WITNESSES IN THE CRIMINAL JUSTICE SYSTEM IN INDIA:
A CRITIQUE OF THE STRATEGIES FOR THEIR PROTECTION

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SUMMARY

The concept of a fair trial is a constitutional imperative recognized in Articles 14, 19, 21, 22 and 39-A of the Constitution of India as well as by The Code of Criminal Procedure, 1973 (hereinafter referred as the Cr.P.C., 1973). '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'.¹ In Maneka Gandhi’s case², the Apex Court while referring to Satwant Singh Sawhney's case³ held that the procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary.

A law which prescribes fair and reasonable procedure for curtailing or taking away the rights enshrined in Article 21 of the Constitution of India⁴ has still to meet a possible challenge under the other provisions of the Constitution. A fair trial, no doubt, should be fair to the accused but at the same time it should be fair to the prosecution or the victims also. So the issue of witnesses in criminal trial being able to give evidence without any allurement, inducement or threat from either of the party to the trial gathers importance.

In a criminal trial, the prosecution is required to first lead evidence. The defence has the right to cross-examine the prosecution witnesses to test the veracity of the prosecution case. A comprehensive legal framework for recording the testimony of witnesses in criminal cases has been laid down in The Indian Evidence Act, 1872 and the Cr.P.C., 1973.

According to Bentham, "witnesses are the eyes and ears of justice". Each and every statement of these witnesses is very important as it has a magic force to change the course of the whole case. The condition of witnesses, however, remains precarious one. In Swaran Singh v. State of Punjab⁵, Wadhwa J. had expressed his opinion about the adverse conditions faced by the witnesses. All such adverse circumstances for the witnesses prove to be a blessing for the accused.

Crimes and acts of terrorism take place in public view and still the public who has seen the same do not come forward to give evidence out of fear and on account of

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² Maneka Gandhi v. Union of India, AIR 1978 SC 597.
³ Satwant Singh Sawhney v. D. Ramarathnam Assistant Passport Officer, Government of India, New Delhi & Ors., AIR 1967 SC 1836.
⁵ Supra note1.
frustrating Court procedures. The net result of the unwilling attitude of the public is that the accused invariably manages to get off the hooks and the criminal justice fails. In such circumstances and scenario in recent past a deep concern was expressed in different quarters for suitable legislation and measures for bold witness protection.\textsuperscript{6}

Under Section 39\textsuperscript{7} of the Cr.P.C., 1973, citizens are legally and morally duty bound to give information about crime and criminals. It is, however, a harsh reality that willing cooperation and support from public and independent witnesses is hardly available. Police investigations are tardy and do not reflect the truth. Police efforts are not to bring the truth before the Court but to prepare a strong prosecution case on behalf of the State. Thus, the statement of the complaint, true or false, becomes very important. Securing conviction rather than unearthing truth is considered to be the yardstick to judge the professional competency of a police investigating officer in police circles. The prosecution agency has not grown to function independently and the prosecutors believe that proving the police story in the Court is their sole responsibility. Therefore, in most of the cases, what is produced and stated before the Court is not a true account of what has happened and what the investigating officer has done during the investigations. Police concoct evidence and distort facts to suit


\textsuperscript{7} Section 39. Public to give information of certain offences.

(1) Every person, aware of the Commission of, or of the intention of any other person to commit, any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely.
   (i) Sections 121 to 126, both inclusive, and section 130 (that is to say offences against the State specified in Chapter VI of the said Code);
   (ii) Sections 143, 144, 145, 147 and 148 (that is to say, offences against the public tranquillity specified in Chapter VIII of the said Code);
   (iii) Sections 161 to 165A, both inclusive (that is to say, offences relating to illegal gratification);
   (iv) Sections 272 to 278, both inclusive (that is to say, offences relating to adulteration of food and drugs, etc.);
   (v) Sections 302, 303 and 304 (that is to say, offences affecting life);
   (va) Section 364A (that is to say, offence relating to kidnapping for ransom, etc);
   (vi) Section 382 (that is to say, offence of theft after preparation made for causing, death, hurt or restraint in order to the committing of the theft);
   (vii) Sections 392 to 399, both inclusive, and section 402 (that is to say, offences (if robbery and dacoity);
   (viii) Section 409 (that is to say, offence relating to criminal breach of trust by public servant, etc.);
   (ix) Sections 431 to 439, both inclusive (that is to say, offence of mischief against property);
   (x) Sections 449 and 450 (that is to say, offence of house-trespass);
   (xi) Sections 456 to 460, both inclusive (that is to say, offences of lurking house trespass); and
   (xii) Sections 489A to 489E, both inclusive (that is to say, offences relating to currency notes and bank notes).

Shall, in the absences of any reasonable excuse, the burden of proving which excuse shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such Commission or intention;

(2) For the purposes of this section, the term "offence" includes any act committed at any place out of India, which would constitute an offence if committed in India.
the prosecution story. Witnesses watch the interest of those who have called them and the prosecution agency overlooks the truth by not going beyond what has been written by the police on the case file. Under these circumstances, the Court hardly gets an opportunity to see the truth through the State agents. Keeping in mind these ground realities; it would be relevant and timely to examine the need and importance of a ‘Witness Protection Programme’ in India.8

Man is a peace-loving animal. He wants to lead a tension free life and has learnt the art of compromising with situations to purchase mental peace for himself and for his kith and kin. ‘Forget and forgive’ is relevant phrase which most of us follow in our day-to-day life. This happens in criminal proceedings also especially in cases of petty offences.9 The prevalent position of law makes witnesses to vacillate during trial. Vacillating witnesses have always been a stumbling block to the flow of justice and a vexing problem for the Courts of law. Deposition before a Court is recorded at the stage of trial, often years after the occurrence. By then the memory of the witnesses has already faded. The police on the other hand records statement of witnesses, as a part of investigation, soon after the occurrence and it places extracts before the concerned Court. Under Section 16110 and Section 16211 of the Cr.P.C.,

9 Ibid.
10 Section 161. Examination of witnesses by Police. (1) Any Police officer making an investigation under this Chapter, or any Police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.
11 Section 162. Statements to Police not to be signed: Use of statements in evidence.- (1) No statement made by any person to a Police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a Police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872; (1 of 1872) and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.
1973 if such statement of witness is recorded the same should not be under oath; nor be got signed by the witness. The purpose is to avoid manipulations at the hands of the police who have potential to extract even false statements of their choice and to pin the witness down during prospective trials. An adverse offshoot of this prohibition is the freedom of witness to give false testimony. Pressures and influences involving money power, threat, political interference etc. may contribute to this eventuality. It is not merely the illiterate and the poor who yield to such pressures, even VIPs and politicians succumb to them. Faced with severe threats to life of self or dear ones, or under substantial tempting offers, an ordinary person would be inclined even to give an untrue version before the Court because he does not stand to lose much thereby.

Evidently a witness is troubled because he is unfortunate enough to be on the spot when the crime is being committed and at the same time "foolish" enough to remain there till the arrival of the police. So it is our responsibility to provide him the best as he is helping the administration of justice. Protection is also necessary to restore a sense of human dignity. Various rules or guidelines for protection of witnesses have been laid but they cannot and are not complete and, in any event, cannot be as effective as the provisions of a special statute on the subject would otherwise be.

Generally speaking, witness protection would imply protection to a witness from physical harm, but so far, in the Indian context, it has had a somewhat restricted meaning. It has been understood to mean protection of witnesses from discomfort and inconvenience and therefore protection has had reference only to the provision of facilities. However in real, the protection of witness may be desirable in a vast number of situations viz. to prevent the witness from being allured and won over, to prevent the witness from coming under social/family pressure to get out of the cumbersome routine of making rounds of Court or due to some other pressures instilling fear in them the safety of the witness or some near and dear one, witness coming under peer group pressure e.g. after observing the other witnesses finding out some way to get out of the situation he also wants to do the same, witness getting tired

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872, (1 of 1872) or to affect the provisions of section 27 of that Act.

**Explanation.** An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.
of the never ending Court proceedings, witness facing threat to his life or property or of his family members, political interference, to prevent the dissemination of information regarding the identity and address of the witness and to ensure that the name, address and identity of the witness are not given publicly in media etc. Protection of witness can relate to any or whole of the period beginning from the stage when a person becomes a witness to the period beyond the stage when trial is over and the accused has been convicted.

According to Justice Madan B. Lokur, physical protection of a witness has become necessary not only in cases involving serious offences, hardened criminals and other bad characters, but also in less serious cases and cases where the accused are socially acceptable persons wielding influence.\textsuperscript{12}

Although there are some provisions e.g. Section 327(2)\textsuperscript{13} of the Cr.P.C., 1973, Section 228A\textsuperscript{14} of The Indian Penal Code, 1860 (hereinafter referred as IPC, 1860),

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\textsuperscript{12} Access to Justice: Witness Protection and Judicial Administration, Delhi Judicial Academy (Quarterly Journal), Volume 3 (Issue 1), 2004.

\textsuperscript{13} Section 327. Court to be open :- (1) The place in which any Criminal Court is held for the purpose of inquiring into, or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them:
Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted in camera:
Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in the room or building used by Court.

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings except with the previous permission of the Court.

\textsuperscript{14} Section 228-A.

1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376B, section 376C or section 376D is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is-
(a) by or under the order in writing of the officer-in-charge of the Police station or the Police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or
(b) by, or with the authorisation in writing of, the victim; or
(c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim:
Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation.
Section 146(3)\textsuperscript{15} of The Indian Evidence Act, 1872 etc. and some special Acts, which work for the protection of witness and also the Supreme Court has repeatedly emphasized on the issue of witness protection but they are not adequate and it is required that a comprehensive law is framed for the same. In absence of such a comprehensive law the problem of witnesses gets compounded as they not only feel unsecured but at the same time having no remedy for the injuries caused to them because of that insecurity. Generally the reason is the unholy combination of money and muscle power, intimidation and monetary inducement.

Sometimes the social pressure works and the complainant and witnesses agree not to support the prosecution case. The solitary incident of Jind district of Haryana where a young man, when he, accompanied by the warrant of the High Court and Police, went to a village to recover his wife was lynched by the villagers is an indicator of a parallel self-proclaimed judicial system. The marriage was not accepted by the social/khap panchayat (community panchayat) and the boy was killed for violating social norms. When the petition pending on the matter came for hearing before the High Court, the girl retracted of marrying the lynched boy and the warrant officer, who was badly beaten by the villagers, also stated before the High Court that he got injured when he was trying to climb a wall in his attempt to escape from the scene.\textsuperscript{16}It speaks volume of how the social/caste/khap panchayats and the community pressure become instrumental in proceedings before the Court.\textsuperscript{17}

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\textsuperscript{15} Section 146. When a witness is cross-examined, he may, in addition to the question here in before referred to, be asked any questions which tend-
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\item To test his veracity,
\item To discover who is and what is his position in life, or
\item To shake his credit, by inuring his character, although the answer to such questions, might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeitures.
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\textsuperscript{16} Mor’s fight a dead issue for Haryana, The Tribune, Friday, 31.7.2009, Chandigarh at 1.
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\textsuperscript{17} Supra note 8.
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The sensational cases like the BMW case, Jessica Lal murder case and the Best Bakery case, witnessed the exodus of witnesses and the resultant acquittal of the accused persons. Public outcry that the justice dispensation system crumbled at least in those cases deserves keen attention. We need to protect the witnesses who want to submit the truth, nothing but truth, before a Court of law. The fact is that the neither there was and nor there is any programme available under which after the assessment of the need for protection to a particular witness, the administration could give him/her the requisite protective cover as has been provided in countries like United States of America, Canada, Australia and United Kingdom.

Various protection programs and measures are needed which range from safe shelter for witnesses to various forms of protection by law enforcement agencies and comprehensive protection programmes. Measures can be taken by establishing a witness protection group in the criminal justice system, an organization at a national level whose aim will be to develop and implement special measures, establishment of a witness unit to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses who appear before the Court and others who are at risk on account of testimony given by such witnesses. Adequate arrangements must also be made to protect the physical and mental well-being of such individuals, many of whom are victims of serious crimes committed against them. This is necessary to avoid getting traumatized again or an otherwise negative experience, one effect of which could be to create a disincentive for witnesses to testify. A system has to be devised to ensure safe travel to home for witnesses at an appropriate juncture. A suitable arrangement for follow up after a witness testifies has to be there. This is crucial for adequate assessment of risks to their physical and mental well-being following testimony, to evaluate his or her condition, psychosocial support required etc. However, such follow up can be a difficult task, particularly where resources are scarce. There should be clear understanding regarding the rules

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20 The Best Bakery case took place on March 1, 2002 in Vadodara, during the 2002 Gujarat violence, in which 14 people were murdered, many of them burned to death. The case came into prominence after all the 21 accused were acquitted on June 27, 2003 by a 'fast-track Court' for lack of evidence, after 37 out of the 73 witnesses, including key witness Zaheera Sheikh turned hostile. Zaheera, later, confessed that she lied in the Court due to fear as her family had received death threats.
and aims of different job holders such as the police, prosecutors, judges and service providers.

In many countries and under international instruments a range of procedural measures are foreseen which help protect witness from intimidation. These measures also protect witnesses from confrontation with offenders and protect their privacy thus preventing intimidation and re-victimization. Most of the counties have formulated Witness Protection Programmes for example, the United States of America has The Victim and Witness Protection Act 1982 and Australia has The Australian Witness Protection Act, 1994. In India, although unfortunately there is very high rate of crime and very low rate of conviction; even then no frame work regarding protection of witness has been drawn. The duty to protect the witness is on the police, but it has dubious reputation in discharging this duty.

There are a number of recommendations of various commissions from administrative to judicial and from police to human rights activists that address the issues of protection of witnesses. The vulnerability of witnesses is so prominent that nowadays even the Courts have broken their silence and have appealed for the witness protection law.

In Best Bakery case21, the Hon’ble Supreme Court commented upon the State administration in general and the investigating agency in particular for rashly and negligently handling their duties and abdicating their responsibilities. The finding of the Court was that the whole machinery of the State failed in maintaining the confidence of public in the justice delivery system. The Court reminded the Trial Courts to be alive to the reality about the witness hostility. One of the predominant points taken note of by the Hon’ble Supreme Court is the lack of witness protection in our country. The principles stated in the above decision have been reiterated by the Hon’ble Supreme Court in the contempt proceedings taken up against Zahira Habibulla H. Sheikh and Another22.

In Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others23, the Apex Court was emphatic on the role the State has to play in protecting the witnesses. It has been observed that as a protector of its citizens, the State has to ensure that during the trial in the Court the witness could safely depose the truth

22 2006 Cri.L.J. 1694.
23 Supra note 21.
without any fear of being haunted by those against whom he had deposed. The Supreme Court reminded the State that it has a constitutional obligation and duty to protect the life and liberty of the citizen who acted as a truthful and earnest witness.


In *People’s Union of Civil Liberties v. Union of India*, the Supreme Court considered the validity of Section 30 of The Prevention of Terrorism Act, 2002 which deals with ‘protection of witnesses’.

Witness protection, in its narrow interpretation, and its impact on judicial administration, was also dealt with in the 4th Report of the National Police Commission where the Commission referred to the inconvenience and harassment caused to the witnesses in attending Courts. The Commission noted that the monetary compensation was woefully inadequate and referred that out of 96,815 witnesses who attended the Courts during the test period, only 6697 witnesses were paid some allowance, and that too after following a rather cumbersome procedure (which incidentally has hardly changed for the better anywhere). These figures signify the irrelevance of the amount paid to witnesses for their troubles.

The 14th Report of the Law Commission considered the problem of witness protection and referred to inadequate arrangements for witnesses in the Court house as well as meagre travelling allowance and daily bhatta (allowance) paid to witnesses for attending the Court in response to summons.

In its 154th Report, while noting the plight of witnesses appearing on behalf of the State, Law Commission observed that the witnesses faced not only inconveniences but also risk to their lives at the hands of criminals. So it made recommendations to mitigate various inconveniences.

The Law Commission in its 178th Report again took up the issue of preventing witnesses from turning hostile. The Report also dealt with the issue of precautions the police should take at the stage of investigation to prevent fabrication

24 2003 (9) SCALE 329.
by witnesses when they are examined later at the trial. The Commission recommended recording the statements of material witnesses in the presence of Magistrates, taking signatures of the witnesses on the police statement and sending the same to appropriate Magistrate and a senior police official and lastly in all serious offences (punishable with ten or more years of imprisonment) the statement of important witnesses should be recorded at the earliest by a Magistrate under Section 164 of the Cr.P.C., 1973. This was observed by the committee that many witnesses give false evidence either because of inducement or because of the threats to him or his family members. There is no law to give protection to the witnesses subject to such threats, similar to witness protection laws available in other countries. It was pointed out that unfortunately the witnesses were treated very shabbily by the system. To overcome these problems, the Committee made several recommendations.

After these reports the commission on reforms of Criminal Justice System under the chairmanship of Dr. Justice V.S. Malimath submitted its rather voluminous

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30 Section 164. Recording of confessions and statements.

(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any, time afterwards before the commencement of the inquiry or trial:
Provided that no confession shall be recorded by a Police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.
(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is bear, made voluntarily.
(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in Police custody.
(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect.
"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.
(Signed)A.B.
Magistrate".
(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.
(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.
31 Supra note 29.
The immediate importance of the subject of witness protection in our country motivated the Law Commission to take up the subject of ‘Witness Anonymity’ and ‘Witness Protection’ suo-motto. The Law Commission’s consultation paper on witness identity protection and Witness Protection Programs August 2004 broadly categorized the need of witness protection as follows:

1. The phenomenon of witness to become hostile on account of the failure to protect their evidence is one of the problems. So it is necessary that procedure should be introduced into the criminal law to balance the need for anonymity of witnesses on the one hand and right of the accused on the other.

2. The other need is for physical protection of the witness at all stages of the criminal justice process till the conclusion of case, by the introduction of Witness Protection Programmes.

The Law Commission analysed validity of the provisions of various statues providing specifically for protection of witnesses. It has discussed various principles of law developed by the Supreme Court and the High Courts. These principles basically stress upon the need for a congenial atmosphere for the conduct of a fair trial and this included the protection of witnesses.

The Criminal Law (Amendment) Act, 2005 which has been enforced w.e.f. 16.4.2006 has amended the IPC, 1860, the Cr.P.C., 1973 and the Indian Evidence Act, 1872. Above Act has introduced Section 195A to the IPC, 1860, whereby threatening or inducing any person to give false evidence is made punishable. By

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32 The Committee submitted its report to the Ministry of Home Affairs on 21 April 2003.
33 Supra note 27.
34 On basis of responses to this paper the Law commission gave its One Hundred and Ninety Eighth Report: Witness Identity Protection And Witness Protection Programmes on the issue in August, 2006.
35 No.2 of 2006, The Gazette of India-Extraordinary Part II-Section 3, Sub Section (ii); No.348, New Delhi, Wednesday, April 12, 2006, Ministry of Home Affairs Notification-S.O.523 (E).
36 Section 195A. Threatening or inducing any person to give false evidence.-Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both; and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced.
virtue of the said amending Act, Section 195 of the Cr.P.C., 1973 has also undergone changes. Section 154 of The Indian Evidence Act, 1872 empowers the Court to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.

The only real attempt with regard to witness protection (in the physical sense) is to be found in the provisions of Control of Organised Crime Acts enacted by some of the State Governments. Section 13 of The Terrorist and Disruptive Activities (Prevention) Act (TADA Act), 1985 and Section 16 of the TADA Act, 1987 provided for protection of the identity and keeping address of a witness secret. Section 16 of the TADA Act, 1987 differed from Section 13 of the TADA Act, 1985 in two respects. Firstly, whereas it was mandatory to hold proceedings in camera under Section 13 of the TADA Act, 1985 the proceedings could be held in camera under Section 16 of the TADA Act, 1987 only where the designated Court so desired. Secondly, Section 16(3)(d) of the TADA Act, 1987 empowered a designated Court to take such measures in the public interest so as to direct that information in regard to all or any of the proceedings pending before such a Court shall not be published in any manner. Section 30 of The Prevention of Terrorism Act (POTA), 2002 is on the same lines as Section 16 the TADA Act, 1987. In its reports the Law Commission has failed to point out that such discretion leaves the witnesses in a confused position about their protection and they decide to quit the path of truth.

Although Section 327 of the Cr.P.C., 1973 provides for trial in the open Court and Section 327(2) of the Cr.P.C., 1973 provides for in-camera trials for offences involving rape under Section 376 of the IPC, 1860 and under Section 376 A to 376 D of the IPC, 1860 but it is shocking to note that barring rape and child abuse cases, there are, as of today, no general statutory provisions in the Cr.P.C., 1973 on this subject.

Whatever recommendations made, the fact remains that there is no general law on protection of identity of witnesses in criminal cases, apart from the provisions for

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37 After section 195 of the principal Act, the following section shall be inserted, namely:- Procedure for witnesses in case of threatening, etc. - "195A. A witness or any other person may file a complaint in relation to an offence under section 195A of the Indian Penal Code."
39 Act already repealed.
40 Ibid.
41 Ibid.
protection of witnesses in the special statues governing terrorist-crimes. But the cases where nobody is ready to become a witness or is no longer interested in continuing as a witness or just interested in denying his original version of statement so as to get rid of the threats hanging on his head are no longer confined to cases of terrorism as this phenomenon has reached alarming proportion elsewhere also. There is therefore need, as in other countries, to generally empower the Court in cases where muscle power, political power, money power or other methods are employed against witnesses and victims to prevent them from giving true evidence or testimony, so that these witnesses are provided sufficient protection to enable them to give evidence without any fear or reprisals and threats by the accused do not have any impact on them.

In the Fifty-fifth session of the General Assembly of the United Nations, a resolution \textsuperscript{43} was adopted relating to the Convention against Trans-national Organized Crime. The thrust of the Convention was on serious crimes (constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty) in order to obtain, directly or indirectly, a financial or other material benefit. The application of the Convention is to serious crimes as mentioned above and to offences mentioned in Articles 5, 6, 8 and 23 of the Convention. Article 5 basically concerns itself with criminal activity of an organized criminal group, which means a structured group of three or more persons. Article 6 relates to the criminalization of the laundering of proceeds of crime, while Article 8 relates to the criminalization of corruption. Article 23 of the Convention is of some importance and it deals with criminalization of obstruction of justice. Each State party to the convention shall adopt legislative measures to make it a criminal offence, inter alia, to use physical force, threats or intimidation or to otherwise interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by the Convention. Article 24 relates to the protection of witnesses and this reads as follows:

\textit{Protection of witnesses}

1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in

\textsuperscript{43} No.55/25.
criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter-alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use communications technology such as video links or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are Witnesses.”

The convention thus reinforces three significant advances in the matter of witness protection:

(i) Enlarging the definition of a witness to include his or her relatives and other persons close to him or her.

(ii) Acceptance of the use of modern technology such as video linkage to record the testimony of a witness, and

(iii) Victims of a crime are also entitled to protection if they are witnesses.

In the United States of America, the Organized Crime Control Act, 1970 and later the Comprehensive Crime Control Act, 1984 authorized the Witness Security Program. The Witness Security Reform Act, 1984 provides for relocation and other protection of a witness or a potential witness in an official proceeding concerning an organised criminal activity or other serious offence. Protection may also be provided to the immediate family of, or a person closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding. The Attorney General takes the

44 State of Maharashtra v. Dr Praful B. Desai 2003 Cri.L.J. 2033 also endorsed this.
45 U.S. Code Collection, Title 18, Part II, Chapter 224, Section 3521.
final decision whether a person is qualified for protection from bodily injury and otherwise to assure the health, safety and welfare of that person. In a large number of cases, witnesses have been protected, relocated and sometimes even given new identities. The programme assists in providing housing, medical care, job training and assistance in obtaining employment and subsistence funding until the witness becomes self-sufficient. The Attorney General shall not provide protection to any person if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony. The Marshals Service which is a division of the Department of Justice gives protection to government witnesses and their immediate dependants against drug traffickers, terrorists, organized crime members and other major criminals. The claim of the Marshals Service is that about 7000 witnesses have so far been successfully protected and since the inception of the programme, the conviction rate has gone up to 89% due to the testimony of protected witnesses.

A similar programme is in operation in Canada under the Witness Protection Act, 1996. The purpose of the Act is "to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters"46. Protection given to a witness may include relocation, accommodation and change of identity as well as counselling and financial support to ensure the security of the protected or to facilitate his becoming self-sufficient. Admission to the Programme is determined by the Commissioner of Police on a recommendation by a law enforcement agency or an International Criminal Court or tribunal47.

The Australian Witness Protection Act, 1994 establishes the National Witness Protection Programme in which (amongst others) the Commissioner of the Australian Federal Police arranges or provides protection and other assistance for witnesses48. The witness must disclose a wealth of information about himself before he is included in the Program. This includes his outstanding legal obligations, details of his criminal history, details of his financial liabilities and assets49 etc. The Commissioner has the sole responsibility of deciding whether to include a witness in the Program, and in

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46 Section 3.
47 Section 5 and 6.
48 Section 4.
49 Section 7.
deciding whether to so include a person, the Commissioner shall\textsuperscript{50} have regard to various specified aspects.

The Witness Protection Act, 1998 of South Africa provides for the establishment of an office called the Office for Witness Protection within the Department of Justice. The Director of this office is responsible for the protection of witnesses and related persons and exercises control over Witness Protection Officers and Security Officers\textsuperscript{51}. Any witness who has reason to believe that his safety is threatened by any person or group or class of persons may report such belief to the Investigating Officer in a proceeding or any person in-charge of a police station or the Public Prosecutor etc.\textsuperscript{52} and apply for being placed under protection. The application is then considered by a Witness Protection Officer who prepares a report, which is then submitted to the Director\textsuperscript{53}. The Director, having due regard to the report and the recommendation of the Witness Protection Officer, takes into account the various factors\textsuperscript{54} for deciding whether a person should be placed under protection or not.

The Witness Protection, Security and Benefit Act \textsuperscript{55} of the Philippines, which came into force from 24.04.1991 is intended to "encourage a person who has witnessed or has knowledge of the commission of a crime to testify before a Court or quasi-judicial body, or before an investigating authority, by protecting him from reprisals and from economic dislocation." Admission to the Programme is given to a witness\textsuperscript{56} where the offence in which his testimony will be used is a grave felony, his testimony can be corroborated on material points and he or any member of his family "within the second degree of consanguinity or affinity is subjected to threats to his life or bodily injury or there is a likelihood that he will be killed, forced, intimidated, harassed or corrupted to prevent him from testifying, or to testify falsely, or evasively." A witness admitted to the Programme is entitled to certain rights and benefits\textsuperscript{57}. These include a secure housing facility until he has testified or until the threat, intimidation or harassment disappears or is reduced to a manageable or

\textsuperscript{50} Section 8.
\textsuperscript{51} Section 4.
\textsuperscript{52} Section 7.
\textsuperscript{53} Section 9.
\textsuperscript{54} Section 10.
\textsuperscript{55} Republic Act No. 6981.
\textsuperscript{56} Section 3.
\textsuperscript{57} Section 8.
tolerable level. The Department of Justice shall, wherever practicable, assist the witness in obtaining a means of livelihood and if the witness is relocated, he shall be entitled to financial support for himself and his family. The witness will be provided free medical treatment, hospitalization and medicines for any injury or illness incurred or suffered by him because of witness duty in any private or public hospital, clinic or at any institution at the expense of the Program.

In the *Nitish Katara murder case*[^58], the Delhi High Court laid down certain guidelines for a witness protection scheme. Further the initiative taken by the Law Commission of India to examine the issue of witness protection is commendable. But to ensure that the law in this regard is effective and in conformity with international criminal and human rights law, the gaps in the legal protection of witnesses must first be identified. The protection that is currently available to a certain category of witnesses, especially in terrorist cases, is based upon the discretion of the Court and is highly arbitrary and unpredictable. There is an urgent need to establish a neutral agency that can consider the needs of all witnesses, not just those brought by the prosecution.

So witness protection should aim at enabling the witness to live safely. Special measures for minors must be ensured in accordance with the best interest of the child and these measures should also extend to family members when appropriate. These programmes and measures should also include that there should be international agreement regarding temporary and permanent relocation of the witnesses. For development of these measures and programs there should be coordination and cooperation at international level amongst all the job holders. Some measures should be regarding the capacity building, regarding ethical and legal obligation of the media to preserve confidentiality of information and privacy of witnesses.

**Objective of the study:** Being realistic there is need for witness to come forward, especially when we are trying to bring to Justice the career criminals or particularly dangerous criminals. Some times that would mean that we need to actively and rigorously protect those witnesses. For this an effective Witness Protection Programme is an often essential tool in the fight against crime. Those who face investigation and criminal prosecution may attempt to frustrate the administration of

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Justice through intimidation or by causing physical or other harm to witnesses or their relatives. In the absence of any programme to protect them from reprisals, witnesses may not be forthcoming, and the justice system may be paralysed. So there is a need to discuss the inadequacy of Indian Laws in dealing with the subject.

At the same time, it can’t be overemphasised that implementing a Witness Protection Scheme is an extremely demanding enterprise in India and other countries. Both the stakes and risks are high. The success of major criminal investigations and prosecutions, the safety of the witnesses and police officers involved, as well as the integrity and effectiveness of the programme itself depend on the sound design and careful implementation of the scheme set in place.

When a senior lawyer Vivek Tankha, appearing for an NGO, Country First - which had filed the petition for enacting a legislation on witness protection - said the country cannot be allowed to suffer the menace of hostile witnesses, Chief Justice K G Balakrishnan observed that it was not possible to provide protection to every witnesses, as there were too many pending cases. The bench commented, "How can there be a blanket protection? Do you (petitioner) have an idea how many witnesses would be required to be protected?" The Supreme Court, while directing Delhi Courts to conduct a sample survey of Criminal Courts and also the pending cases, asked them to file a status report on the feasible option of instances where witnesses can be given protection.\(^{59}\)

However the fact remains that a nation cannot afford to expose it’s righteous and morally elated citizens to the peril of being haunted or harassed by anti social elements, for the simple reason that they testified the truth in a Court of law. Dearth of funds should never be an excuse. If our society fails to be alive to the reality, the plight of an honest witness will be catastrophic and calamitous.\(^{60}\)

Hence, this research work starts with the aim not only to survey laws on the subject in other countries and to analyse the suggestion given by various committees on the subject but also to suggest suitable measures for witness protection so as to encourage witnesses to come forward.

To protect witness is a present global problem which has drawn the attention of international authorities. Therefore to solve the issue with top priority at the National and International level, the subject in the present study is a matter of tremendous significance.

Present study consists of both theoretical and empirical study. A purely theoretical approach to the study may not prove to be fruitful unless an empirical study of the actual cases, which required the need of Witness Protection Programme but its absence proved a hindrance, is made.

\(^{59}\) All witnesses can’t be protected: SC, (Supreme Court bench comprising Chief Justice K G Balakrishnan and Justice D K Jain), The Times of India, New Delhi, 23.1.2007.

\(^{60}\) Supra note 38.
**Hypothesis:** Witnesses play an important role in deciding the course of criminal justice system. So there is need for witnesses to come forward without any fear of repercussion from the criminal elements. In the present times this aspect of protection of witnesses is gathering a lot of attention and several countries in the world are in advanced stages of doing the needful for protecting witnesses. However there is total inadequacy of Indian laws in dealing with this matter. In view of the complexities involved, this hypothesis rests on the presumption that if the state of affairs regarding protection to the witnesses in criminal cases remained unchanged the repercussions of this problem shall be annihilating the delivery of justice by the judicial system with criminals going scot-free and reliable witnesses difficult to trace. For that matter a comprehensive study which deals with the subject of ‘Witness Protection in Criminal Justice System in India’ needs to be done.

The main issues considered while examining the concept of witness protection are:

- Balance between the right of the accused for an open trial in his or her presence as against the need for fair administration of justice in which the victims and witness depose without fear or danger to their lives or property or those of their close relatives.
- Methods to protect witnesses from various discomforts and inconveniences so as to achieve efficient and effective prosecution and alleviate the factors which deter the people from becoming a witness.
- Various strategies which can be adopted to protect the witnesses so that they give their testimony without any fear and also to inculcate a feeling of security among the people so that they do not hesitate in becoming a witness in a case.
- Various methods which can be adopted for witness identity protection.
- Various methods which can be adopted to provide physical protection to the witnesses.
- The need for a Witness Protection Programme and whether it would satisfactorily contribute to the fight against the crimes that are being targeted by the programme. Further if there are any other means through which witnesses can be protected, then overpowering utility of this programme over such other means.
• The organization and operation of the programme and the Legal status which it should carry.
• The issue of the authority who would be responsible for the administration of the programme and the aspect of the most suitable method to be adopted by such authority.
• Financial resources can be a big restrain in countries like India. So this issue has been suitably dealt with.
• The factors which would make a person eligible or ineligible for the programme have been taken into consideration.
• The extent of the benefits that should be granted under the program.
• The obligations of the protecting agency and the protected witness.
• Nature and duration of protection and the circumstances in which it can be terminated.
• The issue of dealing with a person who compromise the security of a protected witness or the integrity of the program.

Universe of study: In the present research work, the factors which generate the need for protection of witnesses especially in Indian context have been analysed. The aspects of witness vulnerability as well as need of their welfare at all stages of the case and thereafter have been studied and examined. A thorough study of existing programmes on witness protection in various countries has been made and worldwide efforts being made to deal with the problem have been given due attention. Various Statutes, Law Journals, available legal literatures, articles, media reports and judicial activism have been used to examine the issues. Although presumption of innocence is attached to every witness, whether prosecution witness or defence witness and he has all the rights to lead evidence and thus there should not be any different approach; but the present study is confined to study of prosecution witnesses in criminal cases and various protection measures needed for them.

Analysis of Literature: The literature resource for analysis is available in the form of number of books, newspaper, magazines, internet sites, journals, articles, conventions and relevant laws in different countries. The literature relating to the rights of witnesses and laws relating to their protection, various tradition and custom, various
support systems like constitutional, legislative, government programs and policies and also the international conventions and conferences affecting the national scenario have been studied in detail. The internet had a substantial effect to studying international scenario as well as definitions of different words and news items, without which the research would have been much more difficult.

**Research methodology:** The present research work required both theoretical and empirical study. The theoretical work dealt with the study of literature and judicial verdicts available on the issue. The empirical work comprises taking views of Judges, Advocates and Police Officers, who normally deal with the witnesses during trial, by means of a questionnaire designed for the purpose. The analysis of such responses and study of literature and judicial verdicts has provided the real picture about the need for witness protection and necessity of designing a programme for the same.

**Plan of Study:** The research has been presented schematically by dividing into eight chapters detailed as follows:

Chapter-1: Gives the introduction of the topic, its problem profile, object of study, research hypothesis, literature analysis, universe of study, defining witness and different types of witnesses like eye witness, independent witness, interested witness, formal witness, police witness, stock witness, hostile witness, expert witness, won over witness and at last categorization of witnesses for protection like State witnesses, informers including undercover police officers, victim witnesses, other types of witnesses (witnesses who are known to the accused; witnesses not known to the accused) etc.

Chapter-2: Explains the various provisions in Indian laws like Indian Penal Code 1860, the Criminal Procedure Code 1973, the Indian Evidence Act, 1872 and Special laws like Terrorist Affected Areas (Special Courts) Act, 1984, the Terrorists and Disruptive Activities (Prevention) Act, 1985 and the Terrorists and Disruptive Activities (Prevention) Act, 1987 commonly known as TADA Acts etc. for protection to witnesses and the various court decisions which have worked towards improving the conditions of the witnesses or giving them some kind of protection and how all of these are not sufficient to deal with the issue.

Chapter-3: Discusses the aspect of perjury and its bonding with the concept of witness protection as well as how punishment under perjury is not sufficient in itself
to deal with the issue of lack of readiness on part of witnesses to testify when faced with some kind of threat, mild or severe.

Chapter-4: Deals with various dimensions of the witness protection, nature of threats, scope of witness protection and various parameters within which it can function. There is a detailed discussion on the issue of rights of the accused vis a vis witness anonymity for protection.

Chapter-5: Gives a detailed insight into witness protection laws existing in different countries e.g. USA, Australia, Canada, South Africa, Colombia, Germany, Italy, United Kingdom and some Asian countries like Thailand, Republic of China (Taiwan) so as to examine their broad framework and points of convergence and divergence.

Chapter-6: Involves a detailed and critical study of various reports of the Law Commission since its inception e.g. 14th Report, 154th Report, 172nd Report, 178th Report and 198th Report as well as Malimath Committee Report on the issues relating to the witnesses in the Indian judicial system and the utility of such reports in improving the environment for frank and fearless testimony of these witnesses. Insufficiency of these reports in dealing with the issue under consideration has been examined.

Chapter-7: Details the findings of the empirical study done for the research work. Views of Judicial Officers, Police Officers and Advocates have been taken on the issue and analysed.

Chapter-8: Finally based upon the research, conclusion has been drawn that evolving an effective and sustainable scheme including a Witness Protection Programme is need of the hour in our country. On the issue of witness protection there are no easy solutions, as without effective implementation it will be worth just piece of paper. In practice it may work out to be very complicated, especially with regard to funding, regarding the change of identity and relocation of at-risk witnesses and with regard to cross-border cooperation. The conditions and criteria for the establishment of a scheme, the sole purpose of which would be to ensure the safety of threatened witnesses, have thus been defined. An account of the challenges that our country would have to face in its efforts to address the threat posed to witnesses by criminals as well as their groups has been brought out and suitable measures and practices which can produce positive results have been suggested. These measures would provide for a continuum of protection that starts with the early identification of
vulnerable or intimidated witnesses, continues with the management of witnesses by
the police and the legal measures to protect the witness’s identity during courtroom
testimony, and culminates with the adoption, in extreme cases, of measures for
permanent change of identity and relocation.

The method of protection will largely depend upon the kind of witness, nature
of the testimony, type of crime and last but not the least the nature of threat or
intimidation. Of all these methods, the Witness Protection Programme is that of last
resort in providing protection to a threatened witness. A Witness Protection Scheme
to provide following types of protection has thus been suggested:

Grade 1 Protection: This refers to providing protection to the witnesses from
discomfort and inconveniences which plague the present system, making the life of
the witnesses miserable as well as acting as a strong deterrent against their coming
forward to provide the necessary testimony and evidence. The purpose of providing
assistance to witnesses so as to protect them from various discomforts and
inconveniences has nothing to do with providing security to them against physical
harm but it is a means to achieve efficient and effective prosecution. It can relieve
them from anxiety and improve psychological wellbeing, which can in turn improve
the quality of their deposition. Such assistance should preferably be administered as
well as delivered by professionals who are not under the control of the investigation
or prosecution team.

Grade 2 Protection: Although ideally each and every witness should receive
assistance and support, however due to various practical reasons Witness Protection
Programmes are essentially reserved for those extraordinarily important cases where
the threat against the witness is so serious that protection and support cannot be
ensured by other means. So in cases that do not warrant the permanent relocation and
change of identity of the witness various strategies can be worked out for various
stages of trial (or even pre trial or investigation stage) to ensure that at-risk and
intimidated witnesses cannot be traced easily by the criminals or their accomplices e.g.
by means of enhanced police measures criminals wanting to harm the witness can be
discouraged; change of the trial venue or hearing date; removal of the public and
media from the courtroom (in camera session); presence of an accompanying person
for psychological support etc. Several such measures have been discussed in detail.

Grade 3 Protection: In addition to above some other procedural protection
measures can also be adopted with the permission of the court for the duration of
testimony. Such protection measures can be of great help especially in sensitive cases involving trafficking in persons, sex crimes, child witnesses and family crimes etc. as these would prevent the re-victimization of victim-witnesses by limiting their exposure to the public and the media during the trial. Relevant measures have been discussed in detail.

**Grade 4 Protection:** In circumstances like refusal of the witness to enter Witness Protection Programme or lack of eligibility criteria for entering such programme, witnesses may be offered support to look after their own protection. The procedural aspects of the same have thus been discussed in the work.

**Grade 5 Protection:** Where witnesses cannot be protected by using any of the Grade1 to Grade 4 protection as envisaged in the witness protection scheme but they deserve to be protected due to the nature of crime involved and the overall impact on the society and the criminal justice system if the accused are convicted, then Grade 5 protection should be resorted to. This would involve establishing of a separate Witness Protection Programme which would involve change in identity of the witness or his relocation to a new place so as to eliminate the chances of witness being tracked by the criminals or their associates. Detailed suggestions have been given on following of the most important elements for the establishment and operation of Witness Protection Programme:

1. A clear legal or policy basis for designing a methodology and carrying out operations;
2. Adequate financing that is stable and continues for several years;
3. Strict personnel qualifications and vetting procedures;
4. Protection of the Programme’s integrity;
5. Close coordination with judicial and other Government authorities engaged in law enforcement and intelligence, prison administration, public housing, health and social security services, among others;
6. Accountability and transparency that conform with the Programme’s special security needs;
7. Obligation of Government authorities to provide appropriate assistance, safeguarding the information disclosed to them;
8. Ability to offer assistance to national and international law enforcement agencies.
To conclude in brief, there exists an imminent need for framing a law to protect witnesses so as to throw an effective safety net around them in order to protect them from not being devoured by the powerful crime mafia of the society. Such a law should enable framing up of Witness Protection Schemes including that for Witness Anonymity and Identity Protection and for extreme cases a Witness Protection Programme. Further, a law can be as good as its implementation. So even if there is complete protection and encouragement of witness testimony, there exists a simultaneous need for capacity building of police, prosecutor and Judicial functionality, integrity and public credibility, along with access and outreach to the people of the country. This only can lead to an effective Criminal Justice System which the offenders cannot ignore. This only can create an environment conducive to the witnesses, who can then provide the requisite evidence or testimony without any apprehensions in their mind. This will enable them to come out from self-imposed censorship existing due to a fear that they will put their lives or at least livelihood and social standing at risk, even if there are no explicit threats. Moreover in high profile cases and the cases involving organized crime and terrorism instead of coercion, the accused perpetrator may offer implicit or explicit favours to the witnesses, ranging from cash payments to promises of future positions or promotions. This requires strong anti-corruption strategies side-by-side with effective strategies to address the issues of witness protection. There must be, in short, an integrated strategy, of which witness protection is one important part.
WITNESSES IN THE CRIMINAL JUSTICE SYSTEM IN INDIA: A CRITIQUE OF THE STRATEGIES FOR THEIR PROTECTION

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SUMMARY

The concept of a fair trial is a constitutional imperative recognized in Articles 14, 19, 21, 22 and 39-A of the Constitutional of India as well as by The Code of Criminal Procedure, 1973 (hereinafter referred as the Cr.P.C., 1973). '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'.\(^1\) In Maneka Gandhi’s case\(^2\), the Apex Court while referring to Satwant Singh Sawhney’s case\(^3\) held that the procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary.

A law which prescribes fair and reasonable procedure for curtailing or taking away the rights enshrined in Article 21 of the Constitution of India\(^4\) has still to meet a possible challenge under the other provisions of the Constitution. A fair trial, no doubt, should be fair to the accused but at the same time it should be fair to the prosecution or the victims also. So the issue of witnesses in criminal trial being able to give evidence without any allurement, inducement or threat from either of the party to the trial gathers importance.

In a criminal trial, the prosecution is required to first lead evidence. The defence has the right to cross-examine the prosecution witnesses to test the veracity of the prosecution case. A comprehensive legal framework for recording the testimony of witnesses in criminal cases has been laid down in The Indian Evidence Act, 1872 and the Cr.P.C., 1973.

According to Bentham, "witnesses are the eyes and ears of justice". Each and every statement of these witnesses is very important as it has a magic force to change the course of the whole case. The condition of witnesses, however, remains precarious one. In Swaran Singh v. State of Punjab\(^5\), Wadhwa J. had expressed his opinion about the adverse conditions faced by the witnesses. All such adverse circumstances for the witnesses prove to be a blessing for the accused.

Crimes and acts of terrorism take place in public view and still the public who has seen the same do not come forward to give evidence out of fear and on account of

\(^2\) Maneka Gandhi v. Union of India, AIR 1978 SC 597.
\(^3\) Satwant Singh Sawhney v. D. Ramaratnam Assistant Passport Officer, Government of India, New Delhi & Ors., AIR 1967 SC 1836.
\(^5\) Supra note1.
frustrating Court procedures. The net result of the unwilling attitude of the public is that the accused invariably manages to get off the hooks and the criminal justice fails. In such circumstances and scenario in recent past a deep concern was expressed in different quarters for suitable legislation and measures for bold witness protection.6

Under Section 397 of the Cr.P.C., 1973, citizens are legally and morally duty bound to give information about crime and criminals. It is, however, a harsh reality that willing cooperation and support from public and independent witnesses is hardly available. Police investigations are tardy and do not reflect the truth. Police efforts are not to bring the truth before the Court but to prepare a strong prosecution case on behalf of the State. Thus, the statement of the complaint, true or false, becomes very important. Securing conviction rather than unearthing truth is considered to be the yardstick to judge the professional competency of a police investigating officer in police circles. The prosecution agency has not grown to function independently and the prosecutors believe that proving the police story in the Court is their sole responsibility. Therefore, in most of the cases, what is produced and stated before the Court is not a true account of what has happened and what the investigating officer has done during the investigations. Police concoct evidence and distort facts to suit

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7 Section 39. Public to give information of certain offences.

(1) Every person, aware of the Commission of, or of the intention of any other person to commit, any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely.
   (i) Sections 121 to 126, both inclusive, and section 130 (that is to say offences against the State specified in Chapter VI of the said Code);
   (ii) Sections 143, 144, 145, 147 and 148 (that is to say, offences against the public tranquillity specified in Chapter VIII of the said Code);
   (iii) Sections 161 to 165A, both inclusive (that is to say, offences relating to illegal gratification);
   (iv) Sections 272 to 278, both inclusive (that is to say, offences relating to adulteration of food and drugs, etc.);
   (v) Sections 302, 303 and 304 (that is to say, offences affecting life);
   (va) Section 364A (that is to say, offence relating to kidnapping for ransom, etc);
   (vi) Section 382 (that is to say, offence of theft after preparation made for causing, death, hurt or restraint in order to the committing of the theft);
   (vii) Sections 392 to 399, both inclusive, and section 402 (that is to say, offences (if robbery and dacoity);
   (viii) Section 409 (that is to say, offence relating to criminal breach of trust by public servant, etc.);
   (ix) Sections 431 to 439, both inclusive (that is to say, offence of mischief against property);
   (x) Sections 449 and 450 (that is to say, offence of house-trespass);
   (xi) Sections 456 to 460, both inclusive (that is to say, offences of lurking house trespass); and
   (xii) Sections 489A to 489E, both inclusive (that is to say, offences relating to currency notes and bank notes).

Shall, in the absences of any reasonable excuse, the burden of proving which excuse shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such Commission or intention;

(2) For the purposes of this section, the term "offence" includes any act committed at any place out of India, which would constitute an offence if committed in India.
the prosecution story. Witnesses watch the interest of those who have called them and the prosecution agency overlooks the truth by not going beyond what has been written by the police on the case file. Under these circumstances, the Court hardly gets an opportunity to see the truth through the State agents. Keeping in mind these ground realities; it would be relevant and timely to examine the need and importance of a ‘Witness Protection Programme’ in India.8

Man is a peace-loving animal. He wants to lead a tension free life and has learnt the art of compromising with situations to purchase mental peace for himself and for his kith and kin. ‘Forget and forgive’ is relevant phrase which most of us follow in our day-to-day life. This happens in criminal proceedings also especially in cases of petty offences.9 The prevalent position of law makes witnesses to vacillate during trial. Vacillating witnesses have always been a stumbling block to the flow of justice and a vexing problem for the Courts of law. Deposition before a Court is recorded at the stage of trial, often years after the occurrence. By then the memory of the witnesses has already faded. The police on the other hand records statement of witnesses, as a part of investigation, soon after the occurrence and it places extracts before the concerned Court. Under Section 16110 and Section 16211 of the Cr.P.C.,

9 Ibid.
10 Section 161. Examination of witnesses by Police.
(1) Any Police officer making an investigation under this Chapter, or any Police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.
(2) Such person shall be bound to answer truly all questions relating to such case Put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.
(3) The Police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.
11 Section 162. Statements to Police not to be signed:
Use of statements in evidence.- (1) No statement made by any person to a Police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a Police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:
Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act , 1872; (1 of 1872) and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.
1973 if such statement of witness is recorded the same should not be under oath; nor be got signed by the witness. The purpose is to avoid manipulations at the hands of the police who have potential to extract even false statements of their choice and to pin the witness down during prospective trials. An adverse offshoot of this prohibition is the freedom of witness to give false testimony. Pressures and influences involving money power, threat, political interference etc. may contribute to this eventuality. It is not merely the illiterate and the poor who yield to such pressures, even VIPs and politicians succumb to them. Faced with severe threats to life of self or dear ones, or under substantial tempting offers, an ordinary person would be inclined even to give an untrue version before the Court because he does not stand to lose much thereby.

Evidently a witness is troubled because he is unfortunate enough to be on the spot when the crime is being committed and at the same time "foolish" enough to remain there till the arrival of the police. So it is our responsibility to provide him the best as he is helping the administration of justice. Protection is also necessary to restore a sense of human dignity. Various rules or guidelines for protection of witnesses have been laid but they cannot and are not complete and, in any event, cannot be as effective as the provisions of a special statute on the subject would otherwise be.

Generally speaking, witness protection would imply protection to a witness from physical harm, but so far, in the Indian context, it has had a somewhat restricted meaning. It has been understood to mean protection of witnesses from discomfort and inconvenience and therefore protection has had reference only to the provision of facilities. However in real, the protection of witness may be desirable in a vast number of situations viz. to prevent the witness from being allured and won over, to prevent the witness from coming under social/family pressure to get out of the cumbersome routine of making rounds of Court or due to some other pressures instilling fear in them the safety of the witness or some near and dear one, witness coming under peer group pressure e.g. after observing the other witnesses finding out some way to get out of the situation he also wants to do the same, witness getting tired

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872, (1 of 1872) or to affect the provisions of section 27 of that Act.

Explanation.- An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.
of the never ending Court proceedings, witness facing threat to his life or property or of his family members, political interference, to prevent the dissemination of information regarding the identity and address of the witness and to ensure that the name, address and identity of the witness are not given publicly in media etc. Protection of witness can relate to any or whole of the period beginning from the stage when a person becomes a witness to the period beyond the stage when trial is over and the accused has been convicted.

According to Justice Madan B. Lokur, physical protection of a witness has become necessary not only in cases involving serious offences, hardened criminals and other bad characters, but also in less serious cases and cases where the accused are socially acceptable persons wielding influence.\(^{12}\)

Although there are some provisions e.g. Section 327(2)\(^{13}\) of the Cr.P.C., 1973, Section 228A\(^{14}\) of The Indian Penal Code, 1860 (hereinafter referred as IPC, 1860),


\(^{13}\) Section 327. Court to be open :-(1) The place in which any Criminal Court is held for the purpose of inquiring into, or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them:
Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.
(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted in camera:
Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in the room or building used by Court.
(3) Where any proceedings are held under sub- section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings except with the previous permission of the Court.

\(^{14}\) Section 228-A.
1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376B, section 376C or section 376D is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.
(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is-
(a) by or under the order in writing of the officer-in-charge of the Police station or the Police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or
(b) by, or with the authorisation in writing of, the victim; or
(c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim:
Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation.
Section 146(3)\textsuperscript{15} of The Indian Evidence Act, 1872 etc. and some special Acts, which work for the protection of witness and also the Supreme Court has repeatedly emphasized on the issue of witness protection but they are not adequate and it is required that a comprehensive law is framed for the same. In absence of such a comprehensive law the problem of witnesses gets compounded as they not only feel unsecured but at the same time having no remedy for the injuries caused to them because of that insecurity. Generally the reason is the unholy combination of money and muscle power, intimidation and monetary inducement.

Sometimes the social pressure works and the complainant and witnesses agree not to support the prosecution case. The solitary incident of Jind district of Haryana where a young man, when he, accompanied by the warrant of the High Court and Police, went to a village to recover his wife was lynched by the villagers is an indicator of a parallel self-proclaimed judicial system. The marriage was not accepted by the social/khap panchayat (community panchayat) and the boy was killed for violating social norms. When the petition pending on the matter came for hearing before the High Court, the girl retracted of marrying the lynched boy and the warrant officer, who was badly beaten by the villagers, also stated before the High Court that he got injured when he was trying to climb a wall in his attempt to escape from the scene.\textsuperscript{16} It speaks volume of how the social/caste/khap panchayats and the community pressure become instrumental in proceedings before the Court\textsuperscript{17}.

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\textsuperscript{15} Section 146. When a witness is cross-examined, he may, in addition to the question here in before referred to, be asked any questions which tend-

1. To test his veracity,
2. To discover who is and what is his position in life, or
3. To shake his credit, by inuring his character, although the answer to such questions, might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeitures.

\textsuperscript{16} Mor’s fight a dead issue for Haryana, The Tribune, Friday, 31.7.2009, Chandigarh at 1.

\textsuperscript{17} Supra note 8.
The sensational cases like the BMW case\textsuperscript{18}, Jessica Lal murder case\textsuperscript{19} and the Best Bakery case\textsuperscript{20}, witnessed the exodus of witnesses and the resultant acquittal of the accused persons. Public outcry that the justice dispensation system crumbled at least in those cases deserves keen attention. We need to protect the witnesses who want to submit the truth, nothing but truth, before a Court of law. The fact is that neither there was and nor there is any programme available under which after the assessment of the need for protection to a particular witness, the administration could give him/her the requisite protective cover as has been provided in countries like United States of America, Canada, Australia and United Kingdom.

Various protection programs and measures are needed which range from safe shelter for witnesses to various forms of protection by law enforcement agencies and comprehensive protection programmes. Measures can be taken by establishing a witness protection group in the criminal justice system, an organization at a national level whose aim will be to develop and implement special measures, establishment of a witness unit to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses who appear before the Court and others who are at risk on account of testimony given by such witnesses. Adequate arrangements must also be made to protect the physical and mental well-being of such individuals, many of whom are victims of serious crimes committed against them. This is necessary to avoid getting traumatized again or an otherwise negative experience, one effect of which could be to create a disincentive for witnesses to testify. A system has to be devised to ensure safe travel to home for witnesses at an appropriate juncture. A suitable arrangement for follow up after a witness testifies has to be there. This is crucial for adequate assessment of risks to their physical and mental well-being following testimony, to evaluate his or her condition, psychosocial support required etc. However, such follow up can be a difficult task, particularly where resources are scarce. There should be clear understanding regarding the rules


\textsuperscript{20} The Best Bakery case took place on March 1, 2002 in Vadodara, during the 2002 Gujarat violence, in which 14 people were murdered, many of them burned to death. The case came into prominence after all the 21 accused were acquitted on June 27, 2003 by a 'fast-track Court' for lack of evidence, after 37 out of the 73 witnesses, including key witness Zaheera Sheikh turned hostile. Zaheera, later, confessed that she lied in the Court due to fear as her family had received death threats.
and aims of different job holders such as the police, prosecutors, judges and service providers.

In many countries and under international instruments a range of procedural measures are foreseen which help protect witness from intimidation. These measures also protect witnesses from confrontation with offenders and protect their privacy thus preventing intimidation and re-victimization. Most of the counties have formulated Witness Protection Programmes for example, the United States of America has The Victim and Witness Protection Act 1982 and Australia has The Australian Witness Protection Act, 1994. In India, although unfortunately there is very high rate of crime and very low rate of conviction; even then no frame work regarding protection of witness has been drawn. The duty to protect the witness is on the police, but it has dubious reputation in discharging this duty.

There are a number of recommendations of various commissions from administrative to judicial and from police to human rights activists that address the issues of protection of witnesses. The vulnerability of witnesses is so prominent that nowadays even the Courts have broken their silence and have appealed for the witness protection law.

In *Best Bakery case*\(^2\), the Hon’ble Supreme Court commented upon the State administration in general and the investigating agency in particular for rashly and negligently handling their duties and abdicating their responsibilities. The finding of the Court was that the whole machinery of the State failed in maintaining the confidence of public in the justice delivery system. The Court reminded the Trial Courts to be alive to the reality about the witness hostility. One of the predominant points taken note of by the Hon’ble Supreme Court is the lack of witness protection in our country. The principles stated in the above decision have been reiterated by the Hon’ble Supreme Court in the contempt proceedings taken up against *Zahira Habibulla H. Sheikh and Another*\(^2\).

In *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others*\(^2\), the Apex Court was emphatic on the role the State has to play in protecting the witnesses. It has been observed that as a protector of its citizens, the State has to ensure that during the trial in the Court the witness could safely depose the truth

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\(^2\) *Supra* note 21.
without any fear of being haunted by those against whom he had deposed. The Supreme Court reminded the State that it has a constitutional obligation and duty to protect the life and liberty of the citizen who acted as a truthful and earnest witness.


In *People’s Union of Civil Liberties v. Union of India*, the Supreme Court considered the validity of Section 30 of The Prevention of Terrorism Act, 2002 which deals with ‘protection of witnesses’.

Witness protection, in its narrow interpretation, and its impact on judicial administration, was also dealt with in the 4th Report of the National Police Commission where the Commission referred to the inconvenience and harassment caused to the witnesses in attending Courts. The Commission noted that the monetary compensation was woefully inadequate and referred that out of 96,815 witnesses who attended the Courts during the test period, only 6697 witnesses were paid some allowance, and that too after following a rather cumbersome procedure (which incidentally has hardly changed for the better anywhere). These figures signify the irrelevance of the amount paid to witnesses for their troubles.

The 14th Report of the Law Commission considered the problem of witness protection and referred to inadequate arrangements for witnesses in the Court house as well as meagre travelling allowance and daily bhatta (allowance) paid to witnesses for attending the Court in response to summons.

In its 154th Report, while noting the plight of witnesses appearing on behalf of the State, Law Commission observed that the witnesses faced not only inconveniences but also risk to their lives at the hands of criminals. So it made recommendations to mitigate various inconveniences.

The Law Commission in its 178th Report again took up the issue of preventing witnesses from turning hostile. The Report also dealt with the issue of precautions the police should take at the stage of investigation to prevent fabrication

24 2003 (9) SCALE 329.
29 Law Commission of India, One Hundred and Seventy Eighth Report: Recommendations for amending various enactments, both civil and criminal, Dec 2001.
by witnesses when they are examined later at the trial. The Commission
recommended recording the statements of material witnesses in the presence of
Magistrates, taking signatures of the witnesses on the police statement and sending
the same to appropriate Magistrate and a senior police official and lastly in all serious
offences (punishable with ten or more years of imprisonment) the statement of
important witnesses should be recorded at the earliest by a Magistrate under Section

This was observed by the committee that many witnesses give false evidence
either because of inducement or because of the threats to him or his family members.
There is no law to give protection to the witnesses subject to such threats, similar to
witness protection laws available in other countries. It was pointed out that
unfortunately the witnesses were treated very shabbily by the system. To overcome
these problems, the Committee made several recommendations\textsuperscript{31}.

After these reports the commission on reforms of Criminal Justice System
under the chairmanship of Dr. Justice V.S. Malimath submitted its rather voluminous

\textsuperscript{30} Section 164. Recording of confessions and statements.

(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the
case, record any confession or statement made to him in the course of an investigation under this
Chapter or under any other law for the time being in force, or at any, time afterwards before the
commencement of the inquiry or trial:
Provided that no confession shall be recorded by a Police officer on whom any power of a Magistrate
has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he
is not bound to make a confession and that, if he does so, it may be used as evidence against him; and
the Magistrate shall not record any such confession unless, upon questioning the person making it, he
has reason to believe that it is bear, made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states
that he is not willing to make the confession, the Magistrate shall not authorize the detention of such
person in Police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the
examination of an accused person and shall be signed by the person making the confession; and the
Magistrate shall make a memorandum at the foot of such record to the following effect:
"I have explained to (name) that he is not bound to make a confession and that, if he does so, any
confession he may make may be used as evidence against him and I believe that this confession was
voluntarily made. It was taken in my presence and hearing, and was read over to the person making it
and admitted by him to be correct, and it contains a full and true account of the statement made by him.
(Signed) A.B.
Magistrate".

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such
manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best
fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the
person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the
Magistrate by whom the case is to be inquired into or tried.

\textsuperscript{31} Supra note 29.
report, containing as many as 158 recommendations. Some of these recommendations were made even in the 14th Report of the Law Commission about five decades ago, and yet there is little to show by way of any improvement in the quality of facilities available to a witness.

The immediate importance of the subject of witness protection in our country motivated the Law Commission to take up the subject of ‘Witness Anonymity’ and ‘Witness Protection’ suo-motto. The Law Commission’s consultation paper on witness identity protection and Witness Protection Programs August 2004 broadly categorized the need of witness protection as follows:

1. The phenomenon of witness to become hostile on account of the failure to protect their evidence is one of the problems. So it is necessary that procedure should be introduced into the criminal law to balance the need for anonymity of witnesses on the one hand and right of the accused on the other.

2. The other need is for physical protection of the witness at all stages of the criminal justice process till the conclusion of case, by the introduction of Witness Protection Programmes.

The Law Commission analysed validity of the provisions of various statues providing specifically for protection of witnesses. It has discussed various principles of law developed by the Supreme Court and the High Courts. These principles basically stress upon the need for a congenial atmosphere for the conduct of a fair trial and this included the protection of witnesses.

The Criminal Law (Amendment) Act, 2005 which has been enforced w.e.f. 16.4.2006 has amended the IPC, 1860, the Cr.P.C., 1973 and the Indian Evidence Act, 1872. Above Act has introduced Section 195A to the IPC, 1860, whereby threatening or inducing any person to give false evidence is made punishable. By

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32 The Committee submitted its report to the Ministry of Home Affairs on 21 April 2003.
33 Supra note 27.
34 On basis of responses to this paper the Law commission gave its One Hundred and Ninety Eighth Report: Witness Identity Protection And Witness Protection Programmes on the issue in August, 2006.
35 No.2 of 2006, The Gazette of India-Extraordinary Part II-Section 3, Sub Section (ii); No.348, New Delhi, Wednesday, April 12, 2006, Ministry of Home Affairs Notification-S.O.523 (E).
36 Section 195A. Threatening or inducing any person to give false evidence.-Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both; and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced.
virtue of the said amending Act, Section 195 of the Cr.P.C., 1973 has also undergone changes. Section 154 of The Indian Evidence Act, 1872 empowers the Court to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.

The only real attempt with regard to witness protection (in the physical sense) is to be found in the provisions of Control of Organised Crime Acts enacted by some of the State Governments. Section 13 of The Terrorist and Disruptive Activities (Prevention) Act (TADA Act), 1985 and Section 16 of the TADA Act, 1987 provided for protection of the identity and keeping address of a witness secret. Section 16 of the TADA Act, 1987 differed from Section 13 of the TADA Act, 1985 in two respects. Firstly, whereas it was mandatory to hold proceedings in camera under Section 13 of the TADA Act, 1985 the proceedings could be held in camera under Section 16 of the TADA Act, 1987 only where the designated Court so desired. Secondly, Section 16(3)(d) of the TADA Act, 1987 empowered a designated Court to take such measures in the public interest so as to direct that information in regard to all or any of the proceedings pending before such a Court shall not be published in any manner. Section 30 of The Prevention of Terrorism Act (POTA), 2002 is on the same lines as Section 16 the TADA Act, 1987. In its reports the Law Commission has failed to point out that such discretion leaves the witnesses in a confused position about their protection and they decide to quit the path of truth.

Although Section 327 of the Cr.P.C., 1973 provides for trial in the open Court and Section 327(2) of the Cr.P.C., 1973 provides for in-camera trials for offences involving rape under Section 376 of the IPC, 1860 and under Section 376 A to 376 D of the IPC, 1860 but it is shocking to note that barring rape and child abuse cases, there are, as of today, no general statutory provisions in the Cr.P.C., 1973 on this subject.

Whatever recommendations made, the fact remains that there is no general law on protection of identity of witnesses in criminal cases, apart from the provisions for

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37 After section 195 of the principal Act, the following section shall be inserted, namely:- Procedure for witnesses in case of threatening, etc. - "195A. A witness or any other person may file a complaint in relation to an offence under section 195A of the Indian Penal Code."
39 Act already repealed.
40 Ibid.
41 Ibid.
protection of witnesses in the special statues governing terrorist-crimes. But the cases where nobody is ready to become a witness or is no longer interested in continuing as a witness or just interested in denying his original version of statement so as to get rid of the threats hanging on his head are no longer confined to cases of terrorism as this phenomenon has reached alarming proportion elsewhere also. There is therefore need, as in other countries, to generally empower the Court in cases where muscle power, political power, money power or other methods are employed against witnesses and victims to prevent them from giving true evidence or testimony, so that these witnesses are provided sufficient protection to enable them to give evidence without any fear or reprisals and threats by the accused do not have any impact on them.

In the Fifty-fifth session of the General Assembly of the United Nations, a resolution 43 was adopted relating to the Convention against Trans-national Organized Crime. The thrust of the Convention was on serious crimes (constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty) in order to obtain, directly or indirectly, a financial or other material benefit. The application of the Convention is to serious crimes as mentioned above and to offences mentioned in Articles 5, 6, 8 and 23 of the Convention. Article 5 basically concerns itself with criminal activity of an organized criminal group, which means a structured group of three or more persons. Article 6 relates to the criminalization of the laundering of proceeds of crime, while Article 8 relates to the criminalization of corruption. Article 23 of the Convention is of some importance and it deals with criminalization of obstruction of justice. Each State party to the convention shall adopt legislative measures to make it a criminal offence, inter alia, to use physical force, threats or intimidation or to otherwise interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by the Convention. Article 24 relates to the protection of witnesses and this reads as follows:

“Protection of witnesses

1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in

43 No.55/25.
criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter-alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use communications technology such as video links or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are Witnesses.”

The convention thus reinforces three significant advances in the matter of witness protection:

(i) Enlarging the definition of a witness to include his or her relatives and other persons close to him or her.

(ii) Acceptance of the use of modern technology such as video linkage to record the testimony of a witness,⁴⁴ and

(iii) Victims of a crime are also entitled to protection if they are witnesses.

In the United States of America, the Organized Crime Control Act, 1970 and later the Comprehensive Crime Control Act, 1984 authorized the Witness Security Program. The Witness Security Reform Act, 1984⁴⁵ provides for relocation and other protection of a witness or a potential witness in an official proceeding concerning an organised criminal activity or other serious offence. Protection may also be provided to the immediate family of, or a person closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding. The Attorney General takes the

⁴⁴ State of Maharashtra v. Dr Praful B. Desai 2003 Cri.L.J. 2033 also endorsed this.
⁴⁵ U.S. Code Collection, Title 18, Part II, Chapter 224, Section 3521.
final decision whether a person is qualified for protection from bodily injury and otherwise to assure the health, safety and welfare of that person. In a large number of cases, witnesses have been protected, relocated and sometimes even given new identities. The programme assists in providing housing, medical care, job training and assistance in obtaining employment and subsistence funding until the witness becomes self-sufficient. The Attorney General shall not provide protection to any person if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony. The Marshals Service which is a division of the Department of Justice gives protection to government witnesses and their immediate dependants against drug traffickers, terrorists, organized crime members and other major criminals. The claim of the Marshals Service is that about 7000 witnesses have so far been successfully protected and since the inception of the programme, the conviction rate has gone up to 89% due to the testimony of protected witnesses.

A similar programme is in operation in Canada under the Witness Protection Act, 1996. The purpose of the Act is "to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters". Protection given to a witness may include relocation, accommodation and change of identity as well as counselling and financial support to ensure the security of the protected or to facilitate his becoming self-sufficient. Admission to the Programme is determined by the Commissioner of Police on a recommendation by a law enforcement agency or an International Criminal Court or tribunal.

The Australian Witness Protection Act, 1994 establishes the National Witness Protection Programme in which (amongst others) the Commissioner of the Australian Federal Police arranges or provides protection and other assistance for witnesses. The witness must disclose a wealth of information about himself before he is included in the Program. This includes his outstanding legal obligations, details of his criminal history, details of his financial liabilities and assets etc. The Commissioner has the sole responsibility of deciding whether to include a witness in the Program, and in

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46 Section 3.
47 Section 5 and 6.
48 Section 4.
49 Section 7.
deciding whether to so include a person, the Commissioner shall have regard to various specified aspects.

The Witness Protection Act, 1998 of South Africa provides for the establishment of an office called the Office for Witness Protection within the Department of Justice. The Director of this office is responsible for the protection of witnesses and related persons and exercises control over Witness Protection Officers and Security Officers. Any witness who has reason to believe that his safety is threatened by any person or group of persons may report such belief to the Investigating Officer in a proceeding or any person in-charge of a police station or the Public Prosecutor etc. and apply for being placed under protection. The application is then considered by a Witness Protection Officer who prepares a report, which is then submitted to the Director. The Director, having due regard to the report and the recommendation of the Witness Protection Officer, takes into account the various factors, for deciding whether a person should be placed under protection or not.

The Witness Protection, Security and Benefit Act of the Philippines, which came into force from 24.04.1991 is intended to "encourage a person who has witnessed or has knowledge of the commission of a crime to testify before a Court or quasi-judicial body, or before an investigating authority, by protecting him from reprisals and from economic dislocation." Admission to the Programme is given to a witness where the offence in which his testimony will be used is a grave felony, his testimony can be corroborated on material points and he or any member of his family "within the second degree of consanguinity or affinity is subjected to threats to his life or bodily injury or there is a likelihood that he will be killed, forced, intimidated, harassed or corrupted to prevent him from testifying, or to testify falsely, or evasively." A witness admitted to the Programme is entitled to certain rights and benefits. These include a secure housing facility until he has testified or until the threat, intimidation or harassment disappears or is reduced to a manageable or

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50 Section 8.  
51 Section 4.  
52 Section 7.  
53 Section 9.  
54 Section 10.  
55 Republic Act No. 6981.  
56 Section 3.  
57 Section 8.
tolerable level. The Department of Justice shall, wherever practicable, assist the witness in obtaining a means of livelihood and if the witness is relocated, he shall be entitled to financial support for himself and his family. The witness will be provided free medical treatment, hospitalization and medicines for any injury or illness incurred or suffered by him because of witness duty in any private or public hospital, clinic or at any institution at the expense of the Program.

In the *Nitish Katara murder case*\(^{58}\), the Delhi High Court laid down certain guidelines for a witness protection scheme. Further the initiative taken by the Law Commission of India to examine the issue of witness protection is commendable. But to ensure that the law in this regard is effective and in conformity with international criminal and human rights law, the gaps in the legal protection of witnesses must first be identified. The protection that is currently available to a certain category of witnesses, especially in terrorist cases, is based upon the discretion of the Court and is highly arbitrary and unpredictable. There is an urgent need to establish a neutral agency that can consider the needs of all witnesses, not just those brought by the prosecution.

So witness protection should aim at enabling the witness to live safely. Special measures for minors must be ensured in accordance with the best interest of the child and these measures should also extend to family members when appropriate. These programmes and measures should also include that there should be international agreement regarding temporary and permanent relocation of the witnesses. For development of these measures and programs there should be coordination and cooperation at international level amongst all the job holders. Some measures should be regarding the capacity building, regarding ethical and legal obligation of the media to preserve confidentiality of information and privacy of witnesses.

**Objective of the study:** Being realistic there is need for witness to come forward, especially when we are trying to bring to Justice the career criminals or particularly dangerous criminals. Some times that would mean that we need to actively and rigorously protect those witnesses. For this an effective Witness Protection Programme is an often essential tool in the fight against crime. Those who face investigation and criminal prosecution may attempt to frustrate the administration of

Justice through intimidation or by causing physical or other harm to witnesses or their relatives. In the absence of any programme to protect them from reprisals, witnesses may not be forthcoming, and the justice system may be paralysed. So there is a need to discuss the inadequacy of Indian Laws in dealing with the subject.

At the same time, it can’t be overemphasised that implementing a Witness Protection Scheme is an extremely demanding enterprise in India and other countries. Both the stakes and risks are high. The success of major criminal investigations and prosecutions, the safety of the witnesses and police officers involved, as well as the integrity and effectiveness of the programme itself depend on the sound design and careful implementation of the scheme set in place.

When a senior lawyer Vivek Tankha, appearing for an NGO, Country First - which had filed the petition for enacting a legislation on witness protection - said the country cannot be allowed to suffer the menace of hostile witnesses, Chief Justice K G Balakrishnan observed that it was not possible to provide protection to every witnesses, as there were too many pending cases. The bench commented, “How can there be a blanket protection? Do you (petitioner) have an idea how many witnesses would be required to be protected?” The Supreme Court, while directing Delhi Courts to conduct a sample survey of Criminal Courts and also the pending cases, asked them to file a status report on the feasible option of instances where witnesses can be given protection.

However the fact remains that a nation cannot afford to expose it’s righteous and morally elated citizens to the peril of being haunted or harassed by anti social elements, for the simple reason that they testified the truth in a Court of law. Dearth of funds should never be an excuse. If our society fails to be alive to the reality, the plight of an honest witness will be catastrophic and calamitous.

Hence, this research work starts with the aim not only to survey laws on the subject in other countries and to analyse the suggestion given by various committees on the subject but also to suggest suitable measures for witness protection so as to encourage witnesses to come forward.

To protect witness is a present global problem which has drawn the attention of international authorities. Therefore to solve the issue with top priority at the National and International level, the subject in the present study is a matter of tremendous significance.

Present study consists of both theoretical and empirical study. A purely theoretical approach to the study may not prove to be fruitful unless an empirical study of the actual cases, which required the need of Witness Protection Programme but its absence proved a hindrance, is made.

59 All witnesses can’t be protected: SC, (Supreme Court bench comprising Chief Justice K G Balakrishnan and Justice D K Jain), The Times of India, New Delhi, 23.1.2007.
60 Supra note 38.
**Hypothesis:** Witnesses play an important role in deciding the course of criminal justice system. So there is need for witnesses to come forward without any fear of repercussion from the criminal elements. In the present times this aspect of protection of witnesses is gathering a lot of attention and several countries in the world are in advanced stages of doing the needful for protecting witnesses. However there is total inadequacy of Indian laws in dealing with this matter. In view of the complexities involved, this hypothesis rests on the presumption that if the state of affairs regarding protection to the witnesses in criminal cases remained unchanged the repercussions of this problem shall be annihilating the delivery of justice by the judicial system with criminals going scot-free and reliable witnesses difficult to trace. For that matter a comprehensive study which deals with the subject of ‘Witness Protection in Criminal Justice System in India’ needs to be done.

The main issues considered while examining the concept of witness protection are:

- Balance between the right of the accused for an open trial in his or her presence as against the need for fair administration of justice in which the victims and witness depose without fear or danger to their lives or property or those of their close relatives.
- Methods to protect witnesses from various discomforts and inconveniences so as to achieve efficient and effective prosecution and alleviate the factors which deter the people from becoming a witness.
- Various strategies which can be adopted to protect the witnesses so that they give their testimony without any fear and also to inculcate a feeling of security among the people so that they do not hesitate in becoming a witness in a case.
- Various methods which can be adopted for witness identity protection.
- Various methods which can be adopted to provide physical protection to the witnesses.
- The need for a Witness Protection Programme and whether it would satisfactorily contribute to the fight against the crimes that are being targeted by the programme. Further if there are any other means through which witnesses can be protected, then overpowering utility of this programme over such other means.
• The organization and operation of the programme and the Legal status which it should carry.

• The issue of the authority who would be responsible for the administration of the programme and the aspect of the most suitable method to be adopted by such authority.

• Financial resources can be a big restrain in countries like India. So this issue has been suitably dealt with.

• The factors which would make a person eligible or ineligible for the programme have been taken into consideration.

• The extent of the benefits that should be granted under the program.

• The obligations of the protecting agency and the protected witness.

• Nature and duration of protection and the circumstances in which it can be terminated.

• The issue of dealing with a person who compromise the security of a protected witness or the integrity of the program.

**Universe of study:** In the present research work, the factors which generate the need for protection of witnesses especially in Indian context have been analysed. The aspects of witness vulnerability as well as need of their welfare at all stages of the case and thereafter have been studied and examined. A thorough study of existing programmes on witness protection in various countries has been made and worldwide efforts being made to deal with the problem have been given due attention. Various Statutes, Law Journals, available legal literatures, articles, media reports and judicial activism have been used to examine the issues. Although presumption of innocence is attached to every witness, whether prosecution witness or defence witness and he has all the rights to lead evidence and thus there should not be any different approach; but the present study is confined to study of prosecution witnesses in criminal cases and various protection measures needed for them.

**Analysis of Literature:** The literature resource for analysis is available in the form of number of books, newspaper, magazines, internet sites, journals, articles, conventions and relevant laws in different countries. The literature relating to the rights of witnesses and laws relating to their protection, various tradition and custom, various
support systems like constitutional, legislative, government programs and policies and also the international conventions and conferences affecting the national scenario have been studied in detail. The internet had a substantial effect to studying international scenario as well as definitions of different words and news items, without which the research would have been much more difficult.

**Research methodology:** The present research work required both theoretical and empirical study. The theoretical work dealt with the study of literature and judicial verdicts available on the issue. The empirical work comprises taking views of Judges, Advocates and Police Officers, who normally deal with the witnesses during trial, by means of a questionnaire designed for the purpose. The analysis of such responses and study of literature and judicial verdicts has provided the real picture about the need for witness protection and necessity of designing a programme for the same.

**Plan of Study:** The research has been presented schematically by dividing into eight chapters detailed as follows:

Chapter-1: Gives the introduction of the topic, its problem profile, object of study, research hypothesis, literature analysis, universe of study, defining witness and different types of witnesses like eye witness, independent witness, interested witness, formal witness, police witness, stock witness, hostile witness, expert witness, won over witness and at last categorization of witnesses for protection like State witnesses, informers including undercover police officers, victim witnesses, other types of witnesses (witnesses who are known to the accused; witnesses not known to the accused) etc.

Chapter-2: Explains the various provisions in Indian laws like Indian Penal Code 1860, the Criminal Procedure Code 1973, the Indian Evidence Act, 1872 and Special laws like Terrorist Affected Areas (Special Courts) Act, 1984, the Terrorists and Disruptive Activities (Prevention) Act, 1985 and the Terrorists and Disruptive Activities (Prevention) Act, 1987 commonly known as TADA Acts etc. for protection to witnesses and the various court decisions which have worked towards improving the conditions of the witnesses or giving them some kind of protection and how all of these are not sufficient to deal with the issue.

Chapter-3: Discusses the aspect of perjury and its bonding with the concept of witness protection as well as how punishment under perjury is not sufficient in itself
to deal with the issue of lack of readiness on part of witnesses to testify when faced with some kind of threat, mild or severe.

Chapter-4: Deals with various dimensions of the witness protection, nature of threats, scope of witness protection and various parameters within which it can function. There is a detailed discussion on the issue of rights of the accused vis a vis witness anonymity for protection.

Chapter-5: Gives a detailed insight into witness protection laws existing in different countries e.g. USA, Australia, Canada, South Africa, Colombia, Germany, Italy, United Kingdom and some Asian countries like Thailand, Republic of China (Taiwan) so as to examine their broad framework and points of convergence and divergence.

Chapter-6: Involves a detailed and critical study of various reports of the Law Commission since its inception e.g. 14th Report, 154th Report, 172nd Report, 178th Report and 198th Report as well as Malimath Committee Report on the issues relating to the witnesses in the Indian judicial system and the utility of such reports in improving the environment for frank and fearless testimony of these witnesses. Insufficiency of these reports in dealing with the issue under consideration has been examined.

Chapter-7: Details the findings of the empirical study done for the research work. Views of Judicial Officers, Police Officers and Advocates have been taken on the issue and analysed.

Chapter-8: Finally based upon the research, conclusion has been drawn that evolving an effective and sustainable scheme including a Witness Protection Programme is need of the hour in our country. On the issue of witness protection there are no easy solutions, as without effective implementation it will be worth just piece of paper. In practice it may work out to be very complicated, especially with regard to funding, regarding the change of identity and relocation of at-risk witnesses and with regard to cross-border cooperation. The conditions and criteria for the establishment of a scheme, the sole purpose of which would be to ensure the safety of threatened witnesses, have thus been defined. An account of the challenges that our country would have to face in its efforts to address the threat posed to witnesses by criminals as well as their groups has been brought out and suitable measures and practices which can produce positive results have been suggested. These measures would provide for a continuum of protection that starts with the early identification of
vulnerable or intimidated witnesses, continues with the management of witnesses by the police and the legal measures to protect the witness’s identity during courtroom testimony, and culminates with the adoption, in extreme cases, of measures for permanent change of identity and relocation.

The method of protection will largely depend upon the kind of witness, nature of the testimony, type of crime and last but not the least the nature of threat or intimidation. Of all these methods, the Witness Protection Programme is that of last resort in providing protection to a threatened witness. A Witness Protection Scheme to provide following types of protection has thus been suggested:

**Grade 1 Protection:** This refers to providing protection to the witnesses from discomfort and inconveniences which plague the present system, making the life of the witnesses miserable as well as acting as a strong deterrent against their coming forward to provide the necessary testimony and evidence. The purpose of providing assistance to witnesses so as to protect them from various discomforts and inconveniences has nothing to do with providing security to them against physical harm but it is a means to achieve efficient and effective prosecution. It can relieve them from anxiety and improve psychological wellbeing, which can in turn improve the quality of their deposition. Such assistance should preferably be administered as well as delivered by professionals who are not under the control of the investigation or prosecution team.

**Grade 2 Protection:** Although ideally each and every witness should receive assistance and support, however due to various practical reasons Witness Protection Programmes are essentially reserved for those extraordinarily important cases where the threat against the witness is so serious that protection and support cannot be ensured by other means. So in cases that do not warrant the permanent relocation and change of identity of the witness various strategies can be worked out for various stages of trial (or even pre trial or investigation stage) to ensure that at-risk and intimidated witnesses cannot be traced easily by the criminals or their accomplices e.g. by means of enhanced police measures criminals wanting to harm the witness can be discouraged; change of the trial venue or hearing date; removal of the public and media from the courtroom (in camera session); presence of an accompanying person for psychological support etc. Several such measures have been discussed in detail.

**Grade 3 Protection:** In addition to above some other procedural protection measures can also be adopted with the permission of the court for the duration of
testimony. Such protection measures can be of great help especially in sensitive cases involving trafficking in persons, sex crimes, child witnesses and family crimes etc. as these would prevent the re-victimization of victim-witnesses by limiting their exposure to the public and the media during the trial. Relevant measures have been discussed in detail.

**Grade 4 Protection:** In circumstances like refusal of the witness to enter Witness Protection Programme or lack of eligibility criteria for entering such programme, witnesses may be offered support to look after their own protection. The procedural aspects of the same have thus been discussed in the work.

**Grade 5 Protection:** Where witnesses cannot be protected by using any of the Grade 1 to Grade 4 protection as envisaged in the witness protection scheme but they deserve to be protected due to the nature of crime involved and the overall impact on the society and the criminal justice system if the accused are convicted, then Grade 5 protection should be resorted to. This would involve establishing of a separate Witness Protection Programme which would involve change in identity of the witness or his relocation to a new place so as to eliminate the chances of witness being tracked by the criminals or their associates. Detailed suggestions have been given on following of the most important elements for the establishment and operation of Witness Protection Programme:

1. A clear legal or policy basis for designing a methodology and carrying out operations;
2. Adequate financing that is stable and continues for several years;
3. Strict personnel qualifications and vetting procedures;
4. Protection of the Programme’s integrity;
5. Close coordination with judicial and other Government authorities engaged in law enforcement and intelligence, prison administration, public housing, health and social security services, among others;
6. Accountability and transparency that conform with the Programme’s special security needs;
7. Obligation of Government authorities to provide appropriate assistance, safeguarding the information disclosed to them;
8. Ability to offer assistance to national and international law enforcement agencies.
To conclude in brief, there exists an imminent need for framing a law to protect witnesses so as to throw an effective safety net around them in order to protect them from not being devoured by the powerful crime mafia of the society. Such a law should enable framing up of Witness Protection Schemes including that for Witness Anonymity and Identity Protection and for extreme cases a Witness Protection Programme. Further, a law can be as good as its implementation. So even if there is complete protection and encouragement of witness testimony, there exists a simultaneous need for capacity building of police, prosecutor and Judicial functionality, integrity and public credibility, along with access and outreach to the people of the country. This only can lead to an effective Criminal Justice System which the offenders cannot ignore. This only can create an environment conducive to the witnesses, who can then provide the requisite evidence or testimony without any apprehensions in their mind. This will enable them to come out from self-imposed censorship existing due to a fear that they will put their lives or at least livelihood and social standing at risk, even if there are no explicit threats. Moreover in high profile cases and the cases involving organized crime and terrorism instead of coercion, the accused perpetrator may offer implicit or explicit favours to the witnesses, ranging from cash payments to promises of future positions or promotions. This requires strong anti-corruption strategies side-by-side with effective strategies to address the issues of witness protection. There must be, in short, an integrated strategy, of which witness protection is one important part.
WITNESSES IN THE CRIMINAL JUSTICE SYSTEM IN INDIA: 
A CRITIQUE OF THE STRATEGIES FOR THEIR PROTECTION

A THESIS
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SUMMARY

The concept of a fair trial is a constitutional imperative recognized in Articles 14, 19, 21, 22 and 39-A of the Constitution of India as well as by The Code of Criminal Procedure, 1973 (hereinafter referred as the Cr.P.C., 1973). ‘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’.\(^1\) In *Maneka Gandhi’s case*\(^2\), the Apex Court while referring to *Satwant Singh Sawhney’s case*\(^3\) held that the procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary.

A law which prescribes fair and reasonable procedure for curtailing or taking away the rights enshrined in Article 21 of the Constitution of India\(^4\) has still to meet a possible challenge under the other provisions of the Constitution. A fair trial, no doubt, should be fair to the accused but at the same time it should be fair to the prosecution or the victims also. So the issue of witnesses in criminal trial being able to give evidence without any allurement, inducement or threat from either of the party to the trial gathers importance.

In a criminal trial, the prosecution is required to first lead evidence. The defence has the right to cross-examine the prosecution witnesses to test the veracity of the prosecution case. A comprehensive legal framework for recording the testimony of witnesses in criminal cases has been laid down in The Indian Evidence Act, 1872 and the Cr.P.C., 1973.

According to Bentham, "witnesses are the eyes and ears of justice". Each and every statement of these witnesses is very important as it has a magic force to change the course of the whole case. The condition of witnesses, however, remains precarious one. In *Swaran Singh v. State of Punjab*\(^5\), Wadhwa J. had expressed his opinion about the adverse conditions faced by the witnesses. All such adverse circumstances for the witnesses prove to be a blessing for the accused.

Crimes and acts of terrorism take place in public view and still the public who has seen the same do not come forward to give evidence out of fear and on account of

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5. *Supra* note1.
frustrating Court procedures. The net result of the unwilling attitude of the public is that the accused invariably manages to get off the hooks and the criminal justice fails. In such circumstances and scenario in recent past a deep concern was expressed in different quarters for suitable legislation and measures for bold witness protection.  

Under Section 39 of the Cr.P.C., 1973, citizens are legally and morally duty bound to give information about crime and criminals. It is, however, a harsh reality that willing cooperation and support from public and independent witnesses is hardly available. Police investigations are tardy and do not reflect the truth. Police efforts are not to bring the truth before the Court but to prepare a strong prosecution case on behalf of the State. Thus, the statement of the complaint, true or false, becomes very important. Securing conviction rather than unearthing truth is considered to be the yardstick to judge the professional competency of a police investigating officer in police circles. The prosecution agency has not grown to function independently and the prosecutors believe that proving the police story in the Court is their sole responsibility. Therefore, in most of the cases, what is produced and stated before the Court is not a true account of what has happened and what the investigating officer has done during the investigations. Police concoct evidence and distort facts to suit

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7 Section 39. Public to give information of certain offences.

(1) Every person, aware of the Commission of, or of the intention of any other person to commit, any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely.

(i) Sections 121 to 126, both inclusive, and section 130 (that is to say offences against the State specified in Chapter VI of the said Code);

(ii) Sections 143, 144, 145, 147 and 148 (that is to say, offences against the public tranquillity specified in Chapter VIII of the said Code);

(iii) Sections 161 to 165A, both inclusive (that is to say, offences relating to illegal gratification);

(iv) Sections 272 to 278, both inclusive (that is to say, offences relating to adulteration of food and drugs, etc.);

(v) Sections 302, 303 and 304 (that is to say, offences affecting life);

(va) Section 364A (that is to say, offence relating to kidnapping for ransom, etc);

(vi) Section 382 (that is to say, offence of theft after preparation made for causing, death, hurt or restraint in order to the committing of the theft);

(vii) Sections 392 to 399, both inclusive, and section 402 (that is to say, offences (if robbery and dacoity);

(viii) Section 409 (that is to say, offence relating to criminal breach of trust by public servant, etc.);

(ix) Sections 431 to 439, both inclusive (that is to say, offence of mischief against property);

(x) Sections 449 and 450 (that is to say, offence of house-trespass);

(xi) Sections 456 to 460, both inclusive (that is to say, offences of lurking house trespass); and

(xii) Sections 489A to 489E, both inclusive (that is to say, offences relating to currency notes and bank notes).

Shall, in the absence of any reasonable excuse, the burden of proving which excuse shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such Commission or intention;

(2) For the purposes of this section, the term "offence" includes any act committed at any place out of India, which would constitute an offence if committed in India.
the prosecution story. Witnesses watch the interest of those who have called them and the prosecution agency overlooks the truth by not going beyond what has been written by the police on the case file. Under these circumstances, the Court hardly gets an opportunity to see the truth through the State agents. Keeping in mind these ground realities; it would be relevant and timely to examine the need and importance of a ‘Witness Protection Programme’ in India.8

Man is a peace-loving animal. He wants to lead a tension free life and has learnt the art of compromising with situations to purchase mental peace for himself and for his kith and kin. ‘Forget and forgive’ is relevant phrase which most of us follow in our day-to-day life. This happens in criminal proceedings also especially in cases of petty offences.9 The prevalent position of law makes witnesses to vacillate during trial. Vacillating witnesses have always been a stumbling block to the flow of justice and a vexing problem for the Courts of law. Deposition before a Court is recorded at the stage of trial, often years after the occurrence. By then the memory of the witnesses has already faded. The police on the other hand records statement of witnesses, as a part of investigation, soon after the occurrence and it places extracts before the concerned Court. Under Section 16110 and Section 16211 of the Cr.P.C.,

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9 Ibid.
10 Section 161. Examination of witnesses by Police.
(1) Any Police officer making an investigation under this Chapter, or any Police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.
(2) Such person shall be bound to answer truly all questions relating to such case Put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.
(3) The Police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.
11 Section 162. Statements to Police not to be signed:
Use of statements in evidence.- (1) No statement made by any person to a Police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a Police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872; (1 of 1872) and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.
1973 if such statement of witness is recorded the same should not be under oath; nor be got signed by the witness. The purpose is to avoid manipulations at the hands of the police who have potential to extract even false statements of their choice and to pin the witness down during prospective trials. An adverse offshoot of this prohibition is the freedom of witness to give false testimony. Pressures and influences involving money power, threat, political interference etc. may contribute to this eventuality. It is not merely the illiterate and the poor who yield to such pressures, even VIPs and politicians succumb to them. Faced with severe threats to life of self or dear ones, or under substantial tempting offers, an ordinary person would be inclined even to give an untrue version before the Court because he does not stand to lose much thereby.

Evidently a witness is troubled because he is unfortunate enough to be on the spot when the crime is being committed and at the same time "foolish" enough to remain there till the arrival of the police. So it is our responsibility to provide him the best as he is helping the administration of justice. Protection is also necessary to restore a sense of human dignity. Various rules or guidelines for protection of witnesses have been laid but they cannot and are not complete and, in any event, cannot be as effective as the provisions of a special statute on the subject would otherwise be.

Generally speaking, witness protection would imply protection to a witness from physical harm, but so far, in the Indian context, it has had a somewhat restricted meaning. It has been understood to mean protection of witnesses from discomfort and inconvenience and therefore protection has had reference only to the provision of facilities. However in real, the protection of witness may be desirable in a vast number of situations viz. to prevent the witness from being allured and won over, to prevent the witness from coming under social/family pressure to get out of the cumbersome routine of making rounds of Court or due to some other pressures instilling fear in them the safety of the witness or some near and dear one, witness coming under peer group pressure e.g. after observing the other witnesses finding out some way to get out of the situation he also wants to do the same, witness getting tired

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872, (1 of 1872) or to affect the provisions of section 27 of that Act.

Explanation.- An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.
of the never ending Court proceedings, witness facing threat to his life or property or of his family members, political interference, to prevent the dissemination of information regarding the identity and address of the witness and to ensure that the name, address and identity of the witness are not given publicly in media etc. Protection of witness can relate to any or whole of the period beginning from the stage when a person becomes a witness to the period beyond the stage when trial is over and the accused has been convicted.

According to Justice Madan B. Lokur, physical protection of a witness has become necessary not only in cases involving serious offences, hardened criminals and other bad characters, but also in less serious cases and cases where the accused are socially acceptable persons wielding influence.\(^\text{12}\)

Although there are some provisions e.g. Section 327(2)\(^{13}\) of the Cr.P.C., 1973, Section 228A\(^{14}\) of The Indian Penal Code, 1860 (hereinafter referred as IPC, 1860),


\(^{13}\)Section 327. Court to be open :- (1) The place in which any Criminal Court is held for the purpose of inquiring into, or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them:
Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.
(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted in camera:
Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in the room or building used by Court.
(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings except with the previous permission of the Court.

\(^{14}\)Section 228-A.
1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376B, section 376C or section 376D is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.
(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is-
(a) by or under the order in writing of the officer-in-charge of the Police station or the Police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or
(b) by, or with the authorisation in writing of, the victim; or
(c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim:
Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation.
Section 146(3)\textsuperscript{15} of The Indian Evidence Act, 1872 etc. and some special Acts, which work for the protection of witness and also the Supreme Court has repeatedly emphasized on the issue of witness protection but they are not adequate and it is required that a comprehensive law is framed for the same. In absence of such a comprehensive law the problem of witnesses gets compounded as they not only feel unsecured but at the same time having no remedy for the injuries caused to them because of that insecurity. Generally the reason is the unholy combination of money and muscle power, intimidation and monetary inducement.

Sometimes the social pressure works and the complainant and witnesses agree not to support the prosecution case. The solitary incident of Jind district of Haryana where a young man, when he, accompanied by the warrant of the High Court and Police, went to a village to recover his wife was lynched by the villagers is an indicator of a parallel self-proclaimed judicial system. The marriage was not accepted by the social/khap panchayat (community panchayat) and the boy was killed for violating social norms. When the petition pending on the matter came for hearing before the High Court, the girl retracted of marrying the lynched boy and the warrant officer, who was badly beaten by the villagers, also stated before the High Court that he got injured when he was trying to climb a wall in his attempt to escape from the scene.\textsuperscript{16} It speaks volume of how the social/caste/khap panchayats and the community pressure become instrumental in proceedings before the Court\textsuperscript{17}.

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\textsuperscript{15} Section 146. When a witness is cross-examined, he may, in addition to the question here in before referred to, be asked any questions which tend-
1. To test his veracity,
2. To discover who is and what is his position in life, or
3. To shake his credit, by inuring his character, although the answer to such questions, might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeitures.

\textsuperscript{16} Mor’s fight a dead issue for Haryana, The Tribune, Friday, 31.7.2009, Chandigarh at 1.

\textsuperscript{17} Supra note 8.
The sensational cases like the BMW case\textsuperscript{18}, Jessica Lal murder case\textsuperscript{19} and the Best Bakery case\textsuperscript{20}, witnessed the exodus of witnesses and the resultant acquittal of the accused persons. Public outcry that the justice dispensation system crumbled at least in those cases deserves keen attention. We need to protect the witnesses who want to submit the truth, nothing but truth, before a Court of law. The fact is that the neither there was and nor there is any programme available under which after the assessment of the need for protection to a particular witness, the administration could give him/her the requisite protective cover as has been provided in countries like United States of America, Canada, Australia and United Kingdom.

Various protection programs and measures are needed which range from safe shelter for witnesses to various forms of protection by law enforcement agencies and comprehensive protection programmes. Measures can be taken by establishing a witness protection group in the criminal justice system, an organization at a national level whose aim will be to develop and implement special measures, establishment of a witness unit to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses who appear before the Court and others who are at risk on account of testimony given by such witnesses. Adequate arrangements must also be made to protect the physical and mental well-being of such individuals, many of whom are victims of serious crimes committed against them. This is necessary to avoid getting traumatized again or an otherwise negative experience, one effect of which could be to create a disincentive for witnesses to testify. A system has to be devised to ensure safe travel to home for witnesses at an appropriate juncture. A suitable arrangement for follow up after a witness testifies has to be there. This is crucial for adequate assessment of risks to their physical and mental well-being following testimony, to evaluate his or her condition, psychosocial support required etc. However, such follow up can be a difficult task, particularly where resources are scarce. There should be clear understanding regarding the rules


\textsuperscript{20} The Best Bakery case took place on March 1, 2002 in Vadodara, during the 2002 Gujarat violence, in which 14 people were murdered, many of them burned to death. The case came into prominence after all the 21 accused were acquitted on June 27, 2003 by a 'fast-track Court' for lack of evidence, after 37 out of the 73 witnesses, including key witness Zaheera Sheikh turned hostile. Zaheera, later, confessed that she lied in the Court due to fear as her family had received death threats.
and aims of different job holders such as the police, prosecutors, judges and service providers.

In many countries and under international instruments a range of procedural measures are foreseen which help protect witness from intimidation. These measures also protect witnesses from confrontation with offenders and protect their privacy thus preventing intimidation and re-victimization. Most of the counties have formulated Witness Protection Programmes for example, the United States of America has The Victim and Witness Protection Act 1982 and Australia has The Australian Witness Protection Act, 1994. In India, although unfortunately there is very high rate of crime and very low rate of conviction; even then no frame work regarding protection of witness has been drawn. The duty to protect the witness is on the police, but it has dubious reputation in discharging this duty.

There are a number of recommendations of various commissions from administrative to judicial and from police to human rights activists that address the issues of protection of witnesses. The vulnerability of witnesses is so prominent that nowadays even the Courts have broken their silence and have appealed for the witness protection law.

In *Best Bakery case*\(^1\), the Hon’ble Supreme Court commented upon the State administration in general and the investigating agency in particular for rashly and negligently handling their duties and abdicating their responsibilities. The finding of the Court was that the whole machinery of the State failed in maintaining the confidence of public in the justice delivery system. The Court reminded the Trial Courts to be alive to the reality about the witness hostility. One of the predominant points taken note of by the Hon’ble Supreme Court is the lack of witness protection in our country. The principles stated in the above decision have been reiterated by the Hon’ble Supreme Court in the contempt proceedings taken up against *Zahira Habibulla H. Sheikh and Another*\(^2\).

In *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others*\(^3\), the Apex Court was emphatic on the role the State has to play in protecting the witnesses. It has been observed that as a protector of its citizens, the State has to ensure that during the trial in the Court the witness could safely depose the truth.

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\(^2\) 2006 Cri.L.J. 1694.

\(^3\) *Supra* note 21.
without any fear of being haunted by those against whom he had deposed. The Supreme Court reminded the State that it has a constitutional obligation and duty to protect the life and liberty of the citizen who acted as a truthful and earnest witness.


In *People’s Union of Civil Liberties v. Union of India*, the Supreme Court considered the validity of Section 30 of The Prevention of Terrorism Act, 2002 which deals with ‘protection of witnesses’.

Witness protection, in its narrow interpretation, and its impact on judicial administration, was also dealt with in the 4th Report of the National Police Commission where the Commission referred to the inconvenience and harassment caused to the witnesses in attending Courts. The Commission noted that the monetary compensation was woefully inadequate and referred that out of 96,815 witnesses who attended the Courts during the test period, only 6697 witnesses were paid some allowance, and that too after following a rather cumbersome procedure (which incidentally has hardly changed for the better anywhere). These figures signify the irrelevance of the amount paid to witnesses for their troubles.

The 14th Report of the Law Commission considered the problem of witness protection and referred to inadequate arrangements for witnesses in the Court house as well as meagre travelling allowance and daily bhatta (allowance) paid to witnesses for attending the Court in response to summons.

In its 154th Report, while noting the plight of witnesses appearing on behalf of the State, Law Commission observed that the witnesses faced not only inconveniences but also risk to their lives at the hands of criminals. So it made recommendations to mitigate various inconveniences.

The Law Commission in its 178th Report again took up the issue of preventing witnesses from turning hostile. The Report also dealt with the issue of precautions the police should take at the stage of investigation to prevent fabrication.

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24 2003 (9) SCALE 329.
by witnesses when they are examined later at the trial. The Commission recommended recording the statements of material witnesses in the presence of Magistrates, taking signatures of the witnesses on the police statement and sending the same to appropriate Magistrate and a senior police official and lastly in all serious offences (punishable with ten or more years of imprisonment) the statement of important witnesses should be recorded at the earliest by a Magistrate under Section 164 of the Cr.P.C., 1973.

This was observed by the committee that many witnesses give false evidence either because of inducement or because of the threats to him or his family members. There is no law to give protection to the witnesses subject to such threats, similar to witness protection laws available in other countries. It was pointed out that unfortunately the witnesses were treated very shabbily by the system. To overcome these problems, the Committee made several recommendations.

After these reports the commission on reforms of Criminal Justice System under the chairmanship of Dr. Justice V.S. Malimath submitted its rather voluminous

30 Section 164. Recording of confessions and statements.
(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any, time afterwards before the commencement of the inquiry or trial:
Provided that no confession shall be recorded by a Police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.
(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is bear, made voluntarily.
(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in Police custody.
(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect.
"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.
(Signed)A.B.
Magistrate".
(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.
(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.
31 Supra note 29.
report 32, containing as many as 158 recommendations. Some of these recommendations were made even in the 14th Report33 of the Law Commission about five decades ago, and yet there is little to show by way of any improvement in the quality of facilities available to a witness.

The immediate importance of the subject of witness protection in our country motivated the Law Commission to take up the subject of ‘Witness Anonymity’ and ‘Witness Protection’ suo-motto. The Law Commission’s consultation paper on witness identity protection and Witness Protection Programs August 200434 broadly categorized the need of witness protection as follows:

1. The phenomenon of witness to become hostile on account of the failure to protect their evidence is one of the problems. So it is necessary that procedure should be introduced into the criminal law to balance the need for anonymity of witnesses on the one hand and right of the accused on the other.

2. The other need is for physical protection of the witness at all stages of the criminal justice process till the conclusion of case, by the introduction of Witness Protection Programmes.

The Law Commission analysed validity of the provisions of various statues providing specifically for protection of witnesses. It has discussed various principles of law developed by the Supreme Court and the High Courts. These principles basically stress upon the need for a congenial atmosphere for the conduct of a fair trial and this included the protection of witnesses.

The Criminal Law (Amendment) Act, 200535 which has been enforced w.e.f. 16.4.2006 has amended the IPC, 1860, the Cr.P.C., 1973 and the Indian Evidence Act, 1872. Above Act has introduced Section 195A 36 to the IPC, 1860, whereby threatening or inducing any person to give false evidence is made punishable. By

32 The Committee submitted its report to the Ministry of Home Affairs on 21 April 2003.
33 Supra note 27.
34 On basis of responses to this paper the Law commission gave its One Hundred and Ninety Eighth Report: Witness Identity Protection And Witness Protection Programmes on the issue in August, 2006.
35 No.2 of 2006, The Gazette of India-Extraordinary Part II-Section 3, Sub Section (ii); No.348, New Delhi, Wednesday, April 12, 2006, Ministry of Home Affairs Notification-S.O.523 (E).
36 Section 195A. Threatening or inducing any person to give false evidence.-Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both; and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced.
virtue of the said amending Act, Section 195 of the Cr.P.C., 1973 has also undergone changes. Section 154 of The Indian Evidence Act, 1872 empowers the Court to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.

The only real attempt with regard to witness protection (in the physical sense) is to be found in the provisions of Control of Organised Crime Acts enacted by some of the State Governments. Section 13 of The *Terrorist and Disruptive Activities (Prevention) Act* (TADA Act), 1985 and Section 16 of the TADA Act, 1987 provided for protection of the identity and keeping address of a witness secret. Section 16 of the TADA Act, 1987 differed from Section 13 of the TADA Act, 1985 in two respects. Firstly, whereas it was mandatory to hold proceedings in camera under Section 13 of the TADA Act, 1985 the proceedings could be held in camera under Section 16 of the TADA Act, 1987 only where the designated Court so desired. Secondly, Section 16(3)(d) of the TADA Act, 1987 empowered a designated Court to take such measures in the public interest so as to direct that information in regard to all or any of the proceedings pending before such a Court shall not be published in any manner. Section 30 of The Prevention of Terrorism Act (POTA), 2002 is on the same lines as Section 16 the TADA Act, 1987. In its reports the Law Commission has failed to point out that such discretion leaves the witnesses in a confused position about their protection and they decide to quit the path of truth.

Although Section 327 of the Cr.P.C., 1973 provides for trial in the open Court and Section 327(2) of the Cr.P.C., 1973 provides for in-camera trials for offences involving rape under Section 376 of the IPC, 1860 and under Section 376 A to 376 D of the IPC, 1860 but it is shocking to note that barring rape and child abuse cases, there are, as of today, no general statutory provisions in the Cr.P.C., 1973 on this subject.

Whatever recommendations made, the fact remains that there is no general law on protection of identity of witnesses in criminal cases, apart from the provisions for

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37 After section 195 of the principal Act, the following section shall be inserted, namely:- Procedure for witnesses in case of threatening, etc. - "195A. A witness or any other person may file a complaint in relation to an offence under section 195A of the Indian Penal Code."
protection of witnesses in the special statues governing terrorist-crimes. But the cases where nobody is ready to become a witness or is no longer interested in continuing as a witness or just interested in denying his original version of statement so as to get rid of the threats hanging on his head are no longer confined to cases of terrorism as this phenomenon has reached alarming proportion elsewhere also. There is therefore need, as in other countries, to generally empower the Court in cases where muscle power, political power, money power or other methods are employed against witnesses and victims to prevent them from giving true evidence or testimony, so that these witnesses are provided sufficient protection to enable them to give evidence without any fear or reprisals and threats by the accused do not have any impact on them.

In the Fifty-fifth session of the General Assembly of the United Nations, a resolution 43 was adopted relating to the Convention against Trans-national Organized Crime. The thrust of the Convention was on serious crimes (constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty) in order to obtain, directly or indirectly, a financial or other material benefit. The application of the Convention is to serious crimes as mentioned above and to offences mentioned in Articles 5, 6, 8 and 23 of the Convention. Article 5 basically concerns itself with criminal activity of an organized criminal group, which means a structured group of three or more persons. Article 6 relates to the criminalization of the laundering of proceeds of crime, while Article 8 relates to the criminalization of corruption. Article 23 of the Convention is of some importance and it deals with criminalization of obstruction of justice. Each State party to the convention shall adopt legislative measures to make it a criminal offence, inter alia, to use physical force, threats or intimidation or to otherwise interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by the Convention. Article 24 relates to the protection of witnesses and this reads as follows:

“Protection of witnesses
1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in

43 No.55/25.
criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter-alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use communications technology such as video links or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are Witnesses.”

The convention thus reinforces three significant advances in the matter of witness protection:

(i) Enlarging the definition of a witness to include his or her relatives and other persons close to him or her.

(ii) Acceptance of the use of modern technology such as video linkage to record the testimony of a witness,44 and

(iii) Victims of a crime are also entitled to protection if they are witnesses.

In the United States of America, the Organized Crime Control Act, 1970 and later the Comprehensive Crime Control Act, 1984 authorized the Witness Security Program. The Witness Security Reform Act, 198445 provides for relocation and other protection of a witness or a potential witness in an official proceeding concerning an organised criminal activity or other serious offence. Protection may also be provided to the immediate family of, or a person closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding. The Attorney General takes the

44 State of Maharashtra v. Dr Praful B. Desai 2003 Cri.L.J. 2033 also endorsed this.
45 U.S. Code Collection, Title 18, Part II, Chapter 224, Section 3521.
final decision whether a person is qualified for protection from bodily injury and otherwise to assure the health, safety and welfare of that person. In a large number of cases, witnesses have been protected, relocated and sometimes even given new identities. The programme assists in providing housing, medical care, job training and assistance in obtaining employment and subsistence funding until the witness becomes self-sufficient. The Attorney General shall not provide protection to any person if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony. The Marshals Service which is a division of the Department of Justice gives protection to government witnesses and their immediate dependants against drug traffickers, terrorists, organized crime members and other major criminals. The claim of the Marshals Service is that about 7000 witnesses have so far been successfully protected and since the inception of the programme, the conviction rate has gone up to 89% due to the testimony of protected witnesses.

A similar programme is in operation in Canada under the Witness Protection Act, 1996. The purpose of the Act is "to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters". Protection given to a witness may include relocation, accommodation and change of identity as well as counselling and financial support to ensure the security of the protected or to facilitate his becoming self-sufficient. Admission to the Programme is determined by the Commissioner of Police on a recommendation by a law enforcement agency or an International Criminal Court or tribunal.

The Australian Witness Protection Act, 1994 establishes the National Witness Protection Programme in which (amongst others) the Commissioner of the Australian Federal Police arranges or provides protection and other assistance for witnesses. The witness must disclose a wealth of information about himself before he is included in the Program. This includes his outstanding legal obligations, details of his criminal history, details of his financial liabilities and assets etc. The Commissioner has the sole responsibility of deciding whether to include a witness in the Program, and in

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46 Section 3.  
47 Section 5 and 6.  
48 Section 4.  
49 Section 7.
deciding whether to so include a person, the Commissioner shall have regard to various specified aspects.

The Witness Protection Act, 1998 of South Africa provides for the establishment of an office called the Office for Witness Protection within the Department of Justice. The Director of this office is responsible for the protection of witnesses and related persons and exercises control over Witness Protection Officers and Security Officers. Any witness who has reason to believe that his safety is threatened by any person or group or class of persons may report such belief to the Investigating Officer in a proceeding or any person in-charge of a police station or the Public Prosecutor etc. and apply for being placed under protection. The application is then considered by a Witness Protection Officer who prepares a report, which is then submitted to the Director. The Director, having due regard to the report and the recommendation of the Witness Protection Officer, takes into account the various factors, for deciding whether a person should be placed under protection or not.

The Witness Protection, Security and Benefit Act of the Philippines, which came into force from 24.04.1991 is intended to "encourage a person who has witnessed or has knowledge of the commission of a crime to testify before a Court or quasi-judicial body, or before an investigating authority, by protecting him from reprisals and from economic dislocation." Admission to the Programme is given to a witness where the offence in which his testimony will be used is a grave felony, his testimony can be corroborated on material points and he or any member of his family "within the second degree of consanguinity or affinity is subjected to threats to his life or bodily injury or there is a likelihood that he will be killed, forced, intimidated, harassed or corrupted to prevent him from testifying, or to testify falsely, or evasively." A witness admitted to the Programme is entitled to certain rights and benefits. These include a secure housing facility until he has testified or until the threat, intimidation or harassment disappears or is reduced to a manageable or

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50 Section 8.
51 Section 4.
52 Section 7.
53 Section 9.
54 Section 10.
55 Republic Act No. 6981.
56 Section 3.
57 Section 8.
tolerable level. The Department of Justice shall, wherever practicable, assist the witness in obtaining a means of livelihood and if the witness is relocated, he shall be entitled to financial support for himself and his family. The witness will be provided free medical treatment, hospitalization and medicines for any injury or illness incurred or suffered by him because of witness duty in any private or public hospital, clinic or at any institution at the expense of the Program.

In the *Nitish Katara murder case*\(^{58}\), the Delhi High Court laid down certain guidelines for a witness protection scheme. Further the initiative taken by the Law Commission of India to examine the issue of witness protection is commendable. But to ensure that the law in this regard is effective and in conformity with international criminal and human rights law, the gaps in the legal protection of witnesses must first be identified. The protection that is currently available to a certain category of witnesses, especially in terrorist cases, is based upon the discretion of the Court and is highly arbitrary and unpredictable. There is an urgent need to establish a neutral agency that can consider the needs of all witnesses, not just those brought by the prosecution.

So witness protection should aim at enabling the witness to live safely. Special measures for minors must be ensured in accordance with the best interest of the child and these measures should also extend to family members when appropriate. These programmes and measures should also include that there should be international agreement regarding temporary and permanent relocation of the witnesses. For development of these measures and programs there should be coordination and cooperation at international level amongst all the job holders. Some measures should be regarding the capacity building, regarding ethical and legal obligation of the media to preserve confidentiality of information and privacy of witnesses.

**Objective of the study:** Being realistic there is need for witness to come forward, especially when we are trying to bring to Justice the career criminals or particularly dangerous criminals. Some times that would mean that we need to actively and rigorously protect those witnesses. For this an effective Witness Protection Programme is an often essential tool in the fight against crime. Those who face investigation and criminal prosecution may attempt to frustrate the administration of

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Justice through intimidation or by causing physical or other harm to witnesses or their relatives. In the absence of any programme to protect them from reprisals, witnesses may not be forthcoming, and the justice system may be paralysed. So there is a need to discuss the inadequacy of Indian Laws in dealing with the subject.

At the same time, it can’t be overemphasised that implementing a Witness Protection Scheme is an extremely demanding enterprise in India and other countries. Both the stakes and risks are high. The success of major criminal investigations and prosecutions, the safety of the witnesses and police officers involved, as well as the integrity and effectiveness of the programme itself depend on the sound design and careful implementation of the scheme set in place.

When a senior lawyer Vivek Tankha, appearing for an NGO, Country First - which had filed the petition for enacting a legislation on witness protection - said the country cannot be allowed to suffer the menace of hostile witnesses, Chief Justice K G Balakrishnan observed that it was not possible to provide protection to every witnesses, as there were too many pending cases. The bench commented, “How can there be a blanket protection? Do you (petitioner) have an idea how many witnesses would be required to be protected?” The Supreme Court, while directing Delhi Courts to conduct a sample survey of Criminal Courts and also the pending cases, asked them to file a status report on the feasible option of instances where witnesses can be given protection.

However the fact remains that a nation cannot afford to expose its righteous and morally elated citizens to the peril of being haunted or harassed by anti social elements, for the simple reason that they testified the truth in a Court of law. Dearth of funds should never be an excuse. If our society fails to be alive to the reality, the plight of an honest witness will be catastrophic and calamitous.

Hence, this research work starts with the aim not only to survey laws on the subject in other countries and to analyse the suggestion given by various committees on the subject but also to suggest suitable measures for witness protection so as to encourage witnesses to come forward.

To protect witness is a present global problem which has drawn the attention of international authorities. Therefore to solve the issue with top priority at the National and International level, the subject in the present study is a matter of tremendous significance.

Present study consists of both theoretical and empirical study. A purely theoretical approach to the study may not prove to be fruitful unless an empirical study of the actual cases, which required the need of Witness Protection Programme but its absence proved a hindrance, is made.

59 All witnesses can’t be protected: SC, (Supreme Court bench comprising Chief Justice K G Balakrishnan and Justice D K Jain), The Times of India, New Delhi, 23.1.2007.
60 Supra note 38.
**Hypothesis:** Witnesses play an important role in deciding the course of criminal justice system. So there is need for witnesses to come forward without any fear of repercussion from the criminal elements. In the present times this aspect of protection of witnesses is gathering a lot of attention and several countries in the world are in advanced stages of doing the needful for protecting witnesses. However there is total inadequacy of Indian laws in dealing with this matter. In view of the complexities involved, this hypothesis rests on the presumption that if the state of affairs regarding protection to the witnesses in criminal cases remained unchanged the repercussions of this problem shall be annihilating the delivery of justice by the judicial system with criminals going scot-free and reliable witnesses difficult to trace. For that matter a comprehensive study which deals with the subject of ‘Witness Protection in Criminal Justice System in India’ needs to be done.

The main issues considered while examining the concept of witness protection are:

- Balance between the right of the accused for an open trial in his or her presence as against the need for fair administration of justice in which the victims and witness depose without fear or danger to their lives or property or those of their close relatives.
- Methods to protect witnesses from various discomforts and inconveniences so as to achieve efficient and effective prosecution and alleviate the factors which deter the people from becoming a witness.
- Various strategies which can be adopted to protect the witnesses so that they give their testimony without any fear and also to inculcate a feeling of security among the people so that they do not hesitate in becoming a witness in a case.
- Various methods which can be adopted for witness identity protection.
- Various methods which can be adopted to provide physical protection to the witnesses.
- The need for a Witness Protection Programme and whether it would satisfactorily contribute to the fight against the crimes that are being targeted by the programme. Further if there are any other means through which witnesses can be protected, then overpowering utility of this programme over such other means.
• The organization and operation of the programme and the Legal status which it should carry.

• The issue of the authority who would be responsible for the administration of the programme and the aspect of the most suitable method to be adopted by such authority.

• Financial resources can be a big restrain in countries like India. So this issue has been suitably dealt with.

• The factors which would make a person eligible or ineligible for the programme have been taken into consideration.

• The extent of the benefits that should be granted under the program.

• The obligations of the protecting agency and the protected witness.

• Nature and duration of protection and the circumstances in which it can be terminated.

• The issue of dealing with a person who compromise the security of a protected witness or the integrity of the program.

Universe of study: In the present research work, the factors which generate the need for protection of witnesses especially in Indian context have been analysed. The aspects of witness vulnerability as well as need of their welfare at all stages of the case and thereafter have been studied and examined. A thorough study of existing programmes on witness protection in various countries has been made and worldwide efforts being made to deal with the problem have been given due attention. Various Statutes, Law Journals, available legal literatures, articles, media reports and judicial activism have been used to examine the issues. Although presumption of innocence is attached to every witness, whether prosecution witness or defence witness and he has all the rights to lead evidence and thus there should not be any different approach; but the present study is confined to study of prosecution witnesses in criminal cases and various protection measures needed for them.

Analysis of Literature: The literature resource for analysis is available in the form of number of books, newspaper, magazines, internet sites, journals, articles, conventions and relevant laws in different countries. The literature relating to the rights of witnesses and laws relating to their protection, various tradition and custom, various
support systems like constitutional, legislative, government programs and policies and also the international conventions and conferences affecting the national scenario have been studied in detail. The internet had a substantial effect to studying international scenario as well as definitions of different words and news items, without which the research would have been much more difficult.

**Research methodology:** The present research work required both theoretical and empirical study. The theoretical work dealt with the study of literature and judicial verdicts available on the issue. The empirical work comprises taking views of Judges, Advocates and Police Officers, who normally deal with the witnesses during trial, by means of a questionnaire designed for the purpose. The analysis of such responses and study of literature and judicial verdicts has provided the real picture about the need for witness protection and necessity of designing a programme for the same.

**Plan of Study:** The research has been presented schematically by dividing into eight chapters detailed as follows:

Chapter-1: Gives the introduction of the topic, its problem profile, object of study, research hypothesis, literature analysis, universe of study, defining witness and different types of witnesses like eye witness, independent witness, interested witness, formal witness, police witness, stock witness, hostile witness, expert witness, won over witness and at last categorization of witnesses for protection like State witnesses, informers including undercover police officers, victim witnesses, other types of witnesses (witnesses who are known to the accused; witnesses not known to the accused) etc.

Chapter-2: Explains the various provisions in Indian laws like Indian Penal Code 1860, the Criminal Procedure Code 1973, the Indian Evidence Act, 1872 and Special laws like Terrorist Affected Areas (Special Courts) Act, 1984, the Terrorists and Disruptive Activities (Prevention) Act, 1985 and the Terrorists and Disruptive Activities (Prevention) Act, 1987 commonly known as TADA Acts etc. for protection to witnesses and the various court decisions which have worked towards improving the conditions of the witnesses or giving them some kind of protection and how all of these are not sufficient to deal with the issue.

Chapter-3: Discusses the aspect of perjury and its bonding with the concept of witness protection as well as how punishment under perjury is not sufficient in itself
to deal with the issue of lack of readiness on part of witnesses to testify when faced with some kind of threat, mild or severe.

Chapter-4: Deals with various dimensions of the witness protection, nature of threats, scope of witness protection and various parameters within which it can function. There is a detailed discussion on the issue of rights of the accused vis a vis witness anonymity for protection.

Chapter-5: Gives a detailed insight into witness protection laws existing in different countries e.g. USA, Australia, Canada, South Africa, Colombia, Germany, Italy, United Kingdom and some Asian countries like Thailand, Republic of China (Taiwan) so as to examine their broad framework and points of convergence and divergence.

Chapter-6: Involves a detailed and critical study of various reports of the Law Commission since its inception e.g. 14th Report, 154th Report, 172nd Report, 178th Report and 198th Report as well as Malimath Committee Report on the issues relating to the witnesses in the Indian judicial system and the utility of such reports in improving the environment for frank and fearless testimony of these witnesses. Insufficiency of these reports in dealing with the issue under consideration has been examined.

Chapter-7: Details the findings of the empirical study done for the research work. Views of Judicial Officers, Police Officers and Advocates have been taken on the issue and analysed.

Chapter-8: Finally based upon the research, conclusion has been drawn that evolving an effective and sustainable scheme including a Witness Protection Programme is need of the hour in our country. On the issue of witness protection there are no easy solutions, as without effective implementation it will be worth just piece of paper. In practice it may work out to be very complicated, especially with regard to funding, regarding the change of identity and relocation of at-risk witnesses and with regard to cross-border cooperation. The conditions and criteria for the establishment of a scheme, the sole purpose of which would be to ensure the safety of threatened witnesses, have thus been defined. An account of the challenges that our country would have to face in its efforts to address the threat posed to witnesses by criminals as well as their groups has been brought out and suitable measures and practices which can produce positive results have been suggested. These measures would provide for a continuum of protection that starts with the early identification of
vulnerable or intimidated witnesses, continues with the management of witnesses by
the police and the legal measures to protect the witness’s identity during courtroom
testimony, and culminates with the adoption, in extreme cases, of measures for
permanent change of identity and relocation.

The method of protection will largely depend upon the kind of witness, nature
of the testimony, type of crime and last but not the least the nature of threat or
intimidation. Of all these methods, the Witness Protection Programme is that of last
resort in providing protection to a threatened witness. A Witness Protection Scheme
to provide following types of protection has thus been suggested:

**Grade 1 Protection**: This refers to providing protection to the witnesses from
discomfort and inconveniences which plague the present system, making the life of
the witnesses miserable as well as acting as a strong deterrent against their coming
forward to provide the necessary testimony and evidence. The purpose of providing
assistance to witnesses so as to protect them from various discomforts and
inconveniences has nothing to do with providing security to them against physical
harm but it is a means to achieve efficient and effective prosecution. It can relieve
them from anxiety and improve psychological wellbeing, which can in turn improve
the quality of their deposition. Such assistance should preferably be administered as
well as delivered by professionals who are not under the control of the investigation
or prosecution team.

**Grade 2 Protection**: Although ideally each and every witness should receive
assistance and support, however due to various practical reasons Witness Protection
Programmes are essentially reserved for those extraordinarily important cases where
the threat against the witness is so serious that protection and support cannot be
ensured by other means. So in cases that do not warrant the permanent relocation and
change of identity of the witness various strategies can be worked out for various
stages of trial (or even pre trial or investigation stage) to ensure that at-risk and
intimidated witnesses cannot be traced easily by the criminals or their accomplices e.g.
by means of enhanced police measures criminals wanting to harm the witness can be
discouraged; change of the trial venue or hearing date; removal of the public and
media from the courtroom (in camera session); presence of an accompanying person
for psychological support etc. Several such measures have been discussed in detail.

**Grade 3 Protection**: In addition to above some other procedural protection
measures can also be adopted with the permission of the court for the duration of
testimony. Such protection measures can be of great help especially in sensitive cases involving trafficking in persons, sex crimes, child witnesses and family crimes etc. as these would prevent the re-victimization of victim-witnesses by limiting their exposure to the public and the media during the trial. Relevant measures have been discussed in detail.

**Grade 4 Protection:** In circumstances like refusal of the witness to enter Witness Protection Programme or lack of eligibility criteria for entering such programme, witnesses may be offered support to look after their own protection. The procedural aspects of the same have thus been discussed in the work.

**Grade 5 Protection:** Where witnesses cannot be protected by using any of the Grade1 to Grade 4 protection as envisaged in the witness protection scheme but they deserve to be protected due to the nature of crime involved and the overall impact on the society and the criminal justice system if the accused are convicted, then Grade 5 protection should be resorted to. This would involve establishing of a separate Witness Protection Programme which would involve change in identity of the witness or his relocation to a new place so as to eliminate the chances of witness being tracked by the criminals or their associates. Detailed suggestions have been given on following of the most important elements for the establishment and operation of Witness Protection Programme:

1. A clear legal or policy basis for designing a methodology and carrying out operations;
2. Adequate financing that is stable and continues for several years;
3. Strict personnel qualifications and vetting procedures;
4. Protection of the Programme’s integrity;
5. Close coordination with judicial and other Government authorities engaged in law enforcement and intelligence, prison administration, public housing, health and social security services, among others;
6. Accountability and transparency that conform with the Programme’s special security needs;
7. Obligation of Government authorities to provide appropriate assistance, safeguarding the information disclosed to them;
8. Ability to offer assistance to national and international law enforcement agencies.
To conclude in brief, there exists an imminent need for framing a law to protect witnesses so as to throw an effective safety net around them in order to protect them from not being devoured by the powerful crime mafia of the society. Such a law should enable framing up of Witness Protection Schemes including that for Witness Anonymity and Identity Protection and for extreme cases a Witness Protection Programme. Further, a law can be as good as its implementation. So even if there is complete protection and encouragement of witness testimony, there exists a simultaneous need for capacity building of police, prosecutor and Judicial functionality, integrity and public credibility, along with access and outreach to the people of the country. This only can lead to an effective Criminal Justice System which the offenders cannot ignore. This only can create an environment conducive to the witnesses, who can then provide the requisite evidence or testimony without any apprehensions in their mind. This will enable them to come out from self-imposed censorship existing due to a fear that they will put their lives or at least livelihood and social standing at risk, even if there are no explicit threats. Moreover in high profile cases and the cases involving organized crime and terrorism instead of coercion, the accused perpetrator may offer implicit or explicit favours to the witnesses, ranging from cash payments to promises of future positions or promotions. This requires strong anti-corruption strategies side-by-side with effective strategies to address the issues of witness protection. There must be, in short, an integrated strategy, of which witness protection is one important part.
SUMMARY

The concept of a fair trial is a constitutional imperative recognized in Articles 14, 19, 21, 22 and 39-A of the Constitutional of India as well as by The Code of Criminal Procedure, 1973 (hereinafter referred as the Cr.P.C., 1973). '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'. In Maneka Gandhi’s case, the Apex Court while referring to Satwant Singh Sawhney's case held that the procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary.

A law which prescribes fair and reasonable procedure for curtailing or taking away the rights enshrined in Article 21 of the Constitution of India has still to meet a possible challenge under the other provisions of the Constitution. A fair trial, no doubt, should be fair to the accused but at the same time it should be fair to the prosecution or the victims also. So the issue of witnesses in criminal trial being able to give evidence without any allurement, inducement or threat from either of the party to the trial gathers importance.

In a criminal trial, the prosecution is required to first lead evidence. The defence has the right to cross-examine the prosecution witnesses to test the veracity of the prosecution case. A comprehensive legal framework for recording the testimony of witnesses in criminal cases has been laid down in The Indian Evidence Act, 1872 and the Cr.P.C., 1973.

According to Bentham, "witnesses are the eyes and ears of justice". Each and every statement of these witnesses is very important as it has a magic force to change the course of the whole case. The condition of witnesses, however, remains precarious one. In Swaran Singh v. State of Punjab, Wadhwa J. had expressed his opinion about the adverse conditions faced by the witnesses. All such adverse circumstances for the witnesses prove to be a blessing for the accused.

Crimes and acts of terrorism take place in public view and still the public who has seen the same do not come forward to give evidence out of fear and on account of

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2 Maneka Gandhi v. Union of India, AIR 1978 SC 597.
3 Satwant Singh Sawhney v. D. Ramarathnam Assistant Passport Officer, Government of India, New Delhi & Ors., AIR 1967 SC 1836.
5 Supra note1.
frustrating Court procedures. The net result of the unwilling attitude of the public is that the accused invariably manages to get off the hooks and the criminal justice fails. In such circumstances and scenario in recent past a deep concern was expressed in different quarters for suitable legislation and measures for bold witness protection.6

Under Section 397 of the Cr.P.C., 1973, citizens are legally and morally duty bound to give information about crime and criminals. It is, however, a harsh reality that willing cooperation and support from public and independent witnesses is hardly available. Police investigations are tardy and do not reflect the truth. Police efforts are not to bring the truth before the Court but to prepare a strong prosecution case on behalf of the State. Thus, the statement of the complaint, true or false, becomes very important. Securing conviction rather than unearthing truth is considered to be the yardstick to judge the professional competency of a police investigating officer in police circles. The prosecution agency has not grown to function independently and the prosecutors believe that proving the police story in the Court is their sole responsibility. Therefore, in most of the cases, what is produced and stated before the Court is not a true account of what has happened and what the investigating officer has done during the investigations. Police concoct evidence and distort facts to suit

7 Section 39. Public to give information of certain offences.
(1) Every person, aware of the Commission of, or of the intention of any other person to commit, any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely.
(i) Sections 121 to 126, both inclusive, and section 130 (that is to say offences against the State specified in Chapter VI of the said Code);
(ii) Sections 143, 144, 145, 147 and 148 (that is to say, offences against the public tranquillity specified in Chapter VIII of the said Code);
(iii) Sections 161 to 165A, both inclusive (that is to say, offences relating to illegal gratification);
(iv) Sections 272 to 278, both inclusive (that is to say, offences relating to adulteration of food and drugs, etc.);
(v) Sections 302, 303 and 304 (that is to say, offences affecting life);
(va) Section 364A (that is to say, offence relating to kidnapping for ransom, etc);
(vi) Section 382 (that is to say., offence of theft after preparation made for causing, death, hurt or restraint in order to the committing of the theft);
(vii) Sections 392 to 399, both inclusive, and section 402 (that is to say, offences (if robbery and dacoity);
(viii) Section 409 (that is to say, offence relating to criminal breach of trust by public servant, etc.);
(ix) Sections 431 to 439, both inclusive (that is to say, offence of mischief against property);
(x) Sections 449 and 450 (that is to say, offence of house-trespass);
(xi) Sections 456 to 460, both inclusive (that is to say, offences of lurking house trespass); and
(xii) Sections 489A to 489E, both inclusive (that is to say, offences relating to currency notes and bank notes).
Shall, in the absences of any reasonable excuse, the burden of proving which excuse shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such Commission or intention;
(2) For the purposes of this section, the term “offence” includes any act committed at any place out of India, which would constitute an offence if committed in India.
the prosecution story. Witnesses watch the interest of those who have called them and the prosecution agency overlooks the truth by not going beyond what has been written by the police on the case file. Under these circumstances, the Court hardly gets an opportunity to see the truth through the State agents. Keeping in mind these ground realities; it would be relevant and timely to examine the need and importance of a ‘Witness Protection Programme’ in India.  

Man is a peace-loving animal. He wants to lead a tension free life and has learnt the art of compromising with situations to purchase mental peace for himself and for his kith and kin. ‘Forget and forgive’ is relevant phrase which most of us follow in our day-to-day life. This happens in criminal proceedings also especially in cases of petty offences. The prevalent position of law makes witnesses to vacillate during trial. Vacillating witnesses have always been a stumbling block to the flow of justice and a vexing problem for the Courts of law. Deposition before a Court is recorded at the stage of trial, often years after the occurrence. By then the memory of the witnesses has already faded. The police on the other hand records statement of witnesses, as a part of investigation, soon after the occurrence and it places extracts before the concerned Court. Under Section 161 and Section 162 of the Cr.P.C.,

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9 Ibid.
10 Section 161. Examination of witnesses by Police.
(1) Any Police officer making an investigation under this Chapter, or any Police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.
(2) Such person shall be bound to answer truly all questions relating to such case Put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.
(3) The Police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.
11 Section 162. Statements to Police not to be signed:
Use of statements in evidence.- (1) No statement made by any person to a Police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a Police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:
Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872; (1 of 1872) and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.
1973 if such statement of witness is recorded the same should not be under oath; nor be got signed by the witness. The purpose is to avoid manipulations at the hands of the police who have potential to extract even false statements of their choice and to pin the witness down during prospective trials. An adverse offshoot of this prohibition is the freedom of witness to give false testimony. Pressures and influences involving money power, threat, political interference etc. may contribute to this eventuality. It is not merely the illiterate and the poor who yield to such pressures, even VIPs and politicians succumb to them. Faced with severe threats to life of self or dear ones, or under substantial tempting offers, an ordinary person would be inclined even to give an untrue version before the Court because he does not stand to lose much thereby.

Evidently a witness is troubled because he is unfortunate enough to be on the spot when the crime is being committed and at the same time "foolish" enough to remain there till the arrival of the police. So it is our responsibility to provide him the best as he is helping the administration of justice. Protection is also necessary to restore a sense of human dignity. Various rules or guidelines for protection of witnesses have been laid but they cannot and are not complete and, in any event, cannot be as effective as the provisions of a special statute on the subject would otherwise be.

Generally speaking, witness protection would imply protection to a witness from physical harm, but so far, in the Indian context, it has had a somewhat restricted meaning. It has been understood to mean protection of witnesses from discomfort and inconvenience and therefore protection has had reference only to the provision of facilities. However in real, the protection of witness may be desirable in a vast number of situations viz. to prevent the witness from being allured and won over, to prevent the witness from coming under social/family pressure to get out of the cumbersome routine of making rounds of Court or due to some other pressures instilling fear in them the safety of the witness or some near and dear one, witness coming under peer group pressure e.g. after observing the other witnesses finding out some way to get out of the situation he also wants to do the same, witness getting tired.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872, (1 of 1872) or to affect the provisions of section 27 of that Act.

**Explanation.** An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.
of the never ending Court proceedings, witness facing threat to his life or property or of his family members, political interference, to prevent the dissemination of information regarding the identity and address of the witness and to ensure that the name, address and identity of the witness are not given publicly in media etc. Protection of witness can relate to any or whole of the period beginning from the stage when a person becomes a witness to the period beyond the stage when trial is over and the accused has been convicted.

According to Justice Madan B. Lokur, physical protection of a witness has become necessary not only in cases involving serious offences, hardened criminals and other bad characters, but also in less serious cases and cases where the accused are socially acceptable persons wielding influence.\(^\text{12}\)

Although there are some provisions e.g. Section 327(2)\(^\text{13}\) of the Cr.P.C., 1973, Section 228A\(^\text{14}\) of The Indian Penal Code, 1860 (hereinafter referred as IPC, 1860),


13 Section 327. Court to be open :- (1) The place in which any Criminal Court is held for the purpose of inquiring into, or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them: Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

(2) Notwithstanding anything contained in sub- section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted in camera: Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in the room or building used by Court.

(3) Where any proceedings are held under sub- section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings except with the previous permission of the Court.

14 Section 228-A.

1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376B, section 376C or section 376D is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is-

(a) by or under the order in writing of the officer-in-charge of the Police station or the Police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

(b) by, or with the authorisation in writing of, the victim; or

(c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim:

Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation.
Section 146(3)\textsuperscript{15} of The Indian Evidence Act, 1872 etc. and some special Acts, which work for the protection of witness and also the Supreme Court has repeatedly emphasized on the issue of witness protection but they are not adequate and it is required that a comprehensive law is framed for the same. In absence of such a comprehensive law the problem of witnesses gets compounded as they not only feel unsecured but at the same time having no remedy for the injuries caused to them because of that insecurity. Generally the reason is the unholy combination of money and muscle power, intimidation and monetary inducement.

Sometimes the social pressure works and the complainant and witnesses agree not to support the prosecution case. The solitary incident of Jind district of Haryana where a young man, when he, accompanied by the warrant of the High Court and Police, went to a village to recover his wife was lynched by the villagers is an indicator of a parallel self-proclaimed judicial system. The marriage was not accepted by the social/khap panchayat (community panchayat) and the boy was killed for violating social norms. When the petition pending on the matter came for hearing before the High Court, the girl retracted of marrying the lynched boy and the warrant officer, who was badly beaten by the villagers, also stated before the High Court that he got injured when he was trying to climb a wall in his attempt to escape from the scene.\textsuperscript{16} It speaks volume of how the social/caste/khap panchayats and the community pressure become instrumental in proceedings before the Court\textsuperscript{17}.

\textbf{Explanation-} For the purposes of this sub-section, "recognised welfare institution or organisation" means a social welfare institution or organisation recognised in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a Court with respect to an offence referred to in sub-section (1) without the previous permission of such Court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

\textbf{Explanation-} The printing or publication of the judgement of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.

\textsuperscript{15} Section 146. When a witness is cross-examined, he may, in addition to the question here in before referred to, be asked any questions which tend-1. To test his veracity,
2. To discover who is and what is his position in life, or
3. To shake his credit, by inuring his character, although the answer to such questions, might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeitures.

\textsuperscript{16} Mor’s fight a dead issue for Haryana, The Tribune, Friday, 31.7.2009, Chandigarh at 1.

\textsuperscript{17} Supra note 8.
The sensational cases like the **BMW case**\(^{18}\), **Jessica Lal murder case**\(^{19}\) and the **Best Bakery case**\(^{20}\), witnessed the exodus of witnesses and the resultant acquittal of the accused persons. Public outcry that the justice dispensation system crumbled at least in those cases deserves keen attention. We need to protect the witnesses who want to submit the truth, nothing but truth, before a Court of law. The fact is that the neither there was and nor there is any programme available under which after the assessment of the need for protection to a particular witness, the administration could give him/her the requisite protective cover as has been provided in countries like United States of America, Canada, Australia and United Kingdom.

Various protection programs and measures are needed which range from safe shelter for witnesses to various forms of protection by law enforcement agencies and comprehensive protection programmes. Measures can be taken by establishing a witness protection group in the criminal justice system, an organization at a national level whose aim will be to develop and implement special measures, establishment of a witness unit to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses who appear before the Court and others who are at risk on account of testimony given by such witnesses. Adequate arrangements must also be made to protect the physical and mental well-being of such individuals, many of whom are victims of serious crimes committed against them. This is necessary to avoid getting traumatized again or an otherwise negative experience, one effect of which could be to create a disincentive for witnesses to testify. A system has to be devised to ensure safe travel to home for witnesses at an appropriate juncture. A suitable arrangement for follow up after a witness testifies has to be there. This is crucial for adequate assessment of risks to their physical and mental well-being following testimony, to evaluate his or her condition, psychosocial support required etc. However, such follow up can be a difficult task, particularly where resources are scarce. There should be clear understanding regarding the rules


\(^{20}\) The **Best Bakery case** took place on March 1, 2002 in Vadodara, during the 2002 Gujarat violence, in which 14 people were murdered, many of them burned to death. The case came into prominence after all the 21 accused were acquitted on June 27, 2003 by a 'fast-track Court' for lack of evidence, after 37 out of the 73 witnesses, including key witness Zaheera Sheikh turned hostile. Zaheera, later, confessed that she lied in the Court due to fear as her family had received death threats.
and aims of different job holders such as the police, prosecutors, judges and service providers.

In many countries and under international instruments a range of procedural measures are foreseen which help protect witness from intimidation. These measures also protect witnesses from confrontation with offenders and protect their privacy thus preventing intimidation and re-victimization. Most of the counties have formulated Witness Protection Programmes for example, the United States of America has The Victim and Witness Protection Act 1982 and Australia has The Australian Witness Protection Act, 1994. In India, although unfortunately there is very high rate of crime and very low rate of conviction; even then no frame work regarding protection of witness has been drawn. The duty to protect the witness is on the police, but it has dubious reputation in discharging this duty.

There are a number of recommendations of various commissions from administrative to judicial and from police to human rights activists that address the issues of protection of witnesses. The vulnerability of witnesses is so prominent that nowadays even the Courts have broken their silence and have appealed for the witness protection law.

In Best Bakery case\textsuperscript{21}, the Hon’ble Supreme Court commented upon the State administration in general and the investigating agency in particular for rashly and negligently handling their duties and abdicating their responsibilities. The finding of the Court was that the whole machinery of the State failed in maintaining the confidence of public in the justice delivery system. The Court reminded the Trial Courts to be alive to the reality about the witness hostility. One of the predominant points taken note of by the Hon’ble Supreme Court is the lack of witness protection in our country. The principles stated in the above decision have been reiterated by the Hon’ble Supreme Court in the contempt proceedings taken up against Zahira Habibulla H. Sheikh and Another\textsuperscript{22}.

In Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others\textsuperscript{23}, the Apex Court was emphatic on the role the State has to play in protecting the witnesses. It has been observed that as a protector of its citizens, the State has to ensure that during the trial in the Court the witness could safely depose the truth

\textsuperscript{22} 2006 Cri.L.J. 1694.
\textsuperscript{23} Supra note 21.
without any fear of being haunted by those against whom he had deposed. The Supreme Court reminded the State that it has a constitutional obligation and duty to protect the life and liberty of the citizen who acted as a truthful and earnest witness.


In *People’s Union of Civil Liberties v. Union of India*, the Supreme Court considered the validity of Section 30 of The Prevention of Terrorism Act, 2002 which deals with ‘protection of witnesses’.

Witness protection, in its narrow interpretation, and its impact on judicial administration, was also dealt with in the 4th Report of the National Police Commission where the Commission referred to the inconvenience and harassment caused to the witnesses in attending Courts. The Commission noted that the monetary compensation was woefully inadequate and referred that out of 96,815 witnesses who attended the Courts during the test period, only 6697 witnesses were paid some allowance, and that too after following a rather cumbersome procedure (which incidentally has hardly changed for the better anywhere). These figures signify the irrelevance of the amount paid to witnesses for their troubles.

The 14th Report of the Law Commission considered the problem of witness protection and referred to inadequate arrangements for witnesses in the Court house as well as meagre travelling allowance and daily bhatta (allowance) paid to witnesses for attending the Court in response to summons.

In its 154th Report, while noting the plight of witnesses appearing on behalf of the State, Law Commission observed that the witnesses faced not only inconveniences but also risk to their lives at the hands of criminals. So it made recommendations to mitigate various inconveniences.

The Law Commission in its 178th Report again took up the issue of preventing witnesses from turning hostile. The Report also dealt with the issue of precautions the police should take at the stage of investigation to prevent fabrication.

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24 2003 (9) SCALE 329.
by witnesses when they are examined later at the trial. The Commission recommended recording the statements of material witnesses in the presence of Magistrates, taking signatures of the witnesses on the police statement and sending the same to appropriate Magistrate and a senior police official and lastly in all serious offences (punishable with ten or more years of imprisonment) the statement of important witnesses should be recorded at the earliest by a Magistrate under Section 164\textsuperscript{30} of the Cr.P.C., 1973.

This was observed by the committee that many witnesses give false evidence either because of inducement or because of the threats to him or his family members. There is no law to give protection to the witnesses subject to such threats, similar to witness protection laws available in other countries. It was pointed out that unfortunately the witnesses were treated very shabbily by the system. To overcome these problems, the Committee made several recommendations\textsuperscript{31}.

After these reports the commission on reforms of Criminal Justice System under the chairmanship of Dr. Justice V.S. Malimath submitted its rather voluminous

\textsuperscript{30} Section 164. Recording of confessions and statements.

(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any, time afterwards before the commencement of the inquiry or trial:

Provided that no confession shall be recorded by a Police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is bear, made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in Police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect.

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B. Magistrate".

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

\textsuperscript{31} Supra note 29.
report\(^{32}\), containing as many as 158 recommendations. Some of these recommendations were made even in the 14\(^{th}\) Report\(^{33}\) of the Law Commission about five decades ago, and yet there is little to show by way of any improvement in the quality of facilities available to a witness.

The immediate importance of the subject of witness protection in our country motivated the Law Commission to take up the subject of ‘Witness Anonymity’ and ‘Witness Protection’ suo-motto. The Law Commission’s consultation paper on witness identity protection and Witness Protection Programs August 2004\(^{34}\) broadly categorized the need of witness protection as follows:

1. The phenomenon of witness to become hostile on account of the failure to protect their evidence is one of the problems. So it is necessary that procedure should be introduced into the criminal law to balance the need for anonymity of witnesses on the one hand and right of the accused on the other.

2. The other need is for physical protection of the witness at all stages of the criminal justice process till the conclusion of case, by the introduction of Witness Protection Programmes.

The Law Commission analysed validity of the provisions of various statues providing specifically for protection of witnesses. It has discussed various principles of law developed by the Supreme Court and the High Courts. These principles basically stress upon the need for a congenial atmosphere for the conduct of a fair trial and this included the protection of witnesses.

The Criminal Law (Amendment) Act, 2005\(^{35}\) which has been enforced w.e.f. 16.4.2006 has amended the IPC, 1860, the Cr.P.C., 1973 and the Indian Evidence Act, 1872. Above Act has introduced Section 195A\(^{36}\) to the IPC, 1860, whereby threatening or inducing any person to give false evidence is made punishable. By

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32 The Committee submitted its report to the Ministry of Home Affairs on 21 April 2003.
33 Supra note 27.
34 On basis of responses to this paper the Law commission gave its One Hundred and Ninety Eighth Report: Witness Identity Protection And Witness Protection Programmes on the issue in August, 2006.
35 No.2 of 2006, The Gazette of India-Extraordinary Part II-Section 3, Sub Section (ii); No.348, New Delhi, Wednesday, April 12, 2006, Ministry of Home Affairs Notification-S.O.523 (E).
36 Section 195A. Threatening or inducing any person to give false evidence.-Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both; and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced.
virtue of the said amending Act, Section 195 of the Cr.P.C., 1973 has also undergone changes. Section 154 of The Indian Evidence Act, 1872 empowers the Court to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. 

The only real attempt with regard to witness protection (in the physical sense) is to be found in the provisions of Control of Organised Crime Acts enacted by some of the State Governments. Section 13 of The Terrorist and Disruptive Activities (Prevention) Act (TADA Act), 1985 and Section 16 of the TADA Act, 1987 provided for protection of the identity and keeping address of a witness secret. Section 16 of the TADA Act, 1987 differed from Section 13 of the TADA Act, 1985 in two respects. Firstly, whereas it was mandatory to hold proceedings in camera under Section 13 of the TADA Act, 1985 the proceedings could be held in camera under Section 16 of the TADA Act, 1987 only where the designated Court so desired. Secondly, Section 16(3)(d) of the TADA Act, 1987 empowered a designated Court to take such measures in the public interest so as to direct that information in regard to all or any of the proceedings pending before such a Court shall not be published in any manner. Section 30 of The Prevention of Terrorism Act (POTA), 2002 is on the same lines as Section 16 the TADA Act, 1987. In its reports the Law Commission has failed to point out that such discretion leaves the witnesses in a confused position about their protection and they decide to quit the path of truth.

Although Section 327 of the Cr.P.C., 1973 provides for trial in the open Court and Section 327(2) of the Cr.P.C., 1973 provides for in-camera trials for offences involving rape under Section 376 of the IPC, 1860 and under Section 376 A to 376 D of the IPC, 1860 but it is shocking to note that barring rape and child abuse cases, there are, as of today, no general statutory provisions in the Cr.P.C., 1973 on this subject.

Whatever recommendations made, the fact remains that there is no general law on protection of identity of witnesses in criminal cases, apart from the provisions for

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37 After section 195 of the principal Act, the following section shall be inserted, namely:- Procedure for witnesses in case of threatening, etc. - "195A. A witness or any other person may file a complaint in relation to an offence under section 195A of the Indian Penal Code."
39 Act already repealed.
40 Ibid.
41 Ibid.
protection of witnesses in the special statues governing terrorist-crimes. But the cases where nobody is ready to become a witness or is no longer interested in continuing as a witness or just interested in denying his original version of statement so as to get rid of the threats hanging on his head are no longer confined to cases of terrorism as this phenomenon has reached alarming proportion elsewhere also. There is therefore need, as in other countries, to generally empower the Court in cases where muscle power, political power, money power or other methods are employed against witnesses and victims to prevent them from giving true evidence or testimony, so that these witnesses are provided sufficient protection to enable them to give evidence without any fear or reprisals and threats by the accused do not have any impact on them.

In the Fifty-fifth session of the General Assembly of the United Nations, a resolution 43 was adopted relating to the Convention against Trans-national Organized Crime. The thrust of the Convention was on serious crimes (constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty) in order to obtain, directly or indirectly, a financial or other material benefit. The application of the Convention is to serious crimes as mentioned above and to offences mentioned in Articles 5, 6, 8 and 23 of the Convention. Article 5 basically concerns itself with criminal activity of an organized criminal group, which means a structured group of three or more persons. Article 6 relates to the criminalization of the laundering of proceeds of crime, while Article 8 relates to the criminalization of corruption. Article 23 of the Convention is of some importance and it deals with criminalization of obstruction of justice. Each State party to the convention shall adopt legislative measures to make it a criminal offence, inter alia, to use physical force, threats or intimidation or to otherwise interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by the Convention. Article 24 relates to the protection of witnesses and this reads as follows:

“Protection of witnesses

1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in

43 No.55/25.
criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter-alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use communications technology such as video links or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are Witnesses.”

The convention thus reinforces three significant advances in the matter of witness protection:

(i) Enlarging the definition of a witness to include his or her relatives and other persons close to him or her.

(ii) Acceptance of the use of modern technology such as video linkage to record the testimony of a witness, and

(iii) Victims of a crime are also entitled to protection if they are witnesses.

In the United States of America, the Organized Crime Control Act, 1970 and later the Comprehensive Crime Control Act, 1984 authorized the Witness Security Program. The Witness Security Reform Act, 1984 provides for relocation and other protection of a witness or a potential witness in an official proceeding concerning an organised criminal activity or other serious offence. Protection may also be provided to the immediate family of, or a person closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding. The Attorney General takes the

44 State of Maharashtra v. Dr Praful B. Desai 2003 Cri.L.J. 2033 also endorsed this.
45 U.S. Code Collection, Title 18, Part II, Chapter 224, Section 3521.
final decision whether a person is qualified for protection from bodily injury and otherwise to assure the health, safety and welfare of that person. In a large number of cases, witnesses have been protected, relocated and sometimes even given new identities. The programme assists in providing housing, medical care, job training and assistance in obtaining employment and subsistence funding until the witness becomes self-sufficient. The Attorney General shall not provide protection to any person if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony. The Marshals Service which is a division of the Department of Justice gives protection to government witnesses and their immediate dependants against drug traffickers, terrorists, organized crime members and other major criminals. The claim of the Marshals Service is that about 7000 witnesses have so far been successfully protected and since the inception of the programme, the conviction rate has gone up to 89% due to the testimony of protected witnesses.

A similar programme is in operation in Canada under the Witness Protection Act, 1996. The purpose of the Act is "to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters". Protection given to a witness may include relocation, accommodation and change of identity as well as counselling and financial support to ensure the security of the protected or to facilitate his becoming self-sufficient. Admission to the Programme is determined by the Commissioner of Police on a recommendation by a law enforcement agency or an International Criminal Court or tribunal.

The Australian Witness Protection Act, 1994 establishes the National Witness Protection Programme in which (amongst others) the Commissioner of the Australian Federal Police arrange or provide protection and other assistance for witnesses. The witness must disclose a wealth of information about himself before he is included in the Program. This includes his outstanding legal obligations, details of his criminal history, details of his financial liabilities and assets etc. The Commissioner has the sole responsibility of deciding whether to include a witness in the Program, and in

46 Section 3.
47 Section 5 and 6.
48 Section 4.
49 Section 7.
deciding whether to so include a person, the Commissioner shall have regard to various specified aspects.

The Witness Protection Act, 1998 of South Africa provides for the establishment of an office called the Office for Witness Protection within the Department of Justice. The Director of this office is responsible for the protection of witnesses and related persons and exercises control over Witness Protection Officers and Security Officers. Any witness who has reason to believe that his safety is threatened by any person or group or class of persons may report such belief to the Investigating Officer in a proceeding or any person in-charge of a police station or the Public Prosecutor etc. and apply for being placed under protection. The application is then considered by a Witness Protection Officer who prepares a report, which is then submitted to the Director. The Director, having due regard to the report and the recommendation of the Witness Protection Officer, takes into account the various factors, for deciding whether a person should be placed under protection or not.

The Witness Protection, Security and Benefit Act of the Philippines, which came into force from 24.04.1991 is intended to "encourage a person who has witnessed or has knowledge of the commission of a crime to testify before a Court or quasi-judicial body, or before an investigating authority, by protecting him from reprisals and from economic dislocation." Admission to the Programme is given to a witness where the offence in which his testimony will be used is a grave felony, his testimony can be corroborated on material points and he or any member of his family "within the second degree of consanguinity or affinity is subjected to threats to his life or bodily injury or there is a likelihood that he will be killed, forced, intimidated, harassed or corrupted to prevent him from testifying, or to testify falsely, or evasively." A witness admitted to the Programme is entitled to certain rights and benefits. These include a secure housing facility until he has testified or until the threat, intimidation or harassment disappears or is reduced to a manageable or

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50 Section 8.  
51 Section 4.  
52 Section 7.  
53 Section 9.  
54 Section 10.  
55 Republic Act No. 6981.  
56 Section 3.  
57 Section 8.
tolerable level. The Department of Justice shall, wherever practicable, assist the witness in obtaining a means of livelihood and if the witness is relocated, he shall be entitled to financial support for himself and his family. The witness will be provided free medical treatment, hospitalization and medicines for any injury or illness incurred or suffered by him because of witness duty in any private or public hospital, clinic or at any institution at the expense of the Program.

In the Nitish Katara murder case\textsuperscript{58}, the Delhi High Court laid down certain guidelines for a witness protection scheme. Further the initiative taken by the Law Commission of India to examine the issue of witness protection is commendable. But to ensure that the law in this regard is effective and in conformity with international criminal and human rights law, the gaps in the legal protection of witnesses must first be identified. The protection that is currently available to a certain category of witnesses, especially in terrorist cases, is based upon the discretion of the Court and is highly arbitrary and unpredictable. There is an urgent need to establish a neutral agency that can consider the needs of all witnesses, not just those brought by the prosecution.

So witness protection should aim at enabling the witness to live safely. Special measures for minors must be ensured in accordance with the best interest of the child and these measures should also extend to family members when appropriate. These programmes and measures should also include that there should be international agreement regarding temporary and permanent relocation of the witnesses. For development of these measures and programs there should be coordination and cooperation at international level amongst all the job holders. Some measures should be regarding the capacity building, regarding ethical and legal obligation of the media to preserve confidentiality of information and privacy of witnesses.

Objective of the study: Being realistic there is need for witness to come forward, especially when we are trying to bring to Justice the career criminals or particularly dangerous criminals. Some times that would mean that we need to actively and rigorously protect those witnesses. For this an effective Witness Protection Programme is an often essential tool in the fight against crime. Those who face investigation and criminal prosecution may attempt to frustrate the administration of

\textsuperscript{58} Mrs. Neelam Katara v. Union of India & ors, decided on 14th of October 2003 by Justice Usha Mehra and Justice Pradeep Nandrajog, Crl.W.No. 247 of 2002.
Justice through intimidation or by causing physical or other harm to witnesses or their relatives. In the absence of any programme to protect them from reprisals, witnesses may not be forthcoming, and the justice system may be paralysed. So there is a need to discuss the inadequacy of Indian Laws in dealing with the subject.

At the same time, it can’t be overemphasised that implementing a Witness Protection Scheme is an extremely demanding enterprise in India and other countries. Both the stakes and risks are high. The success of major criminal investigations and prosecutions, the safety of the witnesses and police officers involved, as well as the integrity and effectiveness of the programme itself depend on the sound design and careful implementation of the scheme set in place.

When a senior lawyer Vivek Tankha, appearing for an NGO, Country First - which had filed the petition for enacting a legislation on witness protection - said the country cannot be allowed to suffer the menace of hostile witnesses, Chief Justice K G Balakrishnan observed that it was not possible to provide protection to every witnesses, as there were too many pending cases. The bench commented, “How can there be a blanket protection? Do you (petitioner) have an idea how many witnesses would be required to be protected?” The Supreme Court, while directing Delhi Courts to conduct a sample survey of Criminal Courts and also the pending cases, asked them to file a status report on the feasible option of instances where witnesses can be given protection.

However the fact remains that a nation cannot afford to expose it’s righteous and morally elated citizens to the peril of being haunted or harassed by anti social elements, for the simple reason that they testified the truth in a Court of law. Dearth of funds should never be an excuse. If our society fails to be alive to the reality, the plight of an honest witness will be catastrophic and calamitous.

Hence, this research work starts with the aim not only to survey laws on the subject in other countries and to analyse the suggestion given by various committees on the subject but also to suggest suitable measures for witness protection so as to encourage witnesses to come forward.

To protect witness is a present global problem which has drawn the attention of international authorities. Therefore to solve the issue with top priority at the National and International level, the subject in the present study is a matter of tremendous significance.

Present study consists of both theoretical and empirical study. A purely theoretical approach to the study may not prove to be fruitful unless an empirical study of the actual cases, which required the need of Witness Protection Programme but its absence proved a hindrance, is made.

59 All witnesses can’t be protected: SC, (Supreme Court bench comprising Chief Justice K G Balakrishnan and Justice D K Jain), The Times of India, New Delhi, 23.1.2007.
60 Supra note 38.
**Hypothesis:** Witnesses play an important role in deciding the course of criminal justice system. So there is need for witnesses to come forward without any fear of repercussion from the criminal elements. In the present times this aspect of protection of witnesses is gathering a lot of attention and several countries in the world are in advanced stages of doing the needful for protecting witnesses. However there is total inadequacy of Indian laws in dealing with this matter. In view of the complexities involved, this hypothesis rests on the presumption that if the state of affairs regarding protection to the witnesses in criminal cases remained unchanged the repercussions of this problem shall be annihilating the delivery of justice by the judicial system with criminals going scot-free and reliable witnesses difficult to trace. For that matter a comprehensive study which deals with the subject of ‘Witness Protection in Criminal Justice System in India’ needs to be done.

The main issues considered while examining the concept of witness protection are:

- **Balance between the right of the accused for an open trial in his or her presence as against the need for fair administration of justice in which the victims and witness depose without fear or danger to their lives or property or those of their close relatives.**
- **Methods to protect witnesses from various discomforts and inconveniences so as to achieve efficient and effective prosecution and alleviate the factors which deter the people from becoming a witness.**
- **Various strategies which can be adopted to protect the witnesses so that they give their testimony without any fear and also to inculcate a feeling of security among the people so that they do not hesitate in becoming a witness in a case.**
- **Various methods which can be adopted for witness identity protection.**
- **Various methods which can be adopted to provide physical protection to the witnesses.**
- **The need for a Witness Protection Programme and whether it would satisfactorily contribute to the fight against the crimes that are being targeted by the programme. Further if there are any other means through which witnesses can be protected, then overpowering utility of this programme over such other means.**
- The organization and operation of the programme and the Legal status which it should carry.
- The issue of the authority who would be responsible for the administration of the programme and the aspect of the most suitable method to be adopted by such authority.
- Financial resources can be a big restrain in countries like India. So this issue has been suitably dealt with.
- The factors which would make a person eligible or ineligible for the programme have been taken into consideration.
- The extent of the benefits that should be granted under the program.
- The obligations of the protecting agency and the protected witness.
- Nature and duration of protection and the circumstances in which it can be terminated.
- The issue of dealing with a person who compromise the security of a protected witness or the integrity of the program.

**Universe of study:** In the present research work, the factors which generate the need for protection of witnesses especially in Indian context have been analysed. The aspects of witness vulnerability as well as need of their welfare at all stages of the case and thereafter have been studied and examined. A thorough study of existing programmes on witness protection in various countries has been made and worldwide efforts being made to deal with the problem have been given due attention. Various Statutes, Law Journals, available legal literatures, articles, media reports and judicial activism have been used to examine the issues. Although presumption of innocence is attached to every witness, whether prosecution witness or defence witness and he has all the rights to lead evidence and thus there should not be any different approach; but the present study is confined to study of prosecution witnesses in criminal cases and various protection measures needed for them.

**Analysis of Literature:** The literature resource for analysis is available in the form of number of books, newspaper, magazines, internet sites, journals, articles, conventions and relevant laws in different countries. The literature relating to the rights of witnesses and laws relating to their protection, various tradition and custom, various
support systems like constitutional, legislative, government programs and policies and also the international conventions and conferences affecting the national scenario have been studied in detail. The internet had a substantial effect to studying international scenario as well as definitions of different words and news items, without which the research would have been much more difficult.

**Research methodology:** The present research work required both theoretical and empirical study. The theoretical work dealt with the study of literature and judicial verdicts available on the issue. The empirical work comprises taking views of Judges, Advocates and Police Officers, who normally deal with the witnesses during trial, by means of a questionnaire designed for the purpose. The analysis of such responses and study of literature and judicial verdicts has provided the real picture about the need for witness protection and necessity of designing a programme for the same.

**Plan of Study:** The research has been presented schematically by dividing into eight chapters detailed as follows:

Chapter-1: Gives the introduction of the topic, its problem profile, object of study, research hypothesis, literature analysis, universe of study, defining witness and different types of witnesses like eye witness, independent witness, interested witness, formal witness, police witness, stock witness, hostile witness, expert witness, won over witness and at last categorization of witnesses for protection like State witnesses, informers including undercover police officers, victim witnesses, other types of witnesses (witnesses who are known to the accused; witnesses not known to the accused) etc.

Chapter-2: Explains the various provisions in Indian laws like Indian Penal Code 1860, the Criminal Procedure Code 1973, the Indian Evidence Act, 1872 and Special laws like Terrorist Affected Areas (Special Courts) Act, 1984, the Terrorists and Disruptive Activities (Prevention) Act, 1985 and the Terrorists and Disruptive Activities (Prevention) Act, 1987 commonly known as TADA Acts etc. for protection to witnesses and the various court decisions which have worked towards improving the conditions of the witnesses or giving them some kind of protection and how all of these are not sufficient to deal with the issue.

Chapter-3: Discusses the aspect of perjury and its bonding with the concept of witness protection as well as how punishment under perjury is not sufficient in itself
to deal with the issue of lack of readiness on part of witnesses to testify when faced with some kind of threat, mild or severe.

Chapter-4: Deals with various dimensions of the witness protection, nature of threats, scope of witness protection and various parameters within which it can function. There is a detailed discussion on the issue of rights of the accused vis a vis witness anonymity for protection.

Chapter-5: Gives a detailed insight into witness protection laws existing in different countries e.g. USA, Australia, Canada, South Africa, Colombia, Germany, Italy, United Kingdom and some Asian countries like Thailand, Republic of China (Taiwan) so as to examine their broad framework and points of convergence and divergence.

Chapter-6: Involves a detailed and critical study of various reports of the Law Commission since its inception e.g. 14th Report, 154th Report, 172nd Report, 178th Report and 198th Report as well as Malimath Committee Report on the issues relating to the witnesses in the Indian judicial system and the utility of such reports in improving the environment for frank and fearless testimony of these witnesses. Insufficiency of these reports in dealing with the issue under consideration has been examined.

Chapter-7: Details the findings of the empirical study done for the research work. Views of Judicial Officers, Police Officers and Advocates have been taken on the issue and analysed.

Chapter-8: Finally based upon the research, conclusion has been drawn that evolving an effective and sustainable scheme including a Witness Protection Programme is need of the hour in our country. On the issue of witness protection there are no easy solutions, as without effective implementation it will be worth just piece of paper. In practice it may work out to be very complicated, especially with regard to funding, regarding the change of identity and relocation of at-risk witnesses and with regard to cross-border cooperation. The conditions and criteria for the establishment of a scheme, the sole purpose of which would be to ensure the safety of threatened witnesses, have thus been defined. An account of the challenges that our country would have to face in its efforts to address the threat posed to witnesses by criminals as well as their groups has been brought out and suitable measures and practices which can produce positive results have been suggested. These measures would provide for a continuum of protection that starts with the early identification of
vulnerable or intimidated witnesses, continues with the management of witnesses by
the police and the legal measures to protect the witness’s identity during courtroom
testimony, and culminates with the adoption, in extreme cases, of measures for
permanent change of identity and relocation.

The method of protection will largely depend upon the kind of witness, nature
of the testimony, type of crime and last but not the least the nature of threat or
intimidation. Of all these methods, the Witness Protection Programme is that of last
resort in providing protection to a threatened witness. A Witness Protection Scheme
to provide following types of protection has thus been suggested:

**Grade 1 Protection:** This refers to providing protection to the witnesses from
discomfort and inconveniences which plague the present system, making the life of
the witnesses miserable as well as acting as a strong deterrent against their coming
forward to provide the necessary testimony and evidence. The purpose of providing
assistance to witnesses so as to protect them from various discomforts and
inconveniences has nothing to do with providing security to them against physical
harm but it is a means to achieve efficient and effective prosecution. It can relieve
them from anxiety and improve psychological wellbeing, which can in turn improve
the quality of their deposition. Such assistance should preferably be administered as
well as delivered by professionals who are not under the control of the investigation
or prosecution team.

**Grade 2 Protection:** Although ideally each and every witness should receive
assistance and support, however due to various practical reasons Witness Protection
Programmes are essentially reserved for those extraordinarily important cases where
the threat against the witness is so serious that protection and support cannot be
ensured by other means. So in cases that do not warrant the permanent relocation and
change of identity of the witness various strategies can be worked out for various
stages of trial (or even pre trial or investigation stage) to ensure that at-risk and
intimidated witnesses cannot be traced easily by the criminals or their accomplices e.g.
by means of enhanced police measures criminals wanting to harm the witness can be
discouraged; change of the trial venue or hearing date; removal of the public and
media from the courtroom (in camera session); presence of an accompanying person
for psychological support etc. Several such measures have been discussed in detail.

**Grade 3 Protection:** In addition to above some other procedural protection
measures can also be adopted with the permission of the court for the duration of
testimony. Such protection measures can be of great help especially in sensitive cases involving trafficking in persons, sex crimes, child witnesses and family crimes etc. as these would prevent the re-victimization of victim-witnesses by limiting their exposure to the public and the media during the trial. Relevant measures have been discussed in detail.

**Grade 4 Protection:** In circumstances like refusal of the witness to enter Witness Protection Programme or lack of eligibility criteria for entering such programme, witnesses may be offered support to look after their own protection. The procedural aspects of the same have thus been discussed in the work.

**Grade 5 Protection:** Where witnesses cannot be protected by using any of the Grade1 to Grade 4 protection as envisaged in the witness protection scheme but they deserve to be protected due to the nature of crime involved and the overall impact on the society and the criminal justice system if the accused are convicted, then Grade 5 protection should be resorted to. This would involve establishing of a separate Witness Protection Programme which would involve change in identity of the witness or his relocation to a new place so as to eliminate the chances of witness being tracked by the criminals or their associates. Detailed suggestions have been given on following of the most important elements for the establishment and operation of Witness Protection Programme:

1. A clear legal or policy basis for designing a methodology and carrying out operations;
2. Adequate financing that is stable and continues for several years;
3. Strict personnel qualifications and vetting procedures;
4. Protection of the Programme’s integrity;
5. Close coordination with judicial and other Government authorities engaged in law enforcement and intelligence, prison administration, public housing, health and social security services, among others;
6. Accountability and transparency that conform with the Programme’s special security needs;
7. Obligation of Government authorities to provide appropriate assistance, safeguarding the information disclosed to them;
8. Ability to offer assistance to national and international law enforcement agencies.
To conclude in brief, there exists an imminent need for framing a law to protect witnesses so as to throw an effective safety net around them in order to protect them from not being devoured by the powerful crime mafia of the society. Such a law should enable framing up of Witness Protection Schemes including that for Witness Anonymity and Identity Protection and for extreme cases a Witness Protection Programme. Further, a law can be as good as its implementation. So even if there is complete protection and encouragement of witness testimony, there exists a simultaneous need for capacity building of police, prosecutor and Judicial functionality, integrity and public credibility, along with access and outreach to the people of the country. This only can lead to an effective Criminal Justice System which the offenders cannot ignore. This only can create an environment conducive to the witnesses, who can then provide the requisite evidence or testimony without any apprehensions in their mind. This will enable them to come out from self-imposed censorship existing due to a fear that they will put their lives or at least livelihood and social standing at risk, even if there are no explicit threats. Moreover in high profile cases and the cases involving organized crime and terrorism instead of coercion, the accused perpetrator may offer implicit or explicit favours to the witnesses, ranging from cash payments to promises of future positions or promotions. This requires strong anti-corruption strategies side-by-side with effective strategies to address the issues of witness protection. There must be, in short, an integrated strategy, of which witness protection is one important part.