of the concerned Magistrate who may examine the certification and material on which the certificate is based and pass a judicial order. Such a procedure before a Magistrate must take place in camera. In that inquiry, there is no need to hear the suspect or the accused.

The Magistrate must also decide whether the witness should not merely be granted a different identity but whether, any other measures are required in the case like relocation, financial assistance etc. as stated earlier.

(Q.) 6. Whether protection under the Programme should also be extended to the family members, close relatives and friends of the threatened witness? If so, who should be included in the list of such persons?

Most of the respondents, about 38 out of 40, supported the view that the programme must be extended to cover other family members, close relatives etc. as to who should be included in the list, it is said, it must depend upon the circumstances of each case.

In several cases, it may not be sufficient to grant protection only to the witness. There may be threats to the spouse, children or parents, brother or sisters of the witness. Depending upon who is living close to the witness and who is likely to be threatened, an assessment of the extent of threat to each such family members, must, no doubt, be made and if there is danger, the protection will have to extended. It is common experience that a spouse or children of a witness are generally threatened with abduction.

Further, if it is decided to relocate a witness or victim at a different place and he or she happens to be the breadwinner, the immediate family members of the witness may be deprived of all means of livelihood if the

witness alone is relocated and in such cases, interests of justice certainly require that the immediate family members be also relocated.

As proposed in the Draft Bill in the case of Witness Identity Protection (which is annexed hereto), the 'close family members' may be confined to spouse, children, parents, grand parents, brothers and sisters, but relief may be limited to those whose life or property may be in danger.

(Q.)7. Should necessary funds be provided by both the Central and State Governments for implementation of the Witness Protection Programme?

About 31 out of 41 respondents stated that the necessary funds must be provided both by the Central and State Governments. Among the 31 respondents, 6 were State Governments, 8 were police officers, 3 were Judges and 6 were others. The Government of Bihar and Administration of Union Territory of Lakshadweep have suggested that Central Government should meet 75% of the expenses while the States of Orissa, West Bengal and Tripura, and the Director General of Police, Punjab and the Director General of Manipur stated that the Central Government must bear 100% of the expenses. Only 4 respondents stated that the State Government must bear the expenses.

As stated earlier, the expenditure for Witness Protection Programmes must be borne by the Central Government and State Governments equally, 50% each. It is to be noted that the Indian Penal Code, 1860 is a piece of Central Legislation, which is being administered by the Courts established

by the State Governments. So is the Code of Criminal Procedure, 1973. Further, in 1976, by constitutional amendment, the subject of 'Administration of Justice has been shifted in Schedule 7 of the Constitution from the State List to the Concurrent List under Entry 11A and by that, the Central and State Governments have assumed joint responsibility for the 'administration of justice'. The Central Government cannot, in our view, throw the entire burden on the State Governments on the ground that 'law and order' is a State subject. The subject of 'Witness Protection Programmes' is not strictly a 'law and order' issue, but is directly connected with 'Administration of Justice' so that witnesses may depose without fear while making statements during investigation or giving evidence during inquiry and trial. We have already referred to the fact, as stated in para 7.7.4 of the Consultation Paper that in USA, since the programme's inception, it has obtained an overall conviction rate of 89% as a result of testimony of witness who wee admitted to witness protection programmes. We are of the view the Central and State Governments have to bear the expenditure equally.

8) The question is whether a witness must enter into an MOU with the programme-in-charge, setting out the right, obligations and restrictions of both parties and if so, what is the means of enforcing those rights and obligations?

Most of the respondents (29 out of 37) have supported the need for entering into an MOU under the Witness Protection Programme. This includes 6 State Governments, 9 Police Officers, 3 Judges and 11 others. Others were not in favour of an MOU. So far as enforcement of the rights and obligations under the MOU, some respondents have suggested

enactment of a special Act or execution of documents under which the witness may give property in the form of security. The Director General of Police, Punjab has suggested that provision can be made in the Code of Criminal Procedure, 1973. Some suggested amendment of sec. 446 of the Code.

We shall refer to a few provisions in other countries as to what should be contained in the MOU.

CANADA:

Under the Canadian Witness Protection Act, 1996 (see para 7.4 of the Consultation Paper), the statute in sec. 8 specifies that

> "(a) on the part of the 'Commissioner of the Fora', he is obliged to take such reasonable steps as are necessary to provide for the protection referred to in the agreement to the protector and
>
> (b) on the part of the protectee, he has an obligation
>
> (i) to give the information or evidence or participation as required in relation to the inquiry, investigation and prosecution to which the protection provided in the agreement relates,
>
> (ii) to meet all financial obligations incurred by the protectee, at law that are not, by the terms of the agreement, payable by the Commissioner,

(iii) to meet all legal obligations incurred by the protectee including any obligations regarding the custody and maintenance of children,

(iv) in refrain from activities that constitute an offence against an Act of Parliament or that might compromises the security of the protectee,

(v) to accept and give effect to reasonable requests and directions made by the Commissioner in relation to the protection provided to the protectee and the obligations of the protectee"

Under sec. 11(1) of that Act, no information about the location or change of identity of a protectee or a former protectee can be disclosed by any person.

SOUTH AFRICA:

Under sec. 11(4) of the South African 'Witness Protection Act, 1998', the Director of the Office of Protection has the following obligations:

"(a) (i) to take such reasonable steps as are necessary to provide the protected person with the protection and related services, as referred to in the protection agreement concerned; and

(ii) not to keep a protected person under protection in any prison or police cell, unless otherwise agreed upon;

(b) the obligations of the witness or related person are

(i) where applicable, to give evidence as required in the proceedings to which the protection relates;

(ii) to meet all financial obligations incurred by him or her that are not payable by the Director in terms of the protection agreement;

(iii) to meet all legal obligations incurred by him or her including any obligations regarding the custody and maintenance of children and taxation obligations;

(iv) to refrain from activities that constitute a criminal offence;

(v) to refrain from activities that might endanger his or her safety or that of any other protected person;

(vi) to accept and give effect to all reasonable requests and directions made or given by any members of the office in relation to the protection provided to him or her and his or her obligations;

(vii) to inform the Director of any civil proceedings which have or may be instituted by or against him or her or in which he or she is otherwise involved;

(viii) to inform the Director of any criminal proceedings which have or may be instituted by or against him or her or in which he or she is involved, either as a witness or as accused or otherwise; and

(ix) not to endanger the security or any other aspect of the protection of witnesses and related persons or related services or any other matter relating to a witness protection programme provided for in this Act.

(c) any other prescribed terms and conditions agreed upon; and

(d) a procedure in accordance with which the protection agreement may, if necessary, be amended."

Sec. 17 states that no person shall disclose any information which he has acquired in exercise of powers or functions etc. under the Act, except for the purpose of giving effect to the provisions of the Act or when required to do by any Court. Subsections (5) to (7) refer to the manner and conditions in which the Director may disclose any information.

As regards execution of an MOU by the witness, we have stated in the previous chapter that it is the procedure in almost all countries wherever the Witness Protection Programmes are in force that there is an MOU between the witness and the concerned Police authorities or Prosecutor and the statute concerned contains a list of the rights and obligations of both parties. They have to be incorporated into the MOU.

We recommend that the MOU has to be entered by the victim/ witnesses with the District Superintendent of Police or the Commissioner of Police, as the case may be, and they would move the Magistrate for admitting the victim/witness to the programme. On such orders, funds will be released thereafter by the Legal Aid authorities as stated earlier. Various obligations of the parties, listed above, which have to be covered by the MOU can be listed. The MOU must provide that each party to the MOU will abide by the terms of the MOU. The MOU must contain the broad obligations such as those listed in Canada and South Africa

As to enforcement of the provisions of the MOU, once the rights and obligations are set out in the statute, it can also provide, if necessary, that the parties to the MOU may approach the Magistrate Court for the purpose of enforcement of its terms. In case of breach of MOU by the victim/witness or the police or any other person, the affected party can move the Magistrate for appropriate orders.

(Q.)9. When the identity of a person is changed, and he later becomes a party as plaintiff or defendant or a witness in any other civil proceedings, then should such proceeding be allowed to be suspended temporarily and be subject to order of the Court regarding institution, trial or judgment in such proceedings?

We may state that 30 out of 37 respondents agreed that such later civil proceedings which come into being later may be allowed to be suspended temporarily and should be subject to the order of the Court in which the proceeding has to be filed or is pending regarding the institution, trial or judgment in such proceedings. Among these, 7 are State Governments, 9 are Police Officers and 1 is a Judge and there are 13 others.

(a) A civil proceeding, if it has to be instituted by the protected victim/witness, as a plaintiff or a petitioner, then instead of making a provision for extending period of limitation, it will be sufficient if the protected person is enabled to file the case under a pseudonym, where his or her real name and address are not disclosed in the court records but are

disclosed only to the Judge. The same procedure can be adopted if a civil proceeding is pending at the time when the witness is declared as a protected witness and has to be continued. The proceedings will reflect the pseudonym and the new address will be kept secret except to the Judge in the civil case. Thereafter the civil proceeding has to be stayed temporarily till the criminal case in which the person is a protected witness under the programme is completed.

(b) Where the protected person is sued in his real name, and is a defendant/respondent, the proceeding may again have to be stayed temporarily after substituting his name by a pseudonym and his new address has to be kept confidential except to the Judge in the civil case.

The stay of the civil proceeding in both situations will be till the completion of the criminal case (in the trial Court) in respect of which he has been admitted to the Witness Protection Programme.

(c) Such stay orders have to be granted ex-parte and in in-camera proceedings in the Court in which the civil case is filed or is pending and they will have to be passed upon the application of the abovesaid police authorities or the public prosecutor or the affected witness by using his pseudonym in that civil court.

Such a procedure staying the civil case is available under sec. 15 of the South African Witness Protection Act, 1998 (see para 7.2 of the Consultation Paper).

(Q.)10. When the identity of a person is changed, and he is an accused or a witness in any other criminal proceeding under his former identity, should the person in-charge of Protection Programme be authorized to disclose his identity to the prosecutor, judge or magistrate and or to defence lawyer in such cases?

26 out of 38 respondents suggested that the person incharge of the Witness Protection Programme be authorized to disclose the real identity to the Judge or prosecutor. Several suggested that the real identity cannot be disclosed to the 'defence' lawyer.

Reference has been made in Chapter XII to the procedure in South Africa and Australia where the real identity is disclosed only to the Magistrate or Judge in whose Court the criminal case is filed against the protected witness. The following procedure has to be adopted if a criminal case is filed by/against the protected witness:

(i) Where a criminal case is filed against the victim/witness admitted to a witness protection programme, his or her real identity and pseudonym/relocated address may be disclosed only to the Magistrate or Judge dealing with such proceeding, i.e. the proceeding filed against the protected witness and the said Magistrate or Judge will have to stay the criminal proceeding till the trial in the earlier proceeding in which the person so accused is a protected witness is completed.

(ii) Where the victim/witness is a complainant in a criminal case or a prosecution witness, the real identity and address will be

disclosed to the Judge/Magistrate before whom the matter would come up and that proceeding has to be stayed till the trial of earlier proceeding in which the person is a protected witness is completed.

(Q.)11. Should a person be held liable to punishment if he discloses the identity of any protected person without the authorization of the Court that granted the protection? If so, what punishment should be prescribed?

(i) All the respondents have agreed that any breach of the statutory provision regarding maintenance of confidentiality must be made punishable and punished severely.

We recommend that the unauthorized disclosure by any person of the identity of a witness admitted to a Witness Protection Programme must be made an offence under the proposed law and must be made severely punishable.

(ii) As regards the quantum of punishment, the suggestions of the respondents ranged from 3 years to 7 years and fine between Rs.5000 and Rs.50,000.

We recommend that having regard to the fact that we are proposing Witness Protection Programmes for offences triable by a Sessions Court,

breach of security as to identity must be visited with a punishment of 3 years with fine which may go upto Rs.10,000.

(Q.)12. Do you support the view that where a witness who is admitted to the Programme fails or refuses to testify without any just cause, he should be prosecuted for contempt of court and the protection order be cancelled?

32 out of 40 respondents (including 7 State Governments, 7 Police Officers, 2 Judges and 17 others) stated that not only action should be taken for contempt of Court but that the protection be withdrawn.

If the protected witness violates the MOU and fails or refuses to testify without justifiable cause, both action for contempt of Court and cancellation of the order admitting the witness to the programme must follow.

It is true that so far as our subordinate Courts are concerned, they do not have power to punish anybody for contempt of Court but the Contempt of Courts Act, 1971 envisages that the Judge inform the concerned High Court to take action under the Act and, therefore, this procedure will have to be followed. In addition, the police or the public prosecutor can move the Magistrate who passed the orders admitting the witness to the programme, for cancellation of the order admitting the witness to the programme.

(Q.)13. Should the decision either admitting or refusing to admit a person to the Witness Protection Programme, be made appealable? To avoid delays, should such appeal lie directly to the High Court?

27 out of 38 respondents were in favour of providing a right of appeal against an order admitting or refusing to admit a witness to the programme. Mostly, it has been stated that appeal should lie to the High Court. Among these, 5 responses were from State Governments, 8 from Police Officers, 2 from Judges and 12 from others.

If a victim/witness is given physical protection outside Court or is relocated and given a different name, that no way affects the rights of the accused in that case and he can have no grievance as long as the person will be brought before the Court to depose against him. However, if such victim/witness has, in addition, a witness identity protection order, the accused has a right of appeal to the High Court as provided in sec. 15 of our Draft Bill.

However, if a Magistrate refuses to admit witness/victim to a witness protection programme, the witness/victim must have a right of appeal to the High Court.

There is no contradiction in not providing an appeal at the instance of an accused where a witness is admitted to protection outside Court under a programme on the one hand and providing an appeal in favour of the victim/witness in as much the case of a victim/witness who has been wrongly denied admission to the programme will compel such a person to

live in fear outside Court throughout the period during which the criminal case may be pending.

We recommend accordingly in respect of the thirteen questions posed in the Consultation Paper in relation to 'Witness Protection Programmes'.

(Justice M. Jagannadha Rao)
Chairman

(R.L. Meena)
Vice-Chairman

(Dr. D.P. Sharma)
Member Secretary

Dated: 31.8.2006

ANNEXURE I

The Witness (Identity) Protection Bill, 2006

A Bill to provide for identity protection to threatened witnesses in criminal cases involving serious offences and to provide for procedure and mechanism for such protection and for such other matters incidental thereto:

Be it enacted by Parliament in the Fifty Seventh year of the Republic of India as follows:-

CHAPTER I
PRELIMINARY

Short title and commencement.-

1. (1) This Act may be called the Witness (Identity) Protection Act, 2006.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette appoint.

Definitions.-

2. In this Act, unless the context otherwise requires:-

(a) *"identity"* in relation to a person includes name, sex, names of parents, occupation and address of such person;.

(b) *"close relative"* includes spouse, parents, grand parents, sons, daughters, grand children, brothers and sisters;

(c) "judge" means the Presiding Judge of the Court of Session or Judge of a Court of equivalent status or of a Special Court;

(d) *"serious offence"* means an offence which is described as triable by a Court of Session in the First Schedule to the Code of Criminal Procedure, 1973 (2 of 1974) and includes any offence which is required to be tried by a Court of Session or any other equivalent designated court or special court, by a special law;

(e) *"threatened witness"* means any witness in respect of whom, there is likelihood of danger to the safety of his life or life of his close relatives; or serious danger to his property or property of his close relatives, by reason of his being a witness;

(f) *"victim"* means any person who has suffered physical, mental, psychological or monetary harm or harm to his property as a result of the commission of any offence;

(g) *"witness"* means:

(i) any person who is acquainted with the facts and circumstances, or is in possession of any information or has knowledge, necessary for the purpose of investigation, inquiry or trial of any crime involving serious offence, and who is or may be required to give information or make a statement or produce any document during investigation, inquiry or trial of such case, and

(ii) includes a victim of such serious offence.

(h) words and expressions not defined in this Act and defined in the Code of Criminal Procedure, 1973 (2 of 1974) shall have the meanings assigned respectively to them in that Code.

Application of the Act and overriding effect.-

3. (1) The provisions of this Act shall be applicable to the investigation, inquiry and trial of serious offences.

(2) In case of any inconsistency, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any provision of the Code of Criminal Procedure, 1973 (2 of 1974), or in any provision of any other law for the time being in force.

CHAPTER II

WITNESSES IDENTITY PROTECTION ORDER

Part I

Identity Protection During Investigation

Application for seeking Identity protection order:-

4. (1). During the course of investigation of any serious offence, if the officer in-charge of investigating agency is satisfied that for the purpose of effective investigation of the case, it is necessary to

protect the identity of any threatened witness, he may, through the Public Prosecutor or Assistant Public Prosecutor, as the case may be, apply in writing to the Judicial Magistrate First Class or Metropolitan Magistrate, seeking an identity protection order.

(2). In every application made under sub-section (1), the true identity of the threatened witness, and any other particulars which may lead to the identification of the threatened witness, shall not be mentioned, and instead a pseudonym or a letter of English alphabet shall be mentioned to identify the threatened witness, but the true identity and other particulars shall be disclosed to the Magistrate.

(3). Every application under sub-section (1),

(a) shall be accompanied by the relevant material and documents which are evidence that the witness is a threatened witness and of the need to grant a protection order, and

(b) may be accompanied by a certificate of an officer of the rank of Superintendent of Police or Commissioner of Police certifying that the witness is a threatened witness.

Ex parte preliminary inquiry by the Magistrate.-

5. (1). The Magistrate shall, upon receipt of an application under section 4, hold a preliminary *ex parte* inquiry *in camera* to determine whether the witness is a threatened witness as claimed in the application and

whether there is necessity to pass a protection order, and shall follow the procedure laid down in this section for such determination.

(2). The Magistrate may require the prosecution to place before him any material or document which has not been already submitted, and which he considers relevant for the disposal of the application.

(3). The Magistrate shall hear the prosecution and, in his discretion, may examine any person including the witness who is subject of the application orally, and shall record the substance of the statement.

(4). During the course of the preliminary inquiry, no prosecutor, officer of the Court, or other person present or involved in the preliminary hearing shall disclose or reveal or leak out any information regarding the true identity of the witness, or any other particulars likely to lead to the witness's identification.

(5). During the course of the preliminary inquiry, no oral evidence shall be given, and no question may be put to any person, if such evidence or question relates directly or indirectly to the true identity of the witness who is subject of the application.

(6). While considering the application, the Magistrate shall have regard to the following:-

(i) the general right of the accused to know the identity of witness;

(ii) the principle that witness anonymity orders are justified only in exceptional circumstances;

(iii) the gravity of the offence;

(iv) the importance of the threatened witness's evidence in the case;

(v) whether the witness's statement, if any, under subsection (3) as to why he is a threatened witness and as to why there is necessity to pass a protection order, is reliable; and

(vi) whether there is other evidence, which corroborates the threatened witness's evidence in respect of the offence.

Order by the Magistrate.-

6. (1). If, after consideration of

(a) the application and all material and documents submitted in support of the application under section 4; and

(b) the statement of any person recorded, if any, under sub-section (3) of section 5;

and, after hearing the prosecution, the Magistrate is satisfied that

(a) the witness who is subject of the application is a threatened witness;

(b) withholding the threatened witness's identity until the investigation is completed and final report or charge sheet is submitted in the court, would not be contrary to the interests of justice; and

(c) the need for passing a protection order outweighs the general right of the accused to know the identity of the witness,

he shall, pass a reasoned judicial order that until the investigation is completed and the police report referred to in sub section (2) of section 173 of the Code of Criminal Procedure, 1973 or charge sheet under any other law is forwarded to the Magistrate or Judge, the identity of threatened witness shall not be reflected or mentioned in:

(a) any document prepared or any statement recorded under sections 161 and 164 of the Code of Criminal Procedure, 1973 (Act 2 of 1974) or any other statement recorded during the course of investigation, including the case diary ;

(b) the police report or charge sheet referred to above and documents forwarded along with the police report or charge sheet;

(c) any other document forwarded to the Magistrate or Judge in any proceeding in relation to such offence;

(d) any proceeding before the Magistrate or before any other Court, during investigation, in relation to such offence.

(2). If, however, after such consideration and hearing as referred to in sub-section (1), the Magistrate is satisfied that

(a) the witness who is the subject of the application is not a threatened witness, or

(b) withholding the identity of such a witness

(i) would be contrary to the interests of justice, or

(ii) would not outweigh the right of the accused to know the identity of the witness,

he shall, by a reasoned judicial order, dismiss the application.

Prohibition of mentioning identity of witness.-

7. (1) The true identity of witness who is subject of the application shall not be mentioned or reflected in any order sheet or proceeding under this part.

(2). It shall not be lawful for any person to print or publish in any manner any matter in relation to any proceeding under this part.

Part II

Identity Protection after completion of investigation

Application for Identity Protection.-

8. (1). If, after the Police Report referred to in sub section (2) of section 173 of the Code of Criminal Procedure, 1973 (2 of 1974) or charge sheet referred to in any other law is forwarded to the Magistrate or Judge, as the case may be, but before the examination of witnesses begins to commence at the trial, including inquiry, the Assistant Public Prosecutor or the Public Prosecutor, as the case may be, is if opinion that it is necessary to protect the identity of a threatened witness, whether or not, identity protection in respect of such threatened witness was sought or ordered at the stage of investigation under Part I, he may, move an application in writing to the Judicial Magistrate First Class or Judge, before whom the case is pending seeking an identity protection order.

(2). The application referred to in sub-section (1) may also be moved by the threatened witness, if such a witness intends to seek a protection order.

(3). Provisions of sub-sections (2) and (3) of section 4 shall apply *mutatis mutandis* to the application made under this section.

(4). Where an application filed under subsection (1) before the Magistrate or Judge, as the case may be, has been rejected at any time under Part I or this Part, such rejection, shall not preclude a fresh application being filed before the Magistrate or Judge, if fresh

circumstances have arisen after the rejection of the earlier application for the grant of a protection order.

Preliminary Inquiry by Magistrate or Judge.-

9. (1). The Magistrate or Judge, as the case may be, shall, upon receipt of an application under section 8, hold a preliminary inquiry *in camera* to determine whether the witness is a threatened witness as claimed in the application and whether there is necessity for the passing of a protection order and shall follow the procedure laid down in this section for such determination.

(2). The Magistrate or Judge, as the case may be, may require the prosecution or the threatened witness who has moved the application under section 8, to place before him any material or document which has not already been submitted, and which he considers relevant for the disposal of the application.

(3). The Magistrate or the Judge, as the case may be, shall hear the prosecution, and subject to provisions of sub-sections (4) and (5), the accused and may examine any person including the witness who is subject of the application, orally and shall record the substance of the statement.

(4). The Magistrate or Judge, as the case may be, shall, on the basis of the information which has come before him under sub section (1) of section 8(1) and sub section (2) and (3), inform the accused or his pleader as to the apprehensions of the witness and as to why he is a threatened witness and the necessity for passing a protection order

and, for that purpose, give a hearing to the accused before passing an order of protection.

Provided that the Magistrate or Judge shall not disclose the identity of the witness or any other particulars which may lead to the identification of the said witness.

Provided further that if the accused or his pleader wants to elicit further information from the prosecution of the threatened witness on the question of likelihood of danger to the life or property of the said witness or his close relatives, they may be permitted to furnish a list of questions to be answered by the prosecution or the said witness but no question or information which may lead directly or indirectly to the identification of the said witness shall be permitted.

(5). The accused and his pleader shall not be allowed to remain present during such inquiry when the Magistrate or Judge, as the case may be, is

(i) examining the witness or any other person under subsection (3); and

(ii) hearing the submissions of the prosecutor or the applicant witness, as the case may be.

(6). Provisions of sub-sections (4) to (6) of section 5 shall, *mutatis mutandis*, apply to the preliminary inquiry under this part.

Order by the Magistrate or Judge.-

10. (1). If, after consideration of

(a) the application and all materials and documents submitted in support of the application by the parties; and

(b) the statements recorded under sub-section (3) of section 9, if any;

and, after hearing the submissions of the prosecutor or the applicant witness, as the case may be, and the accused, the Magistrate or Judge, as the case may be, is satisfied that

(a) the witness who is subject of the application is a threatened witness;

(b) withholding the threatened witness's identity until the judgment in trial is given and if any appeal or revision is presented against the judgment, until the decision in the appeal or revision, as the case may be, is given, would not be contrary to the interests of justice; and

(c) the need for passing a protection order outweighs the general right of the accused to know the identity of the witness,

he shall, pass a reasoned judicial order that until the judgment in trial is given and if any appeal or revision is presented against the judgment, until the decision of the appeal or revision, as the case may be, is given, the identity of threatened witness shall not be reflected or mentioned in,

(i) any document produced before the Magistrate or Judge, or before an appellate or revisional Court, in relation to such case;

(ii) any proceeding (including judgment and order) before the Magistrate or Judge, or before an appellate or revisional Court, in relation to such case;

(iii) any copy of documents required to be supplied to the accused as specified in, sections 207 and 208 of the Code of Criminal Procedure, 1973 (2 of 1974) or under any other special law.

(2). If, however, after such consideration and hearing as referred to in sub-section (1), the Magistrate or Judge, as the case may be, is satisfied that

(a) the witness who is subject of the application is not a threatened witness, or

(b) that withholding the identity of such a witness

(i) would be contrary to the interests of justice, or

(ii) would not outweigh the right of the accused to know the identity of the witness,

he shall, by a judicial reasoned order, dismiss the application.

Prohibition of mentioning identity of witness -

11. (1) The true identity of witness who is subject of the application shall not be mentioned or reflected in any order sheet or proceeding under this part.

(2). It shall not be lawful for any person to print or publish in any manner any matter in relation to any proceeding under this part.

CHAPTER III

PROTECTION OF WITNESSES AND VICTIMS AT THE TRIAL

Recording of statements of threatened witnesses at the trial by close-circuit television.-

12. (1) When in respect of a threatened witness, an order for identity protection has been passed under subsection (1) of section 10, his statement in the Court during trial shall be recorded as per the procedure indicated in Schedule I, by using two-way closed circuit television or video link in such a manner that the accused and his pleader shall not be able to see the face or body of the witness.

Provided that the accused and his pleader shall, subject to the provisions of subsection (2), be entitled to hear the voice of the witness during recording of the statement.

(2) The Presiding Judge may, on his own or on an application made by the prosecution or the threatened witness, if he is so satisfied, direct that while recording the statement referred to in subsection (1), the voice of the witness shall be distorted, and in that event, the accused or his pleader shall be entitled to hear the distorted voice:

Provided that the undistorted voice-recording shall be kept in a sealed cover and the Presiding Judge shall have the exclusive right to access the undistorted voice.

(3) When the statement is recorded as mentioned in subsection (1), the public generally, including the media personnel, shall not have

access to, or be or remain, in the room or other places used by the court for the purpose of recording of the statement.

(4) Where the statement of the threatened witness is recorded as mentioned above in subsections (1) and (2), it shall not be lawful for any person to print or publish in any manner whatsoever, the identity of the threatened witness whose statement is so recorded.

Recording of statements of victim at the trial of serious offences where protection order has not been sought or has been refused.-

13. Where in the case of trial of a serious offence, no application for a protection order has been made or having been made, has been refused but where the victim seeks that he may be permitted to depose without seeing the accused either physically or through television or video link to avoid trauma, the Court may, except for enabling the victim to identify the accused either physically or through television or video link, direct that examination of the witness shall be conducted by using two-way closed circuit television or video link and two-way audio system in the manner specified in Schedule II.

Oath of secrecy to be administered to certain persons referred to in Schedules I and II.-

14.(1) The technical personnel operating the two-way television or video link and the two-way audio system and the courtmaster or stenographer of the Judge referred to in Schedule I and II, shall be administered an oath of secrecy in respect of the identity and other particulars of the threatened witness and

(2) It shall not be lawful for any of the persons referred to in sub section (1) to reveal the identity of the witness to any other person or body.

Applicability of the Act.-

15. The provisions of this Act shall apply to

(a)victims of serious offences the recording of whose statements at the trial in the court of Session has not commenced, and

(b)threatened witnesses in relation to serious offences whose identity has not been revealed to the suspect or the accused and whose statements have not been recorded during investigation or during inquiry before the Magistrate or before their statements are recorded by the Court of Session during trial,

at the date of commencement of this Act.

CHAPTER IV
MISCELLANEOUS

Appeal.-

15. (1) Any person who is aggrieved by an order passed under section 10, may appeal against such order to the High Court within thirty days from the date of order.

(2). The High Court shall decide the appeal as expeditiously as possible and preferably within thirty days from the date of service of notice on respondent.

Offences.-

16. Whoever contravenes the provisions of sub-section (2) of section 7, sub section (2) of section 11 and sub section (2) of section 14, shall be punished with imprisonment of either description which may extend to two years and shall also be liable to fine which may extend upto rupees ten thousand.

Power of High Court to make rules.-

17. (1) Every High Court may, make rules for the purpose of enforcement of the provisions of the Act in the Court of the Magistrate or of the Judge.

(2) In particular and without prejudice to the generality of the provision of subsection (1), such rules may refer to

(a) the manner in which and the places at which the statement of threatened witnesses referred to in section 12 and Schedule I and the statement of victim referred to in section 13 and Schedule II may be recorded by using two way close circuit television or video link and two-way audio system;

(b) as to the appointment, control and making availability of technical staff necessary for installation and operation of close circuit television and video link system, and for screening the victim and other witnesses from accused.

(3) All rules made under this section shall be published in the Official Gazette.

Schedule I

(section 12)

(1) There shall be a two-way closed circuit television or video link and a two-way audio system established between the room from which the Presiding Judge functions (hereinafter called Room A) and another room (hereinafter called Room B).

(2) In Room A, the Presiding Judge, the courtmaster and the stenographer, the public prosecutor, the threatened witness in whose favour a protection order under section 10 has been passed and the technical personnel of the Court operating the television or video link and the audio system, shall alone be present.

(3) In Room B, the accused, his pleader and the technical personnel of the Court operating the television or video link and the audio system, shall alone be present.

(4) (a) The threatened witness shall be examined by the prosecutor who is in Room A directly, and he may identify the accused on the video screen but the camera in Room A shall not be focussed on the threatened witness and his image shall not be visible on the screen in Room B.

(b) The said witness who is in Room A shall be cross-examined by the accused or his pleader who are in Room B through the two-way television or video link and the two-way audio system, subject to the procedure stated in subsections (1) and (2) of section 12.

Schedule II

(section 13)

(1) There shall be a two-way closed circuit television or video link and a two-way audio system established between the room from which the Presiding Judge functions (hereinafter called Room A) and the other room (hereinafter called Room B).

(2) In Room A, the Presiding Judge, the courtmaster and stenographer, the accused and the technical personnel operating the two-way television or video link and the two-way audio system shall be present and the camera will not be focussed on the accused except when the victim has to identify the accused.

(3) In Room B, the victim, the public prosecutor and the pleader of the accused shall be present and except as permitted by clause (2), the image of the accused shall not be shown on the screen in Room B.

(4) The victim shall be examined by the prosecutor or cross-examined by the pleader of the accused directly and the image of the accused who is in Room A shall not be visible on the screen in Room B.

ANNEXURE II

LAW COMMISSION OF INDIA

CONSULTATION PAPER

ON

WITNESS IDENTITY PROTECTION

AND

WITNESS PROTECTION PROGRAMMES

AUGUST 2004

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(d) CANADA
(e) SOUTH AFRICA
(f) UNITED STATES OF AMERICA
(g) EUROPEAN COURT OF HUMAN RIGHTS
(h) PORTUGAL
(i) INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA
(j) INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

PART - III

WITNESS PROTECTION PROGRAMMES

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(a) AUSTRALIA

(i) VICTORIA
(ii) NATIONAL CAPITAL TERRITORY
(iii) QUEENSLAND

(b) SOUTH AFRICA
(c) HONG KONG
(d) CANADA
(e) PORTUGAL
(f) PHILIPPINES
(g) UNITED STATES OF AMERICA
(h) FRANCE
(i) CZECHOSLOVAKIA
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Consultation Paper on Witness Protection

Summary

This is a summary of the contents of the various chapters in this Consultation Paper.

Chapter I - Introduction

There are two broad aspects to the need for witness protection. The first is to ensure that evidence of witnesses that has already been collected at the stage of investigation is not allowed to be destroyed by witnesses resiling from their statements while deposing on oath before a court. This phenomenon of witnesses turning `hostile' on account of the failure to `protect' their evidence is one aspect of the problem. This in turn would entail special procedures to be introduced into the criminal law to balance the need for **anonymity of witnesses** on the one hand and the rights of the accused, on the other, for an open public trial with a right to cross-examination of the witnesses, after knowing all details about witnesses.

The other aspect is the physical and mental vulnerability of the witness and to the taking care of his or her welfare in various respects which call for **physical protection of the witness** at all stages of the criminal justice process till the conclusion of the case, by the introduction of witness protection programmes.

While the first aspect of protecting the evidence of witnesses from the danger of their turning 'hostile' has received limited attention at the hands of Parliament in some special statutes dealing with terrorism, there is an urgent need to have a comprehensive legislative scheme dealing with the second aspect of physical protection of the witness as well. Further, both aspects of anonymity and witness protection will have to be ensured in all criminal cases involving grave crimes not limited to terrorist crimes. The

implementation of such a law would involve drawing up (a) procedures for granting anonymity to witnesses and also (b) introducing Witness Protection Programmes as well in which personal protection is granted to the witness; sometimes by shifting the witness to a different place or even a different country; or by providing some money for maintenance or even by providing employment elsewhere. These are all the various aspects for discussion in this Consultation Paper.

The Law Commission has taken up the subject suo motu on account of the observations of the Supreme Court in certain important cases and also because of immediate importance of the subject in our country. The Commission has prepared this Consultation Paper in order to invite responses from all sections of society. After receiving the responses, it will make its final recommendations possibly along with a draft Bill.

Chapter II – Public trial and cross-examination of witnesses in open court: Indian laws

Sec.327 Cr.PC provides for trial in the open court and 327 (2) provides for in-camera trials for offences involving rape under s.376 IPC and under s.376 A to 376 D of the IPC. 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, under Sec.173 (6) the police officer can form an opinion that any part of the statement recorded under Sec.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.

Sec. 228A IPC prescribes punishment if the identity of the victim of rape is published. 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.

Under Sec. 33 of the Evidence Act, in certain exceptional cases, where cross examination is not possible, previous deposition of the witness can be considered that relevant in subsequent proceedings. The Evidence Act requires to be looked into afresh to provide for protection to a witness.

Chapter III – Protection of identity of witnesses: Special Statutes in India

In the pre-constitutional era, Sec. 31 of the Bengal Suppression of Terrorist Outrages Act, 1932 empowered the special Magistrate to exclude persons or public from the precincts of the court. Sec. 13 of TADA, 1985 and Sec. 16 TADA 1987 provided for protection of the identity and address of a witness secret. Sec. 30 POTA 2002 is on the same lines as Sec. 16 TADA, 1987. 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.

Chapter IV – Earlier reports of the Law Commission of India

The 14th Report of the Law Commission (1958) examined, inter alia, the question of providing adequate facilities to witnesses attending cases in courts. The 4th Report of the National Police Commission (1980) acknowledged the troubles undergone by witnesses attending proceedings in courts. The 154th Report of the Law Commission (1996) 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 172nd Report of the Law Commission (2000), 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 Cr.P.C 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 178th Report (2001), the Law Commission recommended the insertion of s.164A in the Cr.PC 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. On the basis of this recommendation, the Criminal Law (Amendment) Bill, 2003 was introduced in the Rajya Sabha and is pending enactment.

Chapter V – Protection of identity of witnesses v. Rights of accused – Principles of law developed by the Supreme Court and the High Courts

In the pre-*Maneka Gandhi* phase the Supreme Court, in *Gurbachan Singh v. State of Bombay* AIR 1952 SC 221, upheld a provision of the Bombay Police Act, 1951 that denied permission to a detenue 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* AIR 1958 SC 209 and *Maneka Sanjay Gandhi v. Rani Jethmalani* (1979) 4 SCC 167 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* (1994) 3 SCC 569 the Supreme Court upheld the validity of ss.16 (2) and (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) 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 (POTA) in *People's Union of Civil Liberties v. Union of India* (2003) 10 SCALE 967.

In *Delhi Domestic Working Women's Forum v. Union of India* (1995) 1 SCC 14 the Supreme Court emphasised 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 s.327 (2) and (3) Cr.PC was reiterated in *State of Punjab v. Gurmit Singh* (1996) 2 SCC 384. In *Sakshi v. Union of India* (2004) 6 SCALE 15 the Supreme Court referred to the 172nd 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* (2004) 4 SCC 158, 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

emphasise 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* (judgment dated 14.10.2003) 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* AIR 1988 P&H 95, 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.

Chapter VI – Witness anonymity and balancing of rights of accused – a comparative study of case law and other countries

In the United Kingdom, the judgment of the House of Lords in *Scott v. Scott* 1913 AC 417 required that the exception to the general rule that administration of justice should take place in open court should be based "upon the operation of some other overriding principle which … does not leave its limits to the individual discretion of the Judge." In the *Leveller Magazine* case (1979) it was held by the House of Lords that apart from statutory exceptions it was open to the court "in the exercise of its inherent powers to control the conduct of proceedings" so long as the court "reasonably believes it to be necessary in order to save the ends of justice." This was subsequently recognised by the enactment of s.11 of the (UK) Contempt of Court Act, 1981. Under s.24 of the Youth Justice and Criminal Evidence Act, 1999 evidence may be given through a live telecast link where the witness is outside UK or is a child. Ss.16 to 33 of the same Act require the court to consider special measures of various kinds for the protection of vulnerable and intimidated witnesses. In *R vs. DJX, SCY, GCZ* (1991) Crl. A Rep. 36, the Court of Appeal allowed child witnesses to be screened from the accused. In *R vs. Tailor (Gary)* 1995 Crl. LR 253 (CA), various guidelines were issued.

The Lord Diplock Commission, appointed to consider various issues concerning the violent confrontations in Ireland, suggested that witnesses could be screened from the accused. In *R v. Murphy* (1989) it was held that

identity of the witness should be kept secret not only from the accused but also from the defence lawyer. In *R v. Lord Saville of Newdigate* 1999 (4) All ER 860 the Court of Appeal overturned the decision of the Lord Saville Tribunal appointed to enquire into the incident of shooting of 26 people during a demonstration at Londonderry, refusing to grant anonymity to military witnesses. The Court of Appeal held that the approach of the Tribunal was not fair to the soldiers as the risk to them and their families was "a serious possibility." In the second round (*Lord Saville v. Widgery Soldiers* 2002 (1) WLR 1249), the Court of Appeal overturned the decision of the Lord Saville Tribunal to shift the enquiry from London to Londonderry in Northern Ireland holding that the elements at Londonderry in Ireland "pose a threat to the enquiry and those who are or will be taking part in it, and in particular, a solider witnesses." The venue, according to the Court of Appeal, should be London only. Further, since there would be live video linkage to Londonderry "the public confidence will not be eroded by holding a part of the enquiry in London." The same approach was adopted in regard to the recording of the evidence of police witnesses.

Following the ruling of the European Court on Human Rights in *Chahel v. UK*, the Special Judgment on Appeals Commission Act, 1997 and the Northern Ireland Act, 1998 have been enacted which provide for courts to sit in camera where it was necessary on national security grounds and for appointing special counsel to represent individuals in those proceedings.

In Australia, the Supreme Court of Victoria (Australia) in *Jarvie* (1995) approved of non-disclosure of the names and addresses of informers and undercover police officers as well as other witnesses whose personal safety would be endangered by the disclosure of their identity. This has been followed in a series of other cases as well. Australia also has 8 different statutes (in each of the States) dealing with witness protection but not with the anonymity or screening aspects. S.2A (1)(b) of the Australian Evidence Act, 1989 deals with special witnesses – suffering from trauma or likely to be intimidated.

In New Zealand, under s.13A of the (New Zealand) Evidence Act, 1908 (introduced 1986), protection is available to undercover officers in cases involving drug offences and offences tried on indictment attracting a maximum penalty of at least 7 years imprisonment. A certificate has to be given by the Commissioner of Police to the court that the police officer requiring protection has not been convicted of any offence. In 1997, s.13G was introduced making protection applicable to all witnesses if their lives

were likely to be endangered. In *R v. L* 1994 (2) NZLR 54 (CA), this provision came to be tested on the anvil of s.25(f) of the New Zealand Bill of Rights which provides for the right to cross-examination to an accused. The court upheld the provision on the ground that the right of cross-examination was not absolute. Under s.13C(4) the Judge, might make an anonymity order where he is satisfied that the safety of a witness is likely to be endangered if his identity was disclosed. Sub-section (5) of sec. 13C provides for the factors to be accounted for by the court and sub-section (6), the conditions to be fulfilled. The power of the court to exclude the public or to direct screening of the witnesses or to give evidence by close circuit television is provided under s.13G. The 1997 legislation is comprehensive and has been held by the courts to be 'fair' vis-à-vis the New Zealand Bill of Rights in *R vs. Atkins* 2000(2) NZLR 46(CA).

In Canada, the courts have granted more importance to the exception of 'innocence at stake' rather than the needs of administration of justice. In other words, anonymity of witnesses is treated as a privilege granted under the common law unless there is a material to show that it will jeopardize the proof of innocence of the accused. The important cases in this regard are *R v. Durette* 1994 (1) SCR 469; *R v. Khela* 1995 (4) SCR 201; *CBC v. New Brunswick* 1996 (3) SCR 480; *R v. Leipert* 1997 (1) SCR 281 and *R v. Mentuck* 2001 (3) SCR 442.

In South Africa, the approach is on a case by case basis in order to balance the conflict of interests with a view to ensuring proper administration of justice. S.153 of the (South Africa) Criminal Procedure Code permits criminal proceedings to be held in camera to protect privacy to the witness. S.154 gives discretion to the court to refuse publication of the name of the accused. The South African courts have permitted the witness to give evidence behind close doors or to give witness anonymity. The courts prefer to prohibit the press from reporting on identity rather than exclude them from the court room. The important cases are *S v. Leepile* 1986 (4) SA 187 and *S v. Pastoors* 1986 (4) SA 222.

The courts in the US have held that the constitutional protection in favour of the right to confrontation by way of cross examination, as provided in the 6th Amendment to the Constitution, is not absolute and could be restricted for the purpose of protecting witness identity by using video link or by shielding the witness from the accused though not from the lawyers to the defence or the court or the jury. The important cases are *Alford v. US* (1931); *Pointer v. Texas* (1965) and *Smith v. Illinois* (1968). In *Maryland v.*

Craig (1990), the court upheld the procedure under the Maryland Courts and Judicial Procedure Code which provided for protection of child witnesses by way of one-way closed-circuit procedure and held that it did not violate the right to confrontation guaranteed by the 6th Amendment.

The European Court of human rights has in *Kostovski* (1990), *Doorson* (1996), *Vissier* (2002) and *Fitt* (2002) recognised the need to protect anonymity of witnesses while, on account of Article 6 of the European Convention, more importance appears to have been given to the rights of the accused. If national courts had determined that anonymity was necessary or not necessary in public interest, the European court could not interfere.

The judgments of the International Criminal Tribunal for former Yugoslavia (ICTY) in the '*Tadic*' and '*Delaic*' cases in the context of protection of witnesses, anonymity, re-traumatisitation and general and special measures for their protection have been discussed in detail. Likewise, the decisions of the International Criminal Tribunal for Rwanda (ICTR) (1994) with reference to the relevant statute which provide for protection of victims and witnesses have also been discussed in great detail in the Consultation Paper.

Chapter VII – Witness Protection Programmes: A comparative study of programmes in various countries

This chapter discusses the Witness Protection Programmes in the States of Victoria, the National Capital Territory, Queensland in Australia. It discusses the provisions of the Australian Crime Commission Bill, 2003. This chapter also deals with the programmes in South Africa, Hong Kong, Canada, Portugal, Philippines and the United States of America.

Chapter VIII – Questionnaire

This sets out the questions on which specific responses are sought by the Law Commission to the issues raised in the Consultation Paper. The final report of the Law Commission is proposed to be prepared after taking into account the responses received from a wide cross-section of respondents.

PART I

Chapter – I

Introduction

Protection of Witnesses in Criminal Cases – Need for new law – Observations of the Supreme Court

1.1 The criminal justice system in our country has been the focus of several studies and reports of expert bodies. The Law Commission of India has itself submitted several reports on topics related to the substantive and procedural aspects of the criminal justice system. Among the problem areas that have been highlighted is the one relating to intimidation or allurement of victims or witnesses for the prosecution leading to the inevitable consequence of the collapse of the trial. The criminal courts in the capital city New Delhi have witnessed this phenomenon with fair regularity in the recent past in a series of trials involving sensational and ghastly crimes. The impunity with which persons facing charges of mass murders, rape and gruesome killings are able to frustrate the justice process through the tactics of intimidation, threats and even elimination of witnesses has given cause for grave concern. Several recent pronouncements of the Supreme Court of India, including the one in the Best Bakery case, have highlighted the immediate need for legislation in this area.

1.2 There are two broad aspects to the need for witness protection. The first is to ensure that evidence of witnesses that has already been collected at the stage of investigation is not allowed to be destroyed by witnesses resiling from their statements while deposing on oath before a court. This phenomenon of witnesses turning `hostile' on account of the failure to `protect' their evidence is one aspect of the problem. This in turn would entail special procedures to be introduced into the criminal law after knowing all details about witnesses, to balance the need for anonymity of witnesses on the one hand and rights of the accused for an open public trial with a right to cross-examination of the witnesses, on the other hand.

1.3 The other aspect is the physical and mental vulnerability of the witness and to the taking care of his or her welfare in various respects

which calls for physical protection of the witness at all stages of the criminal justice process till the conclusion of the case.

1.4 While the first aspect of protecting the evidence of witnesses from the danger of their turning `hostile' has received limited attention at the hands of Parliament, there is an urgent need to have a comprehensive legislative scheme dealing with the second aspect of physical protection of the witness as well. Further, witness protection will have to be ensured in all criminal cases involving grave crimes not limited to terrorist crimes. The implementation of such a law would involve drawing up of Witness Protection Programmes.

1.5 Today, "Witness Identity Protection" statutes as well as "Witness Protection Programmes" have come into being in a number of countries. Initiatives have been taken, both on the judicial side as well as by legislation, in several countries including the USA, UK, Scotland, Germany, Canada, South Africa, France, Portugal, Brazil, Japan, Philippines, Hong Kong, Korea, Pakistan, Malaysia, China, Fiji, Laos, Nigeria, Tanzania, Papua New Guinea and Thailand. These encompass witness identity protection and witness protection programmes. The statutes and rules governing the functioning of the Tribunals constituted by the United Nations to try the crimes against humanity in Yugoslavia and Rwanda also make provisions not only for protection of identity of witnesses for the prosecution (including victims of offences) but also, in certain cases, to the protection of identity of witnesses on behalf of the defence.

1.6 The judicial pronouncements of the courts in some of the countries referred to above have dealt with complex issues concerning the rights of witnesses/ victims for protecting their identity and for a proper balancing of the rights of the accused to a fair trial. In several countries case law as well as rules require the witnesses to be examined under a one way video-link where the witness does not see the accused or where the accused does not see the witness, but the Judge and the defence counsel will be able to see the witness and watch his demeanour. Likewise, statutes or rules have been made in several countries in regard to comprehensive Witness Protection Programmes.

1.7 In certain situations the public and the media are not allowed inside the court and in certain other cases, media is prohibited from publishing facts relating to the identity of witness. We may point out incidentally that issues also arise whether public or the media can be allowed to know the identity of the victim/ witness. Cases where the

witness's identity has to be kept confidential have raised serious issues of alleged breach of right of the accused to confront the witness by way of cross examination in open Court and questions are debated as to whether there can be an effective cross-examination if the crucial facts relating to the identity and place of residence of the witness are not disclosed to the accused. Statutes as well as Court judgments have come forward with a variety of solutions to balance rights of the accused and of the witnesses. There are also a large number of Witness Protection Programmes in other countries in which personal protection is granted to the witness; sometimes he is shifted to a different place or even a different country; he is paid some money for his maintenance or he is even provided with employment elsewhere. These are all the various aspects for discussion in this Consultation Paper.

Need for a law on various aspects of witness protection – Supreme Court's observations

1.8 In the order dated 8.8.2003 made by the Supreme Court in National Human Rights Commission v. State of Gujarat and Others, 2003 (9) SCALE 329, the Supreme Court referred to the need for legislation on the subject. In the judgment of the High Court of Delhi, dated 14th October 2003 (Crl.W.No.247 of 2002) in Ms Neelam Katara v. Union of India, certain directions/ guidelines on witness protection have been issued, pending the making of legislation but these are only a beginning.

1.9 In the recent judgment of the Supreme Court in PUCL v. Union of India, 2003 (10) SCALE 967 while dealing with the validity of section 30 of the Prevention of Terrorism Act, 2002, the Supreme Court has referred in detail to the subject of 'protection of the witnesses' and to the need to maintain a just balance between the rights of the accused for a fair trial (which includes the right to cross examine the prosecution witnesses in open court) and to the need to enable (1) prosecution witnesses whose identity is known to the accused to give evidence freely with being overawed by the presence of the accused in the Court and (2) protection of the identity of witnesses who are not known to the accused, – by means of devices like video-screen which preclude the accused from seeing the witness even though the Court and defence counsel will be able to see and watch his demeanour.

1.10 Zahaira Habibulla H. Sheikh & Another v. State of Gujarat and Others (2004) 4 SCALE 375, (the Best Bakery Case), was a case involving the killing of fourteen persons in a communal riot in Gujarat. 37 of the prosecution witnesses, including several eye witnesses, some of them relatives of the deceased, turned hostile at the trial. The 21 accused persons were all acquitted by the trial court. The appeal by the State of Gujarat was dismissed by the High Court. While reversing the acquittal and ordering a retrial outside Gujarat, in the State of Maharashtra, the Supreme Court made several observations on the question of protection of witnesses. In this case too, the Supreme Court observed that (p.395) "Legislative measures to emphasise prohibition against tampering with witnesses, victim or informant, have become the imminent and inevitable need of the day". The Court also referred (p.399) to "Witness Protection Programmes" formulated in various countries. It said: "The Witness Protection Programmes are imperative as well as imminent in the context of alarming rate of somersaults by witnesses". In fact, the Court has since sought responses from various States on the question of witness protection.

1.11 In Sakshi v. Union of India, 2004 (6) SCALE 15 (at p.32), the Supreme Court while dealing with the plea for enlargement of the definition of the word 'rape', and protection of victims of child sexual abuse, observed that in matters relating to such sexual offences there need to provide victim protection at the time of recording statement made before the Court. On the need for legislation, the Supreme Court again observed:

"We hope and trust that Parliament will give serious attention to the points highlighted by the petitioner and make appropriate suggestions with all the promptness it deserves."

1.12 The Law Commission has taken up the subject suo motu on account of the observations of the Supreme Court and also because of immediate importance of the subject in our country. The Commission has prepared this Consultation Paper in order to invite responses from all sections of society. After receiving the responses, it will make its final recommendations possibly along with a draft Bill.

1.13 Part I of the Consultation Paper deals with general matters; Part II with protection of witness identity vis-à-vis rights of accused. Witness Protection Programmes are discussed in Part III. Part IV contains a fairly

exhaustive 'Questionnaire' to which the Commission hopes to receive responses from a wide cross-section of people.

CHAPTER II

PUBLIC TRIAL AND CROSS EXAMINATION OF WITNESSES IN OPEN COURT: EXISTING INDIAN LAWS

2.1 Introduction: Public trial and cross examination of witnesses: existing Indian laws

The adversary system of trial which has been adopted in India is founded on the basis of two vital principles, firstly, that the burden of proof lies on the prosecution to prove the guilt of the accused and secondly, that the accused is presumed to be innocent until the contrary is proved. These principles provide a level playing field to an accused as against the mighty power of the State and its instrumentalities. In a criminal trial, the prosecution and defence prepare their respective cases and the prosecution has to first lead evidence. The defence cross-examines the prosecution witnesses to test the veracity of the prosecution case. The accused has the right to silence and need not normally examine witnesses unless he chooses to examine himself or some defence witnesses and this is generally done in cases where he has a special plea or a plea of alibi. The Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1973 lay down a comprehensive legal framework for recording the testimony of witnesses in criminal cases. In addition, clause (3) of Art. 20 the Constitution protects the accused against self-incrimination.

2.2 Code of Criminal Procedure, 1973: Existing Law

In the Code of Criminal Procedure, 1973, section 327 provides for trial in open court. Further, for ensuring a fair trial, elaborate provisions have been made in section 207 (supply of copies of police report and other documents to the accused), section 208 (supply of copies of statements and documents to accused in other cases triable by Court of Sessions), and section 273 (evidence to be taken in the presence of accused). Section 299 refers to the right of the accused to cross-examine the prosecution witnesses. These provisions are intended to guarantee an open public trial with a right to the accused to know the evidence gathered by the prosecution and also a right to cross-examination to safeguard the interest of the accused. This is so particularly because the accused is presumed to be innocent unless proved guilty beyond reasonable doubt.

2.2.1 Section 273 is not without exceptions. The Supreme Court referred to sec. 273 of the Code of Criminal Procedure, 1973 in Sakshi vs. Union of India: 2004(6) SCALE 15 and observed that in spite of sec. 273 which requires evidence to be taken in the presence of the accused, it is open to the court to examine the witness using a video screen in as much as video recorded evidence has now been held to be admissible by the Supreme Court in State of Maharashtra vs. Dr. Praful B. Desai 2003(4) SCC 601. We shall be referring to this case in detail in Chapter V, para 5.17.

2.2.2 Record of evidence in absence of the accused may be taken under section 299 of the Code. No doubt, this section empowers the Magistrate to record the deposition of certain witnesses in the absence of the accused. Such recording of evidence in absence of an accused has been provided only where an accused person has absconded and there is no immediate prospect of arresting him. In such cases, the competent court may examine the witnesses produced on behalf of the prosecution and record their depositions and such depositions may be given in evidence against him on the inquiry into or trial for the offence with which the accused is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

2.2.3 Section 200 of the Code of Criminal Procedure provides that a Magistrate shall examine upon oath the complainant and the witnesses present, if any. Under section 202 (2) of the Code of Criminal Procedure, in

an inquiry, the Magistrate may, if he thinks fit, take evidence of witnesses on oath. Moreover, section 204 (2) of the Code provides that no summons or warrant shall be issued against accused unless a list of the prosecution witnesses has been filed. For the examination of witnesses, the Magistrate shall fix a date under section 242 in case of warrant cases instituted on police report and under section 244 in cases other than those based on police report.

2.2.4 Further, as to right of cross-examination by the accused, it would be evident on a reading of section 299 of the Code that while the right to cross-examine the prosecution witnesses is normally guaranteed, there are certain exceptional circumstances in which an accused may be denied his right to cross-examine a witness of the prosecution in open court.

2.2.5 In addition to section 299 of the Code, reference may be made to sub-section (6) of section 173 of the Code. Section 173 which deals with the report of the police officer on completion of investigation, provides under sub-section (5) (b), that the police officer shall forward to the Magistrate along with his report the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses. However, sub-section (6) of section 173 provides that if the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceeding or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from copies to be granted to the accused and stating his reasons for making such request.

Thus, while the requirement of providing information to the accused is the rule, the exception to the extent permitted as above under section 173 (6) is limited only to a part of the statement made under section 161 of the Code and not to the entire statement deposed to by any person including a prosecution witness under section 161 of the Code.

2.3 Code of Criminal Procedure, 1973: Protection of witnesses

Coming to the issue of protection of witnesses in a criminal trial, it would appear that barring rape cases, there are, as of today, no general statutory provisions in the Code of Criminal Procedure, 1973 on this subject. Section 327 (2) of the Code of Criminal Procedure, 1973 deals

with 'in camera proceedings'. This section has laid down clearly that the inquiry into and trial of rape under section 376 and cases under sections 376A to 376D, Indian Penal Code shall be conducted in camera. This would enable the victim to be a little more comfortable and answer the questions frankly which could ultimately improve the quality of evidence of the prosecutrix or the victims.

2.3.1 The Supreme Court has referred to sec. 327(2) in its judgment in State of Punjab vs. Gurmit Singh 1996(2) SCC 384 as to the adoption of in camera proceedings and reiterated the same again in its recent judgment in Sakshi vs. Union of India: 2003(4) SCC 60, where it stated that sec. 327(2) applies to inquiry or trial of offences under sections 354 and 377 of IPC and has vast applications in rape and child abuse cases. We shall refer to this case in detail in Chapter V, para 5.16.

2.3.2 Further, section 228A of the Indian Penal Code provides that the Court shall impose a sentence of two years imprisonment and fine upon any person who prints or publishes the name or any matter which may identify the person against whom rape has been found or alleged to have been committed. This protection is given with a view to protect the rape victim's privacy from general public and so that the media may not cast stigma on the victim by disclosure of her identity.

2.3.3 Similarly, in the Juvenile Justice (Care and Protection of Children) Act, 2000 section 21 prohibits the publication of name, address or school or any other particular calculated to lead to the identification of the juvenile. It also prohibits the publication of the picture of any such juvenile.

2.4 Evidence Act, 1872:

Evidence as defined in section 3 of the Indian Evidence Act, 1872 means either oral evidence or documentary evidence. The depositions of witnesses and documents included in the term 'evidence' are two principal means by which the materials, upon which the Judge has to adjudicate, are brought before him. In a criminal case, trial depends mainly upon the evidence of the witnesses and, the provisions of the Code of Criminal Procedure, 1973 and of the Evidence Act, 1872 exhaustively provide for the depositions of the witness and the rules regarding their admissibility in the proceedings before the Court.

2.4.1 The Evidence Act refers to direct evidence by witnesses. As to proof of facts, direct evidence of a witness who is entitled to full credit shall be sufficient for proof of any fact (section 134), and the examination of witnesses is dealt with in sections 135 to 166 of the Act (both inclusive). Section 135 provides that the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedures respectively, and, in the absence of such law, by the discretion of the Court. The general law as to the testimony of witnesses in the Code of Criminal Procedure has already been dealt with in earlier part of this Chapter.

2.4.2 Section 138 of the Evidence Act not only lays down the manner of examining a particular witness but also impliedly confers on the party, a right of examination-in-chief, cross-examination and re-examination. The examination of witnesses is generally indispensable and by means of it, all facts except the contents of document may be proved. Anybody who is acquainted with the facts of the case can come forward and give evidence in the Court. Under the Evidence Act, the right of cross-examination available to opposite party is a distinct and independent right, if such party desires to subject the witness to cross-examination. On the importance of the right of cross-examination, the Supreme Court in Nandram Khemraj vs. State of M.P. 1995 Cr.L.J. 1270 observed:

> "The weapon of cross-examination is a powerful weapon by which the defence can separate truth from falsehood piercing through the evidence given by the witness, who has been examined in examination-in-chief. By the process of cross-examination the defence can test the evidence of a witness on anvil of truth. If an opportunity is not given to the accused to separate the truth from the evidence given by the witness in examination-in-chief, it would be as good as cutting his hands, legs and mouth and making him to stand meekly before the barrage of statements made by the witnesses in examination-in-chief against him or sending him to jail. Law does not allow such things to happen".

2.4.3 Under the Evidence Act, in certain exceptional cases, where cross-examination is not possible, then the previous deposition of a witness can be considered relevant in subsequent proceedings. This is provided in section 33 of the Evidence Act. The essential requirements of section 33 are as follows:

(a) that the evidence was given in a judicial proceedings or before any person authorized by law to take it;
(b) that the proceeding was between the same parties or their representatives-in-interest;
(c) that the party against whom the deposition is tendered had a right and full opportunity of cross-examining the deponent when the deposition was taken;
(d) that the issues involved are the same or substantially the same in both proceedings;
(e) that the witness is incapable of being called at the subsequent proceeding on account of death, or incapable of giving evidence or being kept out of the way by the other side or his evidence cannot be given without an unreasonable amount of delay or expense.

The conditions mentioned above must be fulfilled before a previous deposition can be admitted in evidence, without cross-examination. It is significant to note as stated in (c) above, that where such deposition is to be admitted in criminal proceedings, a party against whom a deposition is tendered must have had a right and full opportunity of cross-examining the deponent when the deposition was taken.

2.4.4 The aforesaid provisions of the Evidence Act have been designed to ensure a fair trial to the accused as he is presumed to be innocent till he is proved guilty beyond reasonable doubt. However, there are instances where crucial witnesses, i.e., key witnesses or material witnesses, disappear either before or during a trial or a witness is threatened, abducted or done away with. These incidents do not happen by accident and the inevitable consequence is that in many of these matters, the case of the prosecution fails (Turnor Morrison & Co. vs. K.N. Tapuria, 1993 Cr.L.J. 3384 Bom.).

2.4.5 On the need for protection of witnesses from harassment on account of delays, following observations by Justice Wadhwa in Swaran Singh vs. State of Punjab, AIR 2000 SC 2017 are appropriate:

> "In the course of the trial, more than 50 prosecution witnesses were given up having being won over and the case hinged on the statement of seven witnesses which lead to the conviction of Shamsher Singh and Jagjit Singh by the trial court, and upheld by the High Court and now affirmed by this Court".

In the same case, Justice Wadhwa further observed:

> "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 harassed a lot. … Not only that witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him".

In the above scenario, it is imperative that the provisions of the Evidence Act are required to be looked into afresh to ensure fair trial by affording protection to a witness so that true and correct facts come up before the trial Court.

2.4.6 As to the limitation upon the right of cross-examination of the prosecutrix in rape cases, amendments restricting the scope of cross-examination, have been made by the Indian Evidence (Amendment) Act, 2002. This will be discussed in detail in the next paragraph.

2.5 Section 146 (3) of Evidence Act, 1872 introduced in 2002

Recently, the Indian Evidence (Amendment) Act, 2002 has inserted a proviso below sub-section (3) of section 146 of the Evidence Act, 1872 thereby giving protection to a victim of rape from unnecessary questioning her about her past character.

The said proviso reads as follows:

> "Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible, to put questions in the cross-examination of the prosecutrix as to her general immoral character."

2.5.1 It may be recalled that the Law Commission of India in its 185th Report on Law of Evidence had recommended insertion of a broader provision by way of a new sub-section (4) in section 146 which reads as follows:

> "(4) In a prosecution for an offence under sections 376, 376A, 376B, 376C and 376D of the Indian Penal Code or for attempt to commit

any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to her general moral character, or as to her previous sexual experience with any person for proving such consent or the quality of consent.

Explanation: 'Character' includes reputation and disposition."

2.6 Thus, a survey of the provisions of the Criminal Procedure Code, 1973 and the Indian Evidence Act, 1872 reveals that the accused has a right of open trial and also a right to cross-examine the prosecution witnesses in open court. There are a few exceptions to these principles and the Supreme Court has declared that the right to open trial is not absolute and video-screening techniques can be employed and such a procedure would not amount to violation of the right of the accused for open trial. The Code of Criminal Procedure contains a provision for examination of witnesses in camera and this provision can be invoked in cases of rape and child abuse. There is, however, need for extending the benefit of these special provisions to other cases where the witnesses are either won over or threatened, so that justice is done not only to the accused but also to victims.

CHAPTER III

PROTECTION OF IDENTITY OF WITNESSES; SPECIAL STATUTES IN INDIA

3.1 Protection of identity of witness: Special statutes

The need for the existence and exercise of a general power to grant protection to a witness and preserve his or her anonymity in a criminal case has been universally recognized as being in the interests of the community and the administration of justice, to ensure that serious offences like terrorist acts or organized crime are effectively prosecuted and punished. It is notorious fact that a witness who gives evidence which is unfavourable to an accused in a trial for (say), a terrorist offence would expose himself to severe reprisals which can result in death or severe bodily injury to him or to his family members. While the present Consultation Paper is being issued for formulating similar procedures in the case of other offences, it is first necessary to take notice of existing provisions relating to witness anonymity and prosecution. For the present, we shall therefore refer to some special statutes dealing with specific types of offences where such protection is granted. In this Chapter, we propose to refer to these statutes.

3.2 The West Bengal Act of 1932: exclusion of persons or public from Court:

In the pre-constitutional state of law, we had section 31 of the Bengal Suppression of Terrorist Outrages Act, 1932 which empowered a Special Magistrate to exclude persons or public from precincts of the Court. Section 31 reads as follows:

> "Section 31. – A special Magistrate may, if he thinks fit, order at any stage of a trial that the public generally, or any particular person, shall not have access to, or remain in the room or building used by the Special Magistrate as a Court:
>
> Provided that where in any case the Public Prosecutor or Advocate-General, as the case may be, certifies in writing to the special Magistrate that it is expedient in the interests of public, peace or safety, or of peace or safety of any of the witnesses in the trial that

the public generally should not have access to, or be or remain in the room or building used by the special Magistrate as a Court, the special Magistrate shall order accordingly."

The aforesaid provision clearly states that the safety of the witnesses at trial was considered as a ground for exclusion of public from a criminal trial. But, it will be noticed that while the main part of the section gives discretion to the Magistrate to exclude any person or public from the Court, the proviso gives importance to the certificate of the Public Prosecutor or Advocate-General for such exclusion and gives little discretion to the Court in the matter of exclusion of the public or a person from the court-hall.

3.3 TADA 1985 and TADA 1987: Protection of identity

In view of increase in terrorist activities in recent times, initially, the Terrorist and Disruptive Activities (Prevention) Act, 1985 and thereafter the Terrorist and Disruptive Activities (Prevention) Act, 1987 were enacted. These Acts contained specific provisions in regard to the protection of witnesses. Section 13 of the Terrorist and Disruptive Activities (Prevention) Act, 1985 refers to protection of the identity and address of the witness and in camera proceedings. It reads as follows:

"13. (1) Notwithstanding anything contained in the Code, all proceedings before a Designated Court shall be conducted in camera:

Provided that where public prosecutor so applies, any proceedings or part thereof may be held in open court.

(2) A Designated Court may, on an application made by a witness in any proceedings before it or by the public prosecutor in relation to a witness or on its own motion, take such measures as it deems fit keeping the identity and address of the witnesses secret.

(3) In particular and without prejudice to the generality of provisions of sub-section (2), the measures which a Designated Court may take under that sub-section may include -

(a) the holding of the proceedings at a protected place;

(b) the avoiding of the mention of the names and address of what witnesses in its orders or judgments or in any records of case accessible to public;
(c) the issuing of any directions for security that the identity and addresses of the witnesses are not disclosed.

(4) Any person who contravenes any direction issued under sub-section (3) shall be punishable with imprisonment for a term which may extend to one year and with fine which may extend to one thousand rupees."

3.4 Terrorist and Disruptive Activities (Prevention) Act, 1987 which followed the Act of 1985 provided likewise for the protection of identity of witnesses in section 16 with a few charges. Section 16 differed from section 13 of TADA Act, 1985 in two respects. Firstly, whereas it was mandatory to hold proceedings in camera under section 13 of TADA Act, 1985 the proceedings could be held in camera under section 16 of TADA Act, 1987 only where the Designated Court so desired. Secondly, sec. 16(3)(d) of the TADA Act, 1987 empowered a Designated Court to take such measures in the public interest so as to direct that information in regard to all or any of the proceedings pending before such a Court shall not be published in any manner. The provisions of sec. 16 were elaborately considered by the Supreme Court in Kartar Singh vs. State of Punjab 1994(3) SCC 569. We shall be referring to that case in detail when we come to Chapter V, in para 5.7.

3.5 POTA 2002:

Section 30 of the Prevention of Terrorism Act, 2002 enacted recently, is on the same lines as section 16 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 referred to above. It reads as follows:

"30. **Protection of witnesses**.- (1) Notwithstanding anything contained in the Code, the proceedings under this Act may, for reason to be recorded in writing, be held *in camera* if the Special Court so desires.
(2) A Special Court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such

measures as it deems fit for keeping the identity and address of such witness secret.

(3) In particular, and without prejudice to the generality of the provisions of sub-section (2), the measures which a Special Court may take under that sub-section may include-

(a) the holding of the proceedings at a place to be decided by the Special Court;

(b) the avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to public;

(c) the issuing of any directions for securing that the identity and address of the witnesses are not disclosed;

(d) a decision that it is in the public interest to order that all or any of the proceedings pending before such a Court shall not be published in any manner.

(4) Any person who contravenes any decision or direction issued under sub-section (3) shall be punishable with imprisonment for a term which may extend to one year and with fine which may extend to one thousand rupees."

The validity of section 30 has been upheld in PUCL vs. Union of India: 2003(10) SCALE 967 which will be referred to in detail in Chapter V, para 5.15.

3.6 As already stated in the previous Chapter (para 2.3.3), there is yet another special statute, the Juvenile (Care and Protection of Children) Act, 2000, sec. 21 which prohibits the publication of name, address or school or any other particulars calculated to lead to the identification of the juvenile. It also prohibits the publication of the picture of any such juvenile.

3.7 Present need for a general law on Protection of identity of witnesses even in cases which do not relate to terrorism or disruptive activities.

The above analysis of the state of the statute law, both the general and special law, shows that there is no general law on protection of identity of witnesses in criminal cases – apart from the provisions for protection of witnesses in the special statutes governing terrorist-crimes, such as the Prevention of Terrorism Act, 2002 etc. In recent times, the cases where witnesses are turning hostile at trial due to threats, is no longer confined to

cases of terrorism. Even in other types of offences falling under the Indian Penal Code or other special statute, this phenomenon has reached alarming proportion. There is therefore need, as in other countries, to generally empower the Court in such cases - where muscle power, political power, money power or other methods employed against witnesses and victims - for the purpose of protecting the witnesses so that witnesses could give evidence without any fear of reprisals and witnesses do not turn hostile on account of threats by the accused. That, indeed, is the purpose of this Consultation Paper.

Chapter IV

Earlier Reports of the Law Commission of India

14th Report of Law Commission (1958): 'inadequate arrangements' for 'witnesses':

4.1 In the 14th Report of the Law Commission (1958), 'witness protection' was considered from a different angle. The Report referred to inadequate arrangements for witnesses in the Courthouse, the scales of traveling allowance and daily batta (allowance) paid for witnesses for attending the Court in response to summons from the Court. This aspect too is important if one has to keep in mind the enormous increase in the expense involved and the long hours of waiting in Court with tension and attending numerous adjournments. Here the question of giving due respect to the witness's convenience, comfort and compensation for his sparing valuable time is involved. If the witness is not taken care of, he or she is likely to develop an attitude of indifference to the question of bringing the offender to justice.

4.2 Between 1958 and 2004, there has been a total change in the crime scene, in as much as, not only crime has increased and cases of convictions have drastically fallen, but there is more sophistication in the manner of committing offences for, today, the offender too has the advantages of advances in technology and science. There are now more hostile witnesses than before and the witnesses are provided allurements or are tampered with or purchased and if they remain firm, they are pressurized or threatened or

even eliminated. Rape and sexual offence cases appear to be the worst affected by these obnoxious methods.

4.3 Fourth Report of the National Police Commission (1980): handicaps of witnesses:

In June 1980, in the Fourth Report of the National Police Commission, certain inconveniences and handicaps from which witnesses suffer have been referred to. The Commission again referred to the inconveniences and harassment caused to witnesses in attending courts. The Commission referred to the contents of a letter received from a senior District and Sessions Judge to the following effect:

> "A prisoner suffers from some act or omission but a witness suffers for no fault of his own. All his troubles arise because he is unfortunate enough to be on the spot when the crime is being committed and at the same time 'foolish' enough to remain there till the arrival of the police."

The Police Commission also referred to the meagre daily allowance payable to witnesses for appearance in the Courts. It referred to a sample survey carried out in 18 Magistrates' Courts in one State, which revealed that out of 96,815 witnesses who attended the Courts during the particular period, only 6697 were paid some allowance and even for such payment, an elaborate procedure had to be gone through.

4.4 154th Report of the Law Commission (1996): Lack of facilities and wrath of accused referred:

In the 154th Report of the Commission (1996), in Chapter X, the Commission, while dealing with 'Protection and Facilities to Witnesses', referred to the 14th Report of the Law Commission and the Report of the National Police Commission and conceded that there was 'plenty of justification for the reluctance of witnesses to come forward to attend Court promptly in obedience to the summons". It was stated that the plight of witnesses appearing on behalf of the State was pitiable not only because of lack of proper facilities and conveniences but also because witnesses have to incur the wrath of the accused, particularly that of hardened criminals, which can result in their life falling into great peril. The Law Commission recommended, inter alia, as follows:

> "6. We recommend that the allowances payable to the witnesses for their attendance in courts should be fixed on a realistic basis and that payment should be effected through a simple procedure which would avoid delay and inconvenience. … Adequate facilities should be provided in the court premises for their stay. The treatment afforded to them right from the stage of investigation upto the stage of conclusion of the trial should be in a fitting manner giving them due respect and removing all causes which contribute to any anguish on their part. Necessary confidence has to be created in the minds of the witnesses that they would be protected from the wrath of the accused in any eventuality.
>
> 7. Listing of the cases should be done in such a way that the witnesses who are summoned are examined on the day they are summoned and adjournments should be avoided meticulously. …The

courts also should proceed with trial on day-to-day basis and the listing of the cases should be one those lines. The High Courts should issue necessary circulars to all the criminal courts giving guidelines for listing of cases."

The following points emerge from the above recommendations:

(a) Realistic allowance should be paid to witnesses for their attendance in Courts and there should be simplification of the procedure for such payment.

(b) Adequate facilities should be provided to witnesses for their stay in the Court premises. Witnesses must be given due respect and it is also necessary that efforts are made to remove all reasonable causes for their anguish.

(c) Witnesses should be protected from the wrath of the accused in any eventuality.

(d) Witnesses should be examined on the day they are summoned and the examination should proceed on a day-to-day basis.

4.5 172nd Report of the Law Commission (2000) : Reference by Supreme Court to the Law Commission: screen technique:

In March 2000, the Law Commission submitted its 172nd Report on 'Review of Rape Laws'. The Law Commission took the subject on a request made by the Supreme Court of India (vide its order dated 9th August,

1999, passed in Criminal Writ Petition (No. 33 of 1997), Sakshi vs. Union of India.

The petitioner 'Sakshi', an organization, interested in the issues concerning women, filed this petition, seeking directions for amendment of the definition of the expression 'sexual intercourse', as contained in section 375 of the IPC. The Supreme Court requested the Law Commission 'to examine the issues submitted by the petitioners and examine the feasibility of making recommendations for amendments of the Indian Penal Code or to deal with the same in any other manner so as to plug the loopholes'.

The Law Commission discussed the issues raised by the petitioner with Petitioner NGO and other women organizations. The Commission also requested 'Sakshi' and other organizations to submit their written suggestions for amendment of procedural laws as well as the substantial law.

Accordingly, these women organizations submitted their suggestions for amendment of Cr.P.C. and the Evidence Act and also I.P.C. One of the views put forward by the organizations was that a minor complainant of sexual assault shall not have to give his/her oral evidence in the presence of the accused, as this will traumatic to the minor. It was suggested that appropriate changes in the law should be made for giving effect to this provision.

It was further suggested that a minor's testimony in a case of child sexual abuse should be recorded at the earliest possible opportunity in the

presence of a judge and the child-support person, which may include a family friend, relative or social worker whom the minor trusts. For the purpose of proper implementation of the above suggestion, it was urged that the court should take steps to ensure that at least one of the following methods is adopted:

(i) permitting use of a video-taped interview of the child's statement by the judge in the presence of a child support person;

(ii) allowing a child to testify via closed circuit television or from behind a screen to obtain a full and candid account of the acts complained of;

(iii) the cross examination of the minor should only be carried out by the judge based on written questions submitted by the defence upon perusal of the testimony of the minor;

(iv) whenever a child is required to give testimony, sufficient breaks shall be given as and when required by the child.

The Commission considered the above suggestions along with other issues raised and the order of the Supreme Court and gave its 172nd Report on 25th March, 2000. In respect of the suggestion that a minor who has been assaulted sexually, should not be required to give his/her evidence in the presence of the accused and he or she may be allowed to testify behind the screen, the Law Commission referred to section 273 of the Cr.P.C., which requires that 'except as otherwise expressly provided, all evidence taken in the course of a trial or other proceeding, shall be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader'. The Law Commission took the view that his general principle, which is founded upon natural justice, should not be done away

with altogether in trials and enquiries concerning sexual offence. However, in order to protect the child witness the Commission recommended that it may be open to the prosecution to request the Court to provide a screen in such a manner that the victim does not see the accused, while at the same time providing an opportunity to the accused to listen to the testimony of the victim and give appropriate instructions to his advocate for an effective cross-examination. Accordingly, the Law Commission in para 6.1 of its 172nd Report recommended for insertion of a proviso to section 273 of the Cr.P.C. 1973 to the following effect:

> "Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused".

In respect of other suggestions mentioned above, made by Sakshi organization, the Law Commission expressed its view that these suggestions were impracticable and could not be accepted.

178th Report of the Law Commission (2001): preventing witnesses turning hostile:

In December, 2001, the Commission gave its 178th Report for amending various statutes, civil and criminal. That Report dealt with hostile witnesses and the precautions the Police should take at the stage of

investigation to prevent prevarication by witnesses when they are examined later at the trial. The Commission recommended three alternatives, (in modification of the two alternatives suggested in the 154th Report). They are as follows:

> "1. The insertion of sub-section (1A) in Section 164 of the Code of Criminal Procedure (as suggested in the 154th 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 ten 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 of Criminal Procedure, 1973. For less serious offences, the second alternative (with some modifications) was found viable."

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

4.7 The Criminal Law (Amendment) Bill, 2003: preventing witnesses turning hostile:

In the Criminal Law (Amendment) Bill, 2003, introduced in the Rajya Sabha in August, 2003, the above recommendations have been accepted by further modifying the recommendation (3) of recording statement before a Magistrate to apply where the sentence for the offence could be seven years or more. A further provision is being proposed for summary punishment of the witness by the same Court if the witness goes back on his earlier statement recorded before the Magistrate. Another provision is also being made to find out whether the witness is going back on his earlier statement because of inducement or pressure or threats or intimidation.

4.8 Thus, the above analysis of the various recommendations of the Law Commission made from time to time, including the 178th Report shows that they do not address the issue of 'protection' and 'anonymity' of witnesses or to the procedure that has to be followed for balancing the rights of the witness on the one hand and the rights of the accused to a fair trial. In the absence of such a procedural law, the Supreme Court has had to step in on the judicial side in recent case to give various directions and these judgments will be discussed in the next chapter, Chapter V.

4.9 It is, therefore, proposed to deal with the above gaps in the law, in detail in the Consultation Paper.

PART II

WITNESS IDENTITY PROTECTION Vs. RIGHTS OF ACCUSED

Chapter V

PROTECTION OF IDENTITY OF WITNESSES Vs. RIGHTS OF ACCUSED – PRINCIPLES OF LAW DEVELOPED BY THE SUPREME COURT AND THE HIGH COURTS

5.1 Introduction:

In the absence of a general statute covering witness identity protection and partial restriction of the rights of the accused, the Supreme Court has taken the lead. Some of the High Courts have also gone into this issue recently. We shall start our discussion with the law declared by Supreme Court in 1978.

5.2 The decision of the Supreme Court in Maneka Gandhi's case (AIR 1978 SC 597: 1978(1) 240 continues to have a profound impact on the administration of criminal justice in India. In terms of that case, the phrase "procedure established by law" in Article 21 of the Constitution no longer means "any procedure" whatsoever as interpreted in earlier judgments of the Court but now means a "just, fair and reasonable" procedure. In a criminal trial, a fair trial alone can be beneficial both to the accused as well as society in as much as the right to a fair trial in a criminal prosecution is enshrined in Article 21 of the Constitution of India.

The primary object of criminal procedure is to bring offenders to book and to ensure a fair trial to accused persons. Every criminal trial begins with the presumption of innocence in favour of the accused; and, in India, the provisions of the Code of Criminal Procedure, 1973 are so framed that a criminal trial should begin with and be throughout governed by this essential presumption. A fair trial has two objectives in view, i.e. first, it must be fair to the accused and secondly, it must also be fair to the prosecution or the victims. Thus, it is of utmost importance that in a criminal trial, witnesses should be able to give evidence without any inducement, allurement or threat either from the prosecution or the defence.

These judgments of the Supreme Court have laid down various rules or guidelines for protection of witnesses but they cannot and are not complete and, in any event, cannot be as effective as the provisions of a special statute on the subject would otherwise be. We have already stated in Chapter I that in a vast number of countries, the problem is attempted to be solved by enacting legislation. But until appropriate legislation is made, judgments of Courts will certainly be helpful. Courts have also suggested that appropriate statutory provisions should be made to protect the rights of witnesses and victims on the one hand and the rights of the accused to a fair trial, on the other.

We shall now refer to the case law in India in this behalf.

5.3 Gurbachan Singh's case (sec. 27 of the Greater Bombay Police Act, 1902) (1952)

In 1952, in Gurbachan Singh vs. State of Bombay (AIR 1952 SC 221) decided by the Supreme Court, the challenge was to an order of

externment passed against the appellant (writ petitioner), a resident of Bombay, to the effect that he should shift to Amritsar, (later modified as a shift to Kalyan), so that witnesses may depose freely against him in Bombay. The order was passed by the Commissioner of Police under sec. 27 of the Greater Bombay Police Act, 1902 (which is now replaced by the Bombay Police Act, 1951). That section permitted the Commissioner to direct any person to remove himself outside the State or to such place within the State and by such route and within such time as the Commissioner shall prescribe and not to enter the State or, as the case may be, the Greater Bombay, if it appears to the Commissioner:

> "(a) that the movements or acts of any person in Greater Bombay are causing or calculated to cause alarm, danger or harm to person or property, or that there are reasonable grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence, or an offence punishable under Chapters XII, XVI or XVII of the Indian Penal Code, or in the abetment of any such offence, and where in the opinion of the Commissioner, witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property".

One of the contentions of the appellant was that section 27 which permitted the Court to order the accused to be removed outside the State or to another place within the State, imposed an unreasonable restriction on the appellant violating Art. 19(1)(d) of the Constitution of India and was not saved by

clause (5) of Art 19. The Supreme Court upheld sec. 27 and rejected the challenge to its validity, and observed as follows:

> "There can be no doubt that the provisions of section 27(1) of the Bombay Act, (conferring on the Commissioner of Police the power to extern), was made in the interest of the general public and to protect them against dangerous and bad characters whose presence in a particular locality may jeopardize the peace and safety of the citizens."

The Supreme Court also held that the procedure in the Act which denied permission to be present when the witness was cross-examined was not unreasonable. The law was an extraordinary one and was made only to deal with exceptional cases where witnesses, for fear of violence to their person or property, were unwilling to depose publicly against bad characters whose presence in certain areas might constitute a menace to the safety of the public residing there. This object would be wholly defeated if a right to confront or cross examine these witnesses was given to the suspect. The power under sec 27 was vested in a high dignitary and was justified. It should be noted that the Court treated the procedure as valid as it was not necessary before Maneka Gandhi's case, to go into the question whether the procedure was 'fair'.

5.4 Talab Haji Hussain Case: (cancellation of bail): (1958)

The facts in Talab Haji Hussain vs. Madhukar Purushottam Mondkar: AIR 1958 SC 376 were that the person was accused of having committed

an offence which was bailable but the High Court, in exercise of its inherent power, allowed an application by the complainant for cancelling the bail on the ground that "it would not be safe to permit the appellant to be at large". The Supreme Court confirmed the order of cancellation and observed that the primary purpose of the Criminal Procedure Code was to ensure a fair trial to an accused person as well as to the prosecution. The Court observed:

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

The cancellation of bail was justified on the basis of the conduct of the accused subsequent to release on bail.

5.5 Harpreet Kaur's Case (Preventive detention) (1992)

This case, Harpreet Kaur v. State of Maharashtra, AIR 1992 SC 779 arose under the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug offenders Act (1981). An order of preventive detention was passed against the detenu for indulging in transportion of illicit liquor and keeping arms with him while transporting liquor. He was also creating fear psychosis. Four witnesses, on condition of anonymity gave statements to the police and clearly stated that they would not depose against the detenu for fear of retaliation as the detenu had threatened to do away with anyone who would depose against him. The Supreme Court held that the activities of the detenu affected the even tempo of the society by creating a feeling of insecurity among those who were likely to depose against him as also the law enforcement agencies. The fear psychosis created by the detenu in the minds of the witnesses was aimed at letting the crime go unpunished. These activities, it was held, fell within sec. 2(a) of the Act, as to permit the detenu's preventive detention in the interests of maintaining 'public order'.

5.6 Francis v. Banka Bihau Singh (1958): (case transferred anticipating communal violence) The preserving of a congenial atmosphere for the conduct of a fair trial has been viewed as imperative by the superior courts. If the atmosphere is surcharged with tension on account of the hostility between the parties, or within the community, it is bound to have impact on the fairness of the trial. The necessity for ensuring protection of witnesses assumes significance in this context as well. This case in Francis and the next one relating to Maneka Gandhi state that if there are serious local tensions which are likely to preclude a fair trial, the case can be transferred

for trial to a distant place. These cases were followed recently in NHRC case also (see para 5.14).

5.7 In G.X. Francis vs. Banke Bihari Singh, A.I.R. 1958 SC 209 the Supreme Court was deciding a transfer petition filed under section 527 of the Cr.P.C. 1898 for the transfer of a criminal case from Jashpuranagar, in the state of Madhya Pradesh, to some other State, preferably New Delhi or Orissa. The complainant in the case was a member of the royal family of Jashpur, who used to reside at Jashpurnagar. All the seven accused, except one, were Roman Catholics and the other one was a Jacobite Christian. One of the grounds for asking transfer of the case was that there was bitterness among the communities of the accused and the complainants i.e. Christians and Hindus, in the area of Jashpurnagar. In view of the unanimity of testimony from both sides about the nature of surcharged tension in Jashpurnagar, the Supreme Court ordered transfer of the case from Jashpurangar to the State of Orissa, for fair trial . Vivian Bose J, speaking for the Court observed:

> "…But we do feel that good grounds for transfer from Jashpurnagar are made out because of the bitterness of local communal feeling and the tenseness of the atmosphere there. Public confidence in the fairness of a trial held in such an atmosphere would be seriously underminded, particularly among reasonable Christians all over India, not because the Judge was unfair is biased but because the machinery of justice is geared to work in the midst of such conditions. The calm detached atmosphere of a fair and impartial judicial trial would be

wanting and even if justice were done it would not be 'seen to be done'."

5.8 Maneka Sanjay Gandhi's case (1979): transfer of case can be made if there are local tensions: The Supreme Court in Maneka Sanjay Gandhi vs. Rani Jethmalani (1979) 4 SCC 167 stressed the need for a congenial atmosphere for fair and impartial trial. Krishna Iyer J while defining the need for congenial atmosphere for a fair and impartial trial, observed at para 5:

> "This tendency of roughs and street roughs to violate the serenity of court is obstructive of the course of justice and must surely be stamped out. Likewise the safety of the person of an accused or complainant as an essential condition for participation in a trial and where that is put in peril by commotion, tumult, or threat on account of pathological conditions prevalent in a particular venue, the request for a transfer may not be dismissed summarily. It causes disquiet and concern to a court of justice if a person seeing justice is unable to appear, present one's case, bring only witnesses or adduce evidence. Indeed, it is the duty of the court to assure propitious conditions which conduce to comparative tranquility at the trial. Turbulent conditions putting the accused's life in danger or creating chaos inside the Court hall may jettison public justice. If this vice is peculiar to a particular place and is persistent the transfer of the case from that place may become necessary. Likewise, if there is general consternation or atmosphere of tension or raging masses of public in the entire region taking sides and polluting the climate, vitiating the necessary neutrality to hold a detached judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer".

5.9 Kartar Singh's case: (sec. 16 of TADA)(1994)

Kartar Singh vs. State of Punjab 1994(3) SCC 569 is a landmark and is a case nearest to the subject matter of this Consultation Paper. That case was dealing with the provisions of section 16(2) and (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987. Sec. 16(2) gives discretion to the Designated Court to keep the identity and address of any witness secret on the following three contingencies:

(1) on an application made by a witness in any proceedings before it; or
(2) on an application made by the Public Prosecutor in relation to such witness; or
(3) on its own motion.

Section 16(3) refers to the measures to be taken by the Designated Court while exercising its discretion under subsection (2).

If neither the witness nor the Public Prosecutor has made an application in that behalf nor the Court has taken any decision of its own, then the identity and address of the witnesses have to be furnished to the accused. The measures are to be taken by the Designated Court under any of the above contingencies so that a witness may not be subjected to any harassment for speaking against the accused.

Section 16(3) refers to the measures that the Court without prejudice to its general power under section 16(2), may take. These include:

(a) the holding of the proceedings at a place to be decided by the Designated Court;

(b) the avoiding of the mentioning of the names and addresses of the witnesses in its orders or judgments or in any records of the cases accessible to public;

(c) the issuing of any directions for securing that the identity and addresses of the witnesses are not disclosed;

(d) directing, in the public interest, that all or any of the proceedings pending before such a Court, shall not be published in any manner.

Subsection (4) of section 16 refers to the punishment that can be imposed for contravention of any direction issued under subsection (3). It says that such persons shall be punishable with imprisonment for a term which may extend to one year and with fine which may extend to Rs. 1000/-.

In Kartar Singh, the Supreme Court upheld the special provision envisaged in section 16(2) and (3) stating as follows: (pp 688-689)

> "Generally speaking, when the accused persons are of bad character, the witnesses are unwilling to come forward to depose against such persons fearing harassment at the hands of those accused. The persons who are put for trial under this Act are terrorists and disruptionists. Therefore, the witnesses will all the more be reluctant and unwilling to depose at the risk of their life. The Parliament, having regard to such extraordinary circumstances has thought it fit that the identity and addresses of the witnesses be not disclosed in any one of the above contingencies."

The Supreme Court then referred to the provision of section 228A of the Indian Penal Code, (inserted in 1983) which states that disclosure of the identity of the 'victims' of certain offences, (sections 376, 376A, 376B, 376C, 376D) as contemplated by sub-section (1) of that section is punishable but will be subject to sub-section (2). Sub-section (2) states that nothing in subsection (1) shall extend to any printing or publication of the name of any person which may make known the identity of the victim if such printing or publication is made:

> "(a) by or under the orders in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or
> (b) by, or with the authorisation in writing of the victim; or
> (c) where the victim is dead or minor or of unsound mind, by, or with the authorization in writing of the next of kin of the victim."

Subsection (3) of section 228A of the Indian Penal Code states that whoever prints or publishes any matter in relation to any proceeding before a Court with respect to an offence referred to in subsection (1) without the previous permission of such Court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine. Explanation below sub-section (3) states that the printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of the section.

The Supreme Court (p. 689) then explained the permissible restrictions upon the right of the accused to cross-examine the prosecution witnesses, as follows:

> "However, when the witnesses are examined in the presence of the accused, then the accused may have the chances of knowing the identity of the witnesses if they are already known to the defence. But if the witnesses are unknown to the defence, there is no possibility of knowing the identity of the witnesses even after they enter into the witness box. During a trial, after examination of the witness-in-chief, the accused have a right of deferring the cross-examination and calling the witnesses for cross-examination on some other day. If the witnesses are known to the accused, they could collect the material to cross-examine at the time of cross-examination in such circumstances. Whatever may be the reasons for non-disclosure of the witnesses, the fact remains that the accused persons to be put up for trial under this Act which provides severe punishment, will be put to disadvantage to effective cross-examining and exposing the previous conduct and character of the witnesses."

The following final observation of the Supreme Court in Kartar Singh's case (para 290) is important:

> "Therefore, in order to ensure the purpose and object of the cross-examination, we feel that, as suggested by the Full Bench of the Punjab and Haryana High Court in Bimal Kaur (AIR 1988 P&H p 95 (FB)) the identity, names and addresses of the witnesses may be

> disclosed before the trial commences; but we would like to qualify it by observing that it should be subject to an exception that the Court for weighty reasons in its wisdom may decide not to disclose the identity and addresses of the witnesses especially if the potential witnesses whose life may be in danger."(Emphasis supplied)

The Supreme Court has, therefore, upheld the provision of sub-sections 1(2) and (3) of section 16 of the TADA, 1987 by treating the right of the accused to cross-examine the prosecution witnesses as not being absolute but as being subject to exceptions in the case of trials of alleged offenders by the Designated Court.

5.10 Delhi Domestic Women's Forum case (SC)(1995): As compared to statutory provisions, the judicial pronouncements have gone far ahead in protecting the witnesses and more particularly the protection of victim's witness as in the case of a rape. In the Delhi Domestic Working Women's Forum vs. Union of India (1995) 1 SCC 14, the Supreme Court, while indicating the broad parameters that can assist the victims of rape, emphasized that in all rape trials "anonymity" of the victims must be maintained as far as necessary so that the name is shielded from the media and public. The Court also observed that the victims invariably found the trial of an offence of rape trial a traumatic experience. The experience of giving evidence in court has been negative and destructive and the victims have often expressed that they considered the ordeal of facing cross-examination in the criminal trial to be even worse than the rape itself.

5.11 Swaran Singh's case: (Plight of witnesses in criminal cases) (2000)

The expenses payable to witnesses provided in sec. 312 of the Code of Criminal Procedure, 1973 came up for discussion in Swaran Singh vs. State of Punjab AIR 2000 SC 2017. The Supreme Court (Wadhwa J) described the plight of witnesses in criminal courts as follows:

> "Not only that a witness is threatened; he is maimed; he is done away with; or even bribed. There is no protection for him."

5.12 Shambhu Nath Singh's case: (criminal trial on day to day basis (2001)

The Supreme Court stated in State of UP vs. Shambhu Nath Singh 2001 (4) SCC 667 that section 309 of the Code of Criminal Procedure, 1973 requires that the criminal trial must proceed from day to day and should not be adjourned unless 'special' reasons are recorded by the Court. In that case, after several adjournments, PW1 was not examined even when present. The Supreme Court observed:

> "If any Court finds that day to day examination of witnesses mandated by the legislature cannot be complied with due to the non-cooperation of the accused or his counsel, the Court can adopt any of the measures indicated in the sub section, i.e. remanding the accused to custody or imposing costs on the party who wants such adjournments (the costs must be commensurate with loss suffered by the witnesses, including the expenses to attend the Court). Another option is, when the accused is absent and the witness is present to be examined, the Court can cancel his bail, if he is on bail."

5.13 NHRC vs. State of Gujarat: (Best Bakery Case) (2003): need for law of witness protection:

We now come to the Best Bakery case from Gujarat which came up to the Supreme Court. In the public interest case, (W.P. Crl. No. 109/2003 and batch) in National Human Rights Commission vs. State of Gujarat a series of orders were passed by the Supreme Court.

There, the National Human Rights Commission (NHRC) filed a public interest case seeking retrial on the ground that the witnesses were pressurised by the accused to go back on their earlier statements and the trial was totally vitiated. In its order dated 8.8.2003 NHRC vs, State of Gujarat (2003(9) SCALE 329), the Supreme Court observed:

> "……. A right to a reasonable and fair trial is protected under Articles 14 and 21 of the Constitution of India, Art. 14 of the International Covenant on Civil and Political Rights, to which India is a signatory, as well as Art. 6 of the European Convention for Protection of Human Rights and Fundamental Freedoms.
>
> On perusal of the allegations in the special leave petition and number of criminal cases coming to this Court, we are prima facie of the opinion that criminal justice delivery system is not in sound health. The concept of a reasonable and fair trial would suppose justice to the accused as also to the victims. From the allegations made in the special leave petition together with other materials

> annexed thereto as also from our experience, it appears that there are many faults in the criminal justice delivery system because of apathy on the part of the police officers to record proper report, their general conduct towards the victims, faulty investigation, failure to take recourse to scientific investigation etc."

Then, on the question of protection of witnesses, the Supreme Court referred to the absence of a statute on the subject, as follows:

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

The Court directed that in the counter-affidavit of the Gujarat Government, it should indicate the steps, if any, taken by it for extending protection to the lives of victims, their families and their relations; if not, the same should be done. The Court also wanted to know whether any action had been taken by the Gujarat Government against those who had allegedly extended threats of coercion to the witnesses, as a result whereof the witnesses had changed their statements before the Court. The Court also directed the Union of

India to inform the Court about the proposals, if any, "to enact a law for grant of protection to the witnesses as is prevalent in several countries".

By a subsequent order passed on 12th July, 2004, the Supreme Court issued directions to all States and Union Territories to give suggestions for formulation of appropriate guidelines in the matter.

5.14` Ms. Neelam Katara case (Delhi High Court): (2003) Guidelines for witness protection issued:

We shall next refer to the guidelines suggested by the Delhi High Court in Ms. Neelam Katara vs. Union of India (Crl. W No. 247 of 2002) on 14.10.2003, as applicable to cases where an accused is punishable with death or life imprisonment. The significance of the guidelines is that they are not confined to cases of rape, or sexual offences or terrorism or organized crime. The Court suggested the following scheme:

Definitions:

(1)

(a) "'Witness' means a person whose statement has been recorded by the Investigating Officer under section 161 of the Code of Criminal Procedure pertaining to a crime punishable with death or life imprisonment.

(b) 'Accused' means a person charged with or suspected with the commission of a crime punishable with death or life imprisonment.

(c) 'Competent Authority' means the Secretary, Delhi Legal Services Authority.

(d) Admission to protection: The Competent Authority, on receipt of a request from a witness shall determine whether the witness requires police protection, to what extent and for what duration.

(2) Factors to be considered:

In determining whether or not a witness should be provided police protection, the Competent Authority shall take into account the following factors:

(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 in 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.

(3) Obligation of the police:

(i) While recording statement of the witness under sec. 161 of the Code of Criminal Procedure, it will be the duty of the Investigating Officer to make the witness aware of the 'Witness Protection Guidelines' and also the fact that in case of any threat, he can approach the Competent Authority. This, the Investigating Officer will inform in writing duly acknowledged by the witness.

(ii) It shall be the duty of the Commissioner of Police to provide security to a witness in respect of whom an order has been passed by the Competent Authority directing police protection."

The above guidelines laid down by the Delhi High Court are the first of its kind in the country and have to be commended. But, they deal only with one aspect of the matter, namely, protection of the witnesses. They do however not deal with the manner in which a witness's identity can be kept confidential either before or during trial nor to the safeguards which have to be provided to ensure that the accused's right to a fair trial is not jeopardized.

5.15 Bimal Kaur Khalsa's case (P&H High Court, Full Bench): Protection of witnesses from media: (1988)

We shall next refer to the Full Bench judgment of the High Court of Punjab and Haryana in Bimal Kaur Khalsa case AIR 1988 P&H p. 95. In that case, it was observed that neither the Court nor the government can ensure the 'total safety' of a prosecution witness. A witness deposing in a criminal case does so with a sense of public duty. The Court can however take steps to stop the dissemination of information regarding the identity and address of the witness ensuring that the name, address and identity of the witness are not given publicly in the media.

Even this judgment does not deal with all the aspects relating to witness protection.

5.16 PUCL case: Witness protection under sec.30 of the POTA (2003)

In PUCL vs. Union of India: 2003 (10) SCALE 967, where the validity of several provisions of the Prevention of Terrorism Act, 2002 (POTA), came up for consideration, the Supreme Court considered the validity of section 30 of the Act which deals with 'protection of witnesses'. The provisions of section 30 are similar to those in section 16 of the TADA, 1987, which were upheld in Kartar Singh's case already referred to above. In PUCL, the Court referred to Gurubachan Singh vs. State of Bombay 1952 SCR 737, and other cases, and observed that one cannot shy away from the reality that several witnesses do not come to depose before the Court in serious cases due to fear of their life. Under sec. 30 a fair balance between the rights and interests of witnesses, the rights of the accused and larger public interest has, it was held, been maintained. It was held that section 30 was also aimed to assist the State in the administration of justice and to encourage others to do the same under given circumstances. Anonymity of witnesses is to be provided only in exceptional circumstances when the Special Court is satisfied that the life of witnesses is in jeopardy.

The Court in PUCL has pointed out that the need for existence and exercise of power to grant protection to a witness and preserve his or her identity in a criminal trial has been universally recognized. A provision of this nature should not be looked at merely from the angle of protection of the witness whose life may be in danger if his or her identity is disclosed but also in the interests of the community to ensure that heinous offences like terrorist acts are effectively prosecuted and persons found guilty are

punished and to prevent reprisals. Under compelling circumstances, the disclosure of identity of the witnesses can be dispensed with by evolving a mechanism which complies with natural justice and this ensures a fair trial. The reasons for keeping the identity and address of a witness secret are required to be recorded in writing and such reasons should be weighty. A mechanism can be evolved whereby the Special Court is obliged to satisfy itself about the truthfulness and reliability of the statement or deposition of the witness whose identity is sought to be protected.

On the subject of protection of identity of witnesses, section 30 of the Prevention of Terrorism Act, 2002 is similar to section 16 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. It is necessary to advert to the contentions raised in the case. While challenging the constitutional validity of section 30 of the Prevention of Terrorism Act, 2002 in People's Union of Civil Liberties vs. Union of India (2003) 10 SCALE 967, the petitioner (PUCL) argued as follows:

> "… that the right to cross-examine is an important part of fair trial and principles of natural justice which is guaranteed under article 21; that even during Emergency, fundamental rights under articles 20 and 21 cannot be taken away; that section 30 is in violation of the dictum in Kartar Singh's case because it does not contain the provision of disclosures of names and identities of the witnesses before commencement of trial; that fair trial includes the right for the defence to ascertain the true identity of an accused; that therefore the same has to be declared unconstitutional."

Responding on behalf of Union of India, the learned Attorney-General for India submitted as follows:

> "Such provisions (section 30) or exercise of such powers are enacted to protect the life and liberty of a person who is able and willing to give evidence in prosecution of grave criminal offences; that the section is not only in the interest of witness whose life is in danger but also in the interests of community which lies in ensuring that heinous offences like terrorist acts are effectively prosecuted and

punished; that if the witnesses are not given immunity they would not come forward to give evidence and there would be no effective prosecution of terrorist offences and the entire object of the Act would be frustrated; that cross-examination is not a universal or indispensable requirement of natural justice and fair trial; that under compelling circumstances, it can be dispensed with, and natural justice and fair trial can be evolved; that the section requires the court to be satisfied that the life of witness is in danger and the reasons for keeping the identity of witness secret are required to be recorded in writing; that therefore, it is reasonable to hold that section is necessary for the operation of the Act."

In PUCL, the Supreme Court speaking through Justice Rajendra Babu observed (in para 57) as follows:

"In order to decide the constitutional validity of section 30, we do not think, it is necessary to go into the larger debate, which learned counsel for both sides have argued, that whether right to cross-examine is central to fair trial or not. Because right to cross-examination per se is not taken away by section 30. The section only confers discretion to the concerned court to keep the identity of witness secret if the life of such witness is in danger.

…In our view, a fair balance between the rights and interests of witness, rights of accused and larger public interest has been maintained under section 30. It is also aimed to assist the State in justice administration and encourage others to do the same under the given circumstance. Anonymity of witness is not the general rule under section 30. Identity will be withheld only in exceptional circumstances when the special court is satisfied that the life of witness is in jeopardy."

The Court further observed (in para 59) as follows:

"The present position is that section 30 (2) requires the Court to be satisfied that the life of a witness is in danger to invoke a provision of this nature. Furthermore, reasons for keeping the identity and address of a witness secret are required to be recorded in writing and such reasons should be weighty. In order to safeguard the right of an

> accused to a fair trial and basic requirements of the due process, a mechanism can be evolved whereby the Special Court is obligated to satisfy itself about the truthfulness and reliability of the statement or deposition of the witness whose identity is sought to be protected."

Finally, the Court while upholding the validity of section 30, observed (in para 62) as follows:

> "It is not feasible for us to suggest the procedure that has to be adopted by the special Courts for keeping the identity of witness secret. It shall be appropriate for the concerned courts to take into account all the factual circumstances of individual cases and to forge appropriate methods to ensure the safety of individual witness."

In PUCL, the attention of the Court was drawn to the legal position in USA, Canada, New Zealand, Australia and UK, as well as the view expressed in the European Court of Human Rights in various decisions. However, the Court did not consider it necessary to refer to any of them in detail because the legal position has been fully set out and explained in Kartar Singh's case.

It was stated further in PUCL that the effort of the Court is to strike a balance between the right of the witness as to his life and liberty and the right of the community in the effective prosecution of persons guilty of heinous criminal offences on the one hand and the right of the accused to a fair trial, on the other. The Court observed: (p 993)

> "This is done by devising a mechanism or arrangement to preserve anonymity of the witness when there is an identifiable threat to the

> life or physical safety of the witness or others whereby the Court satisfies itself about the weight to be attached to the evidence of the witness. In some jurisdictions, an independent counsel has been appointed for the purpose to act as amicus curiae and after going through the deposition evidence assist the Court in forming an opinion about the weight of the evidence in a given case or in appropriate cases to be cross-examined on the basis of the question formulated and given to him by either of the parties. Useful reference may be made in this context to the recommendation of the Law Commission of New Zealand."

While elaborating further the need for keeping the identity of the witness secret, the Court observed: (p 994)

> "…It is not feasible for us to suggest the procedure that has to be adopted by the Special Courts for keeping the identity of witness secret."

5.17 Sakshi case (2004)

The Supreme Court in Sakshi vs. Union of India 2004 (6) SCALE 15 referred to the argument of the petitioner that in case of child sexual abuse, there should be special provisions in the law to the following effect:-

(i) permitting use of videotaped interview of the child's statement by the judge (in the presence of a child support person).

(ii) allowing a child to testify via closed circuit television or from behind a screen to obtain a full and candid account of the acts complained of.

(iii) that the cross examination of a minor should only be carried out by the judge based on written questions submitted by the defence upon perusal of the testimony of the minor.

(iv) that whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.

During the pendency of the case in Sakshi, the Supreme Court requested the Law Commission to examine the question as to the expansion of the definition of rape. The Commission gave its 172nd Report dealing with various aspects of the problem. Details of the Report have been set out in Chapter IV para 4.5.

The Supreme Court in Sakshi, after receipt of the Report of the Law Commission (172nd Report, Chapter VI), did not accept the above said arguments of the petitioner in view of sec. 273 of the Code of Criminal Procedure as, in its opinion, the principle of the said section of examining witnesses in the presence of the accused, is founded on natural justice and cannot be done away with in trials and inquiries concerning sexual offences. The Supreme Court however pointed out that the Law Commission had observed that in an appropriate case, it may be open to the prosecution to request the Court to provide a screen in such a manner that the victim does not see the accused and at the same time provide an opportunity to the accused to listen to the testimony of the victim and the Court could give appropriate instructions to his counsel for an effective cross examination. The Law Commission had also suggested that with a view to allay any apprehensions on this score, a proviso could be placed above the Explanation to sec. 273 Cr.P.C to the following effect: “Provided that where

the evidence of a person below 16 years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross examination of the accused". In para 31 and 32 the Supreme Court observed as follows:

> "31. The whole inquiry before a Court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 Cr.P.C. merely requires the evidence to be taken in the presence of the accused. The Section, however, does not say that the evidence should be recorded in such a manner that the accused have full view of the victim or the witnesses. Recording of evidence by way of video conferencing vis-à-vis Section 272 Cr.P.C. has been held to be permissible in a recent decision of this Court in State of Maharashtra vs. Dr. Praful B. Desai 2003(4) SCC 601. There is a major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are hand-maiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the Court to expand or enlarge the meaning of such provisions in order to elicit the truth and do justice with the parties.
>
> 32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not

be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) of section 327 Cr.P.C. should also apply in inquiry or trial of offences under Section 354 and 377 IPC."

The Court in Sakshi referred to State of Punjab vs. Gurmit Singh 1996(2) SCC 384 where the Supreme Court had highlighted the importance of section 327(2) and (3) of the Cr.P.C. which require evidence to be recorded in camera in relation to holding rape and other sexual offences. The Court gave the following directions, in addition to those given in Gurmit Singh's case, namely,

(1) The provisions of sub-section (2) of section 327 Cr.P.C. shall, in addition to the offences mentioned

in that sub-section, would also apply in inquiry or trial of offences under sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

Finally, the Court in Sakshi added that cases of child abuse and rape are increasing with alarming speed and appropriate legislation in this regard is, therefore urgently required. They observed:

> "We hope and trust that the Parliament will give serious attention to the points highlighted by the petitioner and make appropriate suggestions with all the promptness which it deserves."

5.18 Zahira's case, 2004 (4) SCALE 373: Protection of witnesses

This is also one of the most recent cases. In this case, the Supreme Court dealt with 'witness protection' and the need for a fair trial, whereby fairness is meted out not only to the accused but to the victims/witnesses. On the question of 'witness protection', the Court observed (p.392):

> "If the witnesses get threatened or are forced to give false evidence, that also would not result in a fair trial."

(Page 394):

> "Witnesses, as Bentham said, are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control, to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the court on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface. Broader public and social interest require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State representing by their presenting agencies do not suffer (p.395) … there comes the need for protecting the witnesses. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth presented before the Court and justice triumphs and that the trial is not reduced to mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power. …As a protector of its citizens, it has to ensure that during trial in court, the witness could safely depose truth without any fear of being haunted by those against whom he has deposed."

(Page 395):

> "Legislative measures to emphasize prohibition against tampering with witness, victim or informant, have become the imminent and inevitable need of the day."

(Page 399)[Referring to UK]:

> "The Director of Prosecution plays a vital role in the prosecution system. He even administers 'witness protection programmes'. Several countries for example, Australia, Canada and USA have even enacted legislation in this regard. The Witness Protection Programmes are imperative as well as imminent in the context of alarming rate of summersaults by witnesses with ulterior motive and purely for personal gain or fear for security. It would be a welcome step if something in those lines is done in our country. That would be a step in the right direction for a fair trial."

5.19 Other illustrative cases

We may also refer, by way of illustration, to a few cases in which the Indian Courts have given witness protection:

(a) One Mohammed Shaken Sajjad, a victim of the Naroda-Patia carnage in 2002, who was also a key witness in the case, had been beaten brutally by a group of 30 people while he was sitting outside his shop in Vatva. Three of his children were killed. According to him, one Ahmed, an anti-social element of that locality, was shouting and threatening if the victim was venturing to give evidence before the Nanavati Commission on 1.10.2003 naming the persons in the mob. He was given one police guard for his protection.

(b) Ketan Thirodkar, an ex-journalist, had filed a complaint against the police alleging various illegal acts against the police and referring to their links with the underworld. He filed a petition in the Bombay High Court seeking police protection. The prosecution opposed the plea contending that Thirodkar had also links with the underworld. He was given protection for a limited period by the Court. (Treatment and Protection of Witnesses in India by Mr. Dhruv Desai, 4th Year Law student, Symbiosis Society's Law College, Pune in http://legalsauaeindia.com/articles/witness.htm).

5.20 Summary: Need to evolve proposals for a statute for witness protection

In the context of the above discussion and in particular the observations of the Supreme Court in the above cases, emphasizing that there should be statutes governing witness protection in our country, we are making proposals in the Consultation Paper.

Chapter VI

WITNESS ANONYMITY AND BALANCING OF RIGHTS OF ACCUSED - A COMPARATIVE STUDY OF CASE LAW IN OTHER COUNTRIES

6.1 In this Chapter, we propose to deal with the principles laid down in the judgments of various countries, namely, the United Kingdom, Australia, New Zealand, Canada, the United States of America and of the European Court of Human Rights and also the decisions of the United Nation's War Crime Tribunals for Yugoslavia and Rwanda, on the question of witness protection and anonymity. A survey of the case law will bring about common aspects as well as the sharp differences in the law laid down in various countries and will also reveal the manner in which the Courts and Tribunals have tried to balance the rights of the accused for a fair trial (which includes right to an open public trial and right to cross examine the witness) on the one hand and the need to grant adequate witness protection or anonymity to witnesses, and in particular about their names and addresses and other details relating to their identity.

(a) 6.2 United Kingdom:

In the United Kingdom, the Courts have laid down that the right to open justice and cross-examination of the prosecution witnesses is not absolute and that witness anonymity or video-screened evidence could be ordered by the Courts under its inherent powers. We shall presently refer to the cases chronologically. Incidentally, we shall also be referring to certain statutes dealing with the subject.

Open justice and exceptions:

In the United Kingdom, the principle of "open justice" is of ancient origin dating back to the days before the Norman Conquest[1]. There are references to the principle in the reports of the seventeenth century trials. Hale in the seventeenth century and Blackstone, in the eighteenth century, proclaimed the virtues of a public trial. Secrecy would breed abuse while openness would result in transparency. Public attendance would secure strong confidence in the judicial system. The principle of "open justice" has, in fact, been described as the enduring contribution of Britain to the law of other nations before it became engrafted into the European Convention which came into force in 1953. But, at the same time, it has always been accepted that the principle of "open justice" is subject to exceptions.

Art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which applies to United Kingdom, speaks not only of the right to "open justice" but also to the need for exceptions in the interests of morals, public order, national security and for protecting the privacy of juveniles and others where publicity could otherwise prejudice the interests of justice. Article 6(1) of the Convention reads as follows:

> "Art. 6(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and

[1] 1. See "Secret Witnesses" by Mr. Gilbert Marcus 1990 Public Law 207 and Phipsons's Law of Evidence (15th Edition, 2000).

public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interest of justice."

6.2.1 Scott vs. Scott (1913): Principle of "open justice" and exceptions thereto:

We start with the earliest case on the subject, decided by the House of Lords. In Scott vs. Scott (1913 AC 417) Viscount Haldane L.C. referred to 'open justice' as the rule and stated that any exceptions thereto must be based on some overriding principle which defines the field of the exception and not leave it to the discretion of the Judge. He said (at p.435):

"The power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the Judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing shall take place in private. If there is any exception to the fixed principle which requires the administration of justice to take place in open court, that exception must be based upon the operation of some other overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge."

The Crown Court Rules provide for the exercise of certain kinds of jurisdiction in Chambers to permit evidence excluding the public (Rule 27), such as where national security is involved or cases falling under section 8 (4) of the Official Secrets Act, 1920. This latter Act permits the Court to exclude members of the public from the Court in the trial of offences under the said Act on the ground that the publication of evidence could prejudice national safety. However, it states that the passing of the sentence must be in public. In Youth Courts, the public are excluded but the press is admitted under section 47(2) of the Children and Young Persons Act, 1933. In some cases, an order restricting the reporting of all or part of the proceedings may suffice. This is permitted by section 11 of the Contempt of Courts Act, 1981. A Court can, under section 4(2) of that Act, also postpone publication of Court proceedings, where it is necessary to avoid risk of prejudice to the administration of justice; the Court can prohibit publication of identity of a child or young person under 18 years and also in appropriate cases, the names, identity of victims of rape and other sexual offences.

6.2.2 We shall next refer to certain leading cases decided after Scott, chronologically.

It has been held that the names of allegedly blackmailed witnesses in a case of blackmail may be withheld (R vs. Socialist Worker Printers etc. ex parte. Attorney Gen: 1975 QB 637. It has been pointed out that there may be cases in which it is necessary to exclude the public from the court though not the press; (R vs. Walterfield : (1975) 60 Crl Ap. Rep 296).

6.2.3 "Leveller Magazine" case (1979) – 'anonymity' order under statutory or inherent power of Court

In UK, the power of the Court to withhold the name of the witness in a criminal trial is treated as inherent in the Court. Such a power may also be conferred by statute.

Attorney General vs. Leveller Magazine (1979 A.C. 440) arose under the Contempt of Courts Act which was in force before the 1981 Act. In certain committal proceedings of Nov. 1977, in relation to offences under the Official Secrets Act, the Magistrate initially allowed an application filed by the prosecution seeking that the prosecution witness be described as 'Colonel B' and that his actual name should be known only to the defendants and their counsel and the Court, for reasons of national safety. But, the said prohibition was violated and consequently proceedings under the Contempt of Courts Act were taken out by the Attorney General against the press which published the evidence given in the criminal proceedings. The defence in the contempt case was that "Col B" had, in fact, disclosed his real name and address at the criminal trial and that therefore, he must be deemed to have waived the protection given to him under the order for anonymity. This contention was ultimately accepted and it was held that there was no contempt. But during the course of the judgment, Lord Diplock laid down the general principle of open justice and pointed out that there could be exceptions to that principle of open trial either by statute or under the inherent powers of the Court. Lord Diplock stated (p. 450):

> "However, since the purpose of the general rule is to serve the ends of justice, it may be necessary to depart from it where the nature or circumstances of the particular proceedings are such that the application of the general rule in its entirety would frustrate or render impracticable, the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a Court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the Court reasonably believes it to be necessary in order to save the ends of justice."
>
> (emphasis supplied)

In the course of the judgment, Lord Diplock referred to the decision of the Court of Appeal of New Zealand in Taylor vs. Att. Gen:1975(2) NZLR 675 to the effect that the Court had inherent power to make an express order directing to what extent the proceedings should be published or not published outside Court.

6.2.4 Section 11 of the Contempt of Courts Act, 1981:

After the above said 1979 judgment in Leveller Magazine case, the legislature in UK recognized the principle laid down in the case by making adequate provision in section 11 of the (UK) Contempt of Court Act, 1981, which provided that

> "In any case where a Court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the Court, the Court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the Court to be necessary for the purpose for which it was so withheld."

It may, however, be noted that the House of Lords, in the Leveller Magazine case, did not have occasion to consider the question of balancing the rights of the accused for an open trial as against the right of the victim/witness to seek anonymity while adducing evidence.

6.2.5 Evidence through Television: certain statutes:

Evidence through television links is permissible under sec. 24 of the Youth Justice and Criminal Evidence Act, 1999. Evidence may be given by a witness (other than the defendant) through a live telecast link, with the leave of the Court, in two situations (a) if the witness is outside UK and (b) if the witness is a child. (see also section 32(1) of Criminal Justice Act, 1988 and section 55 of Criminal Justice Act, 1991).

6.2.6 Video-recorded evidence: certain statutes

Video recorded evidence is admissible in certain cases: (a) an offence which involves an assault on or injury or a threat of injury to, a person (b) offences of cruelty to persons under the age of 16 years, contrary to section 1 of the Child and Young Persons Act, 1933; (c) offences under the Sexual

Protection Act, 1956, Indecency with Children Act, 1960, Sexual Offences Act, 1967, section 54 of Criminal Law Act 1977 and Protection of Children Act, 1978 etc.

6.2.7 Anonymity and screening of witnesses:

It is a proper practice in criminal trials in UK where children give evidence about sexual abuse to allow a screen to be erected between the witness and the defendant. If a defendant in person seeks to dominate, intimidate or humiliate a complainant, or should it be reasonably apprehended that he will do so, a screen can be erected (R vs. Brown (Milton) 1998(2) Crl. App R 364 CA). Sections 16 to 33 of the Youth Justice and Criminal Evidence Act, 1999 require the Court to consider special measures of various kinds for protection of vulnerable and intimidated witnesses.

Section 23 of that Act deals with 'screening witness from accused'. Subsection (2) however provides that the screen or the other arrangement (which screens the witness) must not prevent the witness from being able to see and to be seen by

(a) the Judge, Jury
(b) legal representative acting in the proceedings,
(c) any interpreter or other person appointed to assist the witness.

6.2.8 Cases after 1990:

In Re Crook, 1991Crl App p 17, it was held that the public can be excluded from the trial.

R vs. DJX, SCY, GCZ: (1990) 91. Crl. App R 36 (CA) concerned children who were allowed to be shielded from the defendants (accused). After stating that there can be exceptions to the rule of open cross examination, and directing a screen to be used, Lord Lane CJ observed:

> "What it really means is, he (the trial Judge) has got to see that the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witness. Sometimes, he has to make decisions as to where the balance of fairness lies. He may come to the conclusion that in this case the necessity of trying to ensure that these children would be able to give evidence outweighed any possible prejudice to the defendant by the erection of the screen."

In R vs. Watford ex parte Lehman (1993) Crim LR 388 where a group of youths had rampaged through Watford and violently attacked four people, witnesses had serious concerns about their personal safety. The Divisional Court followed Lord Lane CJ's observations referred to above and upheld the decision of the trial Judge to allow the witnesses to give evidence anonymously at the committal stage, by screening them from the defendant but not counsel. Their voices were disguised, and their names were withheld from the defence.

In another case in R vs. Taylor (Gary): (1995) Crim LR 253, (CA), the Court of Appeal upheld a decision of the trial court directing witnesses

to be given anonymity. The witness's evidence was crucial as it provided the only independent corroboration of the removal of the victim's body from the pub where the murder allegedly took place. The judgment in the case referred to the last two cases referred to above. The Court held that for maintaining the appropriate balance, the following factors must be satisfied before an order for witness's anonymity can be granted:

(1) there must be real grounds for fearing the consequences if a witness gives evidence and his or her identity is revealed. Those consequences need not be limited to the witness himself or herself;

(2) the evidence must be sufficiently relevant and important to make it unfair to compel the prosecution to proceed without it;

(3) the prosecution must satisfy the Court that the creditworthiness of the witness has been fully investigated and the results of that inquiry have been disclosed to the defence, so far as is consistent with the anonymity sought;

(4) the Court must be satisfied that no undue prejudice is caused to the defendant (the term 'undue' is used deliberately since some prejudice will be inevitable); and

(5) the Court can balance the need for anonymity – including the consideration of other ways of providing witness protection (e.g. screening the witness or holding in camera hearing where members of public are excluded) – against the unfairness or appearance of unfairness in the particular case.

In 1996, the judgment in Taylor's case has been followed in R vs. Liverpool City Magistrates' Court ex parte Director of Public Instruction: (CO 1148 Queen's Bench Division, d. 19.7.96)(Bedlam LJ (Smith J).

R vs. Ward: 1993(2) ALL ER 577.

R vs. Ward, 1993(2) ALL ER 577 decided by the Court of Appeal laid down that the prosecution was bound to disclose all evidence which it had, to the accused and, if indeed, it wanted to claim public interest immunity on the ground of national security or danger to witnesses' life, it should leave the matter to the Court to give a decision on the question of such non-disclosure and that the prosecution could not itself be the Judge of such questions. In that case which involved the death of several persons by bomb explosion, the accused, a lady, was finally acquitted by the Court of Appeal, reversing the conviction by the trial Court, because the decision as to non-disclosure of several pieces of evidence to the accused on the ground of public interest immunity, ought not to have been taken by the prosecution and that hence the trial was not fair to the accused.

6.2.9 Montgomery (1995): an unjust decision:

We may also refer to the rather extraordinary judgment of the Court of Appeal in Montgomery : 1995(2) All ER 28, where a witness was punished for three months imprisonment even though the refusal by him to give evidence was due to fear of reprisals by the accused. The witness had earlier supplied the police with a statement that he was one of the persons concerned in the hurling of missiles at police vehicles, in which a police

officer was seriously injured. Subsequently, he refused to take oath and to give evidence at the trial of the ten accused persons. The trial Judge then permitted his statement to be read in evidence under sec. 23(3)(b) of the Criminal Justice Act, 1988 on the ground that the witnesses had refused to give oral evidence through fear. But, at the same time the Judge imposed a punishment of imprisonment for twelve months on the witness for his refusal to give evidence, though it was on account of fear. Section 23(3)(b) contained certain curious provisions.

> "Section 23: (1) A statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if……
> (2)…….
> (3) (a)……
> (b) The person who made it does not give oral evidence through fear or because he is kept out of the way…."

There was, in fact, an earlier precedent to the contrary before the above case in Montgomery was decided. In an earlier case in Action Justices and Others (1991) 92 Cr App. R 98(105), Watkin L J in the Court of Appeal observed:

> "Fear of what and whether that is relevant is a matter for the Court's consideration in the given circumstances…."

and he said it was sufficient that the Court is sure that the witness is in fear as a consequence of the commission of the material offence or of something

said or done subsequently in relation to that offence and the possibility of the witness testifying to it.

But, in spite of the above precedent, the Court of Appeal, in Montgomery, confirmed the conviction but merely reduced the sentence of imprisonment to three months. The reduction of sentence from twelve months to three months was on the basis that the relatives and supporters of the ten accused were in the gallery when Mr. Montgomery refused to give evidence. The judgment has been widely criticized. Nicholas Reville observes: (see 'The Fearful Witness' in (1995) Vol. 145, New Law Journal p. 1774):

> "…it is difficult to see why Mr. Montgomery was convicted and punished for contempt when he was in fear. If someone in Mr. Montgomery's position refuses to testify through fear , the imposition of a penalty would be unjustified as retribution and irrelevant as a deterrent. When the fear is based on reasonable ground, it would be unreasonable for the law to impose a duty of heroism on the reluctant testifier."

6.2.10 North Ireland Bloody Sunday cases and "Diplock Courts":

We shall next deal with the cases which arose from Northern Ireland and where important principles were laid down.

The specialty of the Irish cases is that here the issue related to the protection of the accused who were military officers whose life was in

danger. Likewise, there were police witnesses who claimed protection. The common issue however was whether video screening evidence could be allowed under the inherent powers of the Court. These rulings have been followed by the Courts in New Zealand while dealing with protection of prosecution witnesses. (see paras 6.4.7, 6.4.8 in this chapter)

In Ireland, towards the end of 1972, three years after the deployment of British troops and in the wake of a series of bloody sectarian confrontations, Lord Diplock Commission was appointed to consider various issues concerning the terrorist problems. The Commission, keeping Art. 6 of the European Convention in mind, suggested that witness safety must be protected if witnesses were to testify voluntarily and without fear of revenge. With several of these amendments being accepted, the Northern Ireland (Emergency Provisions) Act, 1973 was enacted giving birth to the 'Diplock Courts', where witnesses could be 'screened' from the accused.

The Murphy Case (1989):

R. vs. Murphy: (Northern Ireland Crown Court)(1989)(unreported) related to the murder of two British army corporals at an I.R.A. funeral in 1988. Some 27 "media" witnesses were subpoenaed principally to give evidence of the authenticity of the video and photographic material, taken during the course of the violent incidents. The Crown filed an application for an order that these witnesses should not be identified in Court and, in particular, that when they give evidence, their faces should not be seen by the accused or by the public or the press, but should be seen only by the Court and by the counsel and solicitors appearing on behalf of the prosecution and the defence. Hutton L.C. J, after holding in favour of the inherent power of the Court, held that the identity of the witnesses should be kept secret not only from the accused but also from the defence lawyer, in

order to save the ends of justice He did not prohibit the press or the public from noticing the identity of the witness. So far as the accused was concerned, he held that by the use of photographs, defence counsel could ask the witness whether, if the person shown in certain photographs was proved to be one of the accused, and if he (witness) had seen that accused in places different from where he was alleged to have been. (See 'Secret Witnesses' by Mr. Gilbert Marcus, (1990) Public Law 207 (214).

After the Diplock Commission, a Tribunal to inquire into the incidents on 30.1.72 (Bloody Sunday) was constituted and it was headed by Lord Widgery who decided that inquiry should be held in London and not in Ireland, where the incidents took place. Later, he was succeeded by Lord Saville of Newdigate, in whose tenure number of precedents laid down by the said lawlord in the Commission were set aside by the Courts, in the interests of the safety of accused or witnesses.

6.2.11 Lord Saville of Newdigate and others (I) (1999)(28.7.99): Anonymity of witnesses:

It is necessary to refer to the several principles laid down by Lord Woolf in the Court of Appeal in R vs. Lord Saville of Newdigate and others vs. ex parte A & Others 1999(4) All ER 860(CA) (dt. 28.7.99). The matter arose out of the orders dt. 5.5.1999 passed by the Tribunal appointed under the Tribunals of Inquiry (Evidence) Act, 1921 headed by Lord Saville, to inquire into the shooting of 26 people during a demonstration at Londonderry (N. Ireland) on 30th January, 1972 (called the Bloody Sunday). The Tribunal rejected the application of the State for granting "anonymity"

to the military witnesses (who were in the position of accused) as it would violate the principle of open trial. It, however, held that the apprehension of the witnesses as to danger to their life was a reasonable one.

The decision was appealed against by 17 soldiers who had actually opened fire contending that the military witnesses should have been given anonymity. The Divisional Court allowed their appeal on 17.6.99 and held that anonymity be given to the military witnesses. The Court of Appeal affirmed the decision of the Divisional Court.

On further appeal, Lord Woolf, in the Court of Appeal, observed that it seemed that the subsequent tribunal of Lord Saville had not been sufficiently aware that the denial of anonymity would affect the soldiers perception of the fairness of the inquiry. The anonymity would only have a limited effect on the openness of the inquiry since the soldiers would still be giving their evidence in public, their names would be known to the tribunal, their higher officers would be named, a particular soldier could still be named if there was reason to do so, and the tribunal's ability to search for truth would not be undermined. Accordingly, the grant of anonymity to the soldiers was the only possible decision open to the tribunal. After referring to the principle of open justice in a democratic society and to the 'compelling countervailing factors', Lord Woolf stated: (p.877)

> "It is difficult to envisage a more compelling factor than that the withdrawal of anonymity could subject the soldiers to risk of a fatal attack. Furthermore, it is important not to overstate the extent to which the failure to name the soldiers would detract from the open

> search for truth. The soldiers would still give evidence openly in public. The tribunal and counsel for the tribunal would know their names. If any investigation as to their credibility was required, the tribunal could carry out this investigation. Having carefully considered Mr. Clarke's submission, we are left with the clear impression that not only would the tribunal not be hampered in its objective of finding the truth, but in fact the open search for the truth would only be restricted in a marginal way……the tribunal has not assessed what would be the real disadvantage of the soldiers giving their evidence under labels rather than in their own names."

Referring to the burden of proof, Lord Woolf supported the view that once a prima facie case was made out for such an order, the party which is opposing the anonymity order must satisfy the Court why the risk to the witness needs be increased. Lord Woolf stated (p 878) that the approach of the tribunal was not fair to the soldiers:

> "The problem about the risk to which they are subjected is that once their identity is revealed, the dye is cast and it is too late for the protection provided by anonymity, to be restored. The increased risk referred to earlier has subsequent relented. It could again increase…….".

The risk to the soldiers and their families was serious, and the risk was 'a serious possibility', and there was 'reasonable chance' or 'substantial ground for thinking' so. (Fernandez vs. Govt. Of Singapore: 1971(2) All ER 691 (HC)).

Lord Woolf observed: (at p.882)

> "When what is at stake is the safety of the former soldiers and their families, adopting Lord Diplock's approach, the risk is extremely significant. After all, the individual's right to life is, as Lord Bridge stated in Bugdaycay vs. Secy. of State for Home Department 1987(1) All ER 940 (952), the most fundamental of all human rights……"

and concluded:

> "… We do not consider that any decision was possible other than to grant the anonymity to the soldiers."

Lord Saville of Newdigate II: Venue Case (19.12.2001)

This case decided by the Court of Appeal reversed the decision of Lord Saville Tribunal, to conduct the inquiry in Ireland and consequently the original venue at London as decided by Lord Widgery was restored. This case lays down principles of law as to when the trial at the place of occurrence of the crime, can be shifted outside.

This case reported in Lord Saville of Newdigate & others vs. Widgey Soldiers & others: 2002(1)WLR 1249 = (2001 EWCA (19.12.2001)(CA) 2048 is known as the "venue" case. It was decided by Lord Philips MR, Lord Justice Jonathan Parker, Lord Justice Dyson.

The case arose out of the proceedings of the Lord Saville Tribunal subsequent to the judgment referred to earlier in this para, namely, R vs. Lord Saville of Newdigate Exp A: 1999(4) All ER 860. It appears that earlier, Lord Widgery Tribunal had fixed the venue for trial to be at London rather than at Londonderry in Ireland, but the Lord Saville Tribunal shifted it to Londonderry in N. Ireland, purportedly to enable the family members of Irish victims to witness the open trial in Ireland. This was challenged successfully by the soldiers before the Administrative Court. They contended that once the venue was fixed at London, there must be 'compelling reasons' to shift the venue from London to Londonderry. This plea was accepted. The Lord Saville Tribunal appealed before the Court of Appeal.

The reasoning of the Court of Appeal, while affirming the decision of the Administrative Court, was as follows. It referred to the earlier judgment of Lord Woolf dt. 28.7.99 in Newdigate where the Court of Appeal had held that the soldiers had reasonable grounds for fearing for their lives if they were identified and that in those circumstances, and once that was prima facie proved, the Tribunal had to demonstrate that there were compelling reasons for naming them and not giving them anonymity. On the same lines, it was now held that there must be 'compelling reasons' as to why the witnesses should give evidence at Londonderry in Ireland rather than at London. There were good grounds for evidence being recorded at London – away from Londonderry in Ireland,- in as much as the witnesses' life would not be in danger in London and they would not be under any mental stress. The procedure must be fair to the witnesses too.

The Court of Appeal stated, "The majority in Londonderry and that majority includes the families of those who were killed or injured on Bloody Sunday, wish the inquiry well and are anxious that it should continue to be peacefully held in Londonderry. It is, however, common ground that there were, in Londonderry in particular but also elsewhere, dissident Republican elements who are not prepared to observe the cease-fire, but are anxious to disrupt the peace process…. These elements pose a threat to the inquiry and those who are or will be taking part in it, and in particular, the soldier witnesses. The security agencies considered that this threat is "sufficiently real and imminent" to call for precautionary measures".

The soldiers here, it was held, have a subjective element of fear which was relevant. Their subjective fear had to be assessed and it was to be seen if their fear could be alleviated in case they gave evidence at a place other than Londonderry. This balancing exercise was for the Court. As the Administrative Court observed, if heavy security was arranged at Londonderry, it might be treated as a hostile and intimidating environment by witnesses. The witnesses, if indeed they had to go to Londonderry, would go there with a subjective fear. Recent events showed that violence might indeed increase. The Court observed:

> "Assessment of terrorist risk involves consideration of both threat and vulnerability. Threat is the likelihood that terrorist will seek to attack an individual. Vulnerability is the susceptibility of that individual to an attack. It will depend in part upon the precautionary measures that are in place to protect against attack. Threat and vulnerability are

interrelated in that terrorists will be likely to attempt an attack where the target is vulnerable."

Changing the venue, it was held, would not affect the Tribunal's capacity to arrive at the truth. The families of deceased or injured could see from Londonderry what transpired at London in as much as facilities would be put in place for that purpose. "There would be live video-linkage to Londonderry. The public confidence will not be eroded by holding a part of the inquiry in London."

Donaughy Re Application for Judicial Review: (2002) NICA (8.5.2002)

This is a further continuation of the second Newdigate case. The case dealt with the need to use of 'screening' techniques to protect the safety of "police" witnesses, while they deposed at London.

This appeal was before the Court of Appeal in Northern Ireland and was against the decision of the Queen's Bench Division (Kerry J). The earlier cases related to evidence of the "military" officers who had fired and whose safety was involved. The present case involved "police" witnesses living in Ireland.

The Tribunal had accepted 'screening' the police witnesses while deposing at London and had held:

> "We, in short, accept that the applicants do have reasonable and genuine fears for their safety, and we further accept that these fears could be alleviated to a significant degree by screening."

The appellant sought the quashing of the decision of the Tribunal allowing police officers to give evidence from behind screens.

The Court of Appeal affirmed 'screening' and observed as follows:-

> "As expressed, this assessment relates to all the police witnesses who thus face a risk to their lives which cannot be shrugged off as an unrealistic one. Further more, the risk is expressed to be greater than that faced by military personnel, the risk to whom, in the opinion of the English Court of Appeal in the Venue decision, justified the more draconian remedy of a change of venue."

The "police" witnesses, it was observed, live in Northern Ireland and hundreds of their colleagues had died due to terrorist activity over the last 30 years. If they are not to be screened, they will be easily identified by their names which are known. The subjective fear was genuine. The police witnesses, no doubt, will not be seen by the family members of the deceased or wounded persons but will be certainly visible to their lawyers, the Tribunal and the family members can hear the replies of the police witnesses. Screening them to this limited extent will not prejudice a fair trial.

Thus, these various judgments lay down that the Court has inherent power to order evidence to be recorded by video-screening protecting the witnesses or the accused.

6.2.13 In 1992, Guidelines were issued by the Attorney General in UK (see 1982(1) All ER 734) (which included non disclosure where witnesses' life could be endangered). For other cases, R vs. Trevor Douglas: (1993) 97 Crl. Appeal Reports 342; R vs.Davis, Johnson and Rowe: 1993(1) Weekly Law Rep. 613 (non disclosure can be permitted in ex parte proceedings); R vs. Rasheed: (20 May 1994, Times); R vs. Winston Brown 1995(1) crl. App. Rep. 191; R vs. Turner : 1995(1) W.LR 264.

6.2.14 Certain other statutes in UK:

The Criminal Procedure and Investigations Act, 1996 requires primary and secondary disclosure of evidence to accused. Consequent to the judgment of the European Court of Human Rights in Chahel vs. UK (15.11.96) and Tinnelly & Sons Ltd and Others & McElduff & others vs. UK (10.7.98), the UK had introduced legislation making provision for appointment of 'special counsel' in certain cases involving national security. The provisions are contained in the Special Judgment on Appeals Commission Act, 1997 and the Northern Ireland Act, 1998. Under this legislation, where it is necessary on national security grounds for the relevant Courts to sit in camera, in the absence of the affected individual and his or her legal representatives, the Attorney – General may appoint a special counsel to represent the interests of the individual in the proceedings. The legislation provides that the special counsel is not however "responsible to the persons whose interest he is appointed to represent", thus ensuring that the special counsel is both entitled and obliged to keep confidential any information which cannot be disclosed.

For example, in the immigration context, the relevant Rules under the 1997 Act are contained in the Supreme Immigration Appeals Act Commission (Procedure) Rules, 1978 (Statutory Instrument No. 1998/1881). Rule 3 provides that in exercising its functions, the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the UK, the detection and prevention of crime or in any other circumstances where disclosure is likely to harm public interest. Rule 7 relates to the special advocate established by sec. 6 of the 1997 Act. Rule permits that the special advocate is to represent the interest of the appellant by

(a) making submissions to the Commission in any proceedings from which the appellant or his representatives are excluded,
(b) cross examining witnesses at any such proceeding, and
(c) making written submissions to the Commission.

The advocate shall not communicate with the appellant except

(1) before the Secretary of State making the material available to him;
(2) when, after such material is received, the special advocate seeks directions from the Commission to seek information from the appellant/representative, and
(3) after hearing the security of State and such application.

(b) 6.3 Australia:

Australian Courts too have ruled in favour of the inherent power of courts to grant 'anonymity' to witnesses. In a number of cases, the Courts have laid down necessary guidelines therefor.

6.3.1 Initially, in 1993, in R vs. The Stipendiary Magistrate at Southport ex parte Gibson: 1993(2) Qd R 687, no doubt, the Full Court of Queensland held that the true identity of a witness must be disclosed to the defence during committal proceedings and at trial. Williams J was of the view that to hold otherwise would infringe the basic principle of natural justice, namely, that a defendant should know the name of the principal prosecution witness and not be deprived of the opportunity of testifying the prosecution's evidence. The Court did not have occasion to consider the question if there could be exceptions to the rule. But, as we shall presently show, this view has not been accepted by the State Supreme Court in Victoria.

6.3.2 The Supreme Court of Victoria in Jarvie & Another vs. The Magistrate's Court of Victoria at Brunswick and others: (1995) 1. V.R. 84, declined to follow the Queensland decision above referred to. The issue there was whether the true identity of two undercover police officers could be withheld from the defendant at the committal proceedings. The Court decided that the trial Court had jurisdiction to make an 'anonymity order' and that the witnesses should be permitted to give evidence without disclosing their real identity. The Court's order was applicable to the stage of committal as well as at the trial. The Court upheld that this principle was not limited to undercover police officers. It applied "to other witnesses whose personal safety may be endangered by the disclosure of their

identity". The opinion draws a parallel between witness anonymity and the principle of exclusion of evidence based on public interest immunity. In Australia, on grounds of executive privilege, certain documentary evidence could be excluded if their disclosure was contrary to public interest as in the English case of Duncan. Those broad principles were applied in criminal cases not only in regard to receiving documentary evidence but also oral evidence.

The relevant factors to be kept in mind are whether there is a real threat of danger, injury, or death to the witness and to the effectiveness of Witness Protection Programmes. If there is good reason to believe that disclosure of the witness's identity may be of substantial assistance to the accused, then there should be no anonymity. However, if knowing the witness's identity is only of slight assistance, anonymity should be granted subject to the rule that it will not be granted merely because of embarrassment to the witness or invasion of his privacy or personal damage to him as a result of media coverage.

In Jarvie, the Court further held that:

(1) at a minimum, the true name and address of a witness must always be disclosed in confidence to the Court.

(2) the same policies which justify the protection of informers as an aspect of public immunity also justify the protection of undercover police officers. However, the claim to anonymity can also extend to other witnesses whose personal safety is endangered by disclosure of their identity.

(3) in deciding whether undercover police officers should be granted anonymity, the Court must balance the competing public interests, namely, (i) the preservation of anonymity, (ii) the right of the accused to a fair trial, which includes his being able to establish those matters going to his credit, and (iii) the interest in public proceedings, and

(4) once the defence establishes that there is good reason to think that non-disclosure would result in substantial prejudice to the accused, disclosure must be directed. In a strong case, the necessary substantial prejudice to the accused could consist in his inability to gather and use material bearing on the credibility of the prosecution witnesses.

6.3.3 In a series of cases, Courts in Australia have treated informers as falling under a special category usually requiring a special protection: Cain vs. Glass (NUL)(1985) NSWLQ 230; (Mc Hugh JA said that the principle applied even to persons other than registered informers). R vs. Smith : (1996) 86 A Crim R 308. (The earliest English case in Marks vs. Beysus : (1890) 25 QBD 494 was referred to.) This was so, even though in Raybos Australia Pty vs. Jones : 1985 2NSWR 97, the principle of open administration of justice was laid down.

6.3.4 As to other types of cases, in John Fairfax Group Pty Ltd.vs. Local Court of New South Wales : (1991)26 NSWLR 131, the Court accepted the need for 'pseudonym orders' in extortion cases. Mahoney JA said that if such orders were not to be made:

> "victims would not approach or cooperate with the police authorities… These consequences, if they flowed from the disclosure of the victim's identity, would, in my opinion, be analogous to those in blackmail and similar cases and would be of sufficient seriousness in the context of the proceedings before the Court, to make the power to make pseudonym orders 'necessary'"

6.3.5 The recent decision of the New South Wales Court of Appeal in Witness vs. Marsden & Another: 2000 NSWCA 52, (a defamation action) contains an elaborate discussion on the subject. The Court of Appeal, speaking through Heydon JA (with whom Mason P and Priestly JA agreed) set aside the judgment of Levine J and granted anonymity order and issued the following important directives (4) to (6):

> "(4) The witness is to be addressed and referred to in the Court only by a pseudonym;
> (5) Any matter which is likely to lead to the identification of the witness is not to be reported by those in Court;
> (6) No photograph, film or video recording is to be taken of the witness in the Court or within its precincts, and no drawings or other likenesses are to be made of the witness either in the Court or within its precincts."

The above case, as already stated, pertained to defamation of plaintiff by the defendant, alleging homosexuality on part of plaintiff. The witness was an inmate of a gaol in New South Wales and he had given a statement to the police supporting the defendant. The defendant's counsel moved an

application to examine the witness by use of a pseudonym, as there was likelihood of danger to the witness's life. This limited issue was tried separately and for that purpose, the witness's answer in chief-examination was given to the opponent and the plaintiff's counsel gave a list of questions to the defendant's witness to answer. They were answered. The Judge had put two questions. Then the defendant's counsel re-examined the witness. The witness stated he had sought pseudonym because he feared for his life and the publicity of giving evidence would embarrass his family and affect the physical health of his parents. If he sought protective custody, he would lose wages and remissions. The trial Judge dismissed the application for anonymity on the ground that the fear expressed by the witness was too generalized. Added to that, the witness was already in custody.

But the New South Wales Court of Appeal disagreed. It referred to the witness's fear that if he should give evidence of his homosexual relationship with plaintiff, he may get killed. The prison in which the witness was lodged was a notorious one and there were forty murders inside the prison in ten years, the last about a few weeks before the application. The Court of Appeal accepted that these fears were genuine and reasonable. The fears about violence to a person in gaol were also real. The witness's fear of embarrassment to family was also real though it only played a small part in the argument. Granting a pseudonym was a minimalist interference into the right of the opposite party for open justice. The Court observed:

> "It is necessary that there be a minimalist interference with open justice to the extent of pseudonym orders in favour of the witness. That is because, without them the witness reasonably fears death or

physical injury, or alternatively an unnecessary loss of liberty. There are evils which it is necessary to avoid by that degree of minimalist interference. Without the order, the witness is exposed to hurt and the party calling him is faced with the risk of testimony proceeding from a person who is reluctant, but in a particular sense."

The Court referred to certain directions given by Hunt J in R vs. Savvas : (1989) 43A Crim R 331 at 339. These were:

"(1) Each of the witnesses referred to in the two affidavits of Supdt. Brian Harding sworn 24 Aug. 1989 is to be addressed and referred to in the Court only by a pseudonym.
(2) Any matter which is likely to lead to the identification of those witnesses is not to be reported by those in Court.
(3) No photographs, film or video recording is to be taken of either of the two witnesses in the Court or within its precincts and no drawings or other likenesses are to be made of either of the witnesses, either in the Court or within its precincts."

Thus, the Court of Appeal granted an order for a pseudonym in the manner referred to above.

6.3.6 We may finally add that in Australia, there have been different statutes on witness protection. They are:

(a) Witness Protection Act 1994 (Cwith);
(b) Witness Protection Act 1995 (NSW);

(c) Witness Protection Act 1996 (S Au);

(d) Witness Protection Act 1996 (Australian Capital Territory) (National Capital Territory Act has further amended by the Bill of 2003);

(e) Witness Protection Act 2000 (Tas);

(f) Witness Protection Act 1991 (Vic);

(g) Witness Protection (Western Australia) Act 1996 (WA);

(h) Witness Protection Regulation 2001 (Queensland).

These Acts deal with a slightly different aspect, namely, witness protection and do not deal with anonymity or the screening aspects. But the provisions of sec. 2A(1)(b) of the Australian Evidence Act 1989 deal with 'special witnesses' who are described as persons suffering from trauma or are likely to be intimidated or to be disadvantaged as witnesses. Special arrangements can be made by the Court in their favour including exclusion of public or the accused from the Court. Video taped evidence can also be allowed.

6.3.7 Summarizing the position, the Courts in Australia have agreed that in cases where there is evidence of likelihood of danger or harm to the witnesses, or their families, the Court has inherent power to grant orders as to anonymity and this procedure is not confined to serious cases of terrorism or police informers or extortion or police undercover agents. What is material is the proof of a reasonable likelihood of danger to the witness. Such a procedure for screening and anonymity is held to be consistent with the right of the accused for fair trial. Video taped evidence is also admissible.

(c)6.4 New Zealand

We shall next turn to the case law from New Zealand. A survey of the case law discloses that the Courts did not accept the inherent power of the Court to pass anonymity orders but felt that it was for the legislature to make adequate provision. The legislators intervened in 1986 initially to protect "undercover" police officers and again in 1997, the legislature widened the Court's power to protect other types of witnesses. These amendments are very comprehensive and provide a very clear legislative scheme for witness anonymity and protection and will be referred to in detail in the course of the discussion below.

6.4.1 R vs. Hughes: 1986(2) NZLR 129 (CA) was decided in 1986 by the New Zealand Court of Appeal and the majority said that it would not compromise the right of the accused to a fair trial and held that the question of balancing the right of witnesses to anonymity and of the accused for a fair trial were matters for Parliament rather than for judicial decision. The Court was not inclined to lay down exceptions. It was held by the majority that undercover police officers who gave evidence in Court in the case must give their true names, at least to the defence, even though this may lead to disclosure of their real identity and expose them to the risk of retaliation. The Court held that the information as to the identity of the witness was prima facie material to the defence of a criminal charge. Two of the Judges went further and stated that otherwise, the right of the accused to cross examine the witness would get 'emasculated'. (The word 'emasculated' was used by Justice Stewart of the US Supreme Court in Smith vs. Illinois

(1968) 390 US 129). The Court warned that any relaxation of the right to open trial and cross-examination would be a 'slippery slope'.

Richardson J speaking for the majority, stated as follows:

> "We would be on a slippery slope as a society if, on a supposed balancing of the interests of the State against those of the individual accused, the Courts were by judicial rule to allow limitations on the defence in raising matters properly relevant to an issue in the trial. Today the claim is that the name of the witness need not be given; tomorrow, and by the same logic, it will be that the risk of physical identification of the witness must be eliminated in the interests of justice in the detection and prosecution of crime, either by allowing the witness to testify with anonymity, for example, from behind a screen, in which case, his demeanour could not be observed, or by removing the accused from the Court, or both. The right to confront an adverse witness is basic to any civilized section of a fair trial. That must include the right for the defence to ascertain the true identity of an accused where question of credibility may be an issue."

The minority (Cook P and Mc Mullen J), however, held that the Court did have the power to grant anonymity in exercise of its inherent jurisdiction and should do so. The identity of an undercover officer should not be disclosed to the defence, unless the Judge was satisfied that it was of such relevance to the facts in issue that to withhold it would be contrary to the interests of justice. The officer could give a cover name, the question of the officer's true identity may be brought up in cross-examination by the

defence. It would then be for the prosecution to show that there was a legitimate reason for withholding the officer's true identity, such as, fear of violence. If this were shown, then it would be for the defence to justify the need for disclosure on the basis that to withhold it would be contrary to 'the interests of justice'.

As to what would amount to justification, Cook P speaking for the minority, stated that:

> "the defence should have to satisfy the Judge of no more than that the truth of the evidence of the undercover officer on a material matter of fact is genuinely in issue on substantial grounds; and that there accordingly arises a serious question as to the officer's credibility upon which it might be helpful to the defence to have his true name. To show this, it should not be enough merely to say that the officer's account is not admitted or denied. An alternative account would have to be before the Court."

The Judge's function, according to the minority view of Cooke P, is not to determine whether or not the witness is truthful, but is limited to deciding whether there is some substantial ground for questioning the undercover officer's credibility. In case the Judge is not satisfied about the credibility of the witness on the question of the danger to the safety of the witness, the Judge must direct the prosecution to disclose the witness's identity, despite the potential danger to the witness.

6.4.2 Accepting the view of the minority in this Judgment of 1986, the New Zealand Parliament introduced section 13A in the Evidence Act, 1908 by section 2 of the Evidence (Amendment) Act, 1986. That section was confined to the case of "undercover" police officers and permits undercover police officers to merely state their cover name in the Court if the specified procedures are complied with. They do not need to state their true name or address, nor to give particulars likely to lead to the discovery of their true identity, unless the Court grants the defence leave to question them on these matters.

The classes of cases where such protection is available to undercover officers are set out in section 13A(1) of the Evidence Act, 1908 as follows, namely, in cases:

(1) involving certain drug offences under the Misuse of Drugs Act, 1975 (except sections 7 and 13); or
(2) involving any offence tried on indictment which attracts a maximum penalty of at least 7 years imprisonment.

It is also available in cases of alleged conspiracy to commit or for attempting to commit these offences (section 13A(1)(c)). According to prescribed procedure laid down in sec. 13A(3), a certificate has to be given to the Court by the Commissioner of Police certifying, among other things, that the officer has not been convicted of any offence (including any offences under the Police Act, 1958). The certificate must also give notice of any occasion when the credibility of the officer has been subject to adverse comment (section 13A(4)).

Once such a certificate is lodged in the Court, a Judge under sec. 13A (7), will grant leave for the witness to be questioned about his or her true identity only if he is satisfied,

(a) that there is some evidence before the Judge that, if believed by the Jury, could call into question the credibility of the witness; and
(b) that it is necessary in the interest of justice that the accused be enabled to test properly the credibility of the witness; or
(c) that it would be impracticable for the accused to test properly the credibility of the witness if the accused were not informed of the true name or the true address of the witness.

6.4.3 The Act of 1986 was soon found insufficient as it was applicable only to "undercover" officers, and therefore cases of other witnesses again came up before the Courts between 1986 and 1997.

The case in R vs. Hughes 1986(2) NZLR 129, referred to above, was not accepted in R vs. Coleman and Others (1996) 14 CRNZ 258. In this latter case, the Court followed the spirit of the 1986 statute and was in favour of grant of anonymity by the Court under its inherent powers even the case of other witnesses. Baragwanath J, in a pre-trial decision, followed the English decisions (R vs. DJX, CCY, GGZ (1990) 91 Cr. App Rep 36, R vs. Watford Magistrates ex p Lenman 1992 (1993) Crl L R 253) and granted orders of anonymity. The witness's identity was to be withheld from the defence and the witness be screened and the Court cleared of the public. He held that:

(1) the evidence was critical to whether the trial can take place at all;
(2) there is no substantial reason to doubt the credibility of the witness (as to the fear expressed by him);
(3) justice can be done to the accused by the issue of suitable directions; and
(4) the public interest in the case proceeding to trial outweighed the disadvantages of that course.

An appeal against the interlocutory order before the trial was dismissed on jurisdictional grounds under section 379A of Crimes Act, 1961. When the aforesaid case in Coleman went finally to trial, Robertson J too followed Bargawnath J's pre-trial judgment rather than R vs. Hughes.

6.4.4 In 1997 when another case R vs. Hines (1997) 15 CRNZ 158 came up before the Court of Appeal, the majority, notwithstanding the liberal attitude of the Legislature in 1986 in protecting under cover police officers, unfortunately reaffirmed R vs. Hughes and reiterated the view against granting anonymity to other witnesses, stating again that it was a matter for Parliament to make a balancing act between the right of the victim and that of the accused. But Gault J, in the minority, observed that in the interests of the community, anonymity be granted and that the 'absolute rule' as in Hughes was 'merely an invitation for intimidation of witnesses'. Thomas J agreed with him. These two learned Judges upheld the inherent power of the Court to grant anonymity unless the witness's credibility was 'reasonably in issue'. They however observed that the witness's fear must also be 'reasonable and justified' and the Court must be satisfied that

anonymity will not deprive the accused of a fair trial. This preliminary issue, according to them, was likely to require a 'voir dire' proceeding..

In the meantime in 1990, the New Zealand Bill of Rights gave right of cross examination as a basic right, and since then there have been several applications before the Courts but there has been no consistency in the judgments of the High Court.

R vs. L (1994)(2) NZLR 54 (CA) came up for consideration before the Court of Appeal in 1997 and had to be tested on the anvil of sec. 25(f) of the NZ Bill of Rights. The Court of Appeal upheld the admission at trial of a written statement, produced as a deposition, of a rape complainant who had committed suicide after a preliminary hearing (at which she had not testified). The Court stated that the right of cross examination was not absolute.

6.4.5 The legislature, therefore, felt compelled to step in again and introduced sections 13B to 13J into the Evidence Act, 1908 by the Evidence (Witness Anonymity) Amendment Act, 1997, making protection applicable to all witnesses if their lives were "likely" to be endangered and laying down a detailed procedure for the Court to follow.

As to the right of cross-examination, this was part of the right to minimum standards as stated in sub-clauses (a) and (f) of section 25 of the NZ Bill of Rights Act, 1990 which were based on the International Covenant on Civil and Political Rights. Section 25(f) included the right to

examine the witness for the prosecution and to obtain his attendance and examination for the defence under the same conditions as the prosecution.

6.4.6 It is necessary to refer to the provisions of sections 13B and 13C introduced in 1997 in the Evidence Act, 1908. Sec. 13B enables exclusion of identification of the witness before trial, by the District Judge or a High Court Judge or a Judge referred to in the Children, Young Persons and their Families Act, 1989. Under sec. 13C, anonymity order can be passed by the High Court. After committal, sec. 13C(2)permits the prosecution to apply to the High Court for an anonymity order, which will be decided in chambers, after hearing both sides. Under sec. 13C(3)(b), neither the party supporting the application nor the witness need reveal any information that might disclose the identity of the witness to any person (other than the Judge) before the application is dealt with. The Judge may, under sec. 13C (4) make an anonymity order, if he is satisfied that

"(a) the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to the property, if the witness's identity is disclosed; and

(b) either

(i) there is no reason to believe that the witness has a motive or tendency to be untruthful having regard (where applicable) to the witness's previous conviction or the witness's relationship with the accused or any associates of the accused; or

(ii) the witness's credibility can be tested properly without the disclosure of the witness's identity; and

(c) the making of the order would not deprive the accused of a fair trial."

It is also necessary to refer to subsection (5) of sec. 13C with regard to the factors to be taken into account and the procedure to be followed by the Court. Subsection (6) of sec. 13C refers to the effect of the order. These subsections read as follows:

"(5) Without limiting subsection (4), in considering the application, the Judge must have regard to –

(a) the general right of an accused to know the identity of witness;

(b) the principle that witness anonymity orders are justified only in exceptional circumstances;

(c) the gravity of the offence;

(d) the importance of the witness's evidence to the case of the party who wishes to call the witness;

(e) whether it is practical for the witness to be protected by any means other than an anonymity order; and

(f) whether there is other evidence which corroborates the witness's evidence.

(6) If a witness anonymity order is made under this section,-

(a) the party who applied for the order must give the Judge the name, address, and occupation of the witness; and

(b) the witness may not be required to state in Court his or her name, address, or occupation; and

(c) during the course of the trial, no counsel, solicitor, officer of the Court, or other person involved in the proceeding may disclose

(i) The name, address, or occupation of the witness; or

(ii) Except with leave of the Judge, any other particulars likely to lead to the witness's identification; and

(d) during the course of the trial,-

(i) no oral evidence may be given, and no question may be put to any witness, if the evidence in question relates to the name, address, or occupation of the witness who is subject to the order;

(ii) except with leave of the Judge, no oral evidence may be given, and no question may be put to any witness, if the evidence or question relates to any other particular likely to lead to the identification of the witness who is subject to the order; and

(e) no person may publish, in any report or account relating to the proceeding, the name, address or occupation of the witness, or any particulars likely to lead to the witness's identification."

We may add that procedure under sec.13B for the District Court is almost identical with procedure under sec.13C for the High Court.

Section 13G is very important as it provides for clearing the public from the Court or to direct screening and allow the witness to give evidence by close-circuit television or by video-link. It also deals with appointment of an 'independent counsel' to assist the Court.

"13G. Judge may make orders and give directions to preserve anonymity of witness –

(1) A Judge who makes an order under section 13B or section 13C may, for the purposes of the preliminary hearing or trial (as the case may be), also make such orders and give such direction as the Judge considers necessary to preserve the anonymity of the witness, including (without limitation) one or more of the following directions:

(a) That the Court be cleared of members of the public;

(b) That the witness be screened from the defendant;

(c) That the witness give evidence by close-circuit television or by video-link.

(2) In considering whether to give directions concerning the mode in which the witness is to give his or her evidence at the preliminary hearing or trial, the Judge must have regard to the need to protect the witness while at the same time ensuring a fair hearing for the defendant.

(3) The section does not limit –

(a) Section 206 of the Summary Proceedings Act, 1957 (which confers powers to deal with Contempt of Court); or

(b) Section 138 of the Criminal Justice Act, 1985 (which confers power to clear the Court); or

(c) Any power of the Court to direct that evidence be given, or to permit evidence to be given by a particular mode."

For purposes of section 13G above mentioned, a Judge may, under sec.13E, appoint an independent counsel to assist the Court; or issue directions to a Jury as may be required (sec. 13F) and orders may be varied or discharged before the witness gives evidence (sec. 13H).

After section 13H, two places below, namely, section 13I deals with witness in "police protection programme" and sec. 13J enables conviction for 7 years if a person who has knowledge of a pre-trial witness anonymity order under sec. 13C contravenes para (c) or (e) of subsection 6 of sec. 13C; may be imposed if para (b) or (d) is violated; if para (c) or (e) is violated and not sec. 13C(1), then fine may be imposed without prejudice to punish for contempt.

6.4.7 R vs. Atkins: 2000 (2) NZLR 46 (CA)

The Amending Act of 1997, introducing sections 13B to 13J, and in particular, sec. 13(C)(4)(a) came up for consideration recently in R vs. Atkins: (2000)(2) NZLR 46 (CA) before the New Zealand Court of Appeal. The case is very important and is a landmark in this branch of the law and we shall refer to it in some detail. We may recall that section 13(C)(4)(a) refers to the satisfaction of Court that:

> "the safety of the witness or other person is likely to be endangered or there is likely to be serious damage to the property, if the witness identity is disclosed."

(This case involved video-link and distortion of voice of witnesses.)

In Atkins, the High Court passed witness anonymity orders and these were questioned by the two accused in an application for leave to appeal before the New Zealand Court of Appeal. Four of the accused had been committed for trial on a charge of murder arising out of an assault in the carpark of a Hotel in the night and all were members or associates of the Crisborne Mongel Mob, playing in a rugby team. The assault was witnessed by 100 people at the carpark out of which 11 agreed to give evidence but only on condition of anonymity. The police obtained pre-trial orders under sec. 13B for all the 11 witnesses prior to the hearing of evidence but six of them dropped out.

6.4.8 The procedures adopted in the case required use of two separate video images in the Courtroom, one that could only be seen by the Judge and Jury and the other that could be seen by everyone else concerned with the trial. The witnesses were testifying from video-link from undisclosed locations with their voices distorted for the Judge and Jury, and their voices and images distorted for all others in the Courtroom including the accused and his counsel. The NZ Court of Appeal interpreted the word "likely" in sec. 13C(4)(a). The Court in Atkins observed:

> "In its context, the word 'likely' bears a common meaning – a real risk that the event may happen – a distinct or significant possibility. As Cook P observed in Commissioner of Police vs. Ombudsman 1988 (1) NZLR 385 (391) in construing the Official Information Act, 1982 which protected information 'likely to prejudice a fair trial': to require a threat to be established as more likely to eventuate than not,

would be unreal. It must be enough if there is a serious or real and substantial risk to a protected interest, a risk that might well eventuate. This Court has given 'likely' that sense in a line of criminal cases, a recent example of which is R vs. Piri (1987) 1 NZLR 66. It is a test familiar in other branches of the law also (see for instance the House of Lords case R vs. Secretary of State for the Home Department, ex parte Sivakumaran 1988(1) All ER 193).

There is no cause to read the word "otherwise" in the present context. It is the existence, in a real sense, of danger to safety (or serious damage) which can, not will, give rise to an order. What is being considered is a threshold, one which is directed to persons who, as part of their civic duty, are being required to take part in the Court process, and their personal safety, or the well-being of their property, which may be affected by reason of their participation".

The NZ Court of Appeal continued:

"This approach is consistent with that adopted by the English Court of Appeal in R vs. Lord Saville of Newdigate (1999)(4) All ER 860, which concerned an inquiry of a specially appointed tribunal into the 'Bloody Sunday' shootings in Londonderry, Northern Ireland in 1972. An application to the tribunal by a number of soldiers for anonymity was in question. Lord Woolf MR, giving the judgment of the Court, said that the issue was not to be determined by the onus of proof and approved the dictum of Lord Diplock in Fernandez vs. Government of Singapore 1971(2) All ER 691, a case concerning the

> return of a fugitive offender. Prejudice involving a risk of inappropriate trial or punishment was there at issue. Lord Diplock said at p. 647: "My Lord, bearing in mind, the relative gravity of the consequences of the Court's expectation being falsified in one way or in the other, I do not think that the test of applicability of para (c) is that the Court must be satisfied that it is more likely than not that the fugitive will be detained or restricted if he is returned. A lesser degree of likelihood is, in my view, sufficient; and I would not quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed by the Divisional Court "A reasonable chance", "substantial ground for thinking", "a serious possibility"."

Further, in Atkins, the New Zealand Court of Appeal continued:

> "As Lord Woolf went on to observe, where what is at stake is the safety of (there) of the former soldiers and their families, the risk is extremely significant. So too, in the case of witnesses to a serious crime, whether a Court is satisfied such a risk exists must be a matter of judgment".

Coming to the facts of the case before them, in Atkins, the Court of Appeal then considered the affidavits supplied by the five witnesses and of the Detective Sergeant. As to the admissibility of the affidavits of the witnesses on the basis of which they sought anonymity, the Court of Appeal laid down very important tests. It said:

> "We are mindful of the fact that the matters deposed to have not been tested by the cross-examination and that there has been no opportunity to present contradicting evidence in respect of the non-disclosed assertions. But in applications of this nature, the Court will necessarily be called upon to consider untested evidence, and to evaluate evidence some of which could be classed as hearsay. We accept Mr. Calver's submission that in such an exercise, care must be taken in making the evaluation and in drawing conclusions, and is to be exceptional. But we do not accept the proposition that unless the evidence was sufficient to warrant prosecution for a normal offence, it should not be acted upon. The weight to be given to any particular assertion will depend upon many differing factors, including source, reliability, and the existence or absence of supporting material. This aspect was dealt with admirably by Young J in his judgment on a sec. 13-C application in R vs. Dunnil: 1998(2) NZLR 341." at 347

[In Dunnil, the Judge had held that screens and video-links are 'very much commonplace' today in Courts].

The Court of Appeal in Atkins then recorded a finding that there was enough material from the affidavits – though was not subjected to cross-examination – to say that there was likelihood of the lives of the five witnesses being endangered, requiring an anonymity order as passed by the Court below.

Yet another important aspect of the Judgment in Atkins is that the Court of Appeal dealt with the meaning of the words "fair hearing for the

defendant" used in subsection (2) of sec. 13G, and the words 'fair trial' used in sec. 24(a) of the NZ Bill of Rights Act, 1990. It explained:

> "The issue is whether despite implementation of those restrictions, the Court is satisfied, in so far as it can be at this point of time, that a fair trial will result. The starting point must be the legislation's recognition that ensuring the anonymity of witness does not necessarily negate the concept of a fair trial – and that must be so. Sec. 13A which enables protection of the identity of undercover police officers is an example. There have been no serious contentions that these provisions infringe sec. 24(a) of the New Zealand Bill of Rights Act, 1990. What is at issue in this respect is an inroad into generally accepted trial processes, something which has occurred from time to time over the years but without infringing the basic concept of a fair trial. In each case, it is therefore, necessary to examine the effect of the particular orders. It can also be noted that the Court has power under para (7) to give leave to ask questions which may otherwise infringe the subsec (6) order. In some circumstances, the order may be revoked under sec. 13H in advance of the giving evidence. That would probably require some significant change in circumstances from those initially prescribed."

The Court of Appeal in Atkins summarized the contentions for the accused as to the disadvantages which an accused suffers in the case of anonymity orders, as follows:

> "They concern the inability to test the credibility and reliability of the witnesses, and relate to: (a) restrictions on ascertaining the precise positioning of the witnesses when observing the incidents deposed to; (b) examining the witness adequately as to possible mistake, motive for untruthfulness or, partiality; (c) testing the witness's physical and mental condition at the time; and (d) the effect of the picture and voice distortions."

In respect of the above contention raised on behalf of the accused, the Court further observed that this was not a case where parties invoked sec. 13E for independent assistance by a counsel, nor was it invoked by the Court below. It is also to be seen that the

> "terms of order under subsection (6) of section 13C do not expressly prohibit questions other than those which can properly be said are likely to lead to identification of the witness – that there is a real or substantial risk of that resulting (in identification). Secondly, the trial Judge has a residual power to allow such questions, which would be exercised having regard to all the circumstances including the relative substantiality of the risk and the importance of the particular question. These are very much matters of judicial control at trial. Thirdly, as the Judge in this case observed the refusal of a witness to give details pertinent and significant to the reliability of his or her evidence will obviously be uppermost in the minds of the jury, and the quality thereof probably substantially diminished. The point however remains one which must be given the due weight in the overall equation."

The Court of Appeal also observed that the fact that an anonymity order has been passed accepting the fears expressed by the witnesses, should be a matter which could go against the character of the accused in the matter of deciding his role in the (alleged) commission of the offence.

The said Court observed that the overall discretion given to the Court under sec. 13C(4) was subject to subsection (a), (b) and (c) and also to subsection (5) some of which may infringe on subsection (4)(b) and (c) considerations. Even if subsection (4) criteria are established, the Court must still stand back and ask whether the orders should, in the overall interest of justice, be made. But 13C orders are, it must be understood, not to be passed as a matter of routine. They are not like gang related offences. The power is to be used sparingly – The exceptional circumstances may arise out of single incident or out of the cumulative result of witnesses.

On the basis of the above discussion, the Court of Appeal dismissed the appeals of the accused.

5.4.9 Summarizing the position in New Zealand Courts, it will be seen that initially there was the view that the Court should not exercise inherent powers to pass anonymity orders but that the legislature alone should provide guidelines. However, the legislature stepped in and carried out amendments first in regard to “undercover” police officers in 1986 and later more generally in 1997 to cover all witnesses whose life is “likely” to be endangered. The legislation of 1997 is very comprehensive and was interpreted in latter cases thoroughly, where the witnesses had deposed from

another place through video-link, their voice not being distorted for the Judge and Jury while their voice and images were both distorted for all others including the accused and his counsel. The procedure was held to be 'fair' within the New Zealand Bill of Rights.

(d)6.5 Canada

In Canada, the broad principle laid down by the Supreme Court is that anonymity may not be granted to the witnesses under inherent powers unless the Court considers that, on the facts, 'innocence would be at stake'. Anonymity was a privilege granted under the common law unless there was material that it would jeopardize proof of innocence of the accused.

6.5.1 It however appears that in Canada, the Courts have generally granted more importance to the exception of 'innocence at stake' rather than the needs of the 'administration of justice' in giving anonymity to witnesses.

6.5.2 R vs. Durette: 1994(1) SCR 469

The accused were charged with offences involving conspiracy of trafficking in controlled drugs and narcotics. A substantial part of the evidence against them consisted of recordings of telephone conversations intercepted pursuant to nine authorizations by the Court. The trial Judge edited the affidavits filed by the officers of the State to secure authorizations for interception "in so far as (they) contain information from informants and others which is to be protected and in so far as they contain summary or opinions'. The issue before the Supreme Court, after the convictions, was

whether the trial Judge's editing of the affidavits prevented a proper and full inquiry into the validity of the authorizations, thereby depriving the accused of the right to make full answer and defence as guaranteed by sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms.

The Supreme Court (by majority) allowed the appeals and ordered a new trial, holding that to justify non-disclosure of information, the Crown must show that disclosure will prejudice the interests of informants, innocent persons or law enforcement authorities and that such prejudice overbears the interests of the accused. When non-disclosure is justified, the affidavits should only be edited to the extent necessary to protect these overriding public interests. Here the editing by the Judge of the affidavits was more than could be legally justified by the decisions in R vs. Parmar (1987) 34 (CC(3d) 260 and R vs. Garfoli : 1990(2) SCR 1421; editing should have been kept at the minimum to the extent needed to maintain confidentiality. It was held that the screening held back information from the affidavits which was not confidential.

6.5.3 In R vs. Khela: 1995 (4)SCR 201

In this case, the Canadian Supreme Court had to deal with the case of disclosure of the identity of a police informer and the right of the accused for cross-examination. The position under sec. 24(1) of the Canadian Charter of Rights and Freedom was also in issue. The question was whether the denial of cross-examination of a person in the position of an 'approver' was justified and further about the validity of his subsequent production for limited cross-examination when he wore a 'hood', to ensure

his safety. The Supreme Court finally held that if there was danger to the person's life, his name and address need not be disclosed till just before the trial.

The facts were that in 1986, the appellants (accused) Santokh Singh Khela and Dhillon, were charged with conspiracy to commit murder of persons on board of an aircraft in the US by placing a bomb on the plane. They were arrested in May 1986 and they waived their right to a preliminary inquiry.

At the first trial in 1986, they were found guilty and sentenced to life imprisonment. According to the accused, an amount of $ 8000 out of agreed sum of $ 20,000 was paid by them to buy a stolen car and import it into the US and the payment was not in connection with the conspiracy to blow up the air-craft as alleged by the Crown. They were not permitted to call the particular person (who was not a police officer) who was the informant to the police, (something like an 'approver'), for cross-examination. The Crown had not provided them the details of the actual name and address of the informant. The appellant's appeal against conviction was allowed (see (1991) 68. CCC(3d) p 81) by the Court of Appeal and a fresh trial was ordered holding that the trial Judge erred in not ordering, as requested by the appellant, (1) the Crown to disclose (a) the evidence of the informer before the trial; (b) the full name and whereabouts of the informant and (2) that the informant be produced for cross-examination.

The Crown agreed to make the person available but said that the questioning would be restricted to specific matters, namely, payment of $8,000 and meeting with the 'explosives expert' and that the interview with the informant could neither be taped nor could a case reporter be present. The counsel for defence met the informant and the Crown Office and the person was wearing a 'hood' over his head and was flanked by two large bodyguards. The informant refused to respond to questions in English and was speaking French even though at the first trial, evidence showed he was fluent in English. Defence Counsel, therefore, doubted the identity of the person produced and the interview was aborted without any question having been asked. The Crown did not provide the defence with the name, address or any other identifying feature of the person.

At the opening of the second trial and before the jury were chosen, the appellants made two applications under sec. 24(1) of the Canadian Charter of Rights and Freedoms, contending that

(a) the Crown had failed to disclose to the defence essential and relevant evidence as required by the judgment of the Court of Appeal;
(b) The Crown violated the rights of the accused to be tried within a reasonable time.

The Crown once again maintained that, notwithstanding the earlier directions of the Court of Appeal, it was not obliged to make disclosure of the name and whereabouts of the person or make him available because,

according to it, the earlier judgment of the Court of Appeal did not contain a specific direction to that effect.

In the Court of Appeal, Steinberg J held that the appellant's rights under sections 7 and 11(b) of the Charter had been infringed and granted stay of proceedings.

When the matter reached the Supreme Court at the instance of the Crown, it was held that, on the facts of the case, it was obligatory for the Crown to furnish the identity and address of the informant in view of the first order of the Court of Appeal while remanding the matter. Failure to disclose could impair the rights of the accused under section 7 of the Charter. But there was no power in the Court of Appeal to redirect production of the informant who was not in the control of the Crown. The obligation of the Crown did not extend to producing its witnesses for furthering discovery. There was no reason for a fresh remand as directed by the Court of Appeal, but the Crown should be given an opportunity to comply with the direction to disclose the name and whereabouts of the persons or to seek modification of the order if they had material to say that the life of the informant would be endangered.

The Supreme Court, therefore, allowed the appeal, set aside the order of the Court of Appeal and issued the following direction to the trial Court. This direction would be subject to variation by the trial Judge on the basis of new evidence relating to jeopardy of the person. The Crown had to comply with the terms of the earlier Judgment of the Court of Appeal. So far as the third direction to make the person available, there appeared to be

some real difficulty because the witness was not cooperating. The Crown had a choice: (1) if the Crown wished to avoid the problem already encountered in trying to comply with the third requirement (of making witness available) the Crown could meet its disclosure obligations by fully complying with the other two requirements, namely, disclosing the evidence of the informer before trial and disclosing the full name and whereabouts of the person before trial, or alternatively, (2) the Crown could choose to comply with the third requirement by producing the person by way of ensuring that he would cooperate and answer all proper questions. The trial Judge was directed to give time to the Crown if it sought for variation on the ground of jeopardy to the person.

The above case, in essence indicates that where there is evidence of jeopardy to the witness, the directions for disclosure of name, whereabouts or enabling his production, may not be given.

6.5.4 Canadian Broadcasting Corpn. vs. New Brunswick (Att. General) (1996(3) SCR 480)

In this case, the Canadian Supreme Court disagreed with the trial Judge's exclusion of media and public from Court room to avoid hardship to 'the victims and the accused' during the sentencing proceedings.

The Media (CBC) successfully challenged the order as infringing the freedom of press (see 486 (1) of Criminal Code and sec. 2(b) of Canadian Charter of Rights). Here the victims were not witnesses. The Supreme Court set aside the exclusion, holding that public access to Courts is

fundamental. It held that the Court could order exclusion to protect the innocent and safeguard the privacy interests of witnesses in cases of sexual offences. No doubt, the statutes permit covertness in the interests "proper judicial administration of justice", but, here, the exclusion of media and public throughout was not justified. Mere fact that victims were young females was not by itself sufficient to warrant exclusion. The victims' privacy was already protected by a publication ban of identities and there was no evidence that their privacy interests required more protection.

6.5.5 R vs. Leipert: (1997) (1) SCR 281

In this case, the police had received a tip off from the Crime Stoppers Association that the accused was growing marijuana in the basement. The police made an inspection of the locality, found smell and applied for a search warrant. The application disclosed, among others, that there was reliable information from the above Association. The accused was duly charged with the offence. At the trial, the accused, relying upon the Canadian Charter of Rights and Freedom, called upon the Crown to make available the documents of the Association which were the subject matter of the report to the police. The Crown refused disclosure on the ground of "informer privilege". The trial Judge saw the document and after trying to edit the notice where there are references as to the identity of the informer, ordered disclosure. Then the Crown asked that the warrant may be relied upon without reference to the "tip sheets". The trial judge refused this request because the accused did not consent. The trial Court granted acquittal as the Crown did not tender evidence and the defence did not call any evidence.

On appeal by the Crown, the judgment was reversed by the Court of Appeal and a retrial was ordered. Upholding the appellate Court's order of retrial, it was held by the Supreme Court that the law recognizes informer's privilege to anonymity but this was subject to the principle "innocence at stake" exception. There must be a basis in the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the "innocence" of the accused. The accused's right to full disclosure of documents in the Crown's possession in aid of the Charter guarantee of the right to make full answer and defence, as interpreted in Stinchcombe (1991) 3 SCR 326, had not created a new exception to the informer privilege rule. To the extent that rules and privileges in favour of the informant stand in the way of an accused person establishing his innocence, they must yield to the Charter guarantee of a fair trial, where 'innocence is at stake' and the common law rule of informer privilege does not offend this exception.

When an accused seeks to establish that a search warrant is not supported by reasonable grounds, he may be entitled to information which may reveal the identity of an informer notwithstanding informer privilege in circumstances where the information is "absolutely essential". "Essential circumstances" exist where the accused establishes the "innocence at stake' exception to informer privilege.

Anonymous "tip sheets" should not be edited with a view to disclosing them to the defence unless the accused can bring himself within the "innocence at stake" exception. The Court can deprive the informer of the privilege which belongs to him absolutely, subject only to the

'innocence at stake' exception. Unless informer identity is protected, the efficacy of programmes such as Crime Stoppers, which depend on guarantee of anonymity to those who volunteer information on crimes, would be adversely affected. In the case of an anonymous informer, where it is impossible to determine which details of the information provided by the informer will or will not result in that person's identity being revealed, none of those details should be disclosed, unless there is a basis to conclude that the "innocence at stake" exception applies.

The Supreme Court held, on facts, that the trial judge erred in editing the tip sheet and in ordering the edited sheet be disclosed to the accused. The identity of the anonymous information is protected by privilege, and, given the anonymous nature of the tip, it was impossible to conclude whether the disclosure of details remaining after editing might be sufficient to reveal the identity of the informer to the accused. The informer's privilege required nothing short of total confidentiality in this case. As it was not established that the informer's identity was necessary to establish the innocence of the accused, the informer's privilege would continue in place.

It was further held that the trial judge also erred in declining to allow the Crown to delete the reference to the informer from the material in support of the search warrant. Since the accused had not brought himself within the 'innocence at stake' exception, the trial judge should have permitted the Crown to defend the warrant, by deleting therefrom, the reference to the tip from the Association.

6.5.6 R vs. Mentuck: 2001 (3) SCR 442:

In this case, the Court gave more importance to the need to see that adequate protection is given to the witnesses to strengthen the 'administration of justice'.

The accused was charged with second degree murder. The trial Judge granted a one year ban as to the identity of the undercover police officers and refused to ban disclosure of the operational matters used in investigating the accused.

The Supreme Court upheld the one year ban as to the identity of undercover police officers to prevent "serious risk" to the 'proper administration of justice'. The applicant, no doubt, had the burden to show that anonymity of the police officers was required. It was felt that at the same time, there should be minimal impairment of right to open justice. The refusal to ban disclosure of the operational methods of police, was in order.

(e)6.6 South Africa:

The approach in South Africa, however, proceeds on a case by case basis in order to balance the conflict of interests with a view to ensure proper administration of justice. The statute permitted in camera proceedings and adequate discretion to the Court.

6.6.1 In South Africa, section 153 of the Criminal Procedure Code permits criminal proceedings being held in camera particularly where it is necessary

to protect privacy of the victims. The offences of indecency and extortion (and related statutory offences) may arise out of facts which do not always demand that the privacy of the victims and/or witnesses trump the right to a public trial. Section 153(3) grants discretion to judicial officers whether to order that the hearing be held in camera. However, the scope of the discretion is controlled by the nature of the offence alone.

Section 154 permits prohibition of publication of certain information relating to criminal proceedings. While the identity of the victim should be protected, the public may have an interest in knowing the identity of the accused and the nature of the incident but even here, the Court will have the discretion to refuse the publication of the name of the accused, if the complaint is a frivolous one.

6.6.2 Chapters 3, 4 and 5 of the Discussion Paper 90 of the South African Law Commission, project 101 (2000) deal with this aspect. Chapter 3 deals with equality and access to Courts, Chapter 4 with Right to fair trial and Chapter 5 with Right to a public trial. Chapter 6 deals with right to adduce and challenge evidence and adequate facilities to prepare defence. The right to cross-examination is basic in South Africa. But the Courts are of the view that the right is not absolute either under common law or statute law.

The South African Courts too have preferred to permit the witness to give evidence behind closed ‘doors’ or to give the witness ‘anonymity’ and not reveal their addresses. The Court also prefers to prohibit the press from reporting on identity rather than exclude the press from the Court room.

6.6.3 S v. Leepile : 1986 (4) SA 187 (W)

In S vs. Leepile: 1986(4) SA 187 (W), during the trial in which the accused faced charges, interalia, of treason arising out of their activities as members of the African National Congress (A.N.C), the prosecution applied for a direction that the evidence of a particular witness referred to as Miss B be given behind closed doors and that only persons whose presence was essential for the hearing of the case be allowed to attend. A further prayer was that the present residential address of the witness be disclosed only to the Court and to counsel but not to the accused. The application was made under section 153(2) of the Criminal Procedure Act, 1977, which authorized the hearing of evidence behind closed doors where it appears that 'there is a likelihood that harm might result' to a witness. There was strong evidence in support of the application. Miss B testified that she had left South Africa in 1978 and had become a member of the ANC, that she received military training from the ANC and worked for its military wing until she was arrested on a mission in South Africa in 1983.

The evidence was sufficient to convince Ackermann J in the High Court that if the ANC were to know that Miss B testified for the State she would be regarded as 'an informer', a collaborator and as a traitor of the ANC cause'. Thus, the Judge, on facts, placed the witness 'in a high risk' category as far as the likelihood of harm to her is concerned, but he was still not inclined to grant relief in the terms prayed for. He declined to exclude the press. So far as the address of the witness was concerned, he said that there was no point in allowing it to be given to the defence counsel because counsel was professionally bound to tell his client. Instead, the Judge

preferred to pass an order that the witness be allowed to testify behind closed doors and no person was allowed to be present unless such presence was necessary in connection with the proceedings. Members of the press who held identification documents 'to the satisfaction of the prosecuting counsel' were allowed to be present subject to the condition that neither Miss B's identity nor that of her immediate family, nor her place of residence, be revealed.

In the same case, the prosecution applied for an in camera order for another person, and proposed to examine that person by a pseudonym and sought an order that his true identity be not disclosed to anyone, not even to the Court or defence counsel. Ackermann J refused to grant the wide request as it had serious consequences for the accused and said that such exclusion would 'require the clearest language on the part of the legislature to make such an order competent'.

6.6.4 S v. Pastoors: 1986(4) SA 222 (W)

However, in S vs. Pastoors 1986 (4) SA 222 (W) the Court allowed the identity of a prosecution witness to be withheld 'from the defence'. The Court held there was 'real risk' that the witness would be attacked or even killed and observed:

> "In every case of this nature, the Court is confronted by a conflict of interest. In resolving this conflict, the Court must protect those interests which, on the facts of the particular case, weigh in favour of proper administration of justice. Such protection, if granted, should

therefore, not go further than it is required by the exigencies of the case."

The Court further ordered that if the defence felt, at a later stage, that it required to know the identity of the witness, it would be able to apply to the Court again.

(f) 6.7 United States:

6.7.1 We shall give a brief summary of the manner in which the US Supreme Court tackled with the problem.

The Courts in US have held that the constitutional protection in favour of the right to confrontation by way of cross examination, as provided in the Sixth Amendment of the Constitution, was not absolute and could be restricted for the purpose of protecting the witness identity by using a video-link and permitting cross examination by shielding the witness from the accused though not from his lawyers or the Court or the Jury. Initially, between 1925 and 1968, the right to confrontation of the witness by way of cross examination was treated as absolute. In 1968, in a concurring judgment, White J in Smith v. Illinois: (1968) 390 US 129 said that witness identity could still be protected where witness safety was involved. Though the Courts of Appeal and trial Courts, in several cases, followed the dissenting observation of White J, the Supreme Court in later cases again reiterated its earlier view that the right to cross examination was absolute. However, in 1990 in Maryland v. Craig 497 US 836, it accepted

the video-link method to screen the witness from the accused though not from the Court or the defence lawyer or Jury.

In the US Constitution, the Sixth Amendment mandates that

> "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial……; and to be confronted with the witnesses against him…."

In addition, the First Amendment ensures freedom of speech, freedom of press and has been interpreted as granting to the public and to the press access to any trial and to information about witnesses.

While both these provisions apply only to the federal government, because they contain the fundamental rights, the US Supreme Court has made them applicable to the States also through the due process clause of the Fourteenth Amendment. (Gotlow vs. New York (1925) 268 US 152; Pointer vs. Texas: (1965) 380 US 400)

The right of the defendant to cross examine a witness flows directly from this constitutional right of confrontation.

(A) Right to cross-examination absolute: initial cases:

We shall first refer to some of the leading decisions of the US Supreme Court, namely, Alford vs. United States: (1931) 282 US 687; Pointer vs. Texas: (1965) 380 US 400; Smith vs. Illinois: (1968) 390 US

129 which treated the right to cross-examination as absolute and without any exceptions.

In Alford, decided in 1931, the Supreme Court held that the trial Court had improperly exercised discretion by permitting a witness to give evidence without revealing his address. The Supreme Court held that the right to ask a witness where he lived was "an essential step in identifying the witness with his environment" to which cross examination may always be directed. It stated:

> "…no obligation is imposed on the Court…to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional right from self-incrimination….. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him… But no such case was presented here".

Smith vs. Illinois (1968) 390 US 129 was a case where the witness had refused to answer questions about his real name and address.

Stewart J for the majority stated that where the credibility of the witness was in issue, the starting point on making inquiries about a witness's credibility is his name and address. He observed:

> "…when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross

> examination must necessarily be to ask the witness who he is and where he lives.
>
> The witness's name and address open countless avenues of in-Court examination and out of Court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross examination itself."

White J's dictum:

In the concurring but separate judgment of White and Marshall JJ, they however pointed out that

> "it may be appropriate to excuse a witness from answering questions about his or her identity if the witness's personal safety was endangered."

(B) Several circuit Courts preferred to rely on the observations of White J in his concurring judgment, to hold that witness identity could be protected.

The exception referred to by White J in Smith, where the witness's safety is likely to be endangered if his identity is disclosed – has been applied by the circuit and trial courts in US in several cases. See US vs. Saletko : (1971) 452. F.2d. 193 (7th Circuit) (contained in (1972) 405 US 1040: and State vs. Hassberger : (1977) 350 S. 2d 1 (Flo) US vs. Cosby (1974) 500 F. 2d 405 (9th circuit)

In United States vs. Palermo : (1969) 410 F 2d 468 (7th circuit), the circuit Court, relying upon Justice White's observations in Alford, held that

the defendant had no absolute right to discover the names and addresses of witnesses if a threat to their personal safety existed. However, where the witness has shifted from his location and is not likely to go back, the Court would disclose the place of his original residence, so that cross examination is effective.

Other Courts have affirmed non-disclosure orders independent of whether the threat to the witness's safety emanated from the defendant or from unknown third party. In Clark vs. Rickets (1991) 958. F 2d. 851 (9th circuit) (cert denied (1993) 506 US 838) the witness was a Drug Enforcement Agency informant. Threats against his life were made in the city where he lived.

Even earlier, in United States vs. Rich (1958) F.2d. 415 the 2nd Circuit held that withholding the address of a witness because of personal danger to him/her was acceptable. In United States vs. Crovedi (1972) 467. F.2d 1032 (7th Circuit), the Court of Appeal upheld a ruling that the new identities and location of two witnesses be kept from the defence and the public at large. The witnesses were given immunity in exchange for their testimony against a co-conspirator. In order to guarantee their safety, the government placed them and their families in witness protection. The Court ruled that there was no abuse of discretion in a determination that these witnesses had reason to fear that disclosure of their present identities would endanger themselves and their families.

In United States vs. Rangel 534 F.2d 147 decided by the 9th Circuit, a similar protection was granted to witnesses who feared their safety. The

Court did not establish a rigid rule of disclosure (of the true name, home address and phone number of informants), but rather discussed disclosure against a background of factors weighing conversely, such as personal safety of the witness.

The 9th Circuit, in United States vs. Ellis (1972) 468. F.2d 638, upheld the right to suppress the real name, residence and occupation of under cover police officers.

(C) We may now refer to two cases decided by the Supreme Court where once again the absolute right to confrontation was reiterated.

(i) In California vs. Green (1970) 399 US 149, the Supreme Court traced the history of the confrontation clause in the Sixth Amendment to the famous English case relating to the trial of Sir Walter Raleigh. The Supreme Court said:

> "A famous example is provided by the trial of Sir Walter Raleigh for treason in 1603. A crucial element of the evidence against him consisted of the statement of one Cobham, implicating Raleigh in a plot to seize the throne. Raleigh had since received a written retraction from Cobham and believed that Cobham would now testify in his favour. After a lengthy dispute over Raleigh's right to have Cobham called as a witness, Cobham was not called, and Raleigh was convicted… At least one author traces the Confrontation Clause to the common law reaction against the abuses of the Raleigh trial. (See F. Heller – the Sixth Amendment, p 104 (1951)."

(ii) In Davis vs. Alaska (1974) 415 US 308 it was held that restrictions on cross-examination were unconstitutional even if they did not cause prejudice. In the same case, the Supreme Court referred to the importance of confrontation and cross-examination for the purpose of knowing the bias of crucial identification witness.

(D) Right to confrontation – not absolute:

(i) In Delaware vs. Van Arsdol (1986) 475 US 673, the Supreme Court, however, held that the defendant's right to full confrontation must occasionally yield to competing government interest including the prevention of victim harassment, jury prejudice, confusion of issues or danger to witness.

The exception to the rule of confrontation was applicable where the restriction on cross-examination was harmless beyond reasonable doubt in the light of the insignificance of the witness's testimony as viewed against the totality of the evidence against the defendant.

(ii) Screening witnesses: Coy (1988) differed from Craig (1990)

To start with, in Coy vs. Iowa (1988) 487 US 1012, the Supreme Court held that the Sixth Amendment right could not be allowed to be violated by permitting witnesses to testify behind a screen which blocked the witnesses from the defendants' sight and which only gave a dim vision of their presence and though their voice was audible.

However, in 1990, the one way video-link or closed-circuit video came to be accepted by the Supreme Court as a device to screen the witness from the accused.

(iii) Maryland v. Craig (1990): close-circuit television permissible

The decision came in Maryland vs. Craig (1990) 497 US 836. In that case, the respondent was tried on several charges related to alleged sexual abuse of a six year old child. Before the trial began, the State sought to invoke the state statutory procedure permitting a judge to receive, by one-way closed circuit television, the testimony of an alleged child-abuse victim after determining whether the child's courtroom testimony would result in the child suffering serious emotional stress such that he or she could not reasonably communicate. If the procedure under Maryland Courts & Judicial Procedure Code Ann 9-102(a)(1)(ii) of 1989 was invoked, the child, prosecutor and defence counsel have to withdraw to another room, where the child would be examined and cross-examined; the Judge, jury and defendant would remain in the courtroom, where the testimony could be displayed on video screen.

Although the child cannot see the defendant, the defendant remains in electronic communication with counsel, and objections may be made and ruled on as if the witness were in the courtroom. The Court rejected Craig's objection that the use of the above one-way closed-circuit procedure violated the confrontation clause of the Sixth amendment, ruling that Craig retained the essence of the right to confrontation. Based on expert

testimony, the Court also found that the alleged victim and others allegedly abused children who were witnesses, would suffer serious emotional distress if they were required to testify in the courtroom, such that each would be unable to communicate. Finding that the children were competent to testify, the Court permitted testimony under the procedure, and Craig was convicted. The State Court of Appeals reversed. Although it rejected Craig's argument that the clause requires, in all cases, a face-to-face courtroom encounter between accused and accusers, it found that the State's showing was insufficient to reach the high threshold required by Coy vs. Iowa 487 US 1011, before the special procedure could be invoked. In Coy, the Court had held that the procedure could not usually be invoked unless the child initially was questioned in the defendant's presence, and that, before using the one-way television procedure, the trial court must determine whether a child would suffer emotional distress if he or she were to testify by two-way television.

On appeal by the State, the Supreme Court in Craig held (1) that the Confrontation Clause did not guarantee an absolute right to a face-to-face meeting with witnesses against them at trial. The clause's central purpose was to ensure the reliability of the evidence against a defendant by subjecting the witness to rigorous testing in an adversary proceeding before the trier of fact is served by the combined effects of the elements of confrontation, physical presence, oath, cross examination, and observation of demeanour by the trier of fact. Although face to face confrontation forms the core of the clause's values, it is not an indispensable element of the confrontation right. If it were, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.

(Ohio vs. Roberts (448) US 56). Accordingly, it was held that the clause must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process. (Kirby vs. United States : 174 US 47) Nonetheless, the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation or trial only where denial of such confrontation is necessary to further an important public policy, and only where the testimony's reliability is otherwise answered (Coy vs. Iowa).

The Court in Craig further held that Maryland's interest in protecting child-witnesses from the trauma of testifying in a child abuse case was sufficiently important to justify the use of its special procedure, provided that the State makes an adequate showing of necessity in an individual case. Maryland's procedure, it was held, preserves the 'other elements' of confrontation and ensures the reliability of the testimony, subject to rigorous adversarial testing in a manner functionally equivalent to that accorded to live, in-person testimony. These assurances are far greater than those required for the admission of hearsay statements. Accepting the use of the One-way closed circuit television procedure, where it was necessary to further an important public interest, it was held that such acceptance does not infringe upon the confrontation clause's truth-seeking or symbolic purposes.

The Court further held in Craig that a State's interest in the physical and psychological well-being of child-abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in Court. The fact that most States have enacted similar

statutes attests the widespread belief in such a public policy's importance. The US Supreme Court has previously recognized that States have a compelling interest in protecting minor victims of sex-crimes from further trauma and embarrassment. (Globe Newspaper Co. vs. Supreme Court: 457 US 596) The Maryland Legislators' considered judgment regarding the importance of its interest will not be second-guessed, given the State's traditional and transcendent interest in protecting the welfare of children and growing body of academic literature, denunciating the psychological trauma suffered by child-abuse victims who must testify in Court.

According to the Supreme Court's observations in Craig, the requirements are that the trial Court must hear evidence and determine whether the procedure's use is necessary to protect the particular child witness's welfare; find that the child would be traumatized, not by the courtroom generally, but by the defendant's presence; and find that the emotional distresses suffered by the child in the defendant's presence is more than de minimis. Since the determining of the minimum showing of emotional trauma required for the use of a special procedure in the Maryland statute is mandatory, the statute was held to meet constitutional standards.

Since there was no dispute, on facts, that here the children who testified under oath, were subject to full cross examination by video-link, and were able to be observed by the Judge, jury and defendant as they testified, the procedure of admitting their testimony was consonant with the confrontation clause, provided that a proper necessity finding was made.

In Idaho vs. Wright (1990) 497 US 805 and in White vs. Illinois (1992) 502 US 346, the Court dealt with hearsay evidence by a witness as to what a child–victim of abuse stated earlier to the witness. The case did not involve one-way video link procedure. But while dealing with admissibility of the hearsay evidence, Maryland vs. Craig was reiterated.

Since most Courts in US routinely permit question as to a witness's name and address, the prosecution must make a special case for imposing a restriction upon this information being asked, by showing that the witness is endangered by the revelation. However, in a few Courts, the onus is put on the accused to justify any inquiries about a witness's place of residence. In some Courts, the accused has to show why the place of residence should not be concealed from him, where some evidence is provided by the prosecution as to why it should be concealed. The procedure in federal courts is that the Government must prove the existence of an actual threat and inform the Judge in camera the relevant information, including the witness's location. The judge who evaluates the information, therefore, considers the need for concealment of the details and its effect on the reliability of the evidence.

(E) Some more recent US judgments:

We shall finally refer to a few more recent judgments of the State Courts. In Marx vs. State (Texas) (dated 3.2.1999) at the trial of the appellant for aggravated assault of a child, two child witnesses testified via two-way close-circuit television, outside appellant's physical presence and over his objection.

The Court of Criminal Appeals, Texas granted appellant's petition for discretionary review to determine whether the admission of the child witness's testimony violated appellant's rights under the Sixth and Fourteenth Amendment and Art. 38.071 of the Texas Code of Criminal Procedure and held, following Maryland vs. Craig that the right of appellant under the Confrontation Clause was not absolute and would give way to considerations of public policy or necessities of the case and the testimony was otherwise reliable. The requisite reliability of the child witness's testimony may be assumed through the testimony under oath (or other admonishment appropriate to the child's age and maturity, to testify truthfully), subject to cross-examination, and the fact finder's ability to observe the witness's demeanour, even if only on a video monitor. The Court found no violation of 6th Amendment by using a two-way close circuit as it was intended to prevent trauma of having to testify in the appellant's physical presence. The required reliability was assured because the witnesses testified after promising to do so truthfully, they were subject to cross examination and the jury was able to observe their demeanour. (Smith vs. Texas dt. 24.11.2001)

In State vs. Bray (31.7.2000) decided by the South Carolina Supreme Court, a case of child abuse, the State moved to have the victim testify via closed-circuit television, out of the presence of Mr. Bray (accused) and the jury. The Court allowed the application for evidence being recorded without the presence of Mr. Bray or their relatives (except the mother) being present. The Court relied upon evidence of a social science expert in counselling services that the child witness (then 7 years) would suffer

trauma if examined in the physical presence of the accused who was the child's uncle.

Section 16-3-1550 (E) (SC)(Ann)(Supplement 1999) provides that:

> "the circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped or who have special needs, by using closed or taped sessions when appropriate. The prosecuting agency or defence attorney must notify the Court when a victim or witness deserves special consideration."

The trial Court was however directed to go into the matter and give specific findings to support of the closed circuit procedure.

In the case of Iowa vs. James Terrance Mosley (15.5.2002) decided by the Court of Appeals, Iowa, the Court confirmed the use of close-circuit TV for receiving the evidence of a eight-year victim of child abuse, on the ground that if the witness had to face the accused, she would have suffered trauma.

6.7.2 A summary of US law by Jurist Nora V. Demleitner: (1998) 46 Amer J of Comp. Law (Suppl) 641

In an article on 'Witness Protection in Criminal Cases: Anonymity, Disguise or other Options' by Nora V. Demleitner (1998)(46 American Journal of Comparative Law, (Suppl.) p. 641) there is a very detailed analysis of the subject. The article refers to some of the cases referred to

above and finally divides witnesses into three categories: (a) undercover-agents; (b) informants and (c) witnesses covered by witness protection programmes. We shall try to summarise what the author has stated in this behalf.

(a) In the case of undercover agents, a witness's house address serves to allow the defence to identify her with her environment so as to allow for a meaningful cross examination. Some Courts have held that with respect to undercover agents, this goal can be accomplished differently – it might be sufficient to disclose their occupational background and circumstances (United States vs. Alston (1972) 460 F.2d 48 (5th Circuit) Certi. Denied 409 US 871 (1972). Police agents, even if working undercover, are subject to supervision and constant monitoring by their superiors. The supervisors can testify as to the agent's general truthfulness. This exception does not necessarily extend to informants since they tend to be subject to less supervision.

(b) Informers have 'privilege' for anonymity if they had started the investigation but did not further it. This encourages witnesses to come forward in exchange for anonymity. A police officer may testify as to the course of investigation which was initiated by the informant, without revealing the informant's identity. However, in Roviaro vs. United States: (1957) 353 U.S. 53, it was held by the US Supreme Court that, if the evidence as to the original informant's identity is 'essential' or even 'relevant and helpful', it must be produced. Any disclosure requires the 'balancing the public interest in protecting the flow of information against the

individual's right to prepare his defense'. The Circuit Court of Appeals, in United States vs. Ellis (1972) 468 F. 2d. 638, affirmed a trial Judge's decision not to force an informant to reveal his name and address based on his safety claims and the marginal importance of his testimony. This ruling was relied upon in other cases to say that even in case other than those of undercover agent, the accused had no absolute right of access to the witness's name and address. In State vs. Hassberger : (1977) 350 So. 2d 1 (Fla) the Florida Supreme Court, required the real name of the witness to be disclosed at trial. US Courts are more likely to give protection of anonymity without revealing name and place of residence so far as undercover agents and victim-witnesses are concerned while in the case of others, the views appear to be not uniform.

(c) So far as witnesses covered by witness protection programmes are concerned or where an undercover agent adopts a 'work' name, the disclosure of the 'current name' of a witness would either violate the purpose of the 'witness protection programme' or unnecessarily endanger the undercover agents who testify under their actual but not their 'work' name. Therefore numerous courts in the US have permitted non-disclosure as long as sufficient other evidence was available for effective cross-examination.

(g) 6.8 European Court of Human Rights

In the European Court of Human Rights, on account of Art. 6 of the European Convention on Human Rights requiring a fair trial to the accused,

more importance appears to have been given to the protection of the rights of the accused. Wherever the right of cross-examination of the prosecution witnesses has been denied to the accused by the State Courts, the European Court set aside the convictions and awarded compensation. While the Court recognized the need to protect anonymity of witnesses in most cases, on facts, in most cases it held that the trial was unfair. The cases in Kostovski (1990), Doorson (1996), Vissier (2002) and Fitt (2002) are the leading cases. If the national Courts felt anonymity was necessary or not necessary in public interest, the European Court, as a matter of principle, would not interfere.

The European Court dealt with the cases arising from various countries in Europe, as detailed below.

6.8.1 Kostovski (1989)

The leading case is the one in Kostovski vs. The Netherlands (20.11.1989) of the European Court (1990) 12 EHRR 434. The case concerned more than one accused. So far as Kostovski was concerned, he was born in Yugoslav and had a long criminal history. He had escaped from prison in the Hague and was alleged to have conducted an armed raid of a bank and made off with currency and cheques. While so, the Amsterdam police got a phone call from a man who said that three persons (Stanley Hills, Paul Molhoct and a Yugoslav who had escaped from prison in the Hague) conducted the robbery. On 26.1.82, the man gave a statement to the police and wanted his name not to be revealed. On being shown photographs, he identified the accused as Kostovski. He gave details of

their hideout. On 23.2.1982, another person gave yet another statement and wanted to be anonymous. On 1.4.82 the accused were arrested. The Magistrate examined the latter person who gave statement on 23.2.82, as above stated, in the presence of the police but in the absence of the public prosecutor and Kostovski and his counsel. The Magistrate who did not know the identity of the witness, considered that the apprehension of the witness as to safety was well-founded and allowed the witness to be anonymous. The Magistrate sent copies of the statement to the Counsel for the various accused and asked them to submit their written questions and informed that they would not be invited to the hearing before him. Kostovski's lawyer submitted 14 questions to be given to the witness. The Magistrate's deputy interviewed the witness, the police were present but not the public prosecutor nor the Counsel for Kostovski nor the accused. The witness gave answers to the questions. Similar procedure was adopted in the matter of the other accused.

On 10.9.82, a single hearing took place before the District Court. The Magistrate, his deputy and the police who had earlier conducted the interview, were all examined. The Court did not, in view of Art 288 of the Code of Criminal Procedure (Netherlands), permit questions designed to clarify the anonymous witness's reliability and sources of information, which could otherwise have revealed. The Magistrate gave evidence that he was satisfied about the genuineness of the fear of reprisal. The anonymous witnesses were not heard at the trial. The official reports drawn up by the police and the examining Magistrate were used as evidence. The sworn statement of one of the anonymous witnesses to the Magistrate was read out

and treated as statement of a witness at the trial under section 295. The District Court convicted the accused.

The Court of Appeal in Netherlands heard the witnesses. They stood by their testimony. It did not allow questions to be put by the defence which would have revealed their identity. The Court of Appeal did not hear the anonymous witnesses but considered the contents of the statement. It accepted that the fear of reprisal was genuine. It confirmed the conviction.

The appeal to the Supreme Court in Netherlands was dismissed on 25.9.84 and it also held that in spite of Art. 6 of the European Convention, a Judge was not precluded, if he deemed it necessary for the proper administration of justice, from curtailing to some extent, the obligation to answer questions and notably, the one relating to identity of witnesses.

The European Court observed that the case was processed under a 1926 law, namely, the Netherlands Code of Criminal Procedure, 1926. It referred to various provisions thereof and as to how a Court, under that law, could convict an accused on previous statement recorded or official reports of the investigating officer. The Court referred to a 1926 judgment of the Netherlands' Supreme Court which permitted such statements/reports as evidence. Since then, in majority of cases, witnesses were not being examined at the trial. The European Court referred to a 1984 Report of a Commission in that country which recommended that statement of anonymous witnesses should not be treated as evidence and to the fact that a Draft Bill was pending legislation.

The European Court said that the procedure followed in the case offended principles of a fair trial under Art. 6 of the European Convention and that even though anonymity was given, these witnesses were not examined at the trial and the Court could not observe their demeanour nor test their reliability. Even before the Magistrate, neither the accused or his counsel were present. The examining magistrates were also unaware of the identity.

The European Court held the procedure was unfair. It held that while at the stage of investigation, the police could get information from anonymous informants, however, at the trial, the use of the previous statements as evidence to form a conviction, was bad in law. The Court allowed the appeal.

By a separate judgment dated 29.3.90, the European Court held that under Art 50 of the Convention, Kostovski was entitled to compensation for detention that was not valid. The amount of compensation was, however, settled by agreement.

6.8.2 Windisch vs. Austria : (1991) 13 EHRR 281

This was a case of burglary by the accused and two witnesses were allowed to identify the accused from a distance, while the accused was allowed to hold a handkerchief in front of his face. The police officers recorded the statements of the two anonymous witnesses but their identity was not disclosed to the Court. The accused's request to summon them for

cross-examination but the request was rejected because the witnesses feared retaliation. The conviction was appealed against.

The European Court referred to Art. 6 of the Convention and to Kotoskovi. It held that there was no fair trial. The argument that the accused could have put written questions was held to be not acceptable as it was not equivalent to production of witnesses before the Court. The trial Court too was not aware of their identity. It could not watch their demeanour as they were never produced before the Court nor could the Court determine their reliability. The police officer's evidence was not sufficient. In this case also, the Court also awarded monetary compensation.

6.8.3 Delta vs. France: (1993) 16. EHRR 574.

The appellant was accused of snatching a chain and a crucifix from two girls at an underground railway station. He was arrested and the two girls immediately identified him. The appellant pleaded he was not guilty and the snatching was done by somebody else. The police later interviewed the girls, they reiterated their earlier version. The girls did not turn up the trial. The accused was convicted by the trial Court in France.

On appeal, the European Court referred to the fact that subsequent to the order of conviction under appeal, the Paris Court of Cassation had departed from its previous view and held that evidence was necessary at the trial unless a clear case was made out about intimidation, pressure or reprisals.

The European Commission decided that the trial was vitiated and granted compensation.

6.8.4 Isgro vs. Italy: (1991) Yearbook of European Convention on Human Rights, 155.

This was also a case where the person (Mr. D) (not anonymous) who gave the statement to the police was not traceable at the trial and did not examine himself at the trial. The trial Court held that, Kostovski was distinguishable, that the accused had opportunity to question Mr. D before the investigating judge but that he did not do so. Thereafter, the accused was committed to trial. At the trial, the witness was not traceable but the accused was convicted.

The European Court held that, on facts, there was no violation of Art. 6 but still in certain situations, the previous statements of witnesses could be relied upon and that this case was one such. The conviction was confirmed.

6.8.5 Doorson vs. The Netherlands: (26.3.96)

The case arose from Netherlands and concerned the appellant, who was alleged to be a drug-dealer. The police, on information received, showed photographs of drug dealers to certain drug-addicts (along with photographs of innocent persons) and upon identification of appellant by several drug-addicts, started investigation. Several persons who wanted to be anonymous did not turn up. However, three persons (one who disclosed his name but was not a clear witness and two other anonymous witnesses)

gave statements. The named witness's evidence was not acted upon. At the stage of appeals, - upon a finding being called for, the investigation Judge who investigated a second time (in the presence of the counsel for accused) – felt that the evidence of the two persons as to their safety – one was earlier attacked by a drug-dealer in another case – was genuine and their anonymity was essential. The European Court referred to Kostovski case and held that the right to disclosure of identity was not absolute. It pointed out that though on the earlier occasion the witnesses gave evidence when counsel for the accused was not present, the second time – when the appeal Court called for a fresh finding – the witnesses were examined in the presence of the counsel for accused and he was permitted to put questions. Where the life, liberty or security of witnesses may be at stake, the rights of the accused and of the victims/witnesses have to be balanced by the Court. Finally, on facts, it was held that there was no violation of Art. 6 (Court here referred to the new statutory Rules of Netherlands, 1993).

6.8.6 Van Michelen & others vs. The Netherlands: (23.4.97)

The case which again arose from Netherlands related to robbery and murder and chase by police officers and ultimate arrest of the accused. The police officers claimed anonymity on the ground of danger to their lives. This was granted and they gave evidence in the presence of the investigating Judge in a separate room from which the accused and even their counsel were excluded. The counsel for accused was thus precluded from watching the demeanour of witness and they could only hear the audio-track. They were not able to test the reliability of witnesses. The European Court observed that it had not been explained as to why it was

necessary to resort to such extreme limitations on the well-known rights of the accused to have evidence given in their presence or as to why less-far reaching measures were not employed. It was held that the Court of Appeal did not assess the reliability of the evidence as to reprisals. The evidence consisted of the statements of the anonymous police officers and nothing else. The conviction was set aside and compensation was awarded.

6.8.7 Vissier vs. The Netherlands: (14.2.2002)

This was a case of an anonymous witness from Netherlands. The appellant Vissier and another Mr. D were the accused. The facts were that one Mr. A told police on 30.9.87 that he had been kidnapped on 30.9.87 and was beaten up by two unknown persons, that he suspected that they had acted on the orders of one Mr. G. He complained this was an act of revenge because of allegations of burglary that Mr. A was supposed to have made earlier against Mr. G. Thereafter, preliminary judicial investigations were made in April 1988 into the allegations. On 28.4.88, two police officers prepared a report on the kidnapping and assault of A. The report stated that a number of witnesses had seen Mr. G and two other persons in bar-restaurants in a town on the previous night 29-30 Sept. 1987 and these witnesses had overheard that the three men were making inquiries about the whereabouts of A. A was said to know G well and to be afraid of G. Police investigations showed that Mr. G was a person who instilled fear in others. The witnesses who had seen the two accused on the previous night and on the date of the alleged commission of offence, were not willing to make written statements because of fear of G.

However, police said that four witnesses were confronted through a two-way mirror in the presence of the accused Vissier and his co-accused D but they found that the witnesses feared Vissier and D and wanted to leave the room as soon as possible. None of the four witnesses identified the two accused although one said Vissier looked similar to one of the perpetrators. Later, witnesses were interviewed separately and one of them, a lady, recognized one of the perpetrators but she wished to be anonymous. A fifth witness reported that he recognized D from photographs as being the person who, after midnight 29-30 Sept. was trying to find out the whereabouts of Mr. A, the victim who was later kidnapped and beaten up on 30th.

The police also said that one of the witnesses reportedly called the police to say that the witness wanted to withdraw the statement, because of fear. The police were satisfied about the danger to the witness.

The trial court acquitted Vissier and Mr. D of the charge of kidnapping and beating but Vissier was convicted on another charge. On appeal, by Vissier as well as State, Vissier was convicted of the charge of kidnapping and beating Mr. A and convicted. (There was no appeal by State against acquittal of Mr. D). On further appeal, the Supreme Court in Netherlands set aside the conviction of Vissier because the statement of the anonymous witness was not taken down by the Judge after being told about the identity of the witness and the reliability of the witness was not proved. The matter was remanded to the appellate court which directed the trial judge to hear the witness (who had previously recognized A, the accused by the photographs). If need be, the witness was to be heard by taking measures to protect the anonymity of the witness.

On 13.9.93, the witness was heard by the trial judge who was aware of the identity. He directed anonymity to be maintained.

Counsel for accused attended when the complainant was interviewed by the Judge and the Judge also put questions suggested by the said counsel.

The Counsel for accused gave questions in writing, these were put by the Court to the witness. Counsel was allowed to read the replies of the witness and to suggest further questions to be put by the Judge but this later opportunity was not availed of. One of the earlier questions by Counsel related to the photographs shown by police to the witnesses for identifying the accused. The investigating judge also found witness reliable.

On 29.9.93, the appellate Court convicted the appellant. It relied upon the statement by the witness now made to investigating Judge and did not rely on the earlier statement of witness recorded by the police. It, however, did not give any finding on the need for anonymity or on the reliability of the witness.

On further appeal, the Supreme Court of Netherlands, by judgment dated 7.6.94, dismissed the appellant's appeal against his conviction.

On further appeal, the European Court allowed the accused's appeal holding that the trial was not fair. It held that the Court of Appeal did not carry out an examination into the well-foundedness of the reasons for the anonymity of the witness. The investigating Judge too did not indicate how

he assessed the reasonableness of the personal fear of the witness, whom he was hearing six years after the incident. It relied upon Kok vs. The Netherlands dt. 4.7.2000 (2000) Vol. 6, EHRR). It also awarded damages.

6.8.8 Fitt v. UK: (16.2.2000)

The appellant was accused of conspiring with C (driver of appellant's car) and one S, to rob the Royal Mail Van; C pleaded guilty. The trial judge directed summary of C's statement to be given to the defence.

Accused gave evidence at trial. He said the bundles of currency were given to him by one D.W from whom C was buying a car and at C's instance, appellant buried the bundles at a place in the cemetery. He claimed he had been falsely implicated. He denied knowledge of the robbery.

The trial judge gave the accused only the summary of C's statement omitting the references to all sources of information. Before passing an order, the counsel for accused was not heard. The omission of details of the confessional statement of C was by an ex parte order.

Still, the trial judge convicted him. On appeal, it was stated, that C was now found to be a regular informer to the police in several cases – 88 such cases for reward - and the information C gave implicating the appellant was false. The conviction was maintained in the Court of Appeal. The accused moved the European Court.

On appeal, the European Court upheld the conviction holding that the trial was fair since the trial judge, who decided the question of disclosure of evidence, was aware of both the contents of the withheld evidence and the nature of the appellant's case, and was thus able to weigh the applicant's interest in disclosure against the public interest in concealment. While the trial must be fair, the "entitlement to disclosure of relevant evidence is not an absolute right. In criminal proceedings, there may be competing interests such as national security or the need to protect witnesses at risk of reprisals or very secret police matters of investigation of crime, which must be weighed against the right of the accused (Doorson vs. Netherlands: (26.3.1996). In some cases, it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individuals or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Art. 1. (Van Mechelen vs. Netherlands : 23.4.97)."

When the evidence is withheld on public grounds, it is not the role of the (European) law to decide whether or not such disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence. It observed in Fitt:

> "In any event, in many cases, such as the present one, where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material."

Here the defence were told that the information given by C which was withheld related to the sources of information. In the absence of the defence, no doubt, the prosecutor explained to the Judge regarding the source of information that was not being disclosed. The material which was not disclosed formed no part of the prosecution case whatever and was never put to the jury.

> "The position must be contrasted with the circumstances addressed by the 1997 Act and the 1998 Act, where impugned decisions were based on material in the hands of the executive, material which was not seen by the supervising Court at all."

The trial judge was fully versed in all the evidence and he did say on 23rd March that he would have directed disclosure of sources if it might have helped the accused. The Court's procedure was fair. The Court made an elaborate reference to the 1992 Attorney General guidelines and to R v. Ward 1993 (1) WLR 619 and other UK cases, referred to by us in the discussion under UK law.

The appeal against conviction was dismissed.

6.8.9 Rowe and Davis vs. UK: (16.2.2000)

This case arose from UK and was one relating to robbery and infliction of injuries on various persons in two incidents. The European Court referred to the same English domestic law and statutes referred to in Fitt. But unlike there, here, on facts, it held there was no fair trial since the

information was withheld by the prosecution without notifying such non-disclosure to the Judge. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against public interest, cannot be said to be within Art. 6 of the Convention. Same principle was applied in R vs. Ward by the Court of Appeals in UK.

It is true that the prosecution counsel notified the defence that certain information had been withheld and this was in the Court of Appeal, and that Court had reviewed the undisclosed evidence in ex parte proceedings with the benefit of submissions from the Crown but in the absence of the defence and had decided in favour of nondisclosure. Before non-disclosure was decided, the trial court was not asked to scrutinize the withheld information. The Court of Appeal had only perused transcripts of the Crown Court hearings and not the basic material. It could also have been influenced in the ex parte proceedings for non-disclosure before it, by the jury's verdict on the guilt. The prosecution's failure to lay the evidence in question before the trial judge to permit him to rule on the non-disclosure deprived the appellant of fair trial. The conviction was set aside and compensation was awarded.

(h) 6.9 PORTUGAL:

6.9.1 The Portugese legislation (Act No.93/99 of 14th July, 1999) deals with the provisions governing the enforcement of measures on the "protection of witnesses" in criminal proceedings where their lives physical or mental

integrity, freedom of property are in danger due to their contribution to the collection of evidence of the facts which are subject to investigation.

Chapters II and III deal with grounds of anonymity, video-link etc. in Court proceedings. Chapter IV deals with Witness Protection Programme. We shall here refer to the provisions of Chapters II and III.

Chapter II of the Act provides provisions for concealment of witness's image and use of teleconferences. In order to avoid witness's recognition, section 4 provides that the court may decide that the testimony or the statement of a witness shall be taken by means of either concealing the witness's image or distorting his voice or both. In case of offer of evidence relating to a crime is to be judged by a three judge court or by a jury court and whenever there are serious grounds to believe that the protection is necessary, the use of teleconference is admissible. It can include the resort to distortion either of image or voice or both. Here teleconference means any testimony or statement taken in the witnesses physical absence by using technical means of transmission, at long distance and in actual time, either of sound or animated images. The use of teleconference is decided either upon request of the public prosecutor, or upon the defendant's or the witness's demand. According to section 7, the long distance testimony or statement is to be taken in a public building, whenever possible in the courts, or in the police or prison premises which offer the appropriate conditions to the installation of the necessary technical devices. The access to such place, where the testimony is to be taken, may be restricted. The technical staff involved in the teleconference is required

to render a commitment not to disclose the location or the witness's identification feature. The Judge presiding to the act shall make sure the presence of another Judge at the location where the testimony or statement is to be taken. It shall be incumbent to such judge who is present at the location to do following things:-

a) to identify and take the oath to the witness whose identity is to remain unrevealed or whose recognition is to be avoided;
b) to receive the commitment from the technical staff;
c) to ensure that the witness will make a free and spontaneous testimony or statement;
d) to provide for the clear understanding of the questions by the witness and for the transmission of the answer in actual time;
e) to act as interlocutor of the Judge presiding to the act by calling his attention to any incident occurring, during the testimony or statement;
f) to guarantee the authenticity and the integrity of the video recording to be enclosed to the proceedings; and
g) to take all preventive, disciplinary and restraining measures legally admissible, which prove adequate to enforce the access restrictions to the location and, in general, to guaranty the security of all persons present.

As per section 12, if during the testimony or the statement, any recognition of persons, documents or objects becomes necessary, the witness shall be allowed the respective visualization.

Under section 13, where the witness's identity is to remain unrevealed, the Judge presiding to the act shall avoid asking any question which is likely to induce the witness to the indirect disclosure of his identity.

Section 14 provides that where the witness's image and voice are concealed, the access to the undistorted sound and image shall be allowed exclusively to the Judge presiding to the act or the court through the technical means available. It is also provided that the autonomous and direct communication between both the judges presiding to the act and the escorting magistrate, as well as between the defendant and his counsel, shall be guaranteed in any circumstances.

Section 15 states that the testimony and the statements made through teleconference according to this Act and to any other relevant legislation, are deemed, for all purposes, as having been made in the presence of the Judge or of the court.

Chapter III of the Act (sections 16 to 19) deal with restriction regarding the disclosure of the witness's identification features.

Under section 17 the non-disclosure of the witness's identification is to be decided by the Examining Magistrate upon the request of the public prosecutor. The request should contain the grounds for the non disclosure as well as the reference to the evidence that must be offered thereto. The Examining Magistrate's decision on a request for non disclosure of identity "impeaches" (i.e. precludes) him to intervene in the proceeding thereafter.

The non disclosure of the witness's identity as per section 16 may cover one or all the phases of the proceedings. The conditions precedent for the order of non disclosure are as follows:-

a) the testimony or the statement should relates to criminal offences mentioned in para (a) of section 16;
b) the witness, his relatives or the persons in close contact with him should face a serious danger or attempt against their lives, physical integrity, freedom or property of a considerable high value;
c) the witness's credibility is beyond reasonable doubt;
d) the testimony or the statement constitutes a relevant probative contribution.

As per section 18, for the purposes of decision on a request for non-disclosure of identity, a supplementary proceeding of a confidential and urgent nature shall be separately prepared. Only the Examining Magistrate and whoever to whom he appoints shall have access to such proceedings. The Examining Magistrate shall ask the Bar to appoint a lawyer with the proper profile to represent the defence's interests. The appointed lawyer shall only intervene in the supplementary proceeding. The witness to whom the measure of non-disclosure of identity has been granted, may make his testimony or statement either by concealing his image or by distorting his voice or through teleconference.

However, under section 19, no conviction shall be based only on the basis of the testimony or evidence of the protected witness.

(i) 6.10 Judgments of the "International Criminal Tribunal for former Yugoslavia" (ICTY) in 'Tadic' and 'Delaic' and other cases and anonymity to prosecution and defence witnesses, video-link etc:

6.10.1 The Yugoslav Tribunal:

In 1993, the U.N. Security Council created the International Criminal Tribunal for former Yugoslavia (ICTY) in response to large scale crimes involving ethnic cleansing in the former Yugoslavia. With the experience of Nuremberg trials, the UN Office of Legal Affairs drafted an enabling statute which the Security Council adopted in May 1993, called the Statute of the International Tribunal for Yugoslavia (available at http://www.un.org/icty/basic/stutut/statute .hcm). The General Assembly elected the first 11 ICTY Judges in September 1993. Between November 1993 and February 1994, the Judges drafted the ICTY Rules pursuant to Art. 15 of the Statute.

While Art. 21 ensured a right to cross-examine and a fair trial, Art. 22 clearly stated that the right was not absolute and is subject not only to in-camera proceedings but also to protection of witness/victim-identity.

The ICTY Rules of Procedure and Evidence, like those of the post-World War II Tribunals, reflect a hybrid approach that combines features that are generally associated with both common law adversarial and civil law inquisitorial systems.

6.10.2 Prosecutor v. Tadic (1997) and anonymity to witness/victim:

Tadic, an ethnic Serb from Bosnia – Herzogovina was arrested in Germany on February 12, 1994, charged in connection with crimes committed in the Omarska prison camp during 1992. Pursuant to a request by ICTY, Germany transferred custody of Tadic to the Tribunal in April 1995. The ICTY indicted Tadic on 132 counts of crimes against humanity and war crimes. The ICTY has jurisdiction over four substantive crimes: (a) genocide, (b) crimes against humanity (c) grave breaches of the Geneva Convention 1949 and (d) violation of laws or customs of war.

In the ICTY trial, Prosecutor vs. Tadic, an evidentiary request by the prosecutor forced the Judges to determine whether witness anonymity is consistent with the defendant's right to a fair trial. This was because several of the prosecution witnesses were unwilling to testify on account of fear of reprisal. The prosecutor wanted the six witnesses to be identified as F, G, H, I, J and K. By a 2:1 majority on 10.8.95, the Judges mandated for anonymity of four witnesses as G, H, J and K (see http://www.un.org/icty/tadic/trial 2/decision-e/100895 jm.htm). The prosecutor had requested, in addition or in the alternative to witness anonymity (i) delayed disclosure of witness identity, (ii) in camera hearings and (iii) non-disclosure of identity to the media and (iv) testimony via closed-circuit television with voice-altering technology.

The majority (Judge Gabrielle Kirk McDonald of US and Judge Lalchane Vohrah of Malaysia) accepted that witness anonymity is an extraordinary measure in traditional criminal trials and that it 'could impede' accurate fact-finding and that the accused had a right under Art. 21

of the ICTY statute to 'examine, or have examined, the witnesses against him'. (Art 21 (4)(e)) and to 'a fair and public hearing' (Art. 21(2)). The majority, however, noted that the latter right is expressly subject to Art. 22 which provides for witness protection and states that the right 'shall include, but shall not be limited to, the conduct of in-camera proceedings and the protection of the victim's (or witness) identity'. The Tadic majority distinguished judgments of Courts in other countries which had treated as absolute, the right of the accused to confront witnesses. This was because of the Tribunal's particular dependence on eye-witness testimony in a climate of 'terror and anguish among the civilian population' and also because of the unique legal framework of the ICTY statute which provided specially for the protection of victims and witnesses. Moreover, the Tribunal determined that the standards drafted for 'ordinary criminal and …. civil adjudication' were not appropriate for the 'horrific' crimes and ongoing conflict in the former Yugoslavia. The Tribunal's majority view was consistent with the fear of retaliation from the personal supporters of the accused, the anti-Tribunal leaders and the members of the opposing ethnic groups. The ICTY did not have a police force of its own and otherwise had to depend on the police systems of the concerned countries for protecting witnesses. Witnesses who knew only the local Serb-Croatian language could not be transplanted into another country. If witnesses refused to testify out of fear, the Tribunal would be able to try any case effectively. Therefore, anonymity procedures became absolutely necessary. Art. 21(3) of the ICTY statute adequately protected the accused when it said that 'the accused shall be presumed innocent until proved guilty according to the provisions of the present statutes' and Rule 87 gave substance to this presumption by requiring that 'a finding of guilt may be reached only when

a majority of the trial chamber is satisfied that guilt has been proved beyond reasonable doubt'.

On 7.5.1997, Tadic was convicted by the trial chamber II in respect of crimes against humanity and violation of laws of war.

On appeal by the prosecutor, Tadic was convicted further by the Appeals Chamber for grave breaches of the Geneva Convention of 1949 on nine further counts of the Indictment. On 26.1.2000, by a separate judgment as to sentence, Tadic was sentenced for 20 years imprisonment on counts 1, 29, 30, 31 to be served concurrently with various penalties.

A review filed by Tadic was dismissed by the Appeals Chamber on 30.7.2002.
(http:..www.un.org/icty/tadic/appeal/decision-e/020730 htna)

6.10.3 Prosecutor v. Delilac (1998): video-link procedure & protective measures from media/public :

The Trial Chamber's judgment dated 16th November, 1998 which runs into 500 pages has been summarized in 20 pages. We shall refer with the summary. The main judgment is one of the most classic judgments on the subject.

The trial of Zejnil Delalic, Zdravv Mucic, Hazrim Deloc and Esado Landzo, before the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International

Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, commenced on 10th March, 1997 and came to a close on 15th October, 1998. The case involved applications by both prosecution and defence for protection/anonymity of their respective witnesses.

As stated earlier, the International Tribunal is governed by its Statute which was adopted by the UN Security Council on 25.5.1993 and by its Rules of procedure and evidence, adopted by the Judges on 11.2.94, as subsequently amended. Under the Statute, the Tribunal has power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Articles 2 and 5 of the Statute confer upon the Tribunal, jurisdiction over breaches of the Geneva Conventions of 12.8.1949 (Art 2); violation of the Laws or Customs of war (Art 3); genocide (Art 4); and crimes against humanity (Art. 5).

The indictment against the four accused was issued on 19.3.96 and confirmed by the Judge on 21.3.96. Four of the 49 counts were subsequently withdrawn at trial by the prosecution. At the time of alleged commission of offences, the accused were citizens of the former Yugoslavia and residents of Bosnia and Herzegovina. The indictment was concerned solely with the events alleged to have occurred at a detention facility in the village of Celibici, in the prison camp, during 1992. The indictment charged the four accused with grave breaches of the Geneva Convention of 1949, (under Art 2 of the Statute), and violation of the laws or customs of war (Art. 3). Zejnil Delilac was co-ordinator of the Bosnian Muslim and Bosnia Croat Forces and later commander of the First Tactical Group of the

Bosnian Army. Esad Landzo was the guard at the prison camp and Hazim Delic and Zdiark Mucic were working as commanders.

The summary of Trial chamber judgment contains discussion under various headings on the following aspects (in Part 6) : Witness related issues as follows:

(a) Protective measures (paras 49 and 50)
(b) Video-link testimony (para 51)
(c) Disclosure of witness identity (para 52)

We shall extract these paragraphs 49 to 52:

(a) Protective measures:

"49. Protective measures: A series of protective measures were sought by both the Prosecution and the Defence, pursuant to Rule 75, and implemented throughout the trial proceedings with respect to both Prosecution and Defence witnesses. At the pre-trial stage, upon an application filed jointly by both parties, the Trial Chamber issued an order for the non-disclosure of the names or any identifying details of potential witnesses to the public or the media, to ensure the privacy and protection of such victims and witnesses.

50. The Trial Chamber's first Decision on the issue during trial granted protective measures to several prosecution witnesses, including such measures as ordering that protective screens be erected in the Court-room; employing image altering devices to prevent

certain witnesses from being identified by the public; ensuring that no information identifying witnesses testifying under a pseudonym be released to the public, and requiring that transcripts of closed-session hearings be edited so as to prevent the release of information that could compromise a witness's safety. Thereafter, the Prosecution filed several additional motions seeking protective measures for its witnesses. Similarly, members of the Defence sought and were granted protective measures for certain of their respective witnesses."

(b) Video-link testimony:

"51. The Prosecution additionally brought motions requesting that certain witnesses, designated by the pseudonym K, L and M, be permitted to give their testimony by means of a video-link mechanism in order to relieve them from having to come to the seat of the International Tribunal in The Hague to testify. The Trial Chamber granted such a motion with respect to witnesses 'K' and 'L', where the circumstances met the relevant test for permitting video-link testimony although this was ultimately not availed of. A later, confidential motion requesting video-linking testimony for additional witnesses, was denied."

(c) Disclosure of identity:

"52. Prior to trial, the Defence for Esad Landzo moved the Trial Chamber to compel the prosecution to provide the names and addresses of its prospective witnesses. The Trial Chamber, while

> acknowledging that under Art 20(1) of the Statute, the Defence was entitled to sufficient information to permit it to identify prospective Prosecution witnesses, denied the Defence request, holding that the current address of a witness is not necessary for the purpose of identification. Subsequently, the Trial Chamber, on a motion by the Prosecution, determined that the Defence, pursuant to sub-Rule 67(A)(ii), has an explicit obligation to disclose the names and addresses of 'those of its witnesses who will testify to alibi and to any special defence offered'. The Trial Chamber held that the Defence disclosure obligation under sub Rule 67(A)(ii) is distinct from that of the Prosecution pursuant to sub Rule 67(A)(i)."

The Trial Chamber by judgment dated 16.11.98 found that the detainees in the camp were killed, tortured, sexually assaulted, beaten and otherwise subjected to cruel and inhumane treatment by all the accused as commanders, though they were held not guilty of certain other offences.

The Appeal Chamber by judgment dated 20.2.2001 confirmed certain convictions which included Count 3 (killing), Count 18 (rape amounting to torture) and Count 21 (repeated incidents of forcible sexual intercourse and rape amounting to torture). It remitted 4 issues to the Trial Chamber on 11.4.2001 on the question of 'adjustment' of sentences. The Trial Chamber gave its decision on 9.10.2001 and the further appeal was decided by the Appeal Chamber on 8.4.2003 dismissing the appeals and confirming the convictions.

6.10.4 Important preliminary orders of the Tribunal laying down crucial principles of law:

The orders of the Trial Chamber during the course of trial reveal the interpretation of the Articles/Rules which balance the rights of the accused and of the victims/witnesses. These preliminary orders were passed before the framing of charges and have laid down excellent principles for guidance of domestic Courts.

(A) 18.3.97: decision on defence motion to compel discovery of identity and location of prosecution witnesses.

(B) 8.10.97: decision on prosecution motion for additional measures of protection for prosecution witnesses.

(C) 25.9.97: decision on confidential motion for protective measures for defence witnesses.

(D) 13.6.97: decision on the motion to compel the disclosure of the addresses of the defence witnesses.

(E) 28.5.97: decision on motion to allow prosecution witnesses K, L, M to give their testimony by means of video-link conference.

(F) 28.4.97 decision on motion by prosecution for protective measures for prosecution witness pseudonymed 'B' through to 'M'.

A: Decision dated 18.3.97 on motion of defence to compel discovery of identity and location of prosecution witnesses:

The Trial Chamber partly allowed the application of the defence asking the prosecution to disclose information about the 'name, sex, date of birth, place of origin, names of parents and place of residence at the time relevant to charges' but not the current address of the prosecution witnesses.

The Trial Chamber referred to Arts. 20, 21 of the Statute and Rule 67, 69, 75 of the Rules. They read as follows:

Articles of Statute:

Art. 20 : Commencement and conduct of trial proceedings:

(1) The trial chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the protection of victims and witnesses.

---- ---- ---- ---- ---- ---- ---- ---- ---- ---- ---- ----

Art. 21: Rights of the accused:

(1) ….
(2) ….
(3) …
(4) In the determination of any charge against the accused pursuant to the present statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) …
(b) to have adequate time and facilities for the preparation of his defence and to communicate with the counsel of his own choosing;
(c) ….

(d) ….

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"

The following rules of procedure and evidence are also referred to:

"Rule 67 : (A) As early as reasonably practicable and in any event, prior to the commencement of the trial:

(a) the Prosecutor shall notify the defence of the names of the witnesses that he intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with sub rule (ii) below;

…. …. …. … …. …. … …. …. …."

"Rule 69: Protection of victims and witnesses:

(A) …. …. …. ….

(B) …. … …. ….

(C) Subject to para 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence."

"Rule 75: Measures for the protection of victims and witnesses:

(A) A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the victims and

witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused."

In para 17 of the judgment, the Trial Chamber observed that in sub Rule 69(C), the word 'identity' has a significance which goes beyond the mere protection of those witnesses. A name by itself is not sufficient to identify the person by whose testimony the charges against the accused are sought to be proven. To identify the witnesses, therefore, it is necessary for the Defence to know further particulars about them, which in turn will satisfy the right of the accused to an adequate preparation of his defence

The Trial Chamber held in para 18 that Rule 75 requires that the privacy and protection of the witnesses may be taken into account and weighed against the rights of the accused. Whilst the Prosecution may, under Rule 39(ii), take special measures to provide for the safety of potential witnesses, these measures relate to the investigative stages of the case. It is not for the Prosecution to provide assurances to witnesses once it has decided that these witnesses will be called to give testimony before the Tribunal. The guarantee of any necessary protective measures is solely a matter for determination by the Trial Chamber.

It said in para 19 that there is no real opportunity to the defence without a proper appreciation of those witnesses. The basic right of the accused to examine witnesses, read in conjunction with the right to have adequate time for the preparation of his defence, therefore, envisages more than a blind confrontation in the Court room. A proper in-Court

examination depends upon a prior out-of-Court investigation. Sub rule 69 (c) reflects this by referring to a 'sufficient time prior to the trial'.

The term 'identity' (para 20) does not necessarily include the present addresses of the witnesses. Substantial identification would mean the sex, date of birth, names of parents, place of origin or town or village where the witness resided at the time relevant to the charges.

The Trial Chamber gave the directions already referred to above, except in relation to the present addresses of the witnesses.

(B) 8.10.97: Decision on prosecution motion for additional measures of protection for prosecution witnesses.

This application was rejected without much discussion.

(C) 25.9.97: Decision on confidential motion for protective measures for defence witnesses.

The Trial Chamber gave witness pseudonym protection as 'witness mucic/A' in all proceedings and discussions. It said that the names, addresses and whereabouts of and any other detail concerning 'witness Mucic/A' shall not be disclosed to the public or to the media and this information shall be sealed and not included in the public records of the Tribunal identifying 'witness Mucic/A'. The details shall not be disclosed to the public, the media or any other party.

The Trial Chamber left the question of 'relocation' of the witnesses to be decided by the 'Victims and Witnesses Unit', established under Rule 34, acting under the authority of the Registrar.

The request of the Defence was heard ex parte and in closed session for grant of interim protection, at this stage, where the witness is a potential witness'. It was considered that the witness could be granted interim protection by use of pseudonym though, when the Defence decides to make him an 'actual witness', the question could be decided by giving notice to the prosecutor.

The Trial chamber referred to an earlier decision that grant of pseudonym could be considered necessary if the fear of a witness has been found to be real.

The Chamber held that the particular defence witness will be called 'Witness Mucic/A' in all proceedings before the Tribunal and discussions. The name, address, whereabouts of and any other data including documents concerning 'witness Mucic/A' shall not be disclosed to the public or to the media and this information shall be sealed and not included in the public records of the Tribunal, until further orders.

(D) 13.6.97: Decision on the motion to compel the disclosure of the addresses of the defence witnesses.

This was an application filed by the prosecutor for disclosure of the addresses of the defence witnesses for Esad Landzo, on the question of the alibi pleaded by the defence.

The provision of Rule 67 deal with 'Reciprocal Disclosure'. They read as follows:

"Rule 67:

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(i) the Prosecutor shall notify the defence of the names of the witnesses that he intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with sub-rule (ii) below:

(ii) the defence shall notify the Prosecutor of its intent to offer:

(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence."

Rule 66: Disclosure by the Prosecutor

"Rule 66:

(A) …. …. …. …. …. …. …. …. ….

(B) The Prosecutor shall on request, subject to sub-rule (C), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigation, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the prosecutor may apply to the Trial Chamber sitting in camera to be relieved from the obligation to disclose pursuant to Sub rule (B). When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential."

The Prosecutor requested the Defence (for accused Esad Landzo) to be ordered to disclose the addresses of those witnesses whom they intend to call on the defence of alibi and special defence of diminished or lack of

mental capacity. It argued that Sub-Rules 67(A)(ii)(a) and (b) require such disclosure and that the order of the Trial Chamber dated 25.1.97 also required that there be additional disclosure of the witnesses' curriculum vitae and a statement on the area (areas) about which they will testify. The names and addresses of some defence witnesses were disclosed; those of 13 others were not disclosed.

The Defence contended that in the light of the subsequent leakage (after the Trial Chamber's decision dated 18.3.97) to the Press concerning many of these witnesses' identities, it has proved rather fortuitous that the addresses of these 13 witnesses were not furnished by the defence and the leakage must be avoided. Those witnesses who live in Yugoslavia would be subject to great risk if their identity/addresses were disclosed. The defence relied on Sub-Rule 66(c).

The Trial Chamber then held that the 18.3.97 decision was not based on Sub rule 67(A)(ii) in as much as the present issue was about alibi witnesses and special defence of diminished or lack of mental capacity. The argument of Defence that there was no reciprocity could not be accepted as that issue was about alibi-witnesses (which is based on Rule 67(A)(ii) while Rule 67(A)(1) which refers to the prosecutor witnesses) is separate. As held by the Trial Chamber on 18.3.97, the Prosecutor must provide the Defence with identifying information about all its witnesses, whereas the Defence was obliged to provide information only about those witnesses who would speak on alibi and special defence. Therefore the Defence must provide the names and addresses as per Sub Rule 67(A)(ii). Both parties must circulate

the curriculum vitae in advance to each other of their intended expert witnesses, as well as statements about the areas to which they will testify.

However, it was open to either of the parties to apply for protective measures to be granted to particular witnesses who may be at risk and therefore, the Defence can also do this instead of seeking to avoid the obligations on general pleas of potential threat to witnesses. It further observed:

> "As has been illustrated by the recent leakage of a Prosecution witness list to the media, it is impossible to absolutely guarantee that confidential information does not find its way into the public domain. However, this is the exceptional case and it cannot and must not be assumed that such a breach of security will not occur again. Furthermore, the Prosecution, has undertaken, as its duty, to do its utmost to ensure that the addresses which it receives remain confidential.
>
> Sub Rule 66(c) is also clear and unambiguous and solely relates to the disclosure of information by the Prosecutor. Moreover, the subjects of the sub Rule are tangible objects and not information concerning the identity of witnesses. The Defence cannot infer any right to apply to Trial Chamber to be relieved of its obligation to disclose the names and addresses of witnesses who clearly fall within Sub Rule 67(A)(ii), from a provision which concerns a separate matter."

The Trial Chamber granted the prosecution motion and directed the defence (for Esad Landzo) to provide the names and addresses of all defence witnesses who are expected to depose on alibi or other special defence to the Prosecutor.

(E) 28.5.97: Decision on motion to allow K, L, M to give testimony by means of Video-link.

On 3.4.97, the Prosecutor filed a motion to allow witnesses K, L and M to give their testimony by video-link conference. The defence for Hazim Debi filed its response.

The Prosecution requested that these three witnesses be designated by pseudonyms K, L and M and be permitted to give evidence by video-link. The motion was confined to K, L and M only in view of the fear of potentially serious consequences to themselves and their families. It relied on Prosecutor vs. Dusko Tadic (25.6.96) as the two conditions stated there were satisfied – namely,

(a) the testimony of three witnesses was sufficiently important to make it unfair to the Prosecutor to proceed without it, and

(b) the witnesses were unable or were unwilling to come to the Tribunal (in the present case for serious medical reasons).

The Defence relied upon Article 21(4)(e) of the Statute and Rule 89 of the Rules of Procedure and Evidence which protect the right of the accused to confront witnesses in open Court.

The Trial Chamber referred to the following provisions:

"Art. 21: Rights of the accused

……..

(a) In the determination of any charge against the accused pursuant to the present statute, the accused shall be entitled to the following minimum guarantees in full equality:

……

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

"Rule 4: Meeting away from the seat of the Tribunal

A chamber may exercise its functions at a place other than the seat of the Tribunal, if so authorized by the President in the interests of justice.

Rule 54; General Rule

At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summons, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Rule 90: Testimony of Witnesses

(A) Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition provided for in Rule 71."

Sub Rules 89(A) and (B) provide as follows:

Rule 89: General provisions.

(A)The rules of evidence set forth in this section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B)In cases not otherwise provided for in this section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the statute and the general principles of law.

….. . . . .. …… …..

The Trial Chamber held that it was not bound by national rules of evidence but could still be guided by them and that this is the spirit of sub Rule 89 (B).

Rule 71 (see sub rule 90(A)) is not the only exception allowed by the Rules. Under sub-Rule 75(B)(iii), when the Trial Chamber grants measures to facilitate the testimony of vulnerable victims and witnesses, such measures may involve the use of one-way closed circuit television.

Accordingly, there are exceptions to the general rule when the right of the accused under Art 21(4)(e) is not prejudicially affected.

The Trial Chamber then stated as follows:

> "15. It is important to re-emphasise the general rule requiring the physical presence of the witness. This is intended to ensure confrontation between the witness and the accused and to enable the Judge to observe the demeanour of the witness when giving evidence. It is, however, well known that video-conferences not only allow the chambers to hear the testimony of a witness who is unable or unwilling to present their evidence before the Trial Chamber at The Hague, but also allows the Judges to observe the demeanour of the witness whilst giving evidence. Furthermore, and importantly, counsel for the accused can cross-examine the witness and the Judges can put questions to clarify evidence given during testimony. Video-conferencing is, in actual fact, merely an extension of the Trial Chamber to the location of the witness. The accused is, therefore neither denied his right to confront the witness, nor does he lose materially from the fact of the physical absence of the witness. It cannot, therefore, be said with any justification that testimony given by video-link conferencing is a violation of the right of the accused to confront the witness. Art. 21(4)(e) is in no sense violated".

The Trial Chamber further stated:

"17. Testimony by video-link conferencing is an exception to the general rule. Accordingly, the Trial Chamber will protect against abuse of the grant of the expedient. The Trial Chamber (composed of Judge McDonald, Presiding, with Judges Stephen and Vohrah), has in the Tadic decision, stated that testimony by video-link will be allowed only if (a) the testimony of the witness is shown to be sufficiently important to make it unfair to proceed without it, and (b) the witness is unable or unwilling for good reasons to come to the International Tribunal at The Hague. The present Trial Chamber agrees with the findings of that discussion and reiterates the position that, because of the particular circumstances of the International Tribunal, "it is in the interest of justice for the Trial Chamber to be flexible and endeavour to provide the parties with the opportunity to give evidence by video-link. The Trial Chamber considers it appropriate to add the additional condition, (c) that the accused will not thereby be prejudiced in the exercise of his right to confront the witness.

18. The Trial Chamber also notes that the Tadic decision sets forth the view that the evidentiary value of testimony provided by Video-link is not as weighty as testimony given in the Court room (para 21). The distance of the witness from the solemnity of the Court room proceedings and the fact that the witness is not able to see all those present in the Court room at the same time, but only those on whom the video-camera is focused, may detract from the reliance placed upon his or her evidence. The Trial Chamber agrees with this general principle, whilst also considering that it is a matter for the assessment

of the Chamber when evaluating the evidence as a whole, to determine how credible each witness is."

As to the accused's rights, the Trial Chamber said:

"19. It is necessary to explain in amplification that the provisions of Art. 21(4)(e), derived from Art. 14 of the International Covenant on Civil and Political Rights of 1966, did not envisage the giving of evidence by video-link conference. But sub Rule 89(B), in its wisdom, has provided for the extension of the rules of evidence to cover new situations not contemplated."

On facts, it held:

"20. The Trial Chamber is satisfied that the testimony of witnesses K and L is sufficiently crucial to the Prosecution and that it will be unfair to omit it merely because of the difficulties of bringing the witnesses to The Hague to give evidence. Witnesses K and L are described as former detainees of Celibici camp. They are to give direct evidence of many of the acts alleged in the various counts of the indictment. The Trial Chamber is satisfied with the submission of the Prosecution that the medical conditions which are alleged to render it impracticable for them to travel, are those of one of the witnesses and their son. These critical conditions and circumstances make them unwilling to travel to the International Tribunal".

Finally, the Trial Chamber in para 21 referred to the guidelines as to video-link evidence as stated in the Tadic decision in para 22 thereof:

> "22. The Trial Chamber acknowledges the need to provide for guidelines to be followed in order to ensure the orderly conduct of the proceedings when testimony is given by Video-link."

And continued:

> "First, the party making the application for video-link testimony should make arrangements for an appropriate location from which to conduct the proceedings. The venue must be conducive to the giving of truthful and open testimony. Furthermore, the safety and solemnity of the proceedings at the location must be guaranteed. The non-moving party and the Registry must be informed at every stage of the efforts of the moving party and they must be in agreement with the proposed location. Where no agreement is reached on an appropriate location, the Trial Chamber shall hear the parties and the Registry, and make a final decision….. Second, the Trial Chamber will appoint a Presiding Officer to ensure that the testimony is given freely and voluntarily. The Presiding Officer will identify the witnesses and explain the nature of the proceedings and the obligation to speak the truth. He will inform the witnesses that they are liable to prosecution for perjury in case of false testimony, will administer the taking of the oath and will keep the Trial Chamber informed at all times of the conditions at the location. Third, unless the Trial Chamber decides otherwise, the testimony shall be given in the physical presence only

of the Presiding Officer and, if necessary, of a member of the Registry-technical staff. Fourth, the witnesses must, by means of a monitor, be able to see, at various times the Judges, the accused and the questioner, similarly, the Judges, the accused and the questioner must each be able to observe the witness on the monitor. Fifth, a statement made under solemn declaration by a witness shall be treated as having been made in the courtroom and the witness shall be liable to prosecution for perjury in exactly the same way as if he had given evidence at the seat of the International Tribunal."

(F) 28.4.97: Decision on the motion by prosecution for protective measures pseudonymed 'B' to 'M'.

This matter related to all the four accused Zejmit Delalic, Zdiavka Mucia, Hazim Deliv and Esad Landzo.

The Trial Chamber quoted the relevant rules of Procedure and Evidence. They are as follows:

"Rule 75: Measures for protection of victims and witnesses:

(A) A Judge or a Chamber may, proprio motu or at the request of either party, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims or witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Chamber may hold an in camera proceeding to determine whether to order:

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:

(a) expunging names and identifying information from the Chambers' public records;

(b) non-disclosure to the public of any records identifying the victim;

(c) giving testimony through image-or voice-altering devices or closed circuit television; and

(d) assignment of a pseudonym.

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measure to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation."

"Rule 78: Open Sessions:

All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public.

Rule 79: Closed Sessions:

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

(i) public order or morality;

(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or

(iii) the protection of the interests of justice.

(B) The Trial Chamber shall make public the reasons for its order.

Rule 90: Testimony of Witnesses

(A) Witnesses shall, in principle, be heard directly by the Chamber unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.

…… …. …. … …"

In the case on hand, the prosecution prayed for 11 separate protective measures for the 12 witnesses 'B' to 'M' and certain special measures to witness 'B'. The Chamber characterized them as falling into 3 groups:

(1) Measures, sought for all 12 witnesses are for confidentiality or protection from the public and media.
(2) Additional protection for witness 'B' only in the form of partial anonymity from the accused.
(3) Additional protection for witness 'B' against 'retraumatisation'.

On these issues, the Trial Chamber, after referring to the elaborate arguments of both sides, proceeded to state as follows. It said that Art. 15 of the Statute enables the Judges to frame rules of procedure and evidence, including rules for protection of victims and witnesses. Art 22 provides that the measures set out in such rules shall

> "include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."

After referring to Art 14 of the ICCPR, the Trial Chamber referred to Art. 21(4) which prescribes minimum guarantees of fair trial and in particular to sub. cl (e) thereof which refers to the right to witness examination by open confrontation and to Rules 69, 75, 79, 90 and 96, and dealt with the various issues, as follows:

(1) Confidentiality: The prayers were concerned with seeking non-disclosure of identifying information to the public or the media. This would, no doubt, somewhat encroach into the right of the accused for a 'public-hearing', a right guaranteed under Art 21(2) of the statute and a requirement of Art 20(4), unless otherwise directed by the Trial Chamber. Rule 78 is based on Art. 20(4). The circumstances under which the public/media could be excluded are set out in Rule 79. (This aspect, covered 11 out of 12 witnesses). Reasons assigned were 'fear' that public knowledge of their testimony would result in danger to themselves and their families (and in case of witness 'C', it was not fear but 'privacy'). The Trial Chamber II then referred to the ruling in Prosecutor vs. Dusko Tadic: (d. 31.7.96), construing the provisions of Rule 79(A)(ii) wherein it was stated:

> "In balancing the interests of the accused, the public and witness R, the Trial Chamber considers that the public's right to information and the accused's right to a public hearing must yield in the present circumstances to confidentiality in the light of the affirmative obligation under the statute and the rules to afford protection to

> victims and witnesses. This Trial Chamber must take into account witness R's fear of the serious consequences to the members of his family if information about his identity is made known to the public or the media'.

Article 21(2) states that the accused is entitled to the exercise of the right to a public hearing, subject to Art. 22. Art. 22 states that the Tribunal shall provide in its rules of procedure and evidence, for the protection of victims and witnesses. "Such protective measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."

The Trial Chamber stated that the 'protection of the witness by in camera proceedings does not invariably detract from the right of the accused, nor from the duty of the Trial Chamber to give full respect to the right of the accused (see Rule 75(B)(i)). It stated that the Trial Chamber notes the importance of not denying the right of the accused for a public hearing except for good reasons. Rule 75A provides that "a Judge or a Chamber may proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses provided that the measures are consistent with the rights of the accused."

The Chamber quoted the principal advantage of permitting the public and the press to a hearing, namely, that it 'contributes to ensuring a fair

trial'. In Pretts & Ors vs. Italy: (1984) 6 EHRR 182, it was stated by European Court that:

> "publicity is seen as one guarantee of fairness of trial; it offers protection against arbitrary decision and builds confidence by allowing the public to see justices administer."

The Chamber stated that a public hearing is mainly for the benefit of the accused and not necessarily for the public. It quoted Chief Justice Warren in Estes vs. Texas (1965) 381. US 532 of US Supreme Court to the following effect:

> "There can be no blinking the fact that there is a strong societal interest in public trials. Openness in Court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously…."

The Trial Chamber must balance both interests – that is a balance between the accused and the victim/witness. Rule 79 enables the exclusion of the press and public from the proceedings for various reasons including the safety of the victim/witness.

Several Rules relate to the maintaining of a balance between the right of the accused to a public hearing and the protection of victims and witnesses. Rule 69 allows non-disclosure at the 'pre-trial' stage, of the identity of a victim or witness who may be in danger until the witness is

brought under the protection of the International Tribunal. This non-disclosure applies to the press, public and the accused. Under Rule 75, appropriate measures consistent with the rights of the accused may be taken, to protect victims and witnesses. Rule 79 enables the exclusion of the press and public from the proceedings on the ground of public order, or morality, or the safety or non-disclosure of the identity of victim or witness or the protection of the interests of justice. The Trial Chamber observed:

> "It is clear from the construction of the provisions of the relevant Articles of the Statute of the International Tribunal, namely Article 20 (4), 21(2) and 22 and the enabling Rules, namely, Rules 69, 75 and 79, that the Statute which is the legal framework for the application of the rules, provides that the protection of victims and witnesses, is an acceptable reason to limit the accused's right to a public trial. Article 14(1) of the ICCPR and Art. 6(1) of the ECHR state that everyone is entitled to a fair and public hearing. Nevertheless, both Articles provide that the press and the public may be excluded in the interests of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or where publicity would prejudice the interests of justice."

The Trial Chamber refused to grant all the prayers for closed sessions asked for in relation to the various witnesses and held that 'a combination of protective measures, including closed sessions, will satisfy the needs of the witnesses and constitute adequate protective measures in these proceedings'.

As to 'witness C' (a male), a victim of sexual assault, the prayer for a closed session was allowed. Public order or morality were good reasons for excluding media and public (under Rule 79(A)(i)). In a number of jurisdictions, both civil and common law, identity of an alleged victim of sexual assault is kept away from the public - section 4 of the (UK) Sexual Offences (Amendment) Act, 1976, permitting anonymity in name, address or picture and Canadian Criminal Code (1954), sec. 442(3) permits granting anonymity from the public, upon application to Court.

Civil law jurisdictions such as Switzerland, Denmark and Germany have similar legislations. Swiss law prohibits the publication of identity of a victim if it is necessary to protect the interests of the prosecution or if the victim requests non-disclosure. The Court room may be closed during the victim's testimony. In Denmark, a victim in an incest or rape case, may request a trial in camera and the request would be granted. In Germany, publicity can be restricted or excluded, in order to protect the accused and witnesses. Further, in Prosecutor vs. Dusko Tadic (dt. 10.8.95) the majority cited several cases decided in the US, permitting non disclosure of identity of sexually assault victims. (Florida vs. B.J.F (1989) 491 US 524, Waller vs. Georgia (1984) 467 US 39; for partial closure see Douglas vs. Wainright (1984) 739 F.2d. 531 (11th Cir); for total closure see Press-Enterprise Co. vs. Superior Court: (1984) 464 US 501.

In regard to witnesses 'D' through to 'M', the fears were held not to be fully substantiated and therefore, instead of total confidentiality, the Chamber directed that the witnesses be shielded from visual recognition by

the public and media, but evidence will be in open session but through image altering devices.

(2) Partial Anonymity:

For witness B, the prosecution sought non-disclosure to the public and media and also protection from face-to-face confrontation with accused as it could increase danger to safety. The witness did not object to his name being disclosed. The Trial Chamber, on facts, held that the accused's rights must be respected, as stated in Kostovski vs. The Netherlands (1990) 12 EHRR 434, Art. 6 of the ECHR, Art. 14 of the ICCPR and Art. 21(4)(e) of the Statute of the Tribunal. The exceptions were public interest and public policy. In Unterpertinger vs. Austria (1991) 13 EHRR 175, the European Court of Human Rights held that non-confrontation of the accused with his accuser could amount to violation of Art. 6(1) of the ECHR. In Delaware vs. Fensterer (1985) 474 US 15, the US Supreme Court said that confrontation was necessary to expose the infirmities of forgetfulness, confusion, or evasion, by subjecting the witness to cross-examination. The Trial Chamber held by reference to Tadic case that the Judges must be able to observe the demeanour of the witnesses, must be aware of the identity of the witness in order to test his reliability; the accused must be enabled to question the witness on issues unrelated to his or her identity or current whereabouts – such as, how the incriminating material was obtained, (excluding information enabling tracing the name). Finally, the identity of the witness must be released when the reasons for requiring such security of the witness, are over.

The Trial Chamber held (as in Tadic) that before anonymity is granted, the following conditions must be satisfied:

(a) there must be real fear of the safety of the witness or his or her family;
(b) the testimony of the witness must be important to the case of the Prosecution;
(c) the Trial Chamber must be satisfied that there is no prima facie evidence that the witnesses are untrustworthy;
(d) the ineffectiveness or non-existence of a witness-protection-programme by the Tribunal and
(e) the protective measures taken, should be necessary.

The Prosecution admitted that accused would not know 'B' merely by his name. But, if that be so, unless there is face to face confrontation, there could not be effective cross-examination. This would violate accused's right to fair trial.

It is further observed by the Trial Chamber that it may conceive of a situation where the rights of the accused can be neutralized by protective measures. This was not such a case. The allegation of danger to safety was not substantiated. It was not made out that the witness was very important for the prosecution. The credibility of the witness had not been investigated. There was no proof that the physical assaults allegedly

suffered by witness 'B' were traceable to any of the accused persons. The request for testifying from a remote room was accordingly rejected. 'B' would testify from the court-room, where his demeanour could be observed by the Judges and the defence counsel. In addition, the accused could see B in the court-room and might communicate freely with their counsel, during the course of his direct testimony and cross-examination.

(3) Retraumatisation:

The Prosecution suggested that B should neither see the accused persons nor should they see him when giving testimony, otherwise, there would be 'retraumatisation'.

The Trial Chamber observed that face to face confrontation allowed observation of the facial and bodily expressions of the witness. (Coy vs. Iowa (1988) 487 US 1012), though "it is not an indispensable ingredient of a fair trial. Where there is conflict between the protection of a vulnerable witness and the requirement of a face to face confrontation, the latter must yield to greater public interest in the protection of the witness". This is exemplified by Rule 75(B)(iii) which enables the Trial Chamber to order "appropriate measures to facilitate the testimony of vulnerable victims and witnesses."

On facts, it was held that there was no proof of 'vulnerability' of witness B on the possibility of traumatisation, except the ipsi dixit of the prosecutor. Retraumatisation is essentially a medical, psychological

condition which required better proof than the evidence before the Trial Chamber. This submission was, therefore, rejected.

At the same time, the Trial Chamber also rejected the accused's plea that Rule 90(A) implied that a witness could only be heard in the Court-room.

An extract of the observations and directions of the Trial Chamber may give some idea as to what should be the nature and content of directions in similar circumstances:

> "Direct evidence is evidence presented directly before the Trial Chamber either from the court room or, in appropriate circumstances as determined and directed by the Trial Chamber, from the remote witness room. The mandate of the Trial Chamber is to ensure a fair trial and maintain a balance between the rights of the accused and the protection of the witness."

The Trial Chamber did not prescribe a remote room, but directed a screen to be placed in the court room to prevent witness B from seeing the accused and therefore, negate the possibility of the witness being traumatised, as he had claimed he would be.

The Court then gave a number of significant directions. It said:

> Special measures:
>
> (1) Testimony of witness 'C' will be heard in closed session during which neither

members of the public nor of the media shall be present. Edited recordings and transcripts of the closed sessions during which the testimony of witness 'C' is given, shall be released to the public and to the media after review by the office of the Prosecutor and the Victims and Witnesses Unit, to ensure that no information leading to the possible identification of the witness 'C' is disclosed. (Witness 'C', a male, was victim of sexual assault).

(2) Witness 'B' shall testify from the court room in open sessions during which the Trial Chamber and Defence counsel shall be able to observe his demeanour. A protective screen shall be placed between witness B and the accused persons to prevent the witness from seeing the accused. The accused persons shall be able to see witness 'B' on the electronic monitors assigned to them in the court room. Image altering devices shall be employed to ensure that the visual image of witness B is protected from the public and the media. The protective screen placed between the accused persons and B shall not impede the conduct of cross-examination in any manner and special

measures may be requested of the Trial Chamber in this regard.

(3) The testimony of witnesses ‘D’ to ‘M’ shall be given in open sessions using image altering devices in order to conceal their visual images from the public and the media.

(4) Unless the Trial Chamber determines that any part of the testimony of witnesses ‘B’ as also witnesses ‘D’ to ‘M’ should be heard in private sessions, every part of their testimonies will be heard in open sessions in the manner mentioned above.

(5) If, pursuant to a determination of the Trial Chamber, the testimony of any of the witnesses ‘B’ and ‘D’ to ‘M’ is heard in private sessions, recordings of the private sessions shall be released to the public and the media, after review by the Prosecutors and the Victims and Witnesses Unit, to ensure that no information leading to the possible identification of the witnesses is disclosed.

(6) Defence Counsel shall not cross-examine any of the pseudonymed witnesses (i.e. B to M), on any matters relating to their identities or by which their identification

may become known to the public or the media.

General Measures:

(7) The pseudonyms by which these witnesses have been designated shall be used whenever the witnesses are referred to in the present proceedings and in the discussion among the parties.

(8) The names, addresses, whereabouts and other identifying dates concerning the pseudonymed witnesses shall not be disclosed to the public or to the media.

(9) The names, addresses, whereabouts of, or other identifying information concerning the pseudonymed witnesses, shall be sealed and not included in any of the public records of the International Tribunal.

(10) To the extent the names, addresses, whereabouts of, or other identifying information concerning the pseudonymed witnesses are contained in existing public documents of the Tribunal, that information shall be expunged from those documents.

(11) Documents of the International Tribunal identifying the pseudonymed witnesses shall not be disclosed to the public or to the media.

(12) The above listed general measures shall apply to witnesses 'D', 'E', 'H' and 'M' only so far as the identifying information contained in any public documents or records of the International Tribunal reveals the fact that they are witnesses in this case. The general measures shall not apply to any documents or records containing the identifying information of witnesses 'D', 'E', 'H' or 'M' which does not reveal, either directly or by implication, that they are witnesses in this case.

(13) Defence Counsel and their representatives who are acting pursuant to their instructions or requests shall not disclose the names of pseudonymed witnesses or other identifying dates concerning these witnesses to the public or to the media, except to the limited extent such disclosure to members of the public is necessary to investigate the witnesses adequately. Any such

disclosure shall be made in such a way as to minimize the risk of the witnesses' names being divulged to the public at large or to the media.

(14) Edited recordings or transcripts of the closed session hearing on these motions held on 14.3.97 shall be released to the public and the media only after review by the office of the Prosecutor and the Victims and Witnesses Unit, to ensure that no information leading to the possible identification of the witnesses, is disclosed.

(15) The public and the media shall not photograph, video-record or sketch the pseudonymed witnesses while they are within the precincts of the International Chamber.

(j) 6.11 The International Criminal Tribunal for Rwanda (1994)

The Security Council of the United Nations, under Chapter VII of the Charter of UN, constituted the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1st January, 1994 and 31st December, 1994. (see http://www.ictr.org/english/basccdocs/statute.html)

6.11.1 The Statute (as amended) consists of 32 Articles. There are again Rules of Procedure and Evidence. There are three Trial Chambers. The office is divided into the Investigation Section and the Prosecution Section. There is an Appeal Chamber which is shared with the International Criminal Tribunal for the former Yugoslavia. (see http://www.retr.org/english/geninfo/structure.htm) . There is a Witness and Victims Support Section for Prosecution as well as Defence witnesses, in order to:

a) Provide impartial support and protection services to all witnesses and victims who are called to testify before the Tribunal;
b) Recommend the adoption of protective measures for victims and witnesses;
c) Ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in case of rape and sexual assaults;

d) Develop short and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family;
e) Respond to the Trial Chambers upon consultation, in the determination of protective measures for victims and witnesses; and
f) Request a Judge or a Chamber to order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

This section is responsible for protecting the privacy and ensuring the security and safety of all witnesses who are called by both the Defence and the Prosecution. It is also responsible for the movement of the witnesses from the place of residence to the headquarters of the Tribunal where they are called to testify. It provides the witnesses with all required assistance to enable them to travel safely and to testify in a secure and conducive environment. Under (f) above, the Judge or Chamber may grant measures if a case is made out for concealment of name or identity from the public and media. Post-trial witness programme ensures relocation of witnesses (thought to be particularly at risk), in other countries or within Rwanda. The Section also organizes, accumulates, provides, multifaceted support and the physical and international protection of witnesses. The Section ensures easy immigration to other countries by negotiations through UN. The Section maintains anonymity of witnesses and following up on them after their testimony.

6.11.2 Art. 14 of the Statute refers to the Rules of Procedure and Evidence, Art. 20 to the Rights of the accused and Art. 21 to the Rights of Victims and Witnesses.

"Article 20: Rights of the Accused

(1) All persons shall be equal before the International Tribunal for Rwanda.
(2) In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Art. 21 of the Statute.
(3) The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.

(4) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with Counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of his right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;

(g) Not to be compelled to testify against himself or herself or to confess guilt."

Article 21: Protection of Victims and Witnesses.

"The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protective measures shall include, but shall not be limited to, the conduct of, in camera proceeding and the protection of the victim's identity."

6.11.3 Rules of the Tribunal (1995) :

(i) Rule 89A states that the Tribunal is not bound by national rules of evidence.

(ii) Rule 89C states that any relevant evidence is admissible if it is in accordance with the requisites of a fair trial.

(iii) Rule 96(i) states that in cases of victims of sexual assault, no corroborative evidence is necessary.

(iv) Rule 34 deals with Victims and Witnesses Support Unit.

(v) Rule 69 deals with Protection of Victims and Witnesses:

"Rule 69:

(A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Support Unit.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and the defence."

(vi) "Rule 70: Matters not subject to Disclosure:

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or the entity providing the initial information and shall, in any event, not be given in evidence without prior disclosure to the accused.

(C) If, after obtaining the consent to the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from

the persons or entity providing the initial information, nor may the Trial Chamber, for the purpose of obtaining such additional evidence, itself summon that person or a representative of that entity as a witness or order their attendance.

(D) If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.

(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to limitations contained in Sub Rules (C) and (D).

(F) Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber's power under Rule 89(C) to exclude evidence if its protective value is substantially outweighed by the need to ensure a fair trial.

(vii) Rule 71: Deposition (i.e. to be taken elsewhere or by video-conference)

(A) At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer.

(B) The motion for the taking of a deposition shall be in writing and shall indicate the name and whereabouts of the witness whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the exceptional circumstances justifying the taking of the deposition.

(C) If the motion is granted, the party at whose request the deposition is to be taken, shall give reasonable notice to the other party, who shall have the right to attend the taking of the deposition and cross examine the witness.

(D) The deposition may also be given by means of a video-conference.

(E) The presiding Officer shall ensure that the deposition is taken in accordance with the Rules and that a record is made of the deposition, including cross examination and objections raised by either party for decision by the Trial Chamber. He shall transmit the record to the Trial Chamber."

(viii) "Rule 73 (bis): Pre-trial Conference:

(A) ……. …. …. ….

(B) At the Pre-trial conference, the Trial Chamber or a Judge designated from amongst its Members may order the Prosecutor, within a time limit set by the Trial Chamber 1st Judge and before the date set for trial, to file the following:

(i) A pre trial brief ….

(ii) Admissions by the parties….

(iii) …. …. ….

(iv) A list of witnesses the Prosecutor intends to call with

(a)the name or pseudonym of each witness

(b)a summary of the facts on which each witness will testify

(c)the points in the indictment on which each witness will testify; and

(d)the estimated length of time required for each witness.

(v) A list of exhibits ……

(C) ….

(D) ….

(F) ….

(ix) Rule 73 ter: Pre-Defence Conference

(A) ….

(B) ….

(C) ….

(D) ….

(E) ….

(F) ….

(x) Rule 74: Amicus Curiae

A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber.

(xi) Rule 74 bis: Medical examination of the Accused

…. …. …. ….

(xii) Rule 75: Measures for the Protection of Victims and Witnesses

(A) A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Chamber may hold an in camera proceeding to determine whether to order notably:

(i) Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:

(a) Expunging names and identifying information from the Tribunal's public records;

(b) Non-disclosure to the public of any records identifying the victim;

(c) Giving of testimony through image-or-voice altering devices or closed circuit television; and

(d) Assignment of a pseudonym.

(ii) Closed session, in accordance with Rule 79;

(iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one way closed circuit television.

(C) A Chamber shall control the manner of questioning to avoid any harassment or intimidation.

(xiii) Rule 76: Solemn Declaration by Interpreters and Translators

…. ….

(xiv) Rule 77: Contempt of the Tribunal:

6.12 Judgments:

There are a number of judgments of the Tribunal under the Rwanda statute and they have been following the precedents of the Yugoslav Tribunal.

We shall, however, refer to one judgment of the Trial Chamber-I.

6.12.1 The Prosecutor vs. Jean-Paul Akayesu (2.9.1998)

The charges involved genocide and other violations of human rights where 2000 Tutsis were killed in 1994. There were contradictions in the evidence but the Trial Chamber attributed it to the trauma of the witnesses. It said that "Many of the eye-witnesses who testified before the Chamber in this case have seen the atrocities against their family members or close friends, and/or have themselves been victims of such atrocities. The possible traumatision of these witnesses caused by their painful experience of violence during the conflict in Rwanda is a matter of particular concern for the Chamber. The recounting of this traumatic experience is likely to evoke memories of the fear and pain once inflicted on the witnesses and thereby affects his or her ability fully or adequately to recount the sequence of events in a judicial context".

The Chamber did not exclude the possibility of trauma and stress, it believed the evidence, in spite of discrepancies, and order non-disclosure of the identity of witnesses to the media or public. The accused were convicted.

CHAPTER VII

Witness Protection Programmes – A Comparative Study of Programmes in various countries

7.0 In the previous Chapter, we have dealt with protection of Witness Identity in various countries. In the present Chapter, we propose to refer to Witness Protection Programmes in various countries.

Statutes dealing with Witness Identity and Anonymity, as noted in the previous Chapter, mainly deal with the protection of witnesses' identity during investigation and trial of criminal cases. However, there are also specialized Witness Protection Programmes which deal with a slightly different kind of protection to witnesses and this refers to their protection outside Court. We shall now proceed to refer to the schemes in various countries.

To start with, it will be useful to refer to the UN Convention in regard to Witness Protection.

There is a 'United Nations Convention Against Transnational Organised Crime'. The purpose of this Convention is to promote cooperation to prevent and combat transnational organised crime more effectively. Article 24 of the Convention deals with protection of witness. It reads as follows:-

'Article 24 – Protection of witness'

1). Each state party shall take appropriate measures within it means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate for their relations and other persons close to them.

2). The measures envisaged in paragraph of this article may include, inter-alia, without prejudice to the rights of the defendant including the right to due process:

a) Establishing procedures for the physical protection of such persons, such as to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communication technology such as video links or other adequate means;

3). State parties shall consider entering into agreement or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4) The provisions of this article shall also apply to victims in so far as they are witnesses."

7.1 Australia

7.1.1. Victoria

In Australia, the Parliament of Victoria has enacted 'Witness Protection Act, 1991' (Act 15 of 1991), for the purposes of facilitating the security of persons who are, or have been, witnesses in criminal proceedings. The Act was amended in 1994 (No. 28/1994) and in 1996(NO. 58/1996). The word 'witness' is defined in section 3.

Section 3A refers to Victorian Witness Protection Programme. As per sub section (1) of section 3A, the Chief Commissioner of Police,

may take such action as he thinks necessary and reasonable to protect the safety and welfare of a witness or a member of the family of a witness. Actions which can be taken by the Chief Commissioner are mentioned in sub-section (2), which reads as follows:-

"(2) that action may include-

(a) applying for any document necessary;

(i) to allow the witness or family member to establish a new identity; or

(ii) otherwise to protect the witness or family member;

(b) relocating the witness or family member;

(c) providing accommodation for the witness or family member;

(d) providing transport for the property of witness or family member;

(e) doing any other things that the Chief Commissioner of Police considers necessary to ensure the safety of the witness or family member."

The Chief Commissioner of Police has the sole responsibility of deciding whether to include or not to include a witness in the Victorian Witness Protection Programme. A witness may be included in such Protection Programme only if the Chief Commissioner has decided that the witness be included and if such witness agrees to be included.

Under Section 3B, the Chief Commissioner must also enter into a memorandum of understanding (MOU) with the witness. The memorandum of understanding must set out the basis on which the witness is included in the Victorian Witness Protection Programme and details of the protection and assistance that are to be provided and should also contain a provision that protection and assistance may be terminated if the witness commits breach of a term of the memorandum of understanding (MOU). An MOU must be signed by the witness or by a parent or guardian or other legal personal representative of the witness if the witness is under the age of 18 or otherwise lacks legal capacity to sign.

After the signing of the MOU, the Chief Commissioner may apply to the Supreme Court for a court order authorising a nominated member of the police force to make a new entry in the Register of Births or Register of Marriages in respect of the witness and specified members of the family of the witness. As per section 7, the Supreme Court may make an authorising court order if it is satisfied that:

(a) the person named in the application as a witness, was a witness to or has knowledge of an indictable offence and

is or has been a witness in criminal proceedings relating to the indictable offence; and

(b) the life or safety of the person or of a member of his or her family may be endangered as a result of the person being a witness; and

(c) a memorandum of understanding in accordance with section 5 has been entered into between the witness and the Chief Commissioner of Police; and

(d) the person is likely to comply with the memorandum of understanding.

The effect of the order of the court is provided in section 8. On the making of an court order, the member or members of the police force nominated in the court order may make any type of entries in the Register of Births and Register of Marriages that are necessary to give effect to the order. An entry made in these registers under this Act can be cancelled by the Registrar, if the Supreme Court has made a court order on the application of the Chief Commissioner of Police directing that the entry be cancelled. Proceedings of the Supreme Court for authorising any court order under this Act have to be in a closed proceeding.

Any information relating to the making of an entry in the Register of Births and Register of Marriages under this Act should not be disclosed or communicated to another person unless it is necessary to do so for the purpose of the Act or to comply with an order of the Supreme Court. Any person who violates this provision may be punished for imprisonment for ten years.

Section 16 provides for cessation of protection and assistance. Sub section (1) states that protection and assistance provided to a person under the Victorian Protection Programme shall be terminated by the Chief Commissioner on the request made by that person in writing that it be terminated. The protection and assistance may also be terminated by the Chief Commissioner if-

(a) the person deliberately breaches a term of MOU or a requirement or undertaking relating to the programme; or

(b) the person's conduct or threatened conduct is, in the opinion of the Chief Commissioner, likely to threaten the security or compromise the integrity of the programme; or

(c) the circumstances that gave rise for the need for protection and assistance for the person ceased to exist.

The Chief Commissioner shall notify his decision to terminate protection and assistance to the concerned person. After receiving the notification, the concerned person may, within 28 days, apply in writing to the Chief Commissioner for a review of the decision. If the Chief Commissioner after the review confirms the decision, the concerned person may within 3 days, appeal to the deputy Ombudsman.

If under the Victorian Witness Programme, a person has been provided with a new identity and, thereafter, protection and assistance to the person under the programme are terminated, then the Chief Commissioner, may take such action as is necessary to restore the person's former identity.

7.1.2 National Capital Territory:

For the Australian Capital Territory, a separate legislation to protect the safety and welfare of witnesses, namely Witness Protection Act, 1996 is in force. It is almost on the same lines as the Victorian Witness Protection Act, 1991. The powers and functions of Chief Police Commissioner provided under the Victorian Protection of Witness Act, 1991 are here given to the Chief Police Officer, in the Witness Protection Act, 1996. Witness Protection Programme is provided in section 4 of the Act of 1996. As per sub section (1) of sec. 4, the Chief Police Officer may make arrangements with the Commissioner of Police for providing service under the Witness

Protection Programme. The Chief Police Officer shall also take actions which are necessary and reasonable to protect the safety and welfare of a witness. Actions which can be taken by the Chief Police Officer are mentioned in sub section (2) of sec. 4, which reads as follows:-

"2) The action that may be taken under sub section (1) includes –

(a) making arrangements necessary –

(i) to allow the witness to establish a new identity; or

(ii) otherwise to protect the witness; or

(b) relocating the witness; or

(c) providing accommodation for the witness; or

(d) providing transport for the property of the witness; or

(e) providing reasonable financial assistance to the witness; or

(f) permitting persons involved in the administration of the Witness Protection Programme to use assumed names in carrying out their duties and to have documentation supporting those assumed names; or

(g) doing any other thing permitted under the Witness Protection Programme to ensure the safety of the witness; or

(h) doing things as a result of functions given to the Chief Police Officer under a complementary Witness Protection law"

As per section 5, the assessment and inclusion in the Witness Protection Programme shall be done in accordance with the similar provisions contained in the Commonwealth's Witness Protection Act, 1994.

The Chief Police Officer, under section 6, may apply for any document which is necessary to allow a witness to establish a new identity; or otherwise to protect the witness. The Chief Police Officer under section 7, may apply to the Supreme Court for a court order authorising a specified person or a person of a specified class or description of persons-

(a) to make a new entry in the register in relation to a witness; or

(b) to issue in the witness's new identity, a document of a kind previously issued to the witness.

The Supreme Court may make a witness protection order under section 8, if the conditions laid down in clause (a) to (d) thereof – which are on the same lines as sec. 7 of the Victorian Statute, 1991 – are satisfied.

If the witness protection order relates to making a new entry in the Register, then the person authorised to do so by the order may make any type of entries in the Register that are necessary to give effect to that order. An entry made in the Register under the Act of 1996 has the same effect as

if it were an entry made under the Births, Deaths and Marriages Registration Act, 1997. An entry made in the register may also be cancelled by the Registrar General if the Supreme Court has made an order on the application of the Chief Police Officer directing that the entry be cancelled. (see Sections 10 and 11). The hearing in the Supreme Court under this Act shall not be open to public. As per section 13, no person shall directly or indirectly, make a record of, or disclose, or communicate to another person any information relating to the making of an entry under the Act in the Register, unless it is necessary to do so for the purpose of or for investigation by the ombudsman or to comply with an order of the Supreme Court. Imprisonment upto 10 years may be awarded in case a person is found guilty of this provision. Provisions as to non-disclosure of former identity of participant are contained in section 14.

Sub section (1) of sec. 14 reads as follows:

"(1) If –

(a) a participant who has been provided with a new identity under the Witness Protection Programme would, apart from this section, be required by or under a Territory law

to disclose his or her former identity for a particular purpose, and

(b) the Chief Police Officer has given the particular permission, in writing, not to disclose his or her former identity for that purpose;

the participant is not required to disclose his or her former identity to any person for that purpose."

It will be seen that as per sub-section (1) of sec. 14, when a participant has been provided with a new identity under the Witness Protection Programme, he would, apart from this section, be required to disclose his or her identity if required by or under a Territory law and, if the Chief Police Officer has given to him the permission in writing not to disclose his or her former identity for that purpose; the participant is not required to disclose his former identity to any person for that purpose. Sub section (2) provides that if a participant has been given permission under section (1) not to disclose his former identity for a particular purpose, it will be lawful for the participant, in any proceedings or for any purpose, under or in relation to the relevant Territory law to claim that his new identity is his only identity. According to section 15, when a person is provided with a new identity and that person is to be a witness in a criminal proceeding

under that identity, ‘but that person has a criminal record under his former identity’, then such person should notify the Chief Police Officer that the person is to be a witness in the proceeding. After being notified, the Chief Police Officer may take any action which is appropriate in the circumstances. That action may include disclosing to the court, the prosecutor and the accused person or the accused’s lawyer the criminal record of the participant.

It is provided in section 16 that when the identity of a participant is in issue or may be disclosed in any proceeding in a court, tribunal, royal commission or board of inquiry, such court, tribunal etc. shall conduct that part of the proceedings that relates to the identity of the participant, in private. The court, tribunal etc. as the case may be, shall also make the order that the evidence given in such court or other body shall not be published so that the identity of the participant may not be disclosed. Similarly when a participant who has been provided with a new identity is giving evidence in any proceeding in a court or tribunal, such court or tribunal may also direct that that part of the proceedings shall be in the absence of the public.

In the Witness Protection Act, 1996 there are provisions which deal with rights and obligations of the participants. If a participant has any

outstanding rights or obligations or is subject to any restriction, Section 19 (1) provides that the Chief Police Officer is required to take steps that are reasonably practicable to ensure that those rights or obligations are dealt with according to law; or the concerned person complies with those according to law; or the concerned person complies with those restrictions. When a participant who has been provided a new identity uses the new identity either to avoid obligations that were incurred before the new identity was established or to avoid complying with restrictions that were imposed on the person before the new identity was established, then as per section 20 the Chief Police Officer, shall give written notice to the participant stating that he is satisfied that participant is avoiding obligations or complying with restrictions.

Any disclosure made by any person about the identity or location of any participant or any disclosure which compromises the security of such participant, are made offences under section 21. Imprisonment upto 10 years may be imposed if any person found guilty of committing such offence. Disclosure made by the participant or former participant is also an offence under section 22.

7.1.3 Australian Crime Commission Bill, 2003

The Bill contemplates the appointment of a Commission to investigate into criminal activities of various persons. There are provisions proposed in the Australian Crime Commission Bill, 2003 which protect the witness who appears before the Commission. Clause 29 of the Bill which is relevant is reproduced here:

"29. **Protection of witnesses from harm or intimidation**.

If it appears to an examiner that, because a person -

(a) is to appear, is appearing or has appeared at an examination before the examiner to give evidence or to produce a document or thing; or

(b) proposes to give or has given information, or proposes to produce or has produced a document or thing, to the Australian Crime Commission (ACC), otherwise than at an examination before the examiner;

the safety of the person may be prejudiced or the person may be subjected to intimidation or harassment, the examiner may make the arrangements (including arrangements with the Territory Minister or with members of the police force) that are necessary to avoid prejudice to the safety of the person, or to protect the person from intimidation or harassment".

7.1.4 **Queensland**

In Queensland, the Crime and Misconduct Commission (CMC) administers the Witness Protection Programme. This programme provides protection to persons eligible under the Witness Protection Act, 2000. In fact the Witness Protection Programme commenced in August, 1987 during the Fitzgerald Commission of Inquiry into police corruption, when it became necessary to protect several important witnesses who were able to give direct evidence of crime and corruption. At the end of Fitzgerald Inquiry, the Witness Protection Division was established as a separate organisational unit within the newly created Criminal Justice Commission. The Criminal Justice Commission merged with the Queensland Crime Commission to become the CMC on January 1st, 2002.

Evidence (Witness Anonymity) Amendment Act, 2000: (Queensland)

The Parliament of Queensland has enacted, 'Evidence (Witness Anonymity) Amendment Act, 2000, by which Evidence Act, 1977 has been amended and Division 5 regarding 'witness anonymity' has been inserted. Section 21C refers to the scope of applicability of this newly inserted

Division. According to this section, this Division is applicable to a proceeding in which a witness, who is or was a covert operative is or may be required to give evidence that was obtained when the operative was engaged in activities for a 'controlled operation'. Here 'Controlled Operation' means an operation approved under the Police Powers and Responsibilities Act, 2000 for the purpose of an investigation being conducted by a law enforcement agency. 'Covert Operative' means a police officer or other person named as a covert operative in an approved operation under the Police Powers and Responsibilities Act, 2000. As per section 21D (1), a witness anonymity certificate may be given by the Chief Executive Officer of a law enforcement agency, if the officer considers that it is necessary to protect a person who is, or was, a covert operative for the agency and he is or may be required to give evidence in the proceeding. A witness anonymity certificate may also be given by a senior police officer for police service, under sub-section (2). The power under these sub sections(1) and (2) may not be delegated. A decision to give a witness anonymity certificate is final and conclusive and cannot be impeached for informality or want of form and also cannot be appealed against, reviewed, quashed or invalidated in any court. Effect of witness anonymity certificate is provided in section 21F which reads as follows-

"**21F Effect of witness anonymity certificate**

On the filing of witness anonymity certificate –

(a) the witness ("protected witness") may give evidence in the relevant proceeding under the name the witness used in the relevant controlled operation; and,

(b) subject to section 21I-

(i) a question may not be asked that may lead to the disclosure of the actual identity of the protected witness or where the protected witness lives; and

(ii) a witness, including the protected witness, cannot be required to answer a question, give any evidence, or provide any information, that may lead to the disclosure of the actual identity of the protected witness or where the protected witness lives: and

(iii) a person involved in a relevant proceeding must not make a statement that discloses or could disclose the actual identity of the protected witness or where the witness lives".

Under sec. 21G, the relevant law enforcement agency is required to give a copy of the witness anonymity certificate to the following-

(a) for criminal proceeding – each accused person or the person's lawyer.

(b) for civil proceeding – each party to the proceeding or the party's lawyer.

(c) for any other proceeding – each person who has been given leave to appear in the proceeding or the person's lawyer.

Under sec. 21H, the relevant entity (which means the entity before whom the relevant proceeding is being heard or conducted) may make any order which it considers necessary to protect the identity of the protected witness. For example, an order prohibiting sketching of the witness or an order that the witness shall give evidence in the absence of the public, can be passed. Any contravention of such an order is a punishable offence. However, under section 21I, the relevant entity may, on application to it, give leave to ask questions of a witness including a protected witness, in respect of his identity or place of residence. But, the leave shall not be granted unless the relevant entity is satisfied that -

(a) there is some evidence that, if believed, it would call into question the credibility of the protected witness; and

(b) it is in the interests of justice for the relevant party to be able to test the credibility of the protected witness; and

(c) it would be impracticable to test properly the credibility of the protected witness without knowing the actual identity of the witness.

7.2 SOUTH AFRICA

In South Africa, 'Witness Protection Act, 1998' is applicable for the purpose of protection of witnesses. An office known as Office for Witness Protection is established. The head of the office is called Director. Powers, functions and duties of the Director are prescribed in section 4. Branch offices may also be established and Witness Protection Officer can be appointed as head of such branch offices.

Under sec. 7, an application for witness protection may be given. Any witness who has reason to believe that his safety or the safety of any related person may be threatened by any person or group of persons by reason of his being a witness, may report accordingly and apply that he or

any related person be placed under protection. Such report may be made (i) to the investigating officer; (ii) to any person in charge of a police station; (iii) to the in-charge of the prison if he is in prison; (iv) to any person registered as a social worker under the Social Works Act, 1978, if he is in prison; (v) to the public prosecutor; (vi) to any member of the office of the witness protection.

Under sec. 7(2), if such witness is unable to make a report or make an application for protection, any interested person or investigation officer may make such report or application on behalf of the witness.

Any person to whom such report or application is made, shall forthwith inform the Director and submit the application to the Director or a Witness Protection Officer. The Director may refer an application to a Witness Protection Officer for evaluation and the submission of a report.

Under sec. 9, the Witness Protection Officer shall consider the merits of an application and, as soon as possible, report thereon to the Director. The report shall be in writing and should include particulars as to (a) whether a person concerned is a witness or not; (b) recommendations as to whether the person concerned qualifies for protection; (c) the factors taken into consideration and (d) any other matter. Witness Protection Officer may also recommend with regard to the nature and expected duration of the

protection. If the Witness Protection Officer recommends that the application for protection be refused, he shall inform the Director, of the reasons for such recommendation.

Section 8 deals with interim protection, pending disposal of the application filed under sec. 7. The Director or a Witness Protection Officer, may, pending the finalisation of an application for protection of a witness, place the witness or related person under temporary protection for a period not exceeding 14 days for the safety of such witness or related persons.

Section 10(1) provides that the Director, while considering an application for protection, should take into account-

"(a) the nature and extent of the risk to the safety of the witness or any related person;

(b) any danger that the interests of the community might be affected if the witness or any related person is not placed under protection;

(c) the nature of the proceedings, in which the witness has given evidence or is or may be required to give evidence;

(d) the importance, relevance and the nature of the evidence given or to be given by the witness in the proceeding;

(e) the probability that the witness or any related person will be able to adjust the protection;

(f) the cost likely to be involved in the protection of the witness or any related person;

(g) the availability of any other means of protecting the witness without involving the provision of the Act;

(h) any other factor that the Director deems relevant.

Section 10(3) refers to an agreement between the witness and the Director in regard to the protection of the witness, which may be entered into under sec. 11. Sec. 10(3) states that after having considered the application for protection, the Director may, (i) either approve the application and thereupon, the witness or related person under protection, in accordance with the agreement entered into by or on behalf of the witness or related person and the Director) or (ii) refuse the application.

Section 11 provides that the Director must, before he places any witness or related person under protection, enter into a witness protection agreement with such witness or related person setting out the obligations of the Director and the witness or related person in respect of such placement under protection. Obligations of the Director and the witness or related person are provided in sub section (4) of section 11. They include:

"(a) An obligation on the Director –

(i) to take such reasonable steps as are necessary to provide the protected person with the protection and related services, as referred to in the protection agreement concerned; and

(ii) not to keep a protected person under protection in any prison or police cell, unless otherwise agreed upon;

(b) an obligation on the witness or the related person -

(i) where applicable, to give the evidence as required in the proceedings to which the protection relates;

(ii) to meet all financial obligations incurred by him or her that are not payable by the Director in terms of the protection agreement;

(iii) to meet all legal obligations incurred by him or her, including any obligations regarding the custody and maintenance of children and taxation obligations;

(iv) to refrain from activities that constitute a criminal offence;

(v) to refrain from activities that might endanger his or her safety or that of any other protected person;

(vi) to accept and give effect to all reasonable requests and directions made or given by any members of the Office in relation to the protection provided to him or her and his or her obligations;

(vii) to inform the Director of any civil proceedings which have or may be instituted by or against him or her or in which he or she is otherwise involved;

(viii) to inform the Director of any civil proceedings which have or may be instituted by or against him or her or in which he or she is involved, either as a witness or as accused or otherwise; and

(ix) not to endanger the security or any other aspect of the protection of witnesses and related persons or related services or any other matter relating to a witness protection programme provided for in this Act;

(c) any other prescribed terms and conditions or obligations agreed upon; and

(d) a procedure in accordance with which the protection agreement may, if necessary, be amended."

Section 12 deals with 'protection to minors'.

Under sec. 13(10), the Director may, on his own accord, or upon receipt of a report from the Witness Protection Officer and after considering any representation of the protected person, by written notice, discharge any protected person.

However, under sec. 14, the Minister of Justice may review the decision of the Director to discharge any person from protection. Any person who feels aggrieved by any decision of or steps taken by the Director, may apply to the Minister to review the decision of the Director.

Section 15 deals with civil proceedings to which a protected person is a party or in which he is a witness. According to this section, if it appears to a judge of a High Court in an ex-parte application made to him by the Director, that the safety of any protected person might be endangered by the institution or prosecution of any civil proceedings in which a protected person is a party or a witness, the judge may make any appropriate order with regard to the institution or prosecution or postponement of those proceedings. The purpose of the order shall be to prevent the disclosure of the identity or whereabouts of the said protected person or to achieve the objects of the Act.

Section 16 refers to 'access to minor under protection'.

Section 17 provides that no person shall disclose any information which he has acquired in exercise of powers, functions etc. under the Act, except for the purpose of giving effect to the provisions of the Act or when required to do so by any court. Sub sections (5) to (7) provide the manner and condition in which the Director may disclose any information.

Section 18 prohibits publication of information concerning a protected person. The Presiding Officer shall make an order prohibiting the publication of any information, including any drawing, picture, illustration, painting, photograph (including photographs produced through or by means of computer software on a screen or a computer print out), pamphlet, poster or other printed matter, which may disclose-

i) the place of safety or location of any protected person or where he has been relocated;

ii) the circumstances relating to his protection;

iii) the identity of any other protected person and the place of safety or location when such person is being protected; or

iv) the relocation or change of identity of a protected person.

The protected person is, however, not obliged to disclose the information mentioned above.

Section 19 contains a non-obstante clause and provides that no protected person when giving evidence or producing any book, document etc. in any proceedings or in any civil proceeding before a court, shall be obliged to disclose such information.

Under Section 20, the Director may receive any donation, bequest or contribution in money or otherwise from any source for the purpose of giving effect to the provisions of the Act.

Under section 21, the Minister of Justice may enter into an agreement with any international body, institution, organisation or foreign country in order to -

(a) place a person who is being protected under a witness protection programme administered by that body, institution, organisation or country under protection in terms of the Act;

(b) admit protected person to a Witness Protection Programme in terms of any law applicable to that body, institution, organisation or in that country.

7.3 HONG KONG

In Hong Kong, the Witness Protection Programme is established under Witness Protection Ordinance (67 of 2000). As per the Ordinance, the approving authority is required to establish and maintain the Witness Protection Programme. The approving authority arranges or provides

protection and other assistance for witness's personal safety or well being that may be at risk as a result of being a witness. 'Approving Authority' means a person designated in writing by the Commissioner of Police or the Commissioner of the Independent Commission against Corruption. The approving authority, as per section 4, has the sole responsibility of deciding whether or not to include a witness in the Witness Protection Programme. A witness may be included in the Witness Protection Programme only if (a) the authority has decided that the witness be included; (b) the witness agrees to be included; and (c) the witness signs a memorandum of understanding. Apart from the nature of the perceived danger to the witness, the approving authority should, in deciding whether or not to include a witness in the Witness Protection Programme, have regard to the factors mentioned in sub section (3) of section 4. The approving authority may also require a witness to undergo psychological, psychiatrist, or other medical tests or examination and make the results available to the authority for the purpose of assessing whether the witness shall be included in the programme or not. The authority may also make other inquires and investigations. The witness is required to provide the authority with all necessary information as per section 5. The contents of the memorandum of understanding are set out in section 6. When a witness is included in the Witness Protection

Programme, the approving authority shall take all necessary and reasonable actions which are required to protect the witness's safety and welfare. The approving authority as per section 8 may establish a new identity for a participant in Witness Protection Programme. Necessary documents shall be issued for the purpose of establishing the new identity. If a participant has legal rights or obligations which are outstanding or is subjected to legal restrictions, the authority shall take reasonable and practicable steps to ensure that those rights and obligations are dealt with according to law and that those restrictions are complied with. Section 10 permits non-disclosure of original identity. Where a participant who has been provided with a new identity, would be required by or under a law of Hong Kong to disclose his original identity for a particular purpose, and the approving authority has given him written permission not to disclose his original identity for that purpose, the participant is not required to disclose his original identity to any person for that purpose. He may claim that his new identity is his only identity.

Under section 11, the approving authority may terminate the protection of a participant. Where a new identity is issued under the protection programme and if that protection is terminated as per section 11, the original identity of the participant shall be restored.

A Board is established to review certain decisions of approving authority. The Board is to consist of (i) an officer who is more senior than the approving authority designated by the Commissioner of Police, and (ii) two persons who are not public officers. The Board may also consist of additional members who may or may not be public officers (section 14).

A person who is aggrieved by a decision of the approving authority (a) not to include him; (b) to terminate his protection as a participant; or (c) not to establish a new identity for him as a participant, in the Witness Protection Programme, may request in writing that the approving authority's decision be reviewed by the Board.

If a participant has been with a new identify or has been relocated under the Witness Protection Programme and is notified to the appropriate authority that the participant has been arrested or is liable to arrest for an arrestable offence, then the approving authority may-

i) release the new identity or new location of the participant;

ii) provide the criminal record and the finger prints of the participant;

iii) release other information; and

iv) allow officers of the law enforcement agency to interview him.

Section 17 prescribes offences. A person is not allowed to disclose information about the identity or location of a participant or such information that compromises the security of such a person. Similarly, a person who is or has been a participant shall not disclose:-

a) the fact that he is or has been a participant;
b) information as to the way in which the witness protection programme operates;
c) information about any officer who is or has been involved in the witness protection programme
d) the fact that he has signed memorandum of understanding;
e) any details of such a memorandum of understanding.

Contravention of these conditions are punishable offences. As per section 18, the approving authority, officers working with such authority or other public officers performing functions in relation to the Witness Protection Programme, shall not be required:-

a) to produce in a court, tribunal, commission or inquiry any document that has come into the custody or control in the course of his duties in relation to the Witness Protection Programme;

b) to disclose or communicate to such body any matter or thing that has come to his notice;

Where a participant has to give evidence for the HKSAR in legal proceedings, the Judge or Magistrate may, upon an ex-parte application by the prosecution, authorise a police officer to require all members of the public wishing to enter the court room to-

a) identify themselves to the satisfaction of the officer; and
b) undergo such search as the officer may require to ensure that they are not carrying into the court room anything which would pose a threat to the security or well being of the participant.

7.4 CANADA

In Canada 'Witness Protection Programme Act, 1996' (C.15) has been enacted. The Act is enacted to provide for the establishment and operation of a programme to enable certain persons to receive protection. As per sec. 2, 'protection' is defined as including relocation, accommodation and change of identity as well as counselling and financial support. As per section 3, the purpose of the Act is to promote law-enforcement by facilitating the protection of persons who are involved in

providing assistance in law enforcement matters. In order to facilitate the protection of a witness, a programme known as the Witness Protection Programme is established under section 4. The programme is being administered by the Commissioner of the Force. The Commissioner may determine whether a witness should be admitted to the programme and the type of protection to be provided to any protectee.

Under sec. 6(1) a witness can be admitted to the programme only if-

a) the law enforcement agency or an international criminal court or tribunal has made a recommendation for the purpose of admission.

b) the witness has provided the Commissioner of the Force, such information concerning the personal history of the witness which enables the Commissioner to consider the factors referred to in section 7.

c) the agreement has been entered into by or on behalf of the witness with the Commissioner setting out the obligations of both parties.

However, under sec. 6(2) in case of emergency, the Commissioner may provide protection upto 90 days to a person who has not entered into a protection agreement referred above. The factors which have to be

considered by the Commissioner while determining whether a witness should be admitted to the programme are set out in section 7 as follows:

(a) the nature of the risk to the security of the witness;

(b) the danger to the community if the witness is admitted to the Programme;

(c) the nature of the inquiry, investigation or prosecution involving the witness and the importance of the witness in the matter;

(d) the value of the information or evidence given or agreed to be given or of the participation by the witness;

(e) the likelihood of the witness being able to adjust to the Program, having regard to the witness's maturity, judgment and other personal characteristics and the family relationships of the witness;

(f) the cost of maintaining the witness in the Program;

(g) alternative methods of protecting the witness without admitting the witness to the Program; and

(h) such other factors as the Commissioner deems relevant.

The obligations under the protection agreement are narrated in section 8. The obligations are as follows:

(a) on the part of the Commissioner, to take such reasonable steps as are necessary to provide the protection referred to in the agreement to the protectee; and

(b) on the part of the protectee,

(i) to give the information or evidence or participate as required in relation to the inquiry, investigation or prosecution to which the protection provided under the agreement relates,

(ii) to meet all financial obligations incurred by the protectee at law that are not by the terms of the agreement payable by the Commissioner,

(iii) to meet all legal obligations incurred by the protectee, including any obligations regarding the custody and maintenance of children,

(iv) to refrain from activities that constitute an offence against an Act of Parliament or that might compromise the security of the protectee, another protectee or the Program, and

(v) to accept and give effect to reasonable requests and directions made by the Commissioner in relation to the protection provided to the protectee and the obligations of the protectee.

As per section 11(1), any information about the location or change of identity of a protectee or former protectee cannot be disclosed by any person. However, under sec. 11(2) a protectee or former protectee may disclose such information which does not endanger the safety of another protectee or former protectee and does not compromise the integrity of the programme. Further, under sec. 11(3) the Commissioner of Force may disclose information of the kind mentioned above, in certain circumstances as stated below:

a) with the consent of the protectee,

b) when the protectee has previously disclosed such information; or

c) when the disclosure is essential in the public interest; or

d) where the disclosure is essential to establish the innocence of a person, in a criminal proceeding.

Under sec. 13, a person whose identity has been changed as a consequence of the protection, shall not be held liable or punished for making a claim that the new identity is and has been the person's only identity.

Under sec. 14, the Commissioner may enter into an agreement with a law enforcement agency or with the Attorney General of Province to enable a witness, who is involved in activities of such law enforcement agency or the Force of such province, to be admitted for the Witness Protection Programme. Apart from this, the Commissioner may also enter into an agreement with any provincial authority in order to obtain documents and other information that may be required for the protection of a protectee. As per sub sections (2) and (3) of the section 14, the Minister (Solicitor General of Canada) may enter into a reciprocal agreement with the Government of a foreign jurisdiction or with an International Court or tribunal to enable a witness who is involved in activities of a law enforcement agency in that jurisdiction of a foreign country or in activities of that court or tribunal, as the case may be, to be admitted to the Witness Protection Programme.

The protection of witness provided under this Act, may be terminated by the Commissioner of Force.

7.5 PORTUGAL:

The Portuguese legislation (Act No. 93/99 of 14th July, 1999) deals with the provisions governing the enforcement of measures on the "protection of witnesses" in criminal proceedings where their lives or physical or mental integrity, freedom or property are in danger due to their contribution to the collection of evidence of the facts which are subject to investigation. These measures may also cover the witness's relatives and other persons in close contact with them. The Act also provides for measures for collection of testimonies or statements of persons who, by reason of age or otherwise, are vulnerable persons even if the dangers mentioned above do not apply. As per section 1, as the measures laid down in the Act are extraordinary in nature, they do not apply unless deemed necessary and adequate in the case. The cross examination allowing a fair balance between the needs for combating crime and right to defence is guaranteed under the Act.

Chapters II and III deal with grant of anonymity, video-link etc. in Court proceedings, already referred to in Chapter VI of this Consultation Paper, Chapter IV deals with Witness Protection Programme.

Chapter IV of the Portuguese Act (sections 20 to 25) makes provisions for security and special measures and programmes. Section 20 provides that where significant grounds for security so justify and where the criminal offences requires the intervention of a three judge court or of a jury court, the witness may also get benefit from sporadic measures of security, namely-

a) mention in the proceeding of an address different from the one he uses or which does not coincide with the domicile location provided by the civil law;
b) being granted a transportation in a State vehicle for purposes of intervention in the procedural act;
c) being granted a room, eventually put under surveillance and security located in the court or the police premises;
d) benefiting from police protection extended to his relatives or other persons in close contact with him;
e) benefiting from inmate regimen which allow him to remain isolated from others and to be transported in a separate vehicle.

As per section 21, any witness or his wife or her husband, ancestors, descendants, brothers and sisters or any other person in close contact

with him, may also get benefit from a special programme of security during the running of the proceeding or even after its closure. The conditions precedents for getting benefit of this programme are:-

(a) the testimony or statement concern the criminal offences which are laid down in section 16.

(b) There is serious danger of their lives, physical integrity or freedom; and

(c) The testimony or the statement constitutes a contribution which is deemed, or has proved to be, essential to the ascertainment of the truth.

The content of such special programme of security may contain following measures:-

a) delivery of documents officially issued;

b) changes in the physiognomy or the body of the beneficiary;

c) granting of a new place to live in the country or abroad, for a period to be determined;

d) free transportation of the beneficiary, his close relatives and the respective property, to the new place of living;

e) implementation of conditions for the obtaining of means of maintenance;

f) granting of a survival allowance for a specific period of time.

For the purpose of implementation of such a special programme of security, a Commission under the direct supervision of the Minister of Justice has been established.

In chapter V of the Act, provisions are made for specially "vulnerable witnesses". The witness's special vulnerability may be caused by his being too young or too old, because of his health condition or by the fact that he has to make a testimony or a statement against a person of his own family, or against a restricted social group to which he belongs in a condition of subordination or dependence. Where a specially vulnerable witness is to take part in a specific procedural act, the relevant judicial authority is required to make all efforts to ensure that, such procedural act be held in the best conditions possible in order to seek the spontaneity and the sincerity of the answers. As per section 27, the judicial authority shall appoint a social welfare officer or any other person to accompany the vulnerable witness, and, if necessary, it shall designate an expert to give the witness psychological support to the witness. The judicial authority presiding to the procedural act may authorise the social welfare officer to stand by the witness during the said procedural act.

7.6 PHILIPPINES

In Philippines, an Act (which came into force from 24.4.1991), namely 'Witness Protection, Security and Benefit Act' (Republic Act NO. 6981) is applicable. It provides witness protection, security and benefit under a programme. This programme is formulated and implemented by the Department of Justice through its Secretary. Any person who has witnessed or has knowledge or information regarding the commission of a crime and has testified or is testifying or is about to testify before any judicial or quasi judicial body, or before any investigating authority, may be admitted into the programme if, (a) the offence in which his testimony will be used is a grave felony or its equivalent; (b) his testimony can be substantially corroborated in its material points; (c) he or any member of his family or affinity is subjected to threats to his life or bodily injury or there is likelihood that he will be killed, forced, intimidated, harassed or corrupted to prevent him from testifying, or to testify falsely, or evasively, because of or on account of his testimony; and (d) he is not a law enforcement officer.

If the Department of Justice, after examination of the applicant and taking into consideration other relevant facts, is convinced that the requirements of the Act or other rules and regulations have been complied

with, it shall admit the said applicant to the programme. Thereafter, the witness shall be required to execute a sworn statement. In case of legislative investigation in aid of legislation, a witness with his express consent may be admitted into the programme upon the recommendations of the legislative committee.

As per section 5, before a person is provided protection under the Act, he shall be required to execute a memorandum of agreement which shall set forth his responsibilities including those referred to in this section. Any substantial breach of the memorandum of agreement shall be a ground for the termination of the protection. All proceedings involving application for admission into the programme and actions taken thereon, shall be confidential in nature. No information or documents given or submitted in support thereof shall be released except upon written order of the Department or the proper court. Any person who violates the confidentiality of the said proceedings shall be punished.

According to section 8, a person who is admitted into the programme (i.e. the witness) shall have the following rights and benefits-

(a) To have a secure housing facility until he has testified or until the threats, etc. disappear or are reduced to a manageable or tolerable level. When the circumstances warrant, the witness shall also be entitled to

relocation and/or change of personal identity at the expense of the programme. This right may be extended to any member of the family of the witness or affinity.

(b) The Justice Department shall, wherever practicable, assist the witness in obtaining a means of livelihood. The witness relocated shall be entitled to financial assistance from the programme for his support and that of his family.

(c) In no case the witness shall be removed from or demoted in work because of or on account of his absence due to his attendance before any judicial, quasi judicial or investigating authority including legislative investigation. But in case of prolonged transfer or permanent relocation, the employer shall have the option to remove the witness from employment after securing clearance from the Department. Any witness who has failed to report for work because of witness duty shall be paid his equivalent salaries or wages.

(d) To be provided with reasonable travelling expenses and subsistence allowance by the Programme for his attendance in the court, body or authority, as well as conferences and interviews with prosecutors or investigating officers.

(e) To be provided with free medical treatment, hospitalisation and medicines for any injury or illness incurred or suffered by him because of witness duty, in any private or public hospital, clinic or at any such institution at the expense of the programme.

(f) If a witness is killed, because of his participation in the programme, his heirs shall be entitled to a burial benefit of not less than Ten thousand Pesos (P, 10,000/-) from the programme.

(g) In case of death or permanent incapacity, his minor or dependant children shall be entitled to free education from primary school to college level in any state, or private school, college or university.

Section 9 provides that in cases where a witness who has been admitted into the programme has to testify, the judicial, quasi judicial or investigating authority shall ensure a speedy hearing or trial and shall endeavour to finish the said proceedings within three months from the filing of the case. According to section 10, any person who has participated in the commission of a crime and desires to be a witness for the State, can also apply for admitting him into the programme. The Department of Justice shall admit him into the programme, wherever the following circumstances are present:-

a) the offence in which his testimony will be used is a grave felony;
b) there is absolute necessity for his testimony;
c) there is no direct evidence available for the proper prosecution of the offence committed;
d) his testimony can be substantially corroborated on its material points;
e) he does not appear to be most guilty; and
f) he has not at any time been convicted of any crime involving moral turpitude.

Any witness registered in the programme who fails or has refused to testify or to continue without just cause when lawfully obliged to do so, shall be prosecuted for contempt. If he testifies falsely or evasively, he shall be liable for perjury.

Section 14 provides that no witness admitted into the programme can refuse to testify or give evidence or produce documents etc., necessary for the prosecution of the offence on the ground of the constitutional right against self-incrimination. However, he shall enjoy immunity from criminal prosecution and cannot be subjected to any penalty or forfeiture for any

transaction, matter or thing concerning his compelled testimony or production of documents etc.

Under section 17, any person who harasses a witness and thereby hinders, delays, prevents or dissuades a witness from:-

a) attending or testifying before any judicial or quasi judicial body or investigating authority;

b) reporting to a law enforcement officer or judge about the commission or possible commission of an offence, or a violation of conditions of probation, parole, or release pending judicial proceedings;

c) seeking the arrest of another person in connection with the offence;

d) causing a criminal prosecution, or a proceeding for the revocation of a parole or probation; or

e) performing and enjoying the rights and benefits under this Act or attempting to do so,

shall be punished.

7.7 U.S.A.

7.7.1 In United States Code, Title 18, Crimes and Criminal Procedure, at part I crimes, in chapter 73 (obstruction of justice), there is provision for issuing a temporary restraining order prohibiting harassment of victim or witness in Federal Criminal cases.

As per sec. 1514(a) when a US District Court, upon application of the attorney for the Government, finds that there are reasonable grounds to believe that harassment of a victim or witness in a Federal criminal case exists, it shall issue a temporary restricting order prohibiting harassment of such victim or witness, as the case may be. This temporary order may be issued without written or oral notice to the adverse party. When the temporary order is issued without notice, the motion for a protective order shall be set down for hearing at the earliest possible time, and after the hearing the District court may issue a protective order.

Apart from this provision, there are other provisions in the United States Code, Title 18 – Crimes and Criminal Procedure, in part II – Criminal Procedure. Chapter 224 thereof deals with protection of witnesses or potential witnesses for Federal Government or for a State Government in any official proceeding in connection with organised criminal activity or other serious offences.

Section 3521 makes provision for witness relocation and protection. According to this section, the Attorney General may provide for the relocation and other protection for a witness. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with such witness or the potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding. The Attorney General shall take necessary action to protect the person involved from bodily injury and otherwise to assure the health, safety and welfare of that

person including the psychological well being and social adjustment of that person. The Attorney General may, by regulation;

a) provide suitable documents to enable the person to establish a new identity or otherwise protect the person;

b) provide housing for the person;

c) provide for the transportation of household furniture and other personal property to a new residence of the person;

d) provide to the person a payment to meet basic living expense;

e) assist the person in obtaining employment;

f) provide other services necessary to assist the person in becoming self sustaining;

g) disclose or refuse to disclose the identity or location of the person relocated or protected or any other matter concerning the programme;

h) protect the confidentiality of the identity and location of person subject to registration requirements as convicted offenders under the Federal or State law;

i) exempt procurement for service, materials and supplies and the renovation and construction of safe sites within existing buildings from other provisions of law, as may be required to maintain the

security of the protective witness and integrity of the witness security programme.

Any person who, without the authorisation of the Attorney General, knowingly discloses any information received from the Attorney General, is liable to be punished.

Before providing protection to any person, the Attorney General shall enter into a memorandum of understanding with that person setting out the responsibilities of such person. The MOU shall also set forth the protection which will be provided to that person.

If the Attorney General determines that harm to a person for whom protection may be provided, is imminent or that failure to provide immediate protection would otherwise seriously jeopardise any ongoing investigation, he (Attorney General) may provide temporary protection to such person.

The Attorney General may terminate the protection provided to any person who substantially breaches the memorandum of understanding, or who provides false information concerning the MOU or the circumstances pursuant to which the person was provided protection. However, before terminating such protection, the Attorney General shall send notice to the

person involved, of the termination of the protection and the reasons for the termination. The decision of the Attorney General to terminate such protection shall not be subject to judicial review.

According to section 3522, a probation officer may, upon the request of the Attorney General, supervise any person provided protection who is on probation or parole under State law, if the State consents to such supervision.

The failure by any person provided protection, who is supervised as mentioned above, to comply with the MOU, shall be ground for revocation of probation or parole.

Section 3523 obliges the Attorney General to serve civil notice issued by a court on a protected person. The Attorney General shall urge the protected person to comply with a court judgment.

Section 3525 requires the Attorney General to pay compensation to the victim of a crime where such crime causes or threatens death or causes serious bodily injury and where the offence is committed by the protected person during the period of protection.

The Attorney General, as per section 3526 may provide protection to a person on the request of a State Government also but the expenses involved are reimbursable by the requesting State Government.

7.7.2 Victim Witness Protection Programme at Western District, New York (at the US Attorney's Office): In the United States of America, the 'Department of Justice Victim Witness Program' was established. It was a result of the Victim and Witness Protection Act, 1982, the victims of Crime Act, 1984, the Violent Crime Control Act, 1996, the Anti-Terrorism and Effective Death Penalty Act, 1996 and the Victims Rights Clarification Act, 1997. Also are relevant, the Crime Control Act, 1990, Violent Crime Control and Law Enforcement Act, 1994, Mandatory Victims Restitution Act, 1996. The Acts guarantee federal victims and witnesses, certain rights and they impose significant duties and responsibilities on the US Attorney's Office.

The Victim and Witness Protection Act, 1982, referred to above, contains several provisions to aid victims and witnesses of federal crimes. It is applicable to all victims of serious crime, personal violence, attempted or threatened personal violence or significant property loss. The basic provisions of the Act relate to (1) notification (2) consultation and (3) referral services for victims and witnesses of serious crime.

The UN Attorney's office for the Western District of New York, which covers 17 counties, has several items in the programme. Under the programme a 'victim' is defined as one who suffers direct or threatened physical, emotional or financial harm as a result of the commission of a crime. The definition includes 'spouse, legal guardian, parent, child, sibling or another family member for any victim below 18 years age, incompetent, incapacitated or deceased. Institutional entities can also be termed as 'victims'. Any person who is culpable for the crime being investigated is not a 'victim'.

A 'witness' is defined as someone who has information or evidence concerning a crime, and provides information regarding his knowledge to a law enforcement agency. Where the 'witness' is a minor, the term includes an appropriate family member. The term 'witness' does not include defence witnesses or those individuals involved in the crime as a perpetrator or accomplice.

The 'Victim-Witness Staff' is available to provide supportive services to innocent victims and witnesses of a crime. Victims of crime often experience physical, emotional and financial trauma as a result of their actions of the accused. As a victim, one has certain rights and the Victim-Witness-Staff is there to help them understand these rights, and ensure that they are complied with.

'Victims' Rights': The victims have the right to be treated with dignity and respect. They have the right to be protected from intimidation and harm. Victims have the right to be present at all Court proceedings, the right to confer with government attorney presenting the case, the right to compensation subject to their meeting the criteria and the right to be informed concerning the criminal justice process.

Services Provided: The New York State Crime Victims' Board provides services to N.Y. State residents through a network of agencies, as well as, financial aid, such as payment of medical expenses, counselling expenses, lost earnings, burial expenses etc. to victims of crimes.

Notification: The Staff provides notification to victims and witnesses regarding the case status and court proceedings.

Consultation: Victims are allowed to provide inputs at various stages of the case, including the dismissal of charges, release of accused pending trial, plea agreement terms, victim views on sentencing and restitution. The staff is available to ensure that the views expressed are communicated to the Assistant (US) Attorney, assigned to the case.

Court Assistances: The Staff is available to accompany the victim/witness to the court proceedings.

Criminal Justice Process: The judicial system can be very confusing to those who are involved in a criminal case. Therefore, the staff is there to help explain each step of the process and to notify the provisions, about all the court dates, times and locations and confirms the presence of the victim/witness, if needed. The Staff will explain the persons what he or she can expect when they are in the court.

Transportation to Court: The Staff can arrange transportation of the victim/witness, if necessary, from the place of the residence to the Court.

Referral services: In cases where victims require medical or counselling referrals, the staff will provide victims with a list of applicable services located in the victim's area. Services include counselling, shelters, housing and many emergency referrals.

Other services: Impact Assessments: A victim's written or verbal statement is submitted to the Judge to review, before sentencing the defendant. It personalizes to the Judge regarding the emotional, physical and financial impact the victim or witness has suffered as a direct result of the crime. The Staff will provide a Forum to the victim/witness prior to the sentencing.

Verbal-Victim Impact Statement: Violent crime victims and victims of sexual abuse have the right to make a victim impact statement at sentencing.

Resources for Protection by Staff: The Staff has certain resources available to assist victims and witnesses who feel threatened or who have threats.

Victim's privacy: The US Attorney's office takes every precaution to ensure that the victim's and witness's privacy is maintained.

Separate Waiting Area: Witnesses waiting to testify can wait in a separate area and away from the defendant. The Staff is available to ensure the witness's comfort while waiting to testify.

Safekeeping and Prompt Return of Property: Every effort is made to return the personal property to victims as soon as the circumstances of the case permit.

Notification to Employer/Creditor: The Staff can write a letter, where a victim or witness requests it, to the employer certifying that the person's presence is required in Court, or to the creditor, as to the trouble the person is experiencing in repayment,- because of the trauma of the crime.

7.7.3 Victim-Witness Programme of District of Maryland (at the US Attrorney's Office):

The victim's rights enumerated under this programme are:

i) the right to be treated with fairness and with respect for the victim's dignity and privacy;
ii) the right to be reasonably protected from the accused offender;
iii) the right to be notified of Court proceedings;

iv) the right to be present at all public Court proceedings related to the offence, unless the Court determines that the testimony by the victim would be materially affected if the victim heard other testimony at trial;

v) right to confer with an attorney for the Government in the case;

vi) right to restitution;

vii) right to information about conviction, sentencing, imprisonment and release of offender.

The programme deals with (a) testifying in federal Court, (b) witness travel information, (c) victim-witness safety through US Marshall's Service, referral resources.

The victim-witness can seek a Protective Order from the Judge giving information about the abuser and recent incidents as well as past incidents. The Court can pass an order against the abuser to:

(2) refrain from abuse;

(3) stop harassment or cut off contact;

(4) stay away from the residence of the victim/witness;

(5) move out of the house.

The Criminal Injuries Compensation Board (CICB) of Maryland provides financial assistance to innocent victims of crime who suffered physical

injury – for their medical expenses and loss of earnings, and in case of homicide, for funeral expenses and loss of support on the part of victim's dependants.

7.7.4 Victim Witness Protection Programme in Michigan (East District)(at US Attorney's Office): The programme ensures that crime victims are informed of their rights and to assist the victims/witnesses throughout the criminal court process. The Unit remains committed to expanding efforts to assist victims in need of justice and healing after the crime.

7.7.5 Witness Security and US Marshall's Service: The service provides for the security, health and safety of government witnesses and their immediate dependants – whose lives are in danger as a result of their testimony against drug traffickers, terrorists, organized crime-member and other major criminals.

The Witness Security Programme was authorized by the Organised Crime Control Act, 1970 and amended by the Comprehensive Crime Control Act, 1984. (See also Witness Security Reform Act 1984). Since its inception, more than 7500 witnesses and over 9500 family members have entered the Programme and have been protected, relocated and given new identities by the Marshal's service.

The successful operation of this programme is widely recognized as providing a unique and valuable tool in the government's war against major criminal conspirators and organized crime. Since the programme's

inception, it has obtained an overall conviction rate of 89% as a result of protected witness's testimony.

Witnesses and their families get typically new identities with authentic documentation or by relocation. Housing, medical care, job training and employment can also be provided. Subsistence funding to cover basic living expenses is also provided to the witnesses until they become self-sufficient in the relocation area.

The Service provides 24-hour protection to all witnesses while they are in a high threat environment, including pre-trial conferences, trial testimony and other Court appearances.

In both criminal and civil matters involving protected witnesses, the Marshall's service cooperates fully with local enforcement and civil authorities in bringing witnesses to justice or in having them fulfill their legal responsibilities. A recidivism study found that less than 17% of protected witnesses with criminal histories are arrested and charged after joining the programme.

7.8 France

In France, Article 706-57 to 706-63 of Penal Procedures Code contains provision for protection of witnesses. In regard to the procedure relating to a crime or an offence punishable with imprisonment upto five years, if it is found that there is danger to the life or the physical integrity of the witness, or any member of his family or of a close relative, then the examining-magistrate-public-prosecutor will be justified in authorising declaration of such witness as protected without his identity appearing in the file of the procedure. In no circumstances can the identity or the address of such a witness be disclosed. The revelation of the identity or the address of such witness is a punishable offence. The above mentioned protections are not available where the knowledge of the identity of such person is essential to the exercise of the right of defence.

7.9 Czechoslovakia

Czechoslovakia is having a law on the special protection of witnesses and other persons. In this regard amendment to the Penal Programme Code was adopted by Act NO. 141/2001 which came into force on 1.5.2001. The fundamental goal of this Act is to secure adequate legal regulations for the special protection of witnesses against all forms of direct or indirect threat, pressure or blackmail in connection with the penal action. The Act includes an all-embracing protection of witnesses in the most serious cases of criminal activity, especially organised crime.

A special programme of protection has been prescribed for witnesses who are threatened under that programme. They will be provided with personal protection, protection of dwelling, movement within the Czech Republic and abroad, help in finding work, social help, and in the more serious cases, disguised identity.

7.10 Republic of Korea

The Republic of Korea enacted its Witness and Victim Protection Law on 31st August, 1999 which came into force in June, 2000. The law covers not only the victim or the witness, but also extends protection to their families. If there is a possibility that a witness may be the target of retaliatory action, his name may be kept confidential and he may be given police protection. When the witness or victim sustains financial loss as a result of the crime or the investigation, he may be granted relief money for the loss suffered. And in the event there is a need for such witness to transfer his residence or secure new employment, he may be furnished some assistance at government expense.

7.11 Japan

Japan has evolved a comprehensive Witness Protection Programme under its Code of Criminal Procedure (CCP) which was amended on 18th August, 1999 and 19th May, 2000.

Under section 96.1(4) in relation to section 89(5) of the CCP, an accused may be denied bail if there is reasonable ground to believe that he may threaten or may actually injure the body or damage the property of a victim or of a witness or relative of the victim/witness.

With the recent amendment of Japan's CCP, an attendant of the witness may be allowed to remain with the witness in the course of examination, and a screen may be set up between the witness and accused. One of the innovations introduced is the allowance of video link examination (w.e.f. November, 2001) where the witness, being out of the court room, answers the questions of the public prosecutor or the defence counsel who are in the court room (CCP 157-2-157-4).

According to CCP, in order to maintain order in the court, or when the judge believes that a witness will be unable to fully testify due to the presence of the accused or of spectators, the court may order such accused or spectators to withdraw from the court room during the examination of the witness.

Under certain circumstances, CCP also permits the court, to order the examination of the witness at any place other than the court, or on dates other than those fixed for public trial even before the first date fixed for trial. In the latter case, the accused/suspect and the defence counsel may attend the examination only when the judge believes their presence will not interfere with the criminal investigation, and the statement obtained thereby may, as an exception to the hearsay rule, be admitted in evidence during the trial even without presenting the declarant.

If there is danger that the witness might be injured or his property damaged, the court may limit the questions by which the domicile or other personal circumstances of the witness may come to the knowledge of the defendant.

Section 105.2 of the Penal Code of Japan provides punishment to any person who intimidates a witness in connection with such person's or another person's case.

7.12 Netherlands

An Act known as 'Witness Protection Act' (Act of 1 of 1994) was enacted by the Parliament. Prior to this Act, the Supreme Court formulated the conditions under which anonymous witness statement could be used in evidence in criminal cases. Many of these conditions can be found in this Witness Protection Act. The legislature broadly distinguished three different categories of anonymous witnesses.

The first category comprises of witnesses with respect to whom there is well founded assumption that they will incur problems in connection with their testimony or that they will be hindered in the further exercise of their profession. These are mainly police officers who have met the accused while working undercover. These witnesses are granted limited anonymity and are heard either by the examining Magistrate or by the trial court. In these cases, the Judge does not disclose the witness's identity and, takes measures to prevent his identity from being disclosed. These measures do not prevent direct questioning of the witness on appearance at the trial.

The second category of anonymous witnesses are those who fear for their lives, health or safety, or the disruption of their family life or socio economic existence. In such cases, the Examining Magistrate may grant him complete anonymity. The Examining Magistrate takes the witness statement in such a way that the identity of the witness is concealed. The defendant, his counsel or both may be denied access to the hearing. It is also stipulated that the Public Prosecutor may also not be present when the defence is denied access. However, the Examining Magistrate gives the absent defendant, his counsel and public prosecutor the opportunity to present questions they wish to ask by telecommunication or alternatively in writing. The examination is conducted by the Examining Magistrate in the privacy of his office. The witness does not have to appear during the investigation at the trial and his statement taken by the Examining Magistrate can be used in evidence.

The third category of anonymous witnesses is of those persons whose names appear in police reports, and who are examined without listing their identity.

There are three cumulative requirements for the use of statements in evidence in the case of completely anonymous witnesses. First, the witness must be recognised by the Examining Magistrate as a threatened witness. Second, the case must involve a serious crime for which detention or remand is permitted. Third, the

judge cannot decide that the defendant as guilty solely on the basis of the statements of completely anonymous witnesses.

It is the Examining Magistrate who determines whether or not a witness will be granted complete anonymity. A court order to conceal the identity of the witness during the examination may be elicited by the public prosecutor, the defence, or by the witness himself. The Examining Magistrate may also give such an order ex officio. The trial judge may order the Examining Magistrate to conduct an enquiry into the need for anonymity. But before taking any decision with respect to granting anonymity to witness, an opportunity of hearing is given to the defendant, his counsel and the witness. A decision of granting complete anonymity to the witness concerned can be appealed against. A panel of three judges sitting in chambers, decide an appeal.

In order to safeguard the anonymity of the witness, in practice he is usually separated and sometimes also acoustically, from the defence and the public prosecutor. Examination of the witness may take place at a secret location and at a time that is kept secret from the defence until the last minute. During the examination, the Examining Magistrate, the witness and the court clerk, are separated from the defence and the public prosecutor. Communication takes place by an audio link, whereby a voice destruction device is generally used.

7.13 Germany and Italy: These countries have witness protection programmes. They also use certain procedures in order to prevent witnesses from being endangered. It is possible, in these countries, to use statement of anonymous witnesses as evidence in the Court, although convictions may not be based on anonymous testimony alone. The witness does not have to state his name/address though the Judge is informed. In Germany, anonymous witnesses are not accepted in cases of offences that cause damage to individuals, but is accepted only in cases of serious organized crime.

The fact that independent witnesses as well co-accused are willing to cooperate in providing evidence against their comrades makes witness programme a must.

MOU: Witness protection services in the above two countries also make use of MOUs. It is not a formal contract, which refers to the witness's conduct. To maintain complete secrecy, the person is not given a copy of the MOU.

The conditions for admission to the programme are that the person is involved, as victim or witness, in a case of serious crime, there is danger to the person or family or to close relatives, and the individual voluntarily enters the programme and is suited to participate in the programme.

In an urgent case, protection measures can be taken in those countries by providing the individual or his relatives a secret place located in another part of the country – say a hotel or a police office or tenement or other public building. If the person is himself a suspect in several crimes, he is placed in a prison. It is stressful for the candidate and his family to seek to enter a programme. In some countries the protection extends during trial, may go upon 2 years to 5 years. Change in identity is also involved. Witness protection is expensive because of salaries of staff, removal of persons to another location, economic subsistence, housing and medical costs.

In the above two countries, the programmes have been very effective. They have resulted in conviction of numerous leaders and also members of organized crime.

CHAPTER VIII

QUESTIONNAIRE

The preceding chapters in this Consultation Paper have dealt with the various aspects of witness anonymity and witness protection. They noted that witness anonymity is necessitated by several factors – intimidation and threat to the personal safety of the witnesses or the peculiar vulnerability of the witness on account of age or other disadvantage. The responses of the courts and the legislatures in our country and several other countries have been discussed. While our courts have recognized the need for and granted witness anonymity on a case by case basis, and that too to a limited extent, they have reiterated the need for a comprehensive legislation covering all aspects of witness anonymity. Apart from witness anonymity, our Courts have stated that there is a need for devising witness protection programmes on the lines of similar programmes in other countries. Such programmes are essential in order to bring into being a statutory right to a witness, who is in danger, to seek protection – either physically or through other measures, apart from being granted anonymity.

With a view to initiating public discussion on what should be the legislative scheme on witness anonymity and the structure of the witness protection programmes, the Law Commission elicits responses to the following questionnaire which is divided into two parts: Part A deals with witness anonymity and Part B with witness protection programmes. After receiving responses to various questions, the Commission will come forward with its final report. The Appendix carries the statutes in New Zealand and Portugal, which contain significant provisions.

(A) WITNESS ANONYMITY

8(1) Should witness anonymity be maintained in all the three stages of investigation, inquiry, trial and even at stage of appeal in a criminal case?

(2) Do you think witness anonymity should be confined to criminal cases or should anonymity be provided in civil cases as well? Should it be extended to defence witnesses also, as done under some statutes in other countries?

(3) Can the provisions of sub-section (3) of section 16 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 or section 30 of the Prevention of Terrorism Act, 2002, which permit the Court to pass an order:

(a) avoiding the mentioning of the names and addresses of the witnesses in its orders or judgments or in any records of the cases accessible to public,

(b) issuing directions for securing that the identity and addresses of the witnesses are not disclosed, or

(c) direct that, in public interest, the proceedings pending before the Court be not published in any manner,

be made applicable to cases involving other grave offences where the Court is satisfied that there is material which prima facie shows danger to the life of the witness or to his relations or to their property?

(4) Do you agree that the existing safeguards for protection of victims of sexual offences and child abuse such as in camera proceedings and ban on publishing of any material relating to such proceeding under sec. 327 of the Code of Criminal Procedure, 1973 are not sufficient and do you suggest any other methods for their protection?

(5) Would it be sufficient if the Commissioner of Police or Superintendent of Police seeks anonymity for the witness by certifying the danger to the life or property of the witness or his relations or should it be for the Judge to decide, on the basis of evidence placed before him, that the life or property of the witness or relations is in danger?

(6) Should there be a preliminary inquiry by the Judge on the question whether the case of the witness is a fit one where anonymity should be granted or not? In such a preliminary inquiry, should the identity and address of the witness be kept secret? Should the accused or his lawyer be heard at that stage on the question of danger to life or property of the witness or relatives or, should it be an ex parte inquiry in camera? Will it serve any useful purpose in giving opportunity to the accused/defence lawyer, particularly where the identity and address cannot be revealed in such preliminary inquiry?

(7) Should the witness satisfy the Judge, in the said preliminary inquiry, that his life or that of his relations or their property is in serious danger or is it sufficient for him to show that there is 'likelihood' of such danger? Is his mere ipse dixit on the question of danger sufficient to deny the accused the right for an open trial in the physical presence of the witness?

(8) Should the complainant or the prosecution be required to file an application before the trial Judge for non-disclosure of identity and address of the witness prior to the stage when copies/the documents are supplied to the accused under sections 207, 208 of the Code of Criminal Procedure, 1973?

(9) Should the Court, if it accepts the request for anonymity, direct that the identity and address of the witness be not reflected in the documents to be given to the accused and should it direct that the original documents containing the identity and address be kept in its safe custody and further direct that the Court proceedings should not reflect the identity and address of the witness?

(10) At the trial, if the Judge is satisfied about the danger to the witness, should the recording of statement of the witness be made in such a manner that the witness and the accused do not see each other and the Judge, the prosecutor and the defence counsel alone see him (using two cameras)? Should the witness who is shown on the video-screen be visible only to the Judge, prosecutor and the defence counsel? Should the taking of photographs in Court by others be banned?

(11) In the above context, should the witness depose from a different room or different place, and should there be another judicial officer in that room to ensure that the witness is free while giving his evidence?

(12) Should the public and media be allowed at such trials subject to a prohibition against publication? What should be the quantum of punishment for breach of this condition?

(13) Should the Court appoint an amicus curiae in every such case, where witness protection is to be or is likely to be granted, to assist the Court independently both at the preliminary hearing referred to above and at the trial?

(14) Should the method of distorting the facial image and voice of the witness be followed while recording evidence through video-link, in such cases?

(15) Should the identity and address of the witness be kept confidential throughout the inquiry and trial (or after trial too) and in all the Court proceedings upto the stage of judgment or should they be disclosed just at the commencement of the examination of the witness? If it is to be just at the commencement of evidence then, in case the evidence is not completed in one hearing, is there not the chance of the witness being threatened by the date of the next or subsequent hearing?

(16) Instead of examining the witness through the video-link procedure, will it be sufficient if a list of questions is handed over to the Court with a request to the Court to put those questions to the witness? Will it preclude fair and effective cross-examination, if the accused or his counsel is thus confined to a set list of questions and without the normal advantage of putting questions arising out of the answers of the witness to particular questions?

(17) Merely because the Court has refused to grant anonymity at preliminary hearing referred to above, is the witness to be precluded subsequently from seeking anonymity or protection at the trial, even if there are fresh circumstances warranting an order in his favour?

(18) Can the defence be allowed to contend that the prosecution witness who is given anonymity is a stock witness?

(19) Should the tele-link and display on video be conducted only by a technical officer of the judicial branch and not by a police officer or other public servant and not by outsourcing to a private contractor?

(20) Should these technical staff be located at one place in each State and move to the concerned Court whenever there is a request, as it is not

possible to provide such facilities for each Court or group of Courts in the districts?

(21) Should the order as to witness anonymity, for the purpose of preliminary inquiry, be passed only by the Sessions Court and not by any other Court subordinate thereto?

(22) Against the order granting anonymity to a witness, should the law provide a right of appeal to the High Court fixing a time frame of one month from the date of service, for disposal of the appeal?

(23) Are there any other suggestions not covered by the above?

(B) WITNESS PROTECTION PROGRAMME

(1) Do you support the view that a Witness Protection Programme should be established to protect the safety, welfare and the interests of the witnesses? Such Programmes are already in existence in various countries like Australia, Canada, South Africa, Portugal, Netherlands, Philippines, New Zealand.

(2) Apart from the change of identity, should other measures for the protection of witnesses be also provided. For example,

(a) mention in the proceeding of an address different from the one he uses or which does not coincide with the domicile location provided by the civil law;

(b) being granted a transportation in a State vehicle for purposes of intervention in the procedural act;

(c) being granted a room, eventually put under surveillance and security located in the court or the police premises;

(d) benefiting from police protection extended to his relatives or other persons in close contact with him;

(e) benefiting from inmate regimen which allow him to remain isolated from others and to be transported in a separate vehicle;

(f) delivery of documents officially issued;

(g) changes in the physiognomy or the body of the beneficiary;

(h) granting of a new place to live in the country or abroad, for a period to be determined;

(i) free transportation of the beneficiary, his close relatives and the respective property, to the new place of living;

(j) implementation of conditions for the obtaining of means of maintenance;

(k) granting of a survival allowance for a specific period of time.

(3) Who among the following should be made in-charge of the implementation of the entire Witness Protection Programme:
(a) Judicial Officer (b) Police Officer
(c) Government Department (d) Autonomous body

(4) Should apart from prosecution witness, a defence witness be also eligible to be admitted into the Witness Protection Programme, if danger to his life or property exists due to his being a witness?

(5) Should the Superintendent of Police/Commissioner of Police be empowered to certify whether a particular person or victim or witness is in danger and entitled to be admitted to the Witness Protection Programme? Should such certificate be further reviewed by the trial Judge before making an order of witness protection? Should such proceedings in the court be held in camera?

(6) Whether protection under the Programme should also be extended to the family members, close relatives and friends of the threatened witness. If so, who should be included in the list of such persons?

(7) Should necessary funds be provided by both the Central and State Governments for implementation of the Witness Protection Programme?

(8) Should a witness who is being admitted into the Programme be required to enter into a memorandum of understanding with the in-charge of the Programme setting out his rights, obligations,

restrictions as well as of the person in-charge of the Programme? What are the means of enforcing such rights and obligations?

(9) When the identity of a person is changed, and he later becomes a party as plaintiff or defendant or a witness in any other civil proceedings, then should such proceeding be allowed to be suspected temporarily and be subject to the order of the Court regarding institution, trial or judgment in such proceedings?

(10) When the identity of a person is changed, and he is an accused or a witness in any other criminal proceeding under his former identity, should the person in-charge of Protection Programme be authorized to disclose his identity to the prosecutor, judge of magistrate and or to defence lawyer in such cases?

(11) Should a person be held liable to punishment if he discloses the identity of any protected person without the authorization of the Court that granted the protection? If so, what punishment should be prescribed?

(12) Do you support the view that where a witness who is admitted to the Programme fails or refuses to testify without any just cause, he should be prosecuted for contempt of Court and the protection order be cancelled?

(13) Should the decision either admitting or refusing to admit a person to the Witness Protection Programme, be made appealable? To avoid delays, should such appeal lie directly to the High Court?

(14) Do you have any other suggestions in respect of Witness Protection Programme?

(Dr. K.N. Chaturvedi) (Justice M. Jagannadha Rao)
Member-Secretary Chairman

Dated: 13th August, 2004