1.1 Overview

Justice is a damsel's idol culled out of the clay of witness-testimony combined with a systematic and artistic excellence portrayed by the brushes of lawyers and judges mixing the paints of different kinds of evidence.\textsuperscript{1} The criminal justice administration is one of the most important organs of the constitutional democracy to protect people's rights as well as interests of the State.\textsuperscript{2} The fundamental objectives of the criminal justice system are to maintain the rule of law and to promote a sense of security among the members of the society.\textsuperscript{3} This is done by punishing the guilty and thereby reinstate the faith of the common man in the criminal justice system.

In the words of the Law Commission of India, "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."\textsuperscript{4}

Hon'ble Supreme Court in \textit{R.K.Anand v. Registrar, Delhi High Court}\textsuperscript{5} highlighted the problem of interference in criminal proceedings by way of witness intimidation in following words:\textsuperscript{6}

\begin{itemize}
\end{itemize}
"... every now and then one would come across reports of investigation botched up or of the trial being hijacked by some powerful and influential accused, either by buying over or intimidating witnesses or by creating insurmountable impediments for the trial court and not allowing the trial to proceed....The trial would fail because it was not protected from external interferences.

Every trial that fails due to external interference is a tragedy for the victim(s) of crime. More importantly every frustrated trial defies and mocks the society based on the rule of law. Every subverted trial leaves a scar on the criminal justice system. Repeated scars make the system unrecognisable and it then loses the trust and confidence of people."

These words of the Apex Court highlight the need to prevent witness intimidation so that every trial should achieve its justified end. Witnesses are the cornerstones of a criminal case. The hon'ble Supreme Court in Swaran Singh v. State of Punjab\(^7\) described the importance of witnesses as under:

"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."

The value of witnesses in the criminal process still remains notwithstanding the advent of new sources of available evidence, such as, DNA profiling and CCTV cameras.\(^8\) Without witness participation, modern technology and science cannot, by themselves, assist the prosecution in proving its case beyond reasonable doubt.\(^9\)

In Zahira HabibullahSheikh v. State of Gujarat\(^{10}\) the Supreme Court observed that "Witnesses are the eyes and ears of justice. If they are incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed and it no longer constitutes fair trial. The incapacitation may be due to several factors like witness

\(^6\) ibid.
\(^7\) AIR 2000 SC 2017 at p. 2022.
\(^9\) ibid.
\(^{10}\) (2004) 4 SCC 158.
being not in a position for reasons beyond control, to speak the truth in the court due
to negligence or ignorance or some corrupt collusion.\textsuperscript{11}

In recent times, in many high profile cases accused were acquitted due to material
witnesses turning hostile. The eyewitness is becoming a rare species. Even when he
is available, he changes colour like a chameleon so much so, that in 2006 the
Supreme Court had to punish \textit{Zahira of Gujarat} for her kaleidoscopic variations in
her versions in various courts. The Red Herring of a 'hostile' eyewitness (bribed,
threatened, favoured or won) had finished many an open and shut case.\textsuperscript{12} According
to the Supreme Court," 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."\textsuperscript{13} On the question of protection
of witnesses the Hon'ble Supreme Court observed that "Time has come when
serious and undiluted thoughts are to be bestowed for protecting witnesses so that
ultimate truth is presented before the court and justice triumphs and that the trial is
not reduced to mockery."\textsuperscript{14} In the words of the court," The reluctance and the
hesitation of witnesses to depose against people with muscle power, money power
or political power has become order of the day. If ultimately truth is to be arrived at,
the eyes and ears of justice have to be protected so that the interests of justice do not
get incapacitated in the sense of making the proceedings before courts mere mock
trials as are usually seen in movies."\textsuperscript{15}

It is submitted that a witness's statement is essential for effective investigation and
prosecution of a criminal trial. Hence, intimidation of witnesses should be strictly
dealt with under a law on witness protection.

\textsuperscript{11} \textit{id.}, p.187.
Limited, Delhi, 2006, p. (v).
\textsuperscript{13} (2004) 4 SCC 158.
\textsuperscript{14} \textit{ibid}.
\textsuperscript{15} \textit{ibid}.
1.2 Meaning and Competency of Witness

Many people or persons serve the justice and court system in several roles i.e. (a) as a party to the case (b) as a witness (c) as a juror (d) as advocates or attorneys and they all act as the instrumentalities in the cause of the justice. A witness plays a pivotal role in helping the system to reach the end product of the law.\textsuperscript{16} This section throws light on the meaning and competency of witnesses. It is divided into three parts as under:

1.2.1 Ancient Period

In this part, the relevant provisions relating to witnesses, as laid in *Naradasmriti*, *Manusmriti* and *Yajnavalkya* are discussed. The basic purpose of the study is to get an insight into the importance and position of witnesses under the ancient laws. In ancient times two modes of evidence vis. *laukika* i.e. worldly and *divya* i.e. divine were accepted. The *laukika* referred to *likhya* or documents, *saksi* or witnesses and *bhukti* or possession, while the *divya* consisted of *sapatha* or oaths and *divya* or ordeals.\textsuperscript{17} Under ancient laws witnesses were recognised as the most important source of evidence. These laws provided for competency of witnesses as well as their disqualification (*saksidosa*).

According to *Narada,*" when matters between the two parties are doubtful, they should be cleared by means of witnesses who have derived their knowledge by having seen or heard them."\textsuperscript{18} *Narada* while defining witness says that, "he should be considered as witness who has witnessed a deed with his own ears or eyes, with his ears if he has heard another man speaking; with his eyes, if he has seen something himself."\textsuperscript{19}

Regarding the competency of witness, *Narada* says that the witnesses should be from honourable family and belonging to a noble race. They should be habitually veracious

\textsuperscript{16} Ravulapati Madhavi, pp. 84-85.
\textsuperscript{18} *Todarananda* (a work compiled under the auspices of Todar Mal, one of the ministers of Akbar), quoted in Vishwanath Narayan Mandlik, *Vyavahara Mayukha or Hindu Law*, Asian Publication Service, New Delhi, p. 22.
\textsuperscript{19} Sunanda Y. Shastri, *Naradasmriti (Historical, Sociological, Political and Legal study)*, Bharatiya Kala Prakashan, Delhi, 2002, p. 112.
and straightforward and unexceptionable to their descent and their fortune. The witnesses should be honest. As regards the caste of witness, there is no bar. Thus, witnesses may be Brahmanas, Ksatriyas, Vaisyas or Sudras, but they should not be faulty. In other words, Narada advocates for honest and virtuous witnesses and he does not disqualify witnesses on the ground of caste.

Narada gives a long list of incompetent witnesses which includes friends, associates, enemies, notorious offenders, slave, imposter, mad man, a religious ascetic, a sick person etc. Thus, interested witnesses and inimical witnesses were considered as incompetent witnesses under ancient laws.

Chapter Eighth of Manusmriti is dedicated to the justice system. In this chapter, Manu has discussed grounds for litigation, judicial conduct and reasoning, qualification of witnesses, questioning to witnesses, signs of false testimony, oaths and ordeals, punishment of perjury etc. In Manusmriti, Manu while discussing the qualification of witnesses says that witnesses should be householders, having sons and should be residents of the same country and of kshatriya, vaisya and sudra caste. Trustworthy men of all social classes may be called as witnesses in lawsuits, men who know the law in its entirety and are free from greed; individuals different from these should be excluded. Wise, unselfish and learned men including brahmanas can be made witnesses in all cases. In the ordinary course women, sudras and lower classes should be made witnesses for women, sudras and lower classes. Individuals who has a stake in the suit; individuals close to the litigants; their associates and enemies; individuals with a criminal record; the very sick and men of ill repute- these must not be called as witnesses.

In the glorious tradition, after Manusmriti comes Yajnavalakayasmriti. Yajnavalakya's views about evidence are gathered and outlined more sharply than Manu.
Yajnavalakya has devoted a chapter for the discussion of witnesses and sixteen verses are focussed on witnesses.\textsuperscript{28} It is provided that men devoted to religious austerities, liberally disposed (\textit{danasilah}), born of high families, truthful, devoted to religious observances, straightforward men who have sons and those who are wealthy, are the competent witness.\textsuperscript{29} Yajnavalkya has given the list of twenty incompetent witnesses including women. These seem to be same as given by Manu.\textsuperscript{30} Thus, in \textit{Manusmriti} and \textit{Yajnavalkyasmriti} women are generally considered as incompetent witnesses.

According to Kautilya," Wife's brothers, co-partners, prisoners (abaddha), creditors, debtors, enemies, maimed persons or persons once punished by the government shall not be taken as witnesses. Likewise persons legally unfit to carry on transactions, the king, persons termed in the \textit{Vedas}, persons depending for their maintenance on villages, lepers, persons suffering from bodily eruptions outcaste persons, chandalas, persons of mean avocation, the blind, the deaf, the dumb, egotistic persons, females or government servants shall not be taken as witnesses excepting in case of transactions in one's own community."\textsuperscript{31} However, in disputes concerning assault, theft or abduction, Kautilya provides that persons other than wife's brothers, enemies and co-partners can be witnesses. Similarly, masters against \textit{sewak}, priests or teachers against their disciples, and parents against their sons can be witnesses.\textsuperscript{32}

\subsection*{1.2.2 Medieval Period}

Evidence during the Muslim era was of various type vis. statements of witnesses, oaths and written documents.\textsuperscript{33} A person who was blind, insane or dumb was considered incompetent to give evidence. Slaves were also considered incompetent witnesses. When the person stood in near relation to each other, they were considered as incompetent. Witnesses such as, son in favour of father and grandfather, wife for husband, master for slave, but a brother was treated as a competent witness against

\begin{footnotes}
\item[28] id., p. 127.  \\
\item[29] ibid.  \\
\item[30] id., p. 115.  \\
\item[31] R. Shamsastry (Translator), \textit{Kautilya's Arthasastra}, Sri Raghuveer Printing Press, Mysore, 1956, p. 199.  \\
\item[32] id., pp. 199-200.  \\
\end{footnotes}
brother and uncle a competent witness against the nephew.\textsuperscript{34} The evidence of a non-believer (Hindu) was not admissible against the Muslim.\textsuperscript{35} Thus, competency of witness was based on religion during the medieval period.

1.2.3 Present Law

Witness can be defined as," A person who gives evidence in a cause, an indifferent person to each party, sworn to speak the truth, the whole truth and nothing but the truth."\textsuperscript{36} He is the one, who sees or has personal knowledge of a thing.\textsuperscript{37} Black's Law Dictionary defines a witness as," One who sees, knows, or vouches for something or one who gives testimony, under oath or affirmation in person or by oral or written deposition or by affidavit."\textsuperscript{38}

Thus, witness is a person, who testifies under oath in a trial with first hand or expert evidence, useful in a law suit. He can also be the party to the lawsuit (plaintiff or defendant). A person, who sees an event, observes the signing of a document like a will or a contract and signs as a witness on the document attesting that the document was signed in his presence is also a witness.\textsuperscript{39} Accordingly, witness may be an expert witness, a complainant or victim himself, an eye-witness, a hearsay witness or an attesting witness depending on the circumstances.

The term 'witness' is not defined specifically under any law. However, the \textit{Indian Evidence Act}, 1872, contains provisions dealing with the competency of a witness.\textsuperscript{40} It provides," Every person is competent to testify, unless the court feels that he is not able to understand the questions, put to him or to give rational answers to them. This may be due to tender years, extreme old age, disease, whether of body or mind, or any

\begin{footnotesize}
\begin{enumerate}
\item S.K. Puri, \textit{Indian Legal and Constitutional History}, 2003, quoted in Shiv Kumar Dogra, p. 34.
\item Shiv Kumar Dogra, p. 34.
\item Available at http://legal-dictionary.thefreedictionary.com/witness, last visited on 19\textsuperscript{th} January, 2013.
\item Section 118, the \textit{Indian Evidence Act}, 1872.
\end{enumerate}
\end{footnotesize}
other cause of the same kind."\textsuperscript{41} Thus, no person is particularly, declared to be incompetent. It is wholly left to the discretion of the court to see whether the person who appears as a witness is capable of understanding the questions put to him and of giving rational answers to them. The disqualifying factors may be that he is too young a child or too old a man or is suffering from a disease of mind or body. Even a lunatic is not declared to be incompetent unless his lunacy prevents him from understanding or answering questions.\textsuperscript{42}

The Delhi High Court while issuing guidelines for witness protection in \textit{Ms. Neelam Katara's case}\textsuperscript{43} defined witness as," A person whose statement has been recorded by the Investigating Officer under Section161 of the \textit{Code of Criminal Procedure} pertaining to a crime punishable with death or life imprisonment."\textsuperscript{44} This definition deals specifically with the witnesses appearing in criminal cases.

According to the \textit{Witness (Identity) Protection Bill}, 2006, proposed in the One Hundred and Ninety Eighth Report of the Law Commission of India," Witness means any person who is acquainted with the fact 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 includes a victim of such serious offence."\textsuperscript{45} It is submitted that this definition is also limited to witnesses deposing in criminal cases relating to serious offences.

The foregoing discussion makes it clear that under present laws, the competency of witnesses does not depend upon caste, creed, religion, social status or sex like ancient laws. It only depends upon his mental ability to understand the questions and giving cogent answers to them.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{41} \textit{ibid}.
\item \textsuperscript{43} Criminal Writ Petition No. 247 of 2002, decided on 14\textsuperscript{th} October, 2003, quoted in the Law Commission of India, \textit{Consultation Paper}, 2004, p. 50.
\item \textsuperscript{44} \textit{ibid}.
\end{itemize}
\end{footnotesize}
1.3 Classification of Witnesses

There can be different kinds of witnesses. The general classification of the witnesses is discussed as under:

1.3.1 Child Witness

A person aged seven years or below is considered child. The court may allow a child of tender age to testify if it is satisfied that he has capacity to understand the questions put to him and give rational answers to those questions. Law is that the testimony of a child witness must be evaluated with abundant care, caution and circumspection since he is at risk to be swayed by what others tell him and thus it is easy to tutor a child witness. Therefore, in case of unlikelihood of tutoring, the evidence of a child witness has to be examined on its own facts and attending circumstances.

1.3.2 Common Witness

Common witness may be defined as a person who gives evidence about the facts observed or received by him. He must explain that he was capable of perceiving the fact by one of his own senses and that he actually, observed the fact. This principle is commonly known as the "first-hand knowledge rule", which may be relevant to establish the exact circumstances of the case for the court. For example A has seen B and C, fighting with sticks on a certain road on particular day and time. In a case of traffic accident, the person who witnessed the accident becomes a common witness.

1.3.3 Expert Witness

Expert witness means a witness trained or skilled in technical or scientific subject, and capable of drawing opinion and conclusions from the facts observed by him, or noticed by others. Such as a doctor, firearms expert, fingerprint expert, handwriting expert etc. The statements of such witnesses are required when the court has to form

---

an opinion upon a point of foreign law, science, art or with regard to identity of handwriting or fingerprint.\textsuperscript{50}

\subsection*{1.3.4 Interested Witness}

Interested Witness (Partisan Witness) is a witness close to any of the parties. However, relationship does not affect the credibility of a witness. In such cases, the court has to be careful in analysing the evidence to find out whether it is cogent and credible.\textsuperscript{51} A close relative who is a very natural witness cannot be regarded as an interested witness. The term 'interested' postulates that the person concerned must have some direct-interest in seeing that the accused person is somehow or the other convicted either because he had some animus with the accused or for some other reason.\textsuperscript{52}

\subsection*{1.3.5 Stock Witness}

Stock witnesses are those witnesses who are used by police in number of cases. Because of appearing as police witness in number of cases and they being pliable and untrustworthy, their evidence cannot be relied upon.\textsuperscript{53} They are also called \textit{panch} witnesses.

\subsection*{1.3.6 Dumb Witnesses}

A dumb witness is one who is mute or incapable of speaking or expressing himself in words.\textsuperscript{54} The \textit{Indian Evidence Act}, 1872, provides," A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or as by signs; but such writing must be written and the signs made in open court. Evidence so given shall be deemed to be oral evidence."\textsuperscript{55}

However, in the context of witness protection, witnesses may be classified as:

\begin{itemize}
\item \textsuperscript{50} Section 45, the \textit{Indian Evidence Act}, 1872.
\item \textsuperscript{51} \textit{B. Singh v. State of Punjab}, AIR 2009 SC 157 at 159.
\item \textsuperscript{54} P. Ramanatha Aiyer, Book 2, p.1509.
\item \textsuperscript{55} Section 119, the \textit{Indian Evidence Act}, 1872.
\end{itemize}
1.3.7 **Vulnerable Witnesses**

Vulnerable witnesses are witnesses who are considered vulnerable due to their age, gender or physical condition like children, women, aged persons, physically handicapped, and victims of rape and sexual abuse. Such witnesses are more susceptible to intimidation and consequently need protection. The Supreme Court had also observed as under:\(^{56}\):

"In most of the cases, witnesses are the victims of the crime. Most vulnerable amongst them are women and children. Under the existing system, they are mere pawns in a criminal trial and there is very little concern for protecting their real interests. The protection is necessary so that there is no miscarriage of justice; but protection is also necessary to restore in them, a sense of human dignity."

1.3.8 **Intimidated or Threatened Witness**

Intimidated witness is a witness whose quality of evidence is likely to be affected by reason of fear or distress.\(^{57}\) He may endanger himself by cooperating with the authorities and has reasons to fear for his life or safety or has already been threatened or intimidated.\(^{58}\) Thus, threatened witness is a person, who faces intimidation at the hands of the accused person. He faces threats against his life or property due to giving testimony before the court.

1.3.9 **Protected Witness**

A protected witness is a witness who is provided some form of protection against intimidation. This term is generally used for witness who receives the protection under a formal witness protection programme.\(^{59}\) According to the existing practice, followed in most of the protection programmes, a protected witness includes the near relatives and close friends of a witness whose life or property is in danger due to their relationship with a witness.


\(^{59}\) *ibid.*
1.3.10 Hostile Witness

Hostile witness\textsuperscript{60} is a witness having an interest or motive for concealing part of the truth or for giving positively false evidence. A witness cannot be declared hostile, if his evidence is truthful but does not support the plea of the prosecution.\textsuperscript{61}

1.4 Importance of Witnesses

"Likhitam Saakshino Bhukti Pramanam Trividham Sprutham" i.e. evidence is the means to arrive at the truth, whether documentary, oral, direct, or indirect.\textsuperscript{62} A court requires reliable and truthful evidence to arrive at a just decision. The \textit{Indian Evidence Act}, 1872, provides," Evidence includes oral as well as documentary evidence. Oral evidence includes all statements made by witnesses, before the court, in relation to matters of fact under inquiry. Documents produced before the court for inspection are called documentary evidence."\textsuperscript{63}

The word 'evidence' as provided in the \textit{Indian Evidence Act}, 1872, signifies the instruments i.e. witnesses and documents by means of which relevant facts are brought before the court.\textsuperscript{64} Thus, witnesses play an important role by giving oral evidence before the court. Even in case of documentary evidence, witnesses are required to prove the genuineness of the contents of the documents. Hence, the role of a witness is indispensable for successful completion of a criminal trial. The Malimath Committee in its Report of 2003, on Criminal Justice Reforms, discussed the importance of witnesses in following words.\textsuperscript{65}

"Witness is an important constituent of the administration of justice. By giving evidence relating to the commission of the offence he performs a sacred duty of assisting the court to discover truth. That is why before giving evidence he either takes oath in the name of God or makes a solemn affirmation that he will speak truth, the whole of truth and nothing but truth. The witness has no stake in the decision of the criminal

\textsuperscript{60} The concept of hostile witness is discussed in detail in chapter two of the present thesis.
\textsuperscript{62} Ravulapati Madhavi, p. 84.
\textsuperscript{63} ibid.
court when he is neither the accused nor the victim. The witness performs an important public duty of assisting the court in deciding on the guilt or otherwise of the accused in the case. He sacrifices his time and takes the trouble to travel all the way to the court to give evidence. He submits himself to cross-examination and cannot refuse to answer questions on the ground that the answer will incriminate him. He will incur the displeasure of persons against whom he gives evidence. He takes all this trouble and risk not for any personal benefit but to advance the cause of justice. Under section 39 of the *Criminal Procedure Code*, 1973, every citizen is legally and morally duty-bound to give information to police about crime and criminals. It is, however, a harsh reality that willing cooperation and support from public and independent witnesses is hardly available in criminal cases. Only very few independent witnesses come forward voluntarily to assist the police in investigation, considering it their legal and national duty to help the State to prosecute the criminals. That is why, the criminal justice system in India has failed to determine the guilt or innocence of those charged with crime, promptly.  

Most of the witnesses are unwilling to come forward and depose before court owing to reasons like intimidation at the hands of accused, unnecessary harassment at the hands of police officials, advocates, court officials, inconvenience caused at court premises, loss of money and time etc.  

Not only this, in a large number of cases witnesses are even killed to prevent them from appearing in the court. It is submitted that a law on witness protection is essential to deal with these problems and to help the witnesses to depose without any fear or threat.

### 1.5 Harassment of Witnesses under Indian Criminal Justice System

It is common place to see the persons who are eye-witness to a crime turning away and leaving the place of occurrence in order to make sure that they are not dragged in as witnesses. The Malimath Committee has observed in its Report that the treatment given to the witnesses is very shabby. It suggested that "The witnesses should be treated with great respect and consideration as a guest of honour. The Committee noticed that quite the reverse is happening in the courts. When the witness goes to the

---

66 *ibid.*

67 These are discussed in detail in chapter two of the present thesis.


69 The Report of the Committee on Reforms of Criminal Justice System, p. 20.
court for giving evidence there is hardly any officer who will be there to receive him, provide a seat and tell him where the court he is to give evidence is located or to give him such other assistance as he may need. In the words of Lord Chief Justice Cockburn:

"Witnesses are just as necessary for the administration of justice as judge or jurymen, and are entitled to be treated with the same consideration...."

The above quoted lines underline the necessity to treat witnesses with proper respect and courtesy. Testifying as a witness in a criminal trial is, however, no easy task. Such an experience has been variously described as 'terrifying', 'intimidating', 'confusing', and 'a difficult and stressful ordeal'.

The hon'ble Apex Court in Swaran Singh v. State of Punjab elaborately discussed the harassment faced by a witness in the following words:

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

---

70 id., p. 151.
is a far cry. Here, again the process of harassment starts and he decides not to get the diet money at all.\textsuperscript{74}

The above quoted lines highlight that in the present criminal justice system the problems faced by the witnesses are completely overlooked. The court further held that "... while adjourning a case without any valid cause, a court unwillingly becomes party to miscarriage of justice. Most witnesses have to wait for their turn. And when the time for deposing or the giving of evidence comes, the lawyers examine and cross-examine them, as if they themselves are the perpetrators of the crime."\textsuperscript{75}

The Supreme Court in \textit{State of Uttar Pradesh v. Shambhu Nath Singh}\textsuperscript{76} summed up the dilemma faced by witnesses and its impact on criminal justice delivery system as following:

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

It is submitted that witness should no longer be taken as for granted. There is an urgent need to address their grievances.

\subsection*{1.6 Witness Intimidation}

Witness intimidation is a subject almost ignored by the policy makers and researchers as well. The present research is a modest attempt to highlight this problem. Intimidation includes such words or acts, intended and calculated to put any person in fear of any injury or danger to himself or to any member of his family or to any

\textsuperscript{74} AIR 2000 SC 2017.
\textsuperscript{75} \textit{ibid}.
\textsuperscript{76} (2001) 4 SCC 667.
person in his employment, or fear of any injury to or loss of property, business, employment, or means of living. Dictionary meaning of intimidation is to frighten, to make fearful or to compel or deter by or as if by threats. Intimidation is, therefore, (a tort and) a crime of applying legally unjustifiable threats or force to a person to compel him to do something or to refrain from doing anything which he is legally bound to do. According to the National Institute of Justice in the United States witness intimidation is of two types:

"Overt Intimidation"

Overt intimidation occurs when someone does something explicitly to intimidate a witness into withholding, changing or falsifying testimony.

Implicit Intimidation

Implicit intimidation involves a situation in which there is a real but unexpressed (or indirectly expressed) threat of harm to anyone who may testify. Implicit intimidation is often communitywide in nature and is characterised by an atmosphere of fear and non-co-operation generated by a history of violent gang retaliation against cooperating witnesses or by cultural mistrust of the criminal justice system.

It is submitted that besides explicit and implicit intimidation, witness intimidation may include actual physical violence and damage to property.

The Council of Europe defines intimidation of witnesses as follows:

"Any direct or indirect threat carried out or likely to be carried out to a witness or collaborator of justice, which may lead to interference with his or her willingness to give testimony free from undue interference, or which is consequence of his or her testimony."

---

80 ibid.
81 ibid.
82 Quoted in Yvon Dandurand, p. 8.
A witness can be intimidated indirectly by targeting his family, relatives, or friends. The expression 'people close to witnesses and collaborators of justice', frequently used in legislations relating to witness protection, usually refers to relatives and other persons who are in close relation with the witnesses and need protection because of their association with a witness.\(^83\)

Before the *Criminal Law (Amendment) Act*, 2006, witness intimidation was not punishable under the *Indian Penal Code*, 1860. However, the offence of criminal intimidation is defined in the Code.\(^84\) It provides," If any person threatens another with injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested and the person is made to do an act he is not legally bound to do or to omit or do any act which he is legally entitled to do, then the person is said to have committed criminal intimidation."\(^85\) It does not deal specifically with intimidation of witnesses.

However, a new section\(^86\) was inserted in the *Indian Penal Code*, 1860, by the *Criminal Law (Amendment) Act*, 2006 which provides for the offence of threatening any person to give false evidence. It is apparent that the problem of witness intimidation has received very limited attention of the law makers. It is submitted that the law should clearly describe the term witness intimidation.

### 1.7 Witness protection and Witness Protection Programme

In the words of Rosalind Sipos," The provision of victim and witness protection is fundamental to the credibility of any justice system and to the battle against impunity. Asking victims and witnesses to come forward without the provision of protection may indeed be irresponsible in cases where they face the possibility of re-victimised or becoming victims in their own right by reason of living up to their duty to provide their evidence."\(^87\)

---

\(^{83}\) Yvon Dandurand, p. 8.

\(^{84}\) Section 503, the *Indian Penal Code*, 1860.

\(^{85}\) ibid.

\(^{86}\) Section 195A, the *Indian Penal Code*, 1860. This section is discussed in detail in chapter four of the present thesis.

Witness protection is the procedure in which witnesses, such as, those who testify in criminal trials are protected against intimidation before their testimony or criminal retaliation after the trial. Most of the times, a witness may require protection until the conclusion of a trial only. However, some witnesses are provided with a new identity and lifelong government protection. Witness protection is usually required in trials against organised crime, where law enforcement sees a risk for witnesses to be intimidated by colleagues of defendants.

*The Serious Organised Crime and Police Act, 2005* of the United Kingdom provides," Witness protection is generally directed to those persons who have provided crucial evidence and against whom there is substantial threat."

Witness protection programme in general means a state programme designed to protect prosecution witnesses in serious criminal cases, especially, from bodily injury or tampering. The United Nations office on Drugs and Crime (UNODC) defines witness protection programmes as," Formally established covert programme(s) subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their co-operation with law enforcing authorities."

In its One Hundred and Ninety Eighth Report, the Law Commission of India provides," Witness protection programmes refer to witness protection outside court. In order to protect a witness, 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 dependents till the trial of the case against the accused is completed." The Commission proposed,

---

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 a Memorandum of Understanding (MOU) which will list out the obligations of the State as well as the witnesses. 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.94

The above discussion makes it clear that there is difference between Witness Protection and Witness Protection Programme. According to the Council of Europe Witness Protection refers to individual procedural and non-procedural measures aimed at protecting witnesses while Witness Protection Programme refer to a set of individual protection measures which are described in an agreement between the authorities and the protected witness.95 Thus, it is apparent that while witness protection may be given to a witness as a matter of right under a law, protection under a formal Protection Programme can be provided only after an agreement has been entered into the protection authorities and the threatened witness.

1.8 Various Aspects of Witness Protection

It is submitted that various aspects and issues may be covered under the concept of witness protection. Figure I illustrate various facets of witness protection. A law on witness protection needs to address following requirements:

1.8.1 Identity Protection or Anonymity to Witnesses

First and foremost is the need for protection of identity of witnesses. Identity protection is essential in certain cases so that the witness feels free and secure to give evidence before the court. Earlier the Bengal Suppression of Terrorist Outrages Act, 1932, the Terrorist Affected Areas (Special Courts) Act, 1984, the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, the Terrorist and

94 ibid.
Disruptive Activities (Prevention) Act (TADA), 1987 and the Prevention of Terrorist Activities Act (POTA), 2002, and presently the Unlawful Activities (Prevention) Act, 2005 and the National Investigation Agency Act, 2008 contain legal provisions for providing anonymity to witness where his life or property or that of his relatives was in danger. The purpose of these provisions is to protect the identity of the witness from dreaded terrorists and gangsters.\textsuperscript{96}

On the question of providing identity protection to witnesses, the Law Commission of India has observed,\textsuperscript{97} "This would entail special procedures to be introduced in the criminal law after knowing all details about witnesses, to balance the need for anonymity of witnesses on the one hand, and right of the accused for an open public-trial with a right to cross-examination of the witnesses, on the other hand."\textsuperscript{97}

Identity Protection or anonymity to a witness may be provided during the stage of investigation, inquiry, trial and in some cases even after the trial. This can be done in two ways:

1.8.1.1 Partial or limited anonymity

Where partial or limited anonymity is granted, the witness may be cross examined in court by the defence but is not obliged to state his or her true name or other personal details such as address, occupation or place of work.\textsuperscript{98}

1.8.1.2 Total or Complete Anonymity

When total or complete anonymity is granted by the court, all information relating to the identity of the witness remains secret. The witness appears in court but testifies behind a shield, disguised through voice-distortion. The evidence of the witness can also be taken through video-conferencing.\textsuperscript{99} However, total anonymity is granted only under exceptional circumstances as it may affect the right of the accused to know the identity of a witness appearing against him and to cross-examine him.

\textsuperscript{96} The relevant provisions of abovementioned Acts are discussed in chapter four of the present thesis.

\textsuperscript{97} The Law Commission of India, \textit{One Hundred and Ninety Eighth Report}, p. 232.


\textsuperscript{99} Video-Conferencing is explained in chapter three of the present thesis.
Figure 1.1

Witness Protection

- Identity Protection or Anonymity
- Physical Protection
- Special Measures
  - Identity Change
  - Relocation
  - Financial Assistance

Figure 1.2

Witness Assistance

- Psychological Support
- Proper Allowances
- Facilities in court Premises
1.8.2 Physical Protection

In cases involving serious offences, corruption, mafia gangs, organized crimes, accused having muscle and money power, the witnesses are more vulnerable to intimidation, bribery and reprisals at the hands of the accused. There is a great degree of risk and danger to their lives and property and that of life and property of their close ones. Such cases reflect the need for physical protection to witnesses. Again, this may be provided during investigation, inquiry, trial and in some cases even after the trial. Physical protection should be provided according to the level of risk and for such period of time till the risk or danger, to life or property of the witness or his close ones, exists.

1.8.3 Special Measures

The special measures of witness protection include:

1.8.3.1 Identity Change

Changing the identity of a witness is an exceptional measure. In cases involving organized crime where one of the accused becomes state or prosecutions witness, he may be given new identity to save him from the retribution of his accomplices. This measure is generally used after the testimony has been given by the witness.

1.8.3.2 Relocation and Financial Assistance

In certain exceptional circumstances, a witness may be provided relocation along with identity change. In such circumstances, he is usually given sustenance allowance to survive at new place. He is also provided transport facilities as well as guidance to get employment at the new place.

Identity change and relocation are generally provided under a witness protection programme.

1.8.4 Witness Assistance

All the witnesses appearing in criminal cases do not need protection. The protection is necessary only for vulnerable witnesses appearing in cases involving grave offences or high profile cases. However, witnesses, in general, may need assistance on various
issues. Hence, a law on witness protection should also cover witness assistance within its ambit.

Witness assistance is different from witness protection, as its purpose is not to protect the physical security of witnesses but to achieve efficient prosecution and avoid secondary victimisation or re-victimisation of the witness in the trial process (in other words, victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim). Witness assistance may include:

1.8.4.1 Psychological support

In some countries witness are provided psychological support to remove their fear and anxiety of appearing before the court. In Canada, protection given to witnesses includes relocation, accommodation, change of identity as well as counseling and financial support.

In America also apart from physical protection, a witness is assured, health, safety and welfare including the psychological well-being and social adjustment. In Albania the witness is provided advice as well-specialized legal assistance. It is submitted that in case of vulnerable witnesses like children, rape victims, women, old, infirm persons and juveniles psychological support becomes imperative and same be provided in India too.

1.8.4.2 Proper allowances

The Code of Criminal procedure, 1973, provides that witnesses may be given travelling allowances by the court. Allowances generally include travelling expenses as well as diet money. A witness comes to the court at the cost of his business or job. If he is coming from a far off place, he has to spend money from his...

---


102 Section 3521, the United States Code, Title 18 – Crimes and Criminal Procedure, in part II – Criminal Procedure, Chapter 224, quoted in the Law Commission of India, One Hundred and Ninety Eighth Report, pp. 481-82.

103 Section 312, the Code of Criminal Procedure, 1973
pocket. So, it becomes essential that he should be compensated for these losses by giving adequate allowances.

1.8.4.3 Proper facilities

Witness assistance also includes giving adequate facilities to a witness within the court premises. Proper arrangements of seating, drinking water and toilet can make the process of giving testimony before the court more comfortable and bearable. The law needs to acknowledge that a witness performing his duty of giving evidence before court should be treated with due respect.

1.9 Witness Protection vis. a. vis. Fair Trial

Free and fair trial is the basis of criminal justice system. One of the essentials of fair trial is that there should be a congenial environment for the conduct of trial so that witnesses should feel free and safe to give his testimony. In *Zahira Habibullah Sheikh v. State of Gujrat*\(^{104}\), the Supreme Court explained," Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial. The fair trial means that the accused has 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."\(^{105}\) The courts have made it clear that under exceptional circumstances these rights of the accused may be restricted in the interests of justice.\(^{106}\)

In its One Hundred and Ninety Eighth Report, the Law Commission has also submitted," These rights of the accused may be restricted to a reasonable extent in the interests of fair administration of justice and for ensuring that victims and

\(^{104}\) 2006 (5) SCJ 536.

\(^{105}\) ibid.

\(^{106}\) The observations of the Supreme Court and various High Courts on the point of balancing the rights of the accused to open trial and the need of witness protection are discussed in chapter four of the present thesis.
witnesses depose without any fear.\textsuperscript{107} The witnesses are entitled to protection from intimidation, considering the crucial role played by them in the delivery of criminal justice.\textsuperscript{108} In countries like United Kingdom, United States of America, Australia, Canada, the courts have laid emphasis on the need of balancing the right of the accused to an open trial and witness identity protection.\textsuperscript{109}

Hence, it is submitted that any criminal justice system must be based on the rights of the accused as well as the rights of victim and witnesses. The law has to balance the rights of the accused against the rights of the witnesses to identity protection to enable them to depose without fear or danger of their lives or property or those of their close relatives. Measures of Witness Identity Protection must be exercised in a manner, which is not prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.

1.10 Need for a Comprehensive Law on Witness Protection in India

The need for a witness protection programme in India has been felt for a long-time. The Apex Court in \textit{National Human Rights Commission v. State of Gujarat and Others}\textsuperscript{110} highlighted the same and observed:

"It is an established fact that witnesses form the key ingredient in a criminal trial and it is the testimonies of these very witnesses, which establishes the guilt of the accused. It is, therefore, imperative that for justice to be done, the protection of witnesses and victims become essential, as it is the reliance on their testimony and complaints that the actual perpetrators of heinous crimes during the communal violence can be brought to book."

The Supreme Court stressed," For the successful prosecution of the criminal cases protection to witnesses is necessary as the criminals have often access to the police and the influential people."\textsuperscript{111}

\begin{thebibliography}{9}
\bibitem{107} \textit{The Hindu}, 1 September, 2006, p. 14.
\bibitem{108} Available at http://www.hrdc.net/sabrdc/hrfeatures/HRF108.htm, last visited on 22\textsuperscript{nd} February, 2007.
\bibitem{109} For details see, the Law Commission of India, \textit{Consultation Paper on Witness Identity Protection and Witness Protection Programmes}, pp. 82-230.
\bibitem{110} 2003 (9) SCALE 329, (Cri.Writ petition 109 of 2003) available at judis.nic.in, last visited on 24\textsuperscript{th} January, 2013.
\bibitem{111} \textit{ibid.}
\end{thebibliography}
The most important aim of a criminal trial is to find out the truth. The principal objective of criminal law is to ensure that the guilty are punished. And for this purpose in prosecuting the accused, state has to obtain credible and legally sound evidence from the witnesses. Witnesses are entitled to safety from intimidation, considering the crucial role played by them in the delivery of criminal justice.\footnote{B.D. Harindranath, pp. 26-27.}

The accounts of incidents, perceived by the witnesses through their senses, are made known in court when witnesses depose. Events are unfolded before the court through the medium of ocular testimony of witnesses. If witnesses are not permitted to say the truth in court, trial becomes meaningless. Wealthy and the powerful may go scot-free after committing crimes with impunity.\footnote{id., p. 27.}

The Law Commission in its One Hundred and Ninety Eighth Report also suggested enactment of comprehensive 'Witness Protection Programme' and 'Witness Identity Protection' to prevent witnesses from turning hostile under threat from the accused and to ensure that criminal trials do not end in acquittals.\footnote{The Hindu, September 1, 2006, p. 14.} Unmerited acquittal is a challenge to the society and necessarily court should make certain that the witnesses are free from fear, intimidation and they are in a position to speak the truth.\footnote{B.D. Harindranath, p.27.} This can be achieved through a law on witness protection.

The purpose of witness protection is not only to preserve quality and quantity of evidence collected at the stage of investigation but also to provide physical protection to the witnesses at all stages of trial. There is urgent need to have a comprehensive legislative scheme dealing with protection of witnesses.\footnote{Sudhir Kumar Jain, “Witness Protection –Role of Judiciary”, Delhi Judicial Academy Journal, 3 (4), 2004 (Dec), pp. 56-57.}

Witness's protection is fundamental for the successful prosecution of offenders. Due to the violent and horrifies nature of the crime it is not surprising that victims rarely want to testify against offenders. Offenders often blackmail victims to stay silent.
They may terrorize the victim's family. Protection not only of the witnesses but also of their immediate family is a prerequisite for any modern legal system to endure.

A large number of cases dragging in the courts today are of persons related to mafia, underworld elements indulge in anti-national activities, arms and drugs smuggling syndicates, terrorist organizations etc. which on the one hand are detrimental to the safety and security of the nation and on the other hand embolden the criminal elements because of the ineffective approach of the law enforcement agencies.

The presence of a credible witness protection programme can go a long way in helping the cause of justice, encourage people to speak up against the criminal and other anti-social elements who flaunt money and muscle and thereby improve the governance in the country and ensure security of the nation.

It is submitted that law on witness protection is urgently required in Indian scenario. The enforcement of such law will help to check the unmerited acquittals and declining conviction rate. The Apex Court has made it clear that it is not possible to provide protection to all witnesses in criminal cases. The court was expressing its view after a senior lawyer, appearing for an NGO, 'Country First', which has filed the petition for enacting legislation on witness protection to threatened and intimidated witnesses is indeed, very much required in cases of grave nature. However, it is not possible to provide protection to all the witnesses appearing in criminal trials.

The court was expressing its view after a senior lawyer, appearing for an NGO, 'Country First', which has filed the petition for enacting legislation on witness protection to threatened and intimidated witnesses is indeed, very much required in cases of grave nature. However, it is not possible to provide protection to all the witnesses appearing in criminal trials.

1.1 Criteria for providing protection

The Apex Court has made it clear that it is not possible to provide protection to all witnesses in criminal cases. The court was expressing its view after a senior lawyer, appearing for an NGO, 'Country First', which has filed the petition for enacting legislation on witness protection to threatened and intimidated witnesses.

The court was expressing its view after a senior lawyer, appearing for an NGO, 'Country First', which has filed the petition for enacting legislation on witness protection to threatened and intimidated witnesses.

The court was expressing its view after a senior lawyer, appearing for an NGO, 'Country First', which has filed the petition for enacting legislation on witness protection to threatened and intimidated witnesses.

The court was expressing its view after a senior lawyer, appearing for an NGO, 'Country First', which has filed the petition for enacting legislation on witness protection to threatened and intimidated witnesses.

The court was expressing its view after a senior lawyer, appearing for an NGO, 'Country First', which has filed the petition for enacting legislation on witness protection to threatened and intimidated witnesses.

The court was expressing its view after a senior lawyer, appearing for an NGO, 'Country First', which has filed the petition for enacting legislation on witness protection to threatened and intimidated witnesses.

The court was expressing its view after a senior lawyer, appearing for an NGO, 'Country First', which has filed the petition for enacting legislation on witness protection to threatened and intimidated witnesses.
protection, said the country cannot be allowed to suffer the menace of hostile witnesses. He contended that if the witness has a duty to speak truth the state also has duty to protect them. The Additional Solicitor General, submitted in response that even the best of the protected witness do not wink before turning hostile.¹²¹

The Supreme Court emphasised," It is not physically possible for police to grant protection to the thousands coming to courts on a daily basis."¹²² The counsel for the petitioner Country First, suggested that the powers may be given to the public prosecutor and the trial judge in order to grant protection to a witness. The protection may be granted if the witness asks for it and if the court is convinced that such protection is necessary. The court agreed with the view of Additional Solicitor General and observed," There cannot be blanket legislation for providing protection to witnesses."¹²³

It is submitted that even if protection cannot be given to all the witnesses testifying in criminal trials, a standard criteria should be fixed under a law, on the basis of which an intimidated witness should be provided adequate protection. The criteria for providing protection may be based on the following factors:

(i) Nature of the proceedings and the gravity of offence relating to which a witness is going to appear;
(ii) Vulnerability of the witness;
(iii) Level of threat perceived by a witness;
(iv) Significance of the testimony of the witness in the concerned case;
(v) The criminal history of the accused, for e.g. he may be a dreaded gang leader or a terrorist; and
(vi) The proximity of the witness with the accused, for e.g. where the witness is a previous member of the gang.

1.12 Significance of the Study

The issue of harassment of the witnesses and witness intimidation in Indian criminal justice system has been neglected area and very little research has been done on this

¹²¹ ibid.
¹²³ ibid.
subject. The study is highly significant as it gives the readers a detailed overview of the problem of witness intimidation and its impact on the criminal justice system. It highlights that lack of adequate protection to witnesses, appearing in criminal cases of serious nature, is the main reason behind the reluctance of the witnesses to depose before a court. The study points out that this is also the major reason behind the witnesses turning hostile in most of the cases leading to unmerited acquittals. It unfolds the insufficiency of the existing legal provisions for the protection of witnesses and puts forth suggestions to remove the same.

The study will be beneficial for future researchers, students and the society as it throws light on the malaise of witness intimidation and highlights the need for a comprehensive legislation on witness protection.

1.13 Purpose of the Study

The purpose of the present study is to highlight the problem of witness intimidation and the need for a law on Witness Protection in the criminal cases involving serious offences, wherever there is evidence that the life and property of the witness or his relative are in serious danger. The study pinpoints that in the Indian criminal justice system, no specific procedural safeguards are available to witness in comparison to the accused. It also emphasises that witness protection is required in high profile cases involving rich and influential people, even if such cases deal with less grave offences.

In order to make and implement an effective legislation on witness protection, the study intends to put forward certain suggestions. These suggestions, if implemented by the government will be helpful in creating an effective institutional framework for Witness Protection Programme in India.

1.14 Scope of the Study

At the outset, it is submitted that the present study is focused on the problems of witnesses appearing in criminal cases. In view of the importance and relevance of the topic, present study includes in depth research on the subject of importance of witness protection in Indian criminal justice system. For this, it tries to highlight that problems faced by witnesses in Indian criminal justice system are multifarious, yet the issue has received limited attention from legislature. It highlights various aspects of witness
protection, such as, identity protection, physical protection, providing new identity, relocation to a new place, financial assistance and protection from various indignities and inconveniences. The study unfolds the reasons behind witnesses turning hostile and consequences thereof. Witnesses can be prevented from turning hostile if there are provisions in law to take care of their security in case of heinous crimes, corruption, terrorism etc. The study includes the analysis of legislative response on the subject of witness protection including existing legal provisions of the Indian Penal Code, 1860, the Criminal Procedure Code, 1973, the Indian Evidence Act, 1872, as well as provisions of special laws like the Bengal Suppression of Terrorist Outrages Act, 1932, the Terrorist Affected Areas (Special Courts) Act, 1984, the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, the Terrorist and Disruptive Activities (Prevention) Act (TADA), 1987 and the Prevention of Terrorist Activities Act (POTA), 2002. The study covers critical analysis and evaluation of recommendations made by the expert bodies like the Law Commission of India and the Malimath Committee. The study also includes the observations made and directions issued by the judiciary on the subject of witness protection in its various pioneering and landmark judgements. It then focuses on laws on ‘Witness Protection' which are in force in other countries. It also examines relevant provisions of manual published by United Nations Office on Drugs Control and Organised Crime on the subject of witness protection.

1.15 **Hypothesis**

After the perusal of the available literature on the subject, the following hypothesis has been formulated for the present research. A Witness serves as an indispensable aid in the administration of criminal justice. He assists the court in arriving at a fair decision. However, in Indian criminal justice system, witnesses are intimidated, harassed, bribed and even killed by the accused. Their failure to depose before court due to these reasons results in wrongful convictions and wrongful acquittals.

Absence of any protection to witnesses is a major reason behind the problem of witnesses turning hostile in most of the cases. Enactment of a law on Witness Protection is necessary to protect the security, welfare and the interests of the
witnesses, to prevent witnesses from turning hostile, to prevent intimidation of witnesses at the hands of accused and to secure truthful statements of witnesses so that criminal cases do not end in wrongful acquittals.

1.16 Review of the Existing Literature

It may be appropriate to mention here that literature dealing particularly with intimidation of witnesses is almost scarce, however, a number of articles on the subject of witness protection are available in leading journals, newspapers as well as on internet sites. These articles have been of immense help to the researcher to get an insight into various aspects of witness protection. The review of the literature is discussed as follows:

1.16.1 Chris Mahony, The Justice Sector Afterthought- Witness Protection in Africa

This book refers to witness protection in South Africa, Kenya, Uganda and Sierra Leone. It highlights the importance of witness protection in cases of organised crime. It also refers to witness protection in International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). The author emphasises that along with physical protection psychological wellbeing of witness sensitive investigatory, prosecutorial and judicial practices as well as relocation and identity change are also part of witness protection. The book is an informative piece of work for research on witness protection.

1.16.2 K.P. Singh, Urgent Need for Witness Protection

In this brief monograph, the author has dealt with the problem of harassed witnesses and emphasised the necessity of witness protection in India. The author has observed that a witness is reluctant to co-operate with the law enforcement agencies as he has to face a lot of inconvenience and harassment in the courts. The author has also briefly referred to witness protection programmes existing in the Republic of China, Canada, South Africa, Venezuela, the United States of


America, Thailand and Australia. The author has also proposed certain suggestions for an effective Witness Protection Programme in India. The author has suggested that a list of heinous crimes should be drawn for the purpose of application of witness protection programme. He has further suggested that the cases in which witnesses are being threatened should be tried in fast track courts. The author has concluded that witness protection is necessary to ensure quality justice to the people.

1.16.3 Law Commission of India, Consultation Paper on Witness Identity Protection and Witness Protection Programme, August, 2004

In this Consultation Paper, the Law Commission has emphasized on the need for a comprehensive law on Witness Protection. It discusses the observations of the Supreme Court, Special Statutes in India and earlier reports of the Law Commission of India on the subject of providing protection to the witnesses. It has laid more stress on identity protection of the witnesses than physical protection. A detailed comparative study of case law on witness protection in other countries has also been made.

1.16.4 The Law Commission of India, One Hundred and Ninety Eighth Report, 2006

The Seventeenth Law Commission, under the Chairmanship of Justice M. Jagannadha Rao, submitted its Report in September, 2006. The Report has suggested that comprehensive ‘Witness Protection Programme’ is essential to prevent witnesses from turning hostile under threat from the accused and to ensure that criminal trials do not end in acquittals. The Report says," It is accepted today that ‘Witness Identity Protection’ and ‘Witness Protection’ is necessary in the cases of all serious offences wherein there is danger to witnesses and it is not confined to cases of terrorism or sexual offences." It calls for Witness Identity Protection and Witness Protection Programmes so that the witnesses can depose without fear and a fair trial can be ensured. The Report discusses in detail various aspects of implementation of a Witness Protection Programme in India.
1.16.5 Madan B. Lokur, "Access to Justice – Witness Protection and Judicial Administration"\textsuperscript{126}

The article is written with considerable depth understanding of the subject. The author in this article highlights the significance and need for a comprehensive Witness Protection Programme in India. Recommendations of Law Commission of India on the subject of Witness Protection are also discussed. He gives international perspective of the subject also. The author refers to the resolution adopted by General Assembly of the United Nations in its fifty fifth session, relating to the Convention against Transnational Organised Crime. Article 24 of the Convention relates to the protection of witnesses. The article is very informative, but the author fails to cover the reasons behind a witness turning hostile.

1.16.6 Justice M. Jagannadha Rao, "Rights, Needs and Benefits required to ensure Effective Victim Testimony"\textsuperscript{127}

The author with the help of case laws like Zahira Habibulla Sheikh v. State of Gujarat, 2004 (4 SCC 158), Guarav Jain v. Union of India (AIR 1997 SC 3021), Sakshi Union of India, 2004 (6 SCALE 15) states the importance of Witnesses in a criminal trial and emphasises that a Witness Protection Programme in India is the need of hour.

1.16.7 Suman K. Jha, "Murder of Justice"\textsuperscript{128}

The authoress explains how the rich people exploit the legal system. She cites various high profile cases like Jessica Lal Murder Case, Priyadarshini Matoo Case, Nitish Katara Case and Salman Khan Hit and Run Case. The author explains that a cursory look at some of the most high profile cases in recent times reveals that there is an increasing trend of witnesses turning hostile. The cases are discussed but the role of law in preventing the witnesses from turning hostile is not covered.


\textsuperscript{128} The Week, 12\textsuperscript{th} March, 2006, p.44.
1.16.8 V.N. Khare, "Amend the Judicial System"\textsuperscript{129}

The author emphasises that a Witness Protection Programme is extremely important to curb the menace of hostile witnesses. The author tells that in America, witnesses are given protection throughout their lives. India needs to devise a similar system as well, so that phenomenon of witnesses turning hostile may be properly handled.

1.16.9 Dhruv Desai, "Treatment and Protection of Witnesses in India – A View at the existing Legal Position as Regards Witnesses"\textsuperscript{130}

The author elaborates that the present judicial system has taken the witnesses completely for granted. According to him, Witness Protection Programmes and Witness Protection laws are simply the need of the hour, and a strong reminder of this is the inability of the State to bring to justice those involved in the Guajrat riots. In fact, it is the absence of these laws that has helped in further strengthening the criminals and offenders. He has also given instances where witness protection was provided to the witnesses. He has also discussed relevant section of the Prevention of Terrorism Act (POTA) dealing with the protection of the identity of prosecution witnesses. He also points out to guidelines issued by the Delhi High Court in giving Witness Protection. The author does not touch the international scenario on witness protection.

1.16.10 Goklesh Meena, "Need for a Witness Protection Law in India – The Solution to the Problem of Hostile Witnesses"\textsuperscript{131}

The author discusses the role of witness in the criminal justice system. He suggests that India should implement a Witness Protection Programme if it does not want its criminal justice system to fail. He discusses various reasons for witnesses turning hostile but fails to study the consequences of witnesses turning hostile.

\textsuperscript{129} ibid., p.52.
\textsuperscript{130} Dhruv Desai, “Treatment and Protection of Witnesses in India – A View at the Existing Legal Position as Regards Witnesses”, \textit{Cri.L.J.}, March 2006.
The author has made deep analysis of the reasons for witnesses turning hostile and also provides possible solutions to prevent witnesses turning hostile. He suggests amendment of sections 161 and 162 of the Code of Criminal Procedure, 1973. It says that statements of witnesses by Police under Section 161 of the Code of Criminal Procedure, 1973, should be signed by the witnesses so that they can be used during trial of the case for corroboration or contradiction of their testimony. The existing law, under Section 162 of the Code of Criminal Procedure, 1973, says that the persons making the statements under Section 161 shall not sign it. The author emphasises that an amendment in the Code of Criminal Procedure, 1973, would to a small extent exert moral pressure on a witness against changing his course in the court subsequently. He also suggests streamlining the process of investigation. Police Officers need to be specially trained for the job of criminal investigation.

It is submitted that above review is only illustrative and not exhaustive. The review makes it apparent that a lot of work needs to be done on the subject of witness protection. The most of the works including the Report of the Law Commission have failed to describe the concept of witness intimidation. The concept of witness intimidation is necessary to understand the significance of witness protection.

1.17 Organisation of Study

For finding the answers to above research questions, the present study will be divided into six Chapters:

Chapter One: Introduction

This Chapter gives an overview of meaning, competency and classification of witnesses. It discusses the importance of witnesses in a criminal case. It highlights that witnesses are not treated properly in Indian criminal justice system. It discusses the problem of witness intimidation, meaning of witness protection and witness

---

protection programme and various aspects of witness protection. The Chapter reflects the necessity for a law on witness protection in India.

**Chapter Two: The Problem of Hostile Witnesses**

This chapter addresses the issue of hostile witnesses. It examines the various reasons for witnesses turning hostile and highlights that absence of witness protection is a major cause behind the witnesses turning hostile. It emphasises that a law for protection of the witnesses will be helpful to tackle the problem of hostile witnesses. It also discusses the provisions relating to perjury and highlights the need for strong action against witnesses retracting from their earlier statements.

**Chapter Three: Reports on Witness Protection**

This chapter refers to the Reports of the Law Commission of India and the Malimath Committee wherein the problems faced by witnesses have been discussed and various recommendations for providing protection to witnesses have been given.

**Chapter Four: Legislative and Judicial Response towards Witness Protection**

Chapter Four is divided into two parts. First part deals with legal response towards witness protection. It discusses relevant provisions of the *Indian Penal Code*, 1860, the *Code of Criminal Procedure*, 1973, the *Indian Evidence Act*, 1872, as well as of special statutes dealing with intimidation of witnesses and their protection. Second part examines the proactive role of the Judiciary to protect the interests of witnesses. It discusses observations made by the judiciary in various cases highlighting the need of witness protection. It also covers cases wherein the courts have passed orders of extermination of the accused, cancellation of bail of the accused, transfer of case to a distant place, preventive detention of the accused and for keeping the identity of the witness secret for ensuring fair trial and to secure fearless and truthful evidence of witnesses.

**Chapter Five: Witness Protection Laws: A Comparative Study**

Chapter Five surveys the laws and programmes in force in other countries dealing with witness protection. It refers to the laws of the United States of America, Republic of Albania, Malaysia and Ireland. It also examines the provincial legislation of Sindh.
Province in Pakistan. Then it studies the response of United Nations towards the witness protection.

**Chapter Six: Conclusion and Suggestions**

It is the last chapter of the thesis which contains concluding observations based on analysis of the foregoing chapters and also provides suggestions relevant for the enactment and implementation of a law on witness protection.

**1.18 Research Methodology**

The present research is doctrinal and analytical in approach. For the completion of study help is taken from the primary as well as secondary sources. For primary sources the researcher has referred to the *Indian Penal Code*, 1860, the *Code of Criminal Procedure*, 1973, the *Indian Evidence Act*, 1872 and special acts like the *Terrorist and Disruptive Activities (Prevention) Act*, 1987, the *Terrorist-Affected Areas (Special Courts) Act*, 1984, the *U.P. Gangsters and Anti-Social Activities (Prevention) Act*, 1986, the *Prevention of Terrorism Act*, 2002, the *Unlawful Activities (Prevention) Act*, 2005, the *National Investigation Agency Act*, 2008 and the *Juvenile Justice (Care and Protection of Children) Act*, 2000. The researcher has also visited the official websites of the ministry of Home Affairs, the Law Commission of India and United nations to access updated information and recent developments relevant for the present research.

For the secondary sources the researcher has consulted books as well as articles available in leading journals, newspapers, magazines and on internet. The researcher has also analytically studied the relevant case law relating to the theme of the present thesis.

**1.19 Research Questions**

The study focuses on the following research questions:

(i) What is the importance of a witness in a criminal trial?

(ii) What is witness intimidation? What are the legal provisions to deal with the issue of witness intimidation?
(iii) What are the various problems faced by witnesses in Indian criminal justice system?

(iv) What is witness protection and what is its relevance and importance in Indian criminal justice system?

(v) What are the various aspects of witness protection?

(vi) What should be the criteria for providing protection to witnesses?

(vii) What are the reasons behind witnesses turning hostile and what are the consequences of the same?

(viii) What are the observations and recommendations of various committees relating to witnesses and witness protection?

(ix) What are the existing legal provisions on the subject of witness protection?

(x) What is the contribution of judiciary on the subject of witness protection?

(xi) What are the suggestions for implementation of a comprehensive legislation on witness protection?

1.19 SUM-UP

It is submitted that the purpose of a criminal trial is to bring the accused to justice and not to subject the witness to intimidation, unnecessary harassment and inconvenience. The criminal justice system has been ignoring the needs of the witnesses for a long time. Time has come that they should be given due treatment and rights. In ancient civilizations of India, witness was considered as one of the central figures in a criminal trial. But it seems that with the development of criminal justice system witnesses has been completely forgotten. There is an urgent need to enact a law to protect threatened witnesses. This is essential to ensure that such witnesses participate in the legal process without any fear or threat. The countries which have implemented witness protection programmes have high conviction rate as compared to India. In India, in the past few years, the conviction rate has dropped alarmingly. This indicates the need for a law for the protection of the witnesses. A comprehensive legislation on Witness Protection is the most urgent reforms needed in the Indian criminal justice system. The Seventeenth Law Commission has submitted its One Hundred and Ninety Eighth Report on 'Witness Identity
Protection' and 'Witness Protection Programmes', now the Government should enact a practical law on the subject as early as possible. But for this a strong political will is also needed because in the absence of political will nothing much happens on the legislative front.