

ISSN 2455 - 0019

Vol. 4, Issue 1-4

INTERNATIONAL RESEARCH JOURNAL OF SOCIO - LEGAL STUDIES

(A Peer - reviewed Quarterly Journal)

January - December, 2019

EDITOR

DR. RASHEED SHAIKH

Principal, M.C.E. Society's, A.K.K. New Law Academy & Ph. D. (Law) Research Centre; Pune &
Former Dean, Faculty of Law, Savitribai Phule Pune University, Pune

M.C.E. Society's

**A.K.K. NEW LAW ACADEMY &
PH. D. (LAW) RESEARCH CENTRE, PUNE**



(A Law College Aided by Government of Maharashtra, Accredited by NAAC)
(Affiliated to Savitribai Phule Pune University, Pune, Approved by the Bar Council of India
and Recognised u/s 2(f) & 12 (B) of the UGC Act, 1956)

INTERNATIONAL RESEARCH JOURNAL OF SOCIO-LEGAL STUDIES

Vol. 4, Issue No. 1-4

January - December, 2019

CONTENTS

ARTICLES

Concept of Parens Patriae in India – Judicial Approach Dr. Naresh V. Waghmare	001
Child Witnesses in Criminal Trial : An Analysis Mrs. Revati Naik	008
Feminist Socio-Legal Research : Problems and Perspectives Dr. Namrata Luhar	025
Deliberations in Constituent Assembly on Article 21 of the Constitution of India Dr. Sopan R. Ivare	036
Harmonizing Patent Law Under TRIPS - A Critical Review Dr. Harunrashid A. Kadri	041
Right to Legal Aid : International Perspective Dr. Swati B. Shingate	060
Women's Rights under various Industrial Laws : International Perspective Ms. Reshma Ahire	073
Right to Privacy Vis-à-vis Right to Information - Constitutional and Judicial Perspectives in India Mr. Uday Ivare	081
Blood Test : An Escape Clause for Sex Determination Mr. Sumer Shaikh	091

CHILD WITNESSES IN CRIMINAL TRIAL : AN ANALYSIS

Mrs. Revati Naik

**Childhood should be carefree playing in the sun, not living a nightmare
in the darkness of the soul :- said Dave Pelzer**

Introduction

Every civilized society owes responsibility to protect children, its foundation of future. The welfare state owes a duty to provide the carefree, victimless and free society for all and diligent efforts are even more necessary, in case of vulnerable class such as women and children.

Due to their tender age and immature physical and mental development, children are considered as vulnerable and this vulnerability poses important issues when they become part of justice delivery system. Recognition of special needs of children so as to justify differential treatment towards them is found in Indian law since prior independence era. Following legislations can be considered as milestones in the development of Indian law with respect to juveniles, as children are referred in law.

Pre-Independence Legislations :

1. The Apprentices Act¹

This is the first legislation which provided for placing children committing petty offences below the age of 15 years, in apprenticeship in a trade. This act initiated differential treatment towards children indulged in commission of petty offences.

2. Reformatory Schools Act²

This act empowered the government to establish reformatory schools along with the provision of sending of children below 15 years of age to these schools instead of prison.

3. State Children's Act³

The recommendation of the All India Jail Committee 1919-1920 resulted in enactment of Children's Act in various states which provided for sending children to remand homes with provision of sending children to jail in exceptional circumstances.

4. Indian Penal Code⁴

Even though, not being a legislation exclusively dealing with children, couple of its sections have carved the special immunities of children. Sec 82 of IPC has introduced the concept of *doli-incapax* which means that a child below 7 years of age is incapable of forming the intention to commit crime and hence can't incur penal liability. Sec 83 has created the qualified privilege for children between 8-12 years.

Post-Independence Legislations :

1. Constitution of India

With the object to protect and safeguard the interest and welfare of the children the framers of the constitution have empowered the government with the capacity to make any special provision for the welfare of women and children⁵. Certain rights are enshrined in the Constitution which are available to adults and children such as equality, liberty, protection against illegal trafficking and bonded labour, protection of the interests of minority, protection from social injustice and all forms of exploitation and minimum standard life including nutrition and improved public health.⁶ Manifestation of special efforts to take care of children welfare can also be seen where provisions are made for providing free and compulsory elementary education for children in the age group of 6-14 years, protection from hazardous employment till the age of 14 years, ensuring that the children are given opportunities to develop in healthy manner and their childhood is protected against the exploitation⁷.

2. Children's Act 1960⁸

This act established two adjuvatory bodies i.e. Children's Court to deal with children committing offences and child welfare committees to deal with neglected children. This act prohibited keeping of any child in any circumstances in police station or in jail.

3. The Juvenile Justice Act

The Juvenile Justice Act, is the first uniform legislation for the children applicable to the whole of India⁹. The boy below the age of 18 and a girl below 16 years were considered to be juvenile. The Juvenile justice Act of 1986 adopted purely reformatory and rehabilitative approach towards juvenile delinquents; punitive approach in the Juvenile Justice System seems to be adopted but that too in the limited extent in the recently passed Juvenile Justice (Care and Protection of Children) Act, 2015¹⁰.

4. Protection of Children from sexual offences Act, 2012, (Act 32 of 2012)

The plight of children as victims of sexual abuse compelled the legislature to take stringent action towards exploitation of children, by passing the POCSO, 2012. The act in a significant way has evolved new techniques and procedures to deal with this specific type of crime. The Act intends to provide child friendly mechanism at every stage of judicial proceeding including reporting, investigation, recording of evidence and trial by a special court. The Act has penalised almost every form of possible and known form of sexual behaviour and seeks the collaboration among various kinds of state agencies such as police, judiciary, child protection machinery with the objective of providing fair trial for the child victims of sexual abuse. Taking in consideration the special needs of child victims the Act has prescribed the Child Friendly Procedure to be adopted while dealing with it -

Child Friendly Procedure :

The child friendly procedure can be considered that process which ensures the human treatment to the child and protection of interest of the child. Such procedure which is ensured under the act can be analyzed as follows :

i. Speedy trial :

The Act provides that the evidence of the child should be recorded within the period of thirty days of the Special Court taking the cognizance of the offence and the reasons for the delay beyond this period needs to be recorded in writings. The court is also required to complete the trial within the period of one year from the date of taking the cognizance¹¹.

ii. Catering special needs :

A. Recording of statement of child¹² :

The Act provides that while reporting the case of child sexual abuse, the child should not be taken to the police station, but the statement of the child shall be recorded at the place of residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a lady police officer. The police officer while recording the statement must not be in the uniform and he should be above the rank of sub-inspector. Further, the investigating police officer should take care to avoid the contact of child with the accused and he should ensure the protection of the identity of child from media.

B. Support Systems :

Taking in consideration the impact of sexual abuse on the child and difficulty on the part of parents and family, in dealing with this delicate situation, the Act has

provided for the association with experienced and professional individuals to assist the child during pre-trial and trial stage¹³. The child welfare committee is required to appoint support person to assist the child during pre-trial and trial stage.

C. Confidentiality :

While specifying in detail the procedure to be followed by the media the Act prohibits any report or presentation of any comment without complete and authentic information, which is likely to affect the reputation and privacy rights of the child. Conduct in violation of this rule is penalised with punishment not less than six months and which may extend to one year or fine or both. Act has imposed the complete ban on disclosure of any information relating to the child such as photograph, address or other particulars, which is likely to disclose its identity.¹⁴

D. Recording of statement by Magistrate :

The Act provides that while recording the statement of the child the magistrate should record it in the words of the child, as spoken by him. While recording such statement, the advocate of the accused is not permitted to be present. Parent of the child or any person on whom the child rely is allowed to be present while the statement is being recorded by the Magistrate. Where ever required, the magistrate or the police officer can take the assistance of a translator or an interpreter while recording such statement. The help of special educator or the family member who is conversant with the communication of the child can also be availed. In case of mentally and physically disabled child. Wherever possible the statement of the child should be recorded by audio-video electronic means¹⁵.

E. Establishment of Special Court and special Procedure :

The Act has provided for the establishment of Special Court and appointment of special public prosecutors therein, with the intention of providing a speedy trial¹⁶. The Special Court has the power to take cognizance of any offence upon receipt of complaints or police report about it, without the accused being committed to it. Questions to the child in examination in chief and cross are not to be asked by lawyers but by the Judge. During the trial, whenever required frequent breaks are provided to the child. The court is bound to create the child friendly atmosphere in court and for that purpose a family member or friend or any other person on whom the child has the trust and confidence should also be allowed. The Special Court should ensure that the child is not called repetitively for testifying before court. Aggressive questioning and character assassination should be discouraged by the court for protecting the dignity of the child. The Court is required to take the care for protecting the identity of the child¹⁷. Taking in consideration the vulnerability of child who is victim of the sexual abuse, the specially designed protective measures are

seen to be carved by the Act.

The position of children in the criminal Justice System can be evaluated through following three perspectives :

1. Children in conflict with law
2. Children as victims
3. Children as witnesses

With respect to the first and second category, we find the detail legislative framework with the specific objective of meeting peculiar demands of the situation. Further the second and the third category is found to be overlapping as children who are victims of crime need to appear before the court as witnesses.

In civil law Children seems to have appeared as witnesses, more frequently in the matrimonial disputes involving custody issues. In a proper case the court can take wishes of child in consideration before deciding about the rights of custody. The opinion of the child is taken in consideration, if the child is mature enough to form the preference in accordance with the provisions of the Guardians and Wards Act¹⁸. Welfare of the minor is the paramount consideration; is the golden thread found to be interwoven in the fabric of civil law, specifically family law. This golden principle allows the court to mould the statutory law according to the requirement of the case and exercise its discretion to protect the well being of the minor.

Children as witnesses :

Witnesses occupy predominant position in the criminal justice system so much so that they are called as eyes and ears of the justice delivery system. In its pursuit of truth, they work as the torch bearers for the court. In spite of their importance, absence of concrete substantive and procedural safeguards makes witnesses vulnerable and due to its peculiar nature, this vulnerability is multiplied in case where a witness is a child. The purpose of this research paper is to analyze the existing law pertaining to admissibility of testimony of child witness and address the issues and challenges pertaining to it.

The Indian Majority Act¹⁹, provided that every person shall attain the age of majority after completing 18 years. So, all persons below this age can be considered as children. Different laws for different purposes have given different age limit for defining the child but while defining competency of persons to testify as witness the Indian Evidence Act²⁰ has not prohibited any person from testifying by laying down the criteria of any specific age but it has laid down certain requirements such as ability to understand and give rational answers. So as a general rule even a person

below 18 years of age is competent to testify as a witness, provided he has sufficient understanding and has the ability to answer the questions asked to him.

Admissibility of evidence of Child Witness :

Competency and creditability are the two major issues in the admissibility of the testimony of child witness. The competency in case of child witness is his capacity to provide reliable testimony. The credibility of the child as witness refers to the extent to which the judge considers that the child is providing honest and accurate testimony. Even though these two concepts seem to be interdependent they need to be analyzed separately.

Competency of child as witness :

As mentioned earlier, competency of child witness relates to his ability to testify before the court. The competency of a person to be a witness is provided under sec 118 of the Indian Evidence Act, 1872. Testimonial capacity conferred under section is may dependent on the ability of the person to understand the questions and answer it rationally. Long back in 1951, in *Rameshwar S/o Kalyan Singh v. The State of Rajasthan* Supreme Court pronounced the competency of every witness to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other similar cause.²¹ There is presumption in favour of competency and lack of ability to comprehend will displace it.

Thus competency to testify is recognized as a general rule and incompetency is considered as an exception to it, which will be evoked only, in certain situations which affect the reasoning of the person. In other words, declaration of incompetency of a person to testify will require the proof of the existence of the specified ground of incompetency.²²

Sec 118 which is worded negatively vests the discretion on the court to decide the competency of the person to be a witness. Therefore, when the child witness is produced before the court, the court has to ascertain its capacity to understand and ability to give rational answers to questions put to him.

Voir dire test :

In order to decide the question of competency, the judge dealing with child witness generally conducts the preliminary examination, called as the voir dire test. It can be described as the preliminary examination conducted by the judge for ascertaining the competency of the witness. In this examination, the judge puts certain questions not connected with the case such as asking child's name, his

father's name, place of residence etc. From the answers given court form its opinion about the ability of the child to differentiate truth from falsehood and understanding of the child about his duty to tell the truth and consequences of failure to observe this duty. After conducting this preliminary inquiry, if the court is satisfied about the understanding of the child, it may either administer the oath to him or proceed with recording his testimony. Conducting the voir dire test for ascertaining the competency of the child to testify, though considered to be safe way, there is no statutory prescription to conduct it and specific format to be followed for conducting it. In absence of the statutory requirement to conduct the voir dire test, conducting this preliminary examination is considered as the rule of prudence and judicial experience has confirmed the need to conduct this examination to ascertain the competence of the child to depose. This test serves two fold purpose, firstly by conducting this test if the trial court is satisfied about incompetency of the child, it may skip the actual examination of the child which would save the precious time of the court and secondly the formal record of the voir dire enables the appellate court to reevaluate whether finding of the lower court about the competency of child were justiciable or not²³. In conclusion it can be said that the child's competency to testify is subjected to judicial discretion.

Nature of questions to be asked in voir dire :

The entire exercise of voir dire is with the intention to ascertain whether the child has the ability to give rational answers to questions asked and due to this questions of voir dire are required to be drafted cautiously.²⁴

Finality of voir dire :

On a question whether the order of holding the child witness incompetent after conclusion of the voir dire is final, long back the Gujarat High Court held that once the Judge forms an opinion in the enquiry regarding the competency of the witness, it would not be final and is liable to be modified later in the course of evidence, since the competency of witness can be apparent only after his examination and cross examination.²⁵

The Kerala High Court, in this recent case has dealt with the question as to the finality of opinion formed by the lower court as to incompetency of the child witness. In this case, the five-year-old daughter was alleged to be the only eye witness in the case of trial of murder of wife by husband. The girl when appeared before the trial court, the judge conducted voir dire and observed her to be incompetent to understand and answer the questions and refused to record the evidence. After two months, the prosecution sought a leave to summon her on the ground that at the time of voir dire the girl could not answer the voir dire due to uncomfortable

circumstances such as visiting court for first time, tiresome journey of three days and absence of relative to support. The trial court allowed the application which was challenged by the accused. While dealing with it, the Kerala High Court scrutinized in detail the voir dire conducted by trial court and pointed out some infirmities in it. The court further observed that voir dire merely performs the work of preliminary inquiry. The observation as to the voir dire concluded by the judge are arrived on the basis of subjective evaluation of the answers given by the child and as a matter of fact, answers given by child may be influenced by various factors such nature of questions, environment of the court or lack of instructions given to the child as to probable questions etc. On this reasoning the High Court held that the finding of the trial court on Voir Dire is not final and the court can examine the witness, to meet the ends of justice.²⁶

However, admissibility of the testimony of the child witness is not tainted due omission to conduct the voir dire test to ascertain its competency. Examination of a child without conducting preliminary examination is not considered as bad, since the best method to evaluate the competency of the child is from the evidence tendered by it in the course of examination. In **Bagdiram v. State of Rajasthan** while dealing with the appeal against conviction of the accused for the offence of rape on the minor girl aged 11-12 years, the Rajasthan High Court held that where there is no preliminary examination, it is the recorded statement of a child, which ordinarily furnishes sufficient material to judge the competency of that witness. If the recorded statement of a child witness shows that he or she has a rational understanding it cannot be wiped off merely on account of the absence of Voir Dire.²⁷

Creditability of witness :

The Oaths Act require that the all witnesses appearing before the court need to be administered the Oath and it also creates an exception in case of a child under 12 years of age by providing that the oath need not be administered to the child under 12 years age who though understands the importance of speaking truth but is unable to understand the nature of an oath or affirmation²⁸. Section further makes it clear that absence of an oath or affirmation will not render the evidence of such child inadmissible as well as it won't affect the obligation of the witness to state the truth.

Need for Corroboration :

While relying upon the testimony of the child witness, courts in India always emphasized the need of the corroborative evidence. In **Panchhi v. State of U.P.**²⁹ the Apex Court emphasized the need to evaluate the testimony of the child,

carefully taking in consideration the possibility of the child being tutored and influenced by the adults. Courts in many cases have pronounced the need of corroboration for relying upon the testimony of the child. However, the necessity of corroborative evidence is mere a rule of wisdom and not law. The evidence tendered by the child will not always be looked at suspicion, rather it should be accepted with great care and caution.

The reluctance of courts to rely upon the testimony of the child witness seems to be result of susceptibility of child to tutoring. In *Ratansinh Dalsukhbhai Nayak v. State of Gujarat* the Supreme Court contended that the testimony of the child needs to be assessed with great care as there is possibility of the child being tutored by adults³⁰.

In *Arbind Singh v. State of Bihar*³¹ the Supreme Court held that need of corroborative evidence which arises due to susceptibility of child to the tutoring by elders, is a well established principle of law. In pursuance of this rule, the court refused to rely upon the testimony of the daughter who at the time of death of her mother of only of five years and who deposed before the trial at the age of nine. Due to inconsistency in her statement to various authorities and considering the possibility of being tutored with respect to certain aspects, in this period of four years by her maternal uncle, the court found her testimony untrustworthy, resulting in the acquittal of the accused father.

So, if we try to understand at which age generally the children are considered as competent to testify and their testimony to be trustworthy, we will find that no precise age is prescribed taking in consideration the variation in the mental growth depending upon the age of the child. Thus, age of the child can't be considered as the sole determining factor in dealing with issue of competency and credibility, even though it is definitely a relevant factor³².

In *Baby Kandayanathil v. State of Kerala*³³ the Supreme Court upheld the testimony of two children of the deceased aged about 8 and 7 years to be trustworthy as their testimony was recorded by the trial judge after satisfying himself that the kids answered questions intelligently without any fear whatsoever, they furnished the details of occurrence in examination in chief and most importantly they withstood the searching cross examination.

In *Dattu Ramrao Sakhare v. State of Maharashtra*, the girl of 10 years who eye witnessed the murder of her father was held to be competent witness and her testimony to be unblemished. The court observed that the evaluation of the testimony of the child for the purpose of ascertaining its reliability should be done taking in consideration the peculiar facts and circumstances of the case and

various other factors such as demeanor of the child and probability of the child being tutored should be taken in consideration. It is just a rule of prudence to require the corroboration in a case involving the testimony of child witness.³⁴

Though competency to testify and credibility are recognized as the basic issues regarding child witness, another issue persisting is the way in which the testimony of the child is perceived by the justice delivery system. Testimony of the child is the cumulative effect of its interaction with lawyers, police, prosecution and judges. The quality and efficacy/effectiveness of child's testimony depends upon lawyer's ability to communicate effectively and ability of judges to make them comfortable while testifying and to draw proper inferences from their testimony.

In the adversarial criminal justice system, judges play a neutral role like the Umpire. In spite of their neutral role they may also affect children's experience in the court by being sensitive to their needs such as providing for a break when they are tired and losing concentration or need to go to toilet, for chair that allow them to see over the bench and for language they can understand. Judges can also model 'child friendly' behavior to the other in the court by being aware of special needs of child witness.³⁵ Judges definitely influence or can influence the testimony of child witness because of their power to assess the competency of children to difficulty of questions and use of special procedures for child witness.

Under the Indian Evidence Act, we can find the statutory measure to empower the judge to enable him to give up his neutral role of umpire in adversarial criminal justice system and become the passionate truth finder in quest of justice. By virtue of it, the judge, in order to discover or to obtain proper proof of relevant facts, may ask any question, to any witness, or the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and when such question is asked the parties can not object it and the person giving the answer can not be cross examined on the basis of it.³⁶

Conscious use of judicial discretion in the context of peculiar needs of child witness can definitely improve the quality of testimony of child conducive to its reliability.

Law has discussed the issues of competency and credibility of testimony of child witness in length but the research exploring impact of testifying in the court, on the child is not ample in India. Many times child's testimony is evaluated from adult perspective but the pain and suffering caused to child while testifying, by and large has remained unaddressed. Children are vulnerable and witnessing the crime has already put lots of stress on child's mind. This stress coupled with a atmosphere of court definitely makes them more vulnerable, resulting in their revictimization.

Some significant initiatives :

Taking in consideration the vulnerability of witnesses, to ensure the free and fearless deposition by them various initiatives have been taken by the government as well as judiciary. Few of such significant initiatives are as follows :

One Stop Centre :

Ministry of Women and Child Development has launched the 'One Stop Centre' scheme³⁷ for the women victim of violence including girls below 18 years of age. The purpose of this scheme is to provide integrated assistance to the women affected with violence such as police assistance, medical aid, psycho social, legal aid and temporary shelter. Apart from these facilities, the one stop centre provides video conferencing facility to facilitate speedy and hassle free police and court proceedings. Through this facility if the aggrieved woman wants, she can record her statement for police or courts from the centre itself by using audio video electronic means. This facility is to be provided only with the consultation among Superintendent of Police and District and Sessions Judge having jurisdiction over the case.

Guidelines for recording evidence of vulnerable witness in criminal matters:

The Delhi High Court has issued guidelines to be following while recording the evidence of the vulnerable witnesses³⁸. Purpose of these guidelines is to improve the way in which the criminal justice system treats vulnerable witnesses. These guidelines intend to elicit the best evidence from the witnesses in criminal proceedings. While ensuring the right of fair trial of the accused, these guidelines intends to minimize harm and impact which the witness may suffer due to the participation in the criminal justice system. These guidelines are applicable to all criminal courts in Delhi. It has defined vulnerable witness as a child below 18 years of age. While defining the competence of the vulnerable witness in the line of the competency of witnesses to depose under the Indian Evidence Act, the guidelines have identified the factors causing stress.

The guidelines have defined the important concepts such as secondary victimization and revictimization. Secondary victimization is defined as that which is the direct outcome of the crime and repose of various institutions and individuals towards victim and revictimisation deals with the sufferings which a person goes through due to criminal incident.

Competence Assessment :

The guidelines provide for the competence assessment to be conducted by the Judge and for that purpose of ascertaining it asking appropriate questions taking in

consideration age and circumstances of the child. Such questions should not be related to matter in issue. The assessment of competence is prescribed to be the continuous duty of court which is required to pass appropriate orders as and when necessary.

Pretrial Court Visit and Meeting the Judge :

For making the child comfortable and confident, the guidelines have provided for various innovative measures such as pre trial visit of the witness to the court and meeting the judge. It is expected that introduction of a witness to the environment of the court and physical facilities available and making the child understand as where he will have to stand and how his evidence will be recorded will be conducive of reducing the stress which in turn will improve the quality of evidence to be tendered.

Guardian ad litem :

The guidelines provide for the appointment by the court of guardian ad litem for the vulnerable witness. The background of such person and his experience in such type of work are relevant considerations for making such appointment. While making such appointment, the preference should be given to the parent fulfilling above mentioned criteria. Such a guardian can also be the person from the bar or a practicing advocate, however a person who is a witness in a proceeding involving a child should not be appointed as a guardian. The guidelines have specified various duties to be performed by the guardian ad litem such as attending the proceedings along with the child, explaining the child legal proceedings, making recommendations for ensuring the welfare of the child and extending the assistance to the child to cope with the impact of the crime and procedural hurdles should be given by guardian ad litem.

Legal Assistance :

As per the guidelines, the court on its own or on at the request of the support person can provide the legal assistance to a vulnerable witness.

Support Person :

The guidelines provide for the appointment of a support person by the court suo motu or on the request of the child. Such a support person shall remain within the view of the child witness or if required may accompany the witness in a witness stand. He is also expected to provide emotional support to a vulnerable witness during the process of testifying before the court, such as by either holding his hands. The support person should neither prompt, sways or influence the testimony of the child nor discuss evidence to be given by vulnerable witness.

Generally, a neutral person should be appointed as a support person, but in a rare case another witness of the case may be appointed.

Appointment of Facilitator :

The guidelines further prescribe that if the child finds it difficult to understand or respond the questions asked, to facilitate effective communication, the court may appoint the facilitator. Such facilitator will be administered an oath to pose questions according to the meaning intended by the counsel. The guidelines prescribe that on the appointment of such facilitator, the questions should be asked to the witness only through him.

Right to be informed :

The right of the vulnerable witness to be informed about the proceedings at various stages, role and importance of the witness, rights of victim and witness under various legislations and instruments, existing support mechanism and protective measures available for a vulnerable witness, along with the progress and disposition of a particular case.

Language to be used :

The guidelines provide that the during proceedings such language is to be used which should be comprehensible to the child. If necessary, it also provides for the services of the interpreter free of cost.

Waiting area and other measures :

Provision of separate waiting area for the vulnerable witnesses along with the support persons and his lawyer is prescribed by the guidelines. For making the vulnerable witnesses comfortable, the guidelines have issued the direction to the courts to ensure a separate waiting area for vulnerable witnesses with support person and his lawyer. Further the guidelines have imposed the duty on the court to ensure comfortable environment by issuing necessary directions and exercising supervision. It has also provided for recording of the evidence of the child at a time when child is energetic and while giving the deposition the child should be given recess as and when necessary.

Identity Protection :

For the purpose of protecting the privacy of victims and witnesses the court can order various measures such as prohibiting the disclosure of the identity of the child by various ways such as pseudonym, expunging their names, addresses and other details which are likely to disclose their identity or conducting in camera proceedings. The guidelines also provide for using screens, image or voice

altering device or video link for recording the evidence of the child. While ordering such measures, the interest of the child is required to be the prime consideration.

Direction for Criminal Court Judges :

Guidelines have issued various directions for the criminal court judges such as giving high priority to the vulnerable witnesses and handling their matter expeditiously without unnecessary delays and continuances. The judges are required to address the developmental needs of vulnerable witnesses by the usage of appropriate language, use of testimonial aids whenever necessary.

In Camera Proceedings :

To protect the privacy of vulnerable witness and to safeguard his interests, while recording the testimony of the child, the court may prohibit general public from attending the proceedings including the media persons. While making such order, the court should take in consideration various factors such as nature of crime and testimony, relation of the accused with the child victim etc.

Use of devices such as Live link, screens, one way mirror for recording the testimony :

If the court is of the opinion that testifying before the court is likely to affect the interest of the child, it may on its own or on the application of prosecutor, guardian ad litem or counsel, may order the recording of the evidence at some place other than court room. and it be televised to the court room by live link television. To avoid the confrontation of the child with the accused, the court may also order the use of screen or another device. While making such order, the court has to take in consideration several factors such as physical and mental health of the victim, his reaction on previous encounter with the accuse, symptoms of stress exhibited by the child previous to testifying etc.

Mode of questioning :

To enable the court to ascertain the truth, the guidelines provide for the effective control of the court over the manner in which the child is examined. To achieve this end, the guidelines require the judge to play an active role by allowing only such questions which are consistent with the needs of child. The questions can be put to the witness only through the court and court should protect him from harassment and undue embarrassment. The guidelines further provide that the witness may be allowed to testify in a narrative form and the questions which are too complicated, misleading, unfair, repetitive and improper should not be allowed.

Vulnerable Witness Deposition Centre :

Due to special initiative taken by Justice Geeta Mittal, in pursuance with the guidelines issued by the Supreme Court and Delhi High Court, Vulnerable Witness Deposition Complex have been established in Delhi. Presently four such complexes are functioning in Delhi District Court. In these complexes various facilities such as separate witness room, separate accused room, play area for the child witnesses, pantry, separate toilet and an exclusive and comfortable waiting area are provided. To avoid the confrontation of the witness with the accused, separate entry is provided for the vulnerable witness. All possible efforts to provide comfortable environment to vulnerable witnesses such as arrangement of support person, pre-trial court visit, pick and drop facility for witnesses from their place of residence, are made to enable such witnesses to depose freely³⁹.

In the *State of Maharashtra v. Bandu @Daulat*, while dealing with case involving the rape of a minor girl who was deaf, dumb and mentally challenged to some extent, the Supreme Court issued directions to all high courts to establish the special centres for vulnerable witness similar to that established in Delhi. The court directed that in the jurisdiction of each High Court at least two such centres should be established within three months from the date of passing of judgement.

*Sampurna Behura v. Union of India*⁴⁰, in the Public Interest Litigation the Supreme Court of India emphasized the need to establish the child friendly courts and directed the chief justice of each high court to take an initiative in establishing the child friendly court and vulnerable witness courts in each district of each state. While opining that such courts would also be useful in conducting trial of sexual offences against women, the court observed that establishing such court could be one manner for justice delivery system to respond to ease the pain and suffering of these people.

Recently the state government of Maharashtra has taken an initiative and allocated funds for establishing children's court in Bombay. The Bombay High Court while hearing a suo moto petition in pursuance of Supreme Courts guideline for establishing child friendly and for vulnerable witnesses, has given the direction to the Maharashtra Government to establish such courts on 'priority basis' and asked to establish such courts in city of Bombay.⁴¹

The analysis of statutory provisions and judicial opinion leads to the following observations with respect to the role of children as witnesses in criminal justice system :

1. Tender age and understanding of the child may act as a hurdle in perception of facts.

2. To elucidate the evidence tendered by the child, the court needs to appreciate it taking in consideration many factors such as the vocabulary of child, his condition in life and level of literacy etc. the way in which the evidence is evaluated becomes much more important in cases involving child witness. Greater possibility is there that the testimony of the child may be evaluated with bias which affects the discovery of truth.
3. The experience of testifying before the court is likely to aggravate the impact of witnessing the crime and it may continue for whole of their life.

Even though attempts have been made to reduce the plight of witnesses, implementation of these measures is the real problem being faced. Lack of infrastructural facilities, inadequate human resources, absence of training to the executing machinery are the basic problems hampering the implementation of such schemes and guidelines. Effective implementation of such schemes and various guidelines is the key to improve the quality of testimony of child witnesses and to ensure them better position in criminal justice delivery system.

Endnotes

1. Assistant Professor, Marathwada Mitra Mandal's Shankarrao Chavan Law College, Pune.
2. The Apprentices Act 1850 (Act 52 of 1961)
3. Reformatory Schools Act, 1897 (Act 8 of 1897)
4. The (Tamil Nadu) Children Act, 1920; (Act 4 of 1920), Bengal Children Act, 1922, (Act 2 of 1922) Bombay Children Act, 1924 (Act 13 of 1924),
5. Indian Penal Code, 1860 (Act 45 of 1860)
6. The Constitution of India, Art. 15(4)
7. The Constitution of India, Arts. 14, 15, 21, 23, 29, 46, 47
8. The Constitution of India, Arts. 21-A, 24, 39(e) and (f)
9. Children's Act 1960, (Act 60 of 1960)
10. Juvenile Justice Act, 1986 (Act 53 of 1986)
11. Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016)
12. The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012), s. 35
13. *Id.*, s. 24
14. *Id.*, ss. 39, 40
15. *Id.*, s. 23
16. The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012), ss. 24, 26
17. *Id.*, ss. 28, 32

FEMINIST SOCIO-LEGAL RESEARCH : PROBLEMS AND PERSPECTIVES

Dr. Namrata Luhar

- 17 *Id.*s. 33
- 18 The Guardian and Wards Act, 1890, (Act 8 of 1890), s. 17(3)
- 19 The Indian Majority (Amendment) Act, 1999, (Act 33 of 1999)
- 20 The Indian Evidence Act, 1872 (Act 1 of 1872), s.118
- 21 AIR 1952 SC 54
- 22 *Supra* note 20
- 23 *Mirajul Islam Shaik V State of Kerala*, 2018 ALLMR(Cri)65
- 24 *Supra* note at 23
- 25 Govind Nath V State, AIR 1961 Guj.11
- 26 *Supra* note 23
- 27 Bagdi Ram V State of Rajasthan 1983 WLN 795
- 28 The Oaths Act, 1969, (Act 44 of 1969), s. 4
- 29 AIR 1998 SC 2726
- 30 Ratansinh Dalsukhbhai Nayak V State of Gujarat, AIR 2004 SC 23
- 31 Arbind Singh and Krishna Nandan Singh and others Vs State of Bihar, AIR 1994 SC 1068
- 32 *Lalu V State of Kerala*(2015(3)KLJ 333), *Dhani alias Dhaneswar Naik V State*((1999) 0 CRL.L.J. 2712
- 33 AIR 1996 SC 1613
- 34 1997 (5) SCC 341
- 35 *Judy Cashmore and Kay Bussey, "Judicial perceptions of Child witness Competence"*, 20 *Law and Human Behaviour*313(1996)
- 36 The Indian Evidence Act, 1872 (Act 1 of 1872), s.165
- 37 One stop Centre Scheme available on <https://wcd.nic.in/schemes/one-stop-centre-scheme-1> (lastly accessed on January 10, 2019)
- 38 Guidelines for recording evidence of vulnerable witnesses in criminal trial available on http://delhihighcourt.nic.in/writereaddata/upload/notification/notificationfile_lcwcd2x4.pdf (last visited on January 10, 2019)
- 39 Vulnerable Witness Deposition Complex Inaugurated In Delhi, available on <https://www.livelaw.in/vulnerable-witnesses-deposition-complex-inaugurated-delhi/> (last visited on January 13, 2019)
- 40 2018 2AWC1734SC
- 41 The news published in Indian Express published on 26th November, 2018.

Legal Research : Meaning and Need

A civilized society envisions robust laws laying down norms and standards of conduct for its subjects followed by the enforce ability of the same. A law that fails to reach to the aspirations of the society becomes a dead letter, vice-versa a lawless society can be hazardous to its people. This entails law and society to go hand and hand so that social order is maintained and legal reforms as desired are brought in action. The inextricable link between law, society and the developments make Research in socio-legal topics to be vital. Any process involving legal reforms necessarily involves in-depth scientific study in the form of Research to reach to specific outcomes. Research is defined as "The act of searching into a matter closely and carefully, inquiry directed to the discovery of truth and in particular the trained scientific investigation of the principles and facts of any subject, based on original and first hand study of authorities or experiment. Investigations of every kind which have been based on original sources of knowledge may be styled research and it may be said that without 'research' no authoritative works have been written, no scientific discoveries or inventions made, no theories of any value propounded..."²

Laws, legal institutions and legal principles are the nucleus of any Legal Research. It basically addresses the relationship of concerned law with the society or examines the law from an analytical or critical point of view. Research conducted in the field of law addressing any specific problem in the matter of legal norm, policy, institution, or system; bringing out its implication, background, application, functioning, and impact; assessing its outcome, efficacy, suggesting the lines of reform and thereby answering the problem at hand can be regarded as legal research. Identifying the most appropriate law, determining questions of fact for the application of law, and suggesting legal reform on the basis of extensive study also comes within its ambit.³ The principal purposes of Legal Research from the functions it performs, expectations it arouses and the consequences it triggers, the purposes of legal research can be identified as exploration, description,