WITNESS DEPOSITION EVIDENTIARY VALUE AND PROTECTION

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ABSTRACT

It was rightly pointed out by Jeremy Bentham[2] *that witnesses are the eyes and ears of justice. A dispute between two persons will be resolved by the court of justice by analysing the evidence put forth by the parties thereto during the process of the court proceedings. Each party will place certain evidence through witness in support of their claim or allegations. The process in which the evidence deduced before the court is analysed and help the court to resolve the dispute basing on the depositions made by the witnesses of the parties. During the process of recording the evidence of these witnesses law provides certain provisions as to how to with such witnesses and their depositions and their evidentiary value of the same. A witness is a person who testify the fact known to him and which is a fact in issue between the parties to the dispute. He is a person who deposed the facts known to him which is a subject matter of dispute between the parties thereto. There are several occasions where the statements were vital for the resolution of dispute and rendering justice who believes in the court of justice. Opinion is a judicial function which can't be delegated to the witness. However, in case of expert witness the power of judiciary is to be delegated to the expert witness whose evidence is crucial for deriving a conclusion by the court where they are not aware of the field where expert evidence is sought by the court. Certain statements of a witness may criminate him. An act may be happened in remote secluded place where no eyewitness is available to testify. In such cases we have to rely on accomplice or Co-accused evidence. This paper focuses on various aspects like witness and his significance, witness in general, restrictions on witnesses, credibility of witness, plight of witness, who will be witness and what will be the number, determination as false or tainted, punishment, perjury witness protection and anonymity and various instances where the witness is dealt in the court of justice.*

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[2] "A Treatise on Judicial Evidence".

INTRODUCTION

WITNESS AND HIS SIGNIFICANCE

The term witness is not defined anywhere in the Evidence Act, 1872. The term 'oral evidence' in section 3 of the Act clearly says that a witness is a person who is called to give evidence in a court of law. A person is referred as witness who appears to be acquainted with the facts and circumstances of the case.[3] Generally, witness is one who is competent; give oral statements, in the court, under oath and subject to cross-examination. "The parties shall themselves produce who are witnesses and who are not far removed either by time or place. Witnesses who are far away or who will not stir out shall be made to present themselves by the order of the judge."[4]

Vasista recognises Sakshi (Witness) is one among the three kinds of evidence namely Lekhya (document) and Bhukti (Possession).Hindu Dharma shstras say that purpose of any trial is desire to ascertain truth. Shastrakarta Sen joined in order to ensure the witnesses to speak truth that a solemn atmosphere should be created in the court premises. The court premises were to be decorated with flowers, idols and paintings of God. The Judges were required to wear distinct robes and sit on high cane seats. Before giving evidence the witnesses were required to perform a brief Sankalpa (ablution) and were required to face towards auspicious direction and were exhorted to speak truth in the most solemn appeals to their religious sentiments. Yagnavalkya says that the king should give decision in accordance with true facts by discarding the fraudulent. Manusays that the king should ascertain the truth by determining the correctness of the testimonies of the witnesses before rendering justice. Therefore, the Hindu Lawgivers took every precaution, in order to discover the truth. This was enshrined in the maxim "FALSUS IN UNO FALSUS IN OMINIBUS" It means false in one thing is false in everything.[5]The shastras enjoined that the parties coming into court must be prevailed on to admit the truth.

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[3]Sec.160(1) of Criminal Procedure Code; see also Sec 3 of Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill 2011

[4]Katutilaya's Arthsahastra

[5] see Manjit Singh v. State of Punjab, 2013, 12 SCC 746 where The Apex Court held that the doctrine is a dangerous one, especially in India, for if a whole body of the testimony were to be rejected, because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop.

The conception of Justice in Islam is that the administration of justice is a divine dispensation. With regard to oral evidence the Holy Quran enjoins truthfulness. Its translated version is: "O" True Believers: Observe Justice , when you appear as witness before God and let not hatred towards any induce you to do wrong but act justly, This will approach nearer to piety. And fear God for God is fully acquainted whit what you do.[6] Further it says"O" You who believe, be maintainers of justice when you bear witness for God's sake, although it be against yourselves or your parents: or your near relations, whether the party be rich or poor, for God is most competent to deal with them both. Therefore do not follow your low desire in bearing testimony so that you may swerve from justice and if you swerve or turn aside then surely God is aware of what you do.[7]

Basically there are three words used in the Greek New Testament which consist of one verb and two nouns. One noun is used 24 times in the New Testament which refers to a person who is a witness to facts and who can speak about them from his own direct knowledge, especially in legal proceedings. New Testament of Holy Bible teachesus: "thou shalt do no murder, thou shalt not commit adultery, thou shalt not steal, and thou shalt not bear false witness"

WITNESSES IN GENERAL

Narda and Bruhasapti classified the witnesses in to eleven and twelve respectively. However in modern times the Halsbury's Laws of India classified witnesses into different categories viz;

- Eye witnesses,
- Natural witness
- Chance witness
- Official witness
- Sole witness
- Injured witness
- Independent witness
- Interested, related and partisan witness
- Inimical witness

[6] Holy Quran Chapter 5 verse 8
[7] Holy Quran Chapter 4 verse 135

- Trap witness
- Rustic witness
- Child witness
- Hostile witness
- Approver, accomplice etc.

Though there is several witnesses discussed above we come across a few in the law of evidence which are as follows:

- Dumb witness
- Trap witness
- Accomplice/co-accused
- Attesting witness
- Trap witness/honest witness
- Hostile witness

RESTRICTIONS ON WITNESSES

Outside the presidency towns there were no fixed rules of evidence. The law was vague and indefinite and had no greater authority than the use of custom. However, a practice had grown to follow. Some rules of evidence on the basis of customs and usages of Muslims.

In ancient period Narada gives us five-fold classification of incompetent witness.[8]During the British period of 1835 to 1853 A.D., a series of Act were passed by the Indian legislature introducing some reforms of these Acts which superficially dealt with the law relating to the witness are summarized as follow:

(i) Lord Denman's Act[9] provides that no witness should be schedule from giving evidence either in person or by deposition by reason of "incapacity for crime interest".

[8]Learned Brahamanas , and ascetics practicing austerities, thieves , robbers and gamblers, rejected on the ground of contradiction in their evidence, one who comes on his own accord for lending evidence, persons named by dead person.

[9] 6 and 7 Vic. C.85 of 1843

(ii) The same Act[10] declares that the parties to the proceedings their wives or husband and all other person capable of understanding the nature of oath and the duty to speak truth, as competent witnesses in the country courts.

(iii) Lord Broughams Act[11] declared that the parties and the person on whose behalf any suit, action or proceeding many be brought or defended, are competent as well as compellable to give evidence in any court of justice.

(iv) The Lord Broughams Act of 1853[12] made the husbands and wives of the parties to the records competent and compellable witnesses.

(v) Act XIX of 1834 abolished the incompetence of the witness by reason of a Correction for criminal offences.

Sec 4 of the Evidence (further amendment) Act of 1869 removes the disability attached to the atheist and such infidels (i.e. on Christians) as were atheist to be reason and to testify they were declared competent witness to testify.

CREDIBILITY OF WITNESS

The most important ports to be ascertained in deciding the credibility of witness is that whether

- he has the means to gain the correct information
- he has any interest in concealing the truth
- he agree in his testimony[13]

The first two will be assessed individually and the third will be determined by relying on the whole testimony.The oral testimony of the witness is classified in to three:

- ✓ fully reliable
- ✓ fully unreliable
- ✓ neither fully reliable nor fully unreliable[14]

[10] 9 and 10 Vic. C.95 of 1843
[11] 14 and 15 Vic. C.95 of 1843
[12] 6 and 17 Vic. C.83 of 1852
[13]Historic Doubts relative to Nepoleon Bona Parte, P.14 Sixth Ed., C.D. Fields' Law of Evidence in 11thEd. Vol. 1 P. 19.
[14]Vadivelu Thevar v. State of Madras, AIR 1957 SC 614

In the first and second categories the court has no problem in resolving the dispute either acquittal or punishable. But whereas in the case of the third one the court has to look in to the corroborative evidence to circumspect in arriving the conclusion to render the justice.[15]The witnesses may be not in a position to speak what they heard or speak in an occasion as the cases are coming for trial after the lapse of time. Allowance must be allowed by the court to those circumstances.[16] The Apex Court made certain presumptions in relation to ordinary witnesses.[17]

- It is not to be expected that a witness possess a photographic memory and one cannot expect from him the video tape revelation of the fact which is in his knowledge.
- An incident may happen suddenly in his presence. He may not take up all the details of the incident because of mental condition at the time of happening of the event in his presence.
- The observation by one person may differ from the other. It is not reasonable to expect every person to notice everything occurred in his presence.
- The witness cannot accurately say what was spoken between the parties in dispute. He can only say the topic on which their conversation is going on. He is not a tape recorder to reproduce the accurate talks which are fact in issue in the present case.
- The exact time of the alleged incident for which he is called as witness may not specify the exact time he will guess the time on the spur of the moment.
- A witness though wholly truthful,an educated, an illiterate, a city dweller, a villager or an adivasi will react differently according to the degree of their sophistication. Moreover even in the case of the same class, the reaction would vary with the physical courage, mental equipment and social awareness of the individual.

Every one reacts the evidence of witnesses on the ground that they did not react in a particular manner is to appreciate the evidence in a wholly unrealistic unimaginative way**.**[18]

[15]State of Punjab v. Tarlok Singh, AIR 1971 SC 1221
[16] Krishna Narayan v. State of Maharashtra, A.I.R. 1973 S.C. 2751
[17]Bhogin Bhat Kirji v. State of Gujarat, 1983 Cri.L.J. 1096 S.C.
[18]Rana Partap V. State of Haryana, 1983 Cr.L.J. 127 S.C.

THE PLIGHT OF WITNESS

The plight of a witness, who comes forward to depose before a court with full sense of conviction, can be seen by the criticism from the Supreme Court in the case of *State of Uttar Pradesh v. Shambhu Nath Singh*[19]

"Witnesses tremble on getting summons from Courts, in India, not because they fear examination or cross-examination in Courts but because of the fear that they might not be examined at all for several days and on all such days they would be nailed to the precincts of the Courts awaiting their chance of being examined. The witnesses, perforce, keep aside their avocation and go to the Courts and wait and wait for hours to be told at the end of the day to come again and wait and wait like that. This is the infelicitous scenario in many of the Courts in India so far as witnesses are concerned. It is high time that trial Courts should regard witnesses as guests invited (through summons) for helping such Courts with their testimony for reaching judicial findings. But the malady is that the predicament of the witnesses is worse than the litigants themselves…. The only casualty in the aforesaid process is criminal justice.[20]

This criticism from the Supreme Court of India pithily sums up the problem facing witnesses.[21]In the case of Swaran Singh v. State of Punjab,[22] Wadhwa J while delivering the judgement expressed his opinion about the conditions of witnesses in the following words:

"The witnesses are harassed a lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a Court unwittingly becomes party to miscarriage of justice. A

[19] (2001) 4 S.C.C. 667
[20] Ibid
[21] Access To Justice: Witness Protection and Judicial Administration. Justice Madan B. Lokur. Delhi High Court. Source: www.humanrightsinitiative.org/
[22] (2000)5 S.C.C. 68 at 678

witness is then not treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers. Then appropriate diet money for a witness is a far cry.

Here again the process of harassment starts and he decides not to get the diet money at all. High Courts have to be vigilant in these matters. Proper diet money must be paid immediately to the witness (not only when he is examined but for every adjourned hearing) and even sent to him and he should not be left to be harassed by the subordinate staff. If the criminal justice system is to be put on a proper pedestal, the system cannot be left in the hands of unscrupulous lawyers and the sluggish State machinery. Each trial should be properly monitored. Time has come that all the Courts, district Courts, subordinate Courts are linked to the High Court with a computer and a proper check is made on the adjournments and recording of evidence. The Bar Council of India and the State Bar Councils must play their part and lend their support to put the criminal system back on its trail. Perjury has also become a way of life in the law Courts. A trial judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him. He is required to sign the complaint himself which deters him from filing the complaint. Perhaps law needs amendment to clause (b) of Section 340(3) of the Code of Criminal Procedure in this respect as the High Court can direct any officer to file a complaint. To get rid of the evil of perjury, the Court should resort to the use of the provisions of law as contained in Chapter XXVI of the Code of Criminal Procedure...”

The witnesses who have to play a pivotal role in criminal justice administrative system are facing lot of hurdles in delivering the justice to the victim. Some of them are as follows:

- For answering few questions in the examination of witness, he has to spent whole day in the court premises. Who will bear his travelling expenses, food allied expenses if he comes from lower strata of the society or a labour that lives on daily wages?

- Such witness is not properly treated by the court. Mallimath Committee expressed that "The witness should be treated with great respects and should be considered as a guest of honour."[23]
- The adjournments after arrival to the court for no fault of him frustrate the witness. Next time, he has to think several times before deciding to go or not. His decision not to turn for chief or cross examinations will render the justice simply unjust because of such absences of witnesses.
- He will be under mental harassment by the opponent while answering the questions in cross.

This makes them to make false statements, turn hostile and retract from earlier statements. It was rightly said that "Nothing shakes public confidence in the criminal justice delivery system more than the collapse of the prosecution owing to witnesses turning hostile and retracting their previous statements." [24]

WHO WILL BE A WITNESS AND WHAT WILL BE THE NUMBER?

Anyone can be witness provided he is a man of good character, trustworthy, knows dharma and acts up to it. The number of witnesses may be 2, 3,4,5,7 or 9. A single person is not to be accepted as witness. Narada and Kautily accepted single witness provided the transaction is taken in secret. Manu says that the persons of the same caste are in perfect knowledge of the different customs of the groups, and therefore, form appropriate witnesses

Witnesses are supposed to be stated in the plaint by the plaintiff as suggested by the text of Gautama. Manusmriti specified the judicial psychology as they are to probe the heart of the accused and the witness by studying their posture, mind and changes in the voice and eyes.[25]

"Ancient Hindu Law"[26]insisted on high moral qualifications in a witness in civil matters and did not permit any one being picked up from streets or from the court premises and made to depose, as is very often done in the modern Indian courts. One common qualification

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[23] 'Committee on Reforms in Criminal Justice System', headed by Justice Mallimath, Vol. I, P.151
[24]The Indian Express, October 26, 2003, The Columnists, Witness Protection by Soli Sorabjee
25 Chapter VIII para 25
26 "Ancient Hindu Law" as pointed out by the late Mr. B. Gururajah Rao in his little booklet "Ancient Hindu judicature"

mentioned is that the witnesses should be as many as possible, "faultless as regard performance of their duties, worthy to be trusted by the court and free from affection for or hatred against either party"

DETERMINATION OF A FACT AS FALSE OR TAINTED

The mixture of both truth and falsehood makes the entire oral evidence of the witness to be discarded by the application of the maxim falsus in uno, falsus in ominibus. The Apex Court in *Ugar Ahir v. State of Bihar*[27]held that the maxim is neither a sound rule of law nor a rule of practice for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth, or at any rate, exaggeration, embroidery or embellishment. Further, in *Bhagawan Tan Patil v. State of Maharashtra*[28] the Supreme Court observed that maxim is not blindly invoked in appraising evidence adduced in our courts where witness seldom tell the whole truth, but often resort to exaggerations, embellishment and padding up to support a story however true in the main. Acquittals of a large number of co-accused persons do not per se entitle others to acquittal and in such cases the court has a duty to separate the grain from the chaff.[29] It has no application in India and the witness cannot be branded as liar and the court in such cases has to separate the grain from chaff.[30] The Apex Court held that the doctrine is a dangerous one, especially in India, for if a whole body of the testimony were to be rejected, because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop.[31]

However, it is to be tested whether the testimony of the witness is consistent with common experience of mankind, with the usual course of nature and human conduct, and with well-known principles of human action. The court is to examine the credibility of such oral evidence both intrinsically and extrinsically.

Vishnu says that awitness may be known as false witness by his altered looks, by his countenance changing colour, and by his talk, wandering from the subject. Yagnavalkya says that he who shifts from place to place, licks his lips, whose forehead perspires, whose countenance changes colour, who with a dry tongue and stumbling speech talks much and

[27] AIR 1965 SC 277
[28] AIR 1974 SC 21; Mallikarjun Ningappa Ragati v. State of Karnataka 2006 CR.L.J 4298 Kant
[29]Gorle S. Naidu v. State of A.P. 2004 Cr.L.J. 924 S C
[30]Prem Chand V. State of Maharashtra 2007 Cr.L.J. 142 Bon.
[31]Supra note 4

incoherently and who does not heed the speech or sight of another, who by mental, vocal and bodily acts falls into shaky state, is considered a tainted person.[32]

A polygraph is popularly known as lie-detector test and it is use to check the truthfulness of the witness statements in the proceedings of the court. It is an instrument that measures the psychological changes produced by the nervous system in a person when he is answering questions about what he has done or seen etc. Certain nervous reactions are produced in him who are measured by reading blood pressure, breath/respiration rate and skin conductivity etc.

The brain mapping or P300 is another technique which recognises whether the witness brain recognises things from the crime scene which an innocent suspect would have no knowledge of.

In Narco-analysis the witness will be under a mental state because of sodium Pentothal /Amytol injected into the body. Under such condition he is thought to reveal things which he would not have otherwise done. While polygraph test is relatively non-invasive, Narco-analysis is invasive. In Selvi v. Karnataka[33] the Apex Court held not only that conducting tests like polygraph, Narco-analysis and the brain mapping were of doubtful utility but also that conducting the tests without the consent of the person was unconstitutional and violative of Articles 20(3) and 21

Punishment: The witness will be punished in three circumstances:

- Not keeping the promise to depose as witness along with other witnesses
- Denies to depose the fact known to him
- For giving false evidence frequently

Further, Bruhaspati says that the opponent may point out the defects, if they exist in the witness cited by the plaintiff, but if he finds faulty which do not exist in the witness, he should be punished with a fine equal to the amount claimed.[34]

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[32]Ancient Hindu Judicature: Tagore Law Lectures: S. Varadachari.
[33]2010 7 SCC 263
[34]Smtitichandrika II p.83

The tone of the warning depending on the cast of the witnesses, varying from simple advice in the case of brahmana, to an invitation to kshtriya, an appeal to a vaisya, and a strong warning to sudra, in case of false testimony would have to expiate any serious crimes committed.[35]

The axiomatic principle is that giving true evidence is rewarded with after life in the heaven, so the corollary is that perjury leads to hell.[36] The descriptions of the punishments for rendering false testimony particularly humiliating one of standing naked, hair shorn, tormented by hunger and thirst and with a bowl in the hand, begging at the door of worst enemy.[37]

PERJURY

Any person who takes oath to say truth and subsequently does not reveal the truth or makes untrue statement as to a fact known to him he committed an offence of perjury. Whoever being legally bound by an oath or by an express provision of law to state the truth....makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence. Whoever gives false evidence at any stage of a judicial proceeding" is punishable under Section 193, I. P. C. Under Section 236 of the Code of Criminal Procedure an accused may be charged in the alternative with having committed some one of two or more offences. If a witness bound by an oath or law to speak the truth, makes two statements one of which is necessarily false and the prosecution is unable to prove which one of them is false, he can be charged in the alternative with having made one or the other statement falsely. Illustration (b)' to the section shows that he can also be convicted in the alternative. If the prosecution succeeds in proving that an accused in the witness box deliberately made two statements which are so contradictory to, and irreconcilable with, each other, that both cannot possibly be true, he can be convicted of perjury even without its being proved which one of them was not true.[38]

A witness makes two contradictory statements intentionally, there is nothing to show that the earlier statement was wrong and was corrected by the subsequent statement and he does not

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[35]Vishnu VIII 20-23, Kautilya 3,11 34-37, Manu VIII 88
[36]Gauthama , XVIII, 7, Apastamba II ,11,29,9-10, Narada I 15, 216-221
[37]Vasistha,XVI, 33, Manu VIII 93
[38]Queen-Empress v. Ghulet', 7 All 44;Habibullah v. Queen-Empress, 10 Cal 937

admit that he had committed a mistake in making the earlier statement and when the prosecution charges him in the alternative with making one of the two statements falsely, he must be convicted of perjury. In the present case the two statements made by the applicant were so contradictory to each other that they could not be reconciled with each other and, could not both be true. One of them was bound to be false. The applicant deposed about matters which were within his knowledge and there was no scope for his making any mistake. It is clearly a case of making both the statements deliberately and when they are found to be irreconcilable, he must be convicted.[39]The two contradictory statements were made in the course of one deposition in one trial. If the first statement is false, the applicant committed the offence of perjury as soon as he made it. Whether he made it deliberately and whether he knew or believed it to be false or did not believe it to be true is to be seen with reference to the time at which he made it. If the requirements of Section 191 are fulfilled, he committed the offence of perjury as soon as he made it.

The completion of the offence does not remain in abeyance for a short time in order to give him an opportunity of repenting and correcting himself. It does not remain in abeyance so long as the trial is not over or so long as he has not been cross-examined under Section 256 of the Code or so long as he has an opportunity of being recalled and making the correct statement later. What he does subsequently has absolutely no bearing on the offence already committed by him. The offence is not purged or wiped off by subsequent repentance or retraction or correction. Of course, on account of the subsequent repentance and admission of mistake, the Court may say that he had not made the earlier statement deliberately knowing or believing it to be false or not believing it to be true; but that would mean that he had not committed the offence at all by making the earlier statement and not that he had committed it and the commission is purged or wiped off by the subsequent repentance and confession. Section 191 does not take into consideration the fact that the false statement was, subsequently in the same deposition or in the same trial, admitted to be incorrect and replaced by the correct statement or that the deposition was not finished before the accused corrected him.[40]

[39]Umrao Lal v. State 1954 Cr.L.J.860
[40]*Ibid*

Generally it is the duty of the court to complain and prosecute the witness separately for the offence of perjury. But the judiciary reluctant to proceed against them even there is a deviation in the statements made by the same witness in different occasions.

WITNESS PROTECTION

The issue of witness protection should be studied in lieu of the conviction rate and acquittal rate which are low and high respectively. The conviction rate under IPC cases is restricted very low even after 69 years of Independence and in the modern era of technology and science. India is known as a huge democratic nation but no law as to the protection of witnesses. This came to limelight during the cases of Ishrat's encounter, Jessica lal and recently in vyapam scam in Madhya Pradesh. The Apex Court in *Krishna Mochi v. State of Bihar* observed that the society suffer by wrong convictions and it equally suffers by wrong acquittals.[41]

In many cases, some witnesses or victim families have succumbed to the threat of reprisals and stopped testifying in courts against the accused. Unless witness protection measures are seriously implemented, witnesses will continue to turn hostile in criminal cases. A well designed witness justice programme would no doubt encourage witnesses to come forward and testify against the accused in their cases, even the powerful persons involved in such case.

LAW COMMISSION REPORTS

The Law Commission in its 14th Report referred to witness protection in the year 1958 to a limited extent that to allowance to arrive and protection in court premises after arrival. Later in 154th Report,[42] the Law Commission recommended that "witness should be protected from the wrath of the accused in any eventuality." Further, in its 172nd Report[43] took up the subject on the request made by Supreme Court in *Sakshi v. Union of India*.[44] Then the Mallimath Committee felt that focusing on "justice to victims" is possible, only careful consideration is

[41] AIR 2003 SC 886
[42] 1996 Code of Criminal Procedure Code, 1973(S.2 of 1974)

[43] 2000 Review of Rape Laws
44 AIR 2004 SC 3566

paid to "the rights of witnesses," 'considering them as special category of victims' and acknowledging their insecurity and vulnerability in general.

WITNESS PROTECTION AROUND THE WORLD AND WITNESS ANONYMITY[45]

The witness protection is a wider term than witness anonymity. The former speaks only of protection whereas the later includes the non-disclosure of the identity of the witness and also the physical protection by providing security and relocation etc. Worldwide the law makers adopted several methods and the courts securing witness programmes which are as follows:[46]

- In Camera proceedings
- Screening of the witness[47] not only from the accused but also from the defence lawyer
- Giving a pseudonym to the witness
- Maintaining the anonymity of the witness
- Barring the press and media from the proceedings or publication of names etc.
- Closed circuit TV coverage of the proceedings
- Video conferencing
- Physical disguise of the witness
- Shifting of the venue of the trial
- Keeping the accused in prison by refusing the bail
- Externment of the accused from the State concerned
- Doing away with cross examination and accepting the affidavits instead
- Doing away of the cross examination by the accused and evolving the mechanism of cross examination by the judge on lines proposed by defence

45 TanujBhushan , witness Protection in India and United States: A Comparative Analysis2(1) International Journal of Criminal Justice Sciences 13(20070 available at http://webcache.googleuserecontent.com/search?seeaslo Dr PallwalAnand , "Witness Protection Programme – Necessary to ensure Justice" , criminal Law Journal Vol.II May 2008; Desai Dhruv , " Treatement and Protection of witnesses in India –A view at the existing legal position as regards witnesses," Criminal Law Journal Vol.I March 2006; Kumar SairamSanath , "The manance if hostile witnesses in Criminal Trials in India—A Closer Look," Criminal Law Journal Vol.III , July 2006; PandeyBrisketuSharan , " Hostile Witness in our Criminal Justice System," Criminal Law Journal ,Vol.II 2005

46 SeeDr.V.NAgeswaraRao, The Indian Evidence Act, A Critical Commentary covering Emerging Issues and International Developments,2nd Edn.2015, Lexis Nexis

47 Sec.23 of UK Youth Justice and Criminal Evidence Act,1999

- The witness may be—
    a) Shifted to a different place after deposition
    b) Shifted to a different country
    c) Employed at the relocation
    d) Provided maintenance

The International Criminal Tribunal for Rwanda has formulated certain rules for the protection of victims and witnesses. Similar rules also exist in the Statute for the creation of International Criminal Court. In 1985 the United Nations adopted the Basic Principle for Victims of Crime and Abuse of Power. Article 14 of the International Covenant on Civil and Political Rights which India ratified recognised the right to a fair trial as a human right.[48] The European Court also recognised that witness should be accorded rights.

USA

WITSEC is one of the most developed of all existing Witness Protection Programs in the world. Prior to this the protection is taken care under the Ku Klux Klan Act of 1871. It was the organised Crime Control Act, 1970 and later the Comprehensive Crime Control Act, 1984 which authorised the present Witness Security Reform Act of 1984was enacted. Agencies like the United Marshal, the office of Enforcement Operations and the Federal Bureau of Prisons and the Army Generals office are associated with this programme.

Australia

The program under the Witness Protection Act, 1991 is an extremely comprehensive system. Though there is no statistics available it is considered to be the model legislation in the world.

UNITED KINGDOM

The government enacted the Criminal Justice and Public Order Act, 1994 which provides for punishment for intimidation of witnesses. Sec. 51 not only protect the person who is going to give at a trial but also protects a person who helps the investigation of a crime. The procedure for application of Witness anonymity orders is given in the Coroners and Justice Act, 2009.

[48]See United Nations Declaration of Human Rights

The Supreme Court in *National Human Rights v. State of Gujarat*[49] opined that "no law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for offering protection to the witnesses. For successful prosecution of the criminal cases, protection to witness is necessary as criminals often have access to the police and influential people."

There are provisions in other statutes to protect witnesses which are as follows:

- The West Bengal Act of 1932
- Juvenile (Care and Protection of Children) Act,2000
- Sec.17 of National Investigation Agency Act, 2008

At present in India even the expert witnesses of the various forensic disciplines do not have any protection. In the Indian situation, where we have so many social obligations and relatives to attend to, proper implementation of the Witness Protection Programmes will not be possible for a variety of reasons. Fali S. Nariman says that criminal jurisprudence in |India being the British concept, the Best Backery case relies heavily on the Blackstonian maxim that "It is better that guilty persons go unpunished than one innocent person suffers.''

In *Samar Vijay Singh Toamr v. State of Chhattisgarh*,[50]Arjit Pasayatand A.K.Ganguly, JJ ., of the Supreme Court lamented that " in cases involving influential people, the common experience is that witness do not come forward because of fear and pressure. The plight of the girls who were under pressure depicts the tremendous need for witness protection in our country…"

The Criminal Law (Amendment) Act, 2005(No.2 of 2006) has added Section 195A to the Penal Code, whereby threatening or inducing any person to give false evidence is made punishable.

The Supreme Court upheld section 16 (2) and (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 which gave discretion to the designated court to keep the identity and

[49] 2009 6SCC 767
[50] 2006 CGLJ 353

address of a witness secret upon certain contingencies; to hold the proceedings at a place to be decided by the court and to withhold the names and addresses of witnesses in its orders.[51]

The right of the accused to cross examine the witness is not absolute but subject to exceptions. The same reasoning in section 30 of the Prevention of Terrorism Act, 2002 was upheld in *People's Union of Civil Liberties v. Union of India*[52]

There is a fundamental difference between maintenance of the anonymity of witness and the protection of informers' privilege under Whistle Blowers Protection Act, 2014 as the former testify in the court and the later do not.

VARIOUS INSTANCES WHERE WITNESS WILL BE DEALTBY THE COURT OF JUSTICE

There are several sections in the Evidence Act, 1872 which deal with witnesses directly or indirectly during the proceedings of the court in dispensing justice to the needy who knocks the doors of justice.

The enquiry of the person with vakils, the property alleged to be mentioned and the making of drafts of will and not approving such drafts by him can be placed as the conduct of a person to be admissible by the testimony of witnesses as to the question, whether a certain document is the will of a person?[53]Identifier establishing the identity of a person Identification Parade of the accused is admissible as evidence.[54] Non-identification by the other witnesses does not nullify the evidentiary value.[55] A witness can testify before the court as to a written deed. In other words, anything as to a custom or right in which such custom or right is created, claimed, modified, recognised, asserted or denied in a transaction or created , claimed, recognised or exercised , or disputed , asserted or departed in particular instance.[56]A confession made in police custody is not admissible.[57] But a confession leads to the discovery of material facts is admissible with the corroboration of panch witness in whose presence

[51] See Kartar Sing v. State of Punjab, 1994 3 SCC 569
[52] AIR 2004 SC 456
[53]Sec.8 illustration (d)
[54] Sec.9
[55]See Sunderv State, AIR 1957 809
[56]Sec.13 written deeds
[57]Sec.26

such material facts are recovered by the police through a recovery memo.[58] A co-accused is recognised as witness against the other accused subject to certain conditions[59] though he is not permitted as witness under English Law.

Generally, the person who is present in the court and to whom oath is administered is regarded as witness in the proceedings of the court. But there are certain persons who cannot be called as witnesses but their statements are admissible. Such persons are:

- who are dead
- who cannot be found
- who has become incapable of giving evidence
- who cannot be procured without an amount of delay or expense[60]
- who kept out of the way by the adverse party[61]

In Mubarak Ali v. State of Bombay[62] it was held that the opinion is the judicial function which can't be delegated to any other person particularly to a person who testifies the fact known to him which is a fact in issue between the parties. An expert witness is one "who is skilled in any particular art or trade, or profession, being possessed" of a particular knowledge concerning the same.[63] The question is, as Lord Russel puts: Is he peritous? Is he skilled? Has he adequate knowledge? Any person skilled or has adequate knowledge in particular is an expert witness whose evidence is admissible even though he expresses his opinion as to the fact in issue.[64]

An attesting witness may testify as to the due execution of any document which is required by law to be attested. An attesting witness is one who has seen the executant sing or affix his mark to the instrument.[65] Scribes of documents will be the attesting witness in general. Any

[58]Sec.27
[59] Sec.30
[60]Sec.32
[61] Sec.33
[62]AIR 1957 SC 857
[63] Punjab Singh v. State, AIR 1974 J&K LR 607
[64]Sec.45
[65]Sec68

person who is custodian of public document is entitled to testify the contents of documents which are under his custody under the official capacity of an authority.[66]

Normally deposition of witness must be in writing which is to follow the rules of CPC and Cr.P.C. Before signing the deposition copy by the witness the contents must be read over to the witness and if necessary it is to be translated also. Such deposition of witness may be inadmissible in evidence if the rules of read over or translation not adhered thereto. In such cases no oral evidence in contravention of the contents in the deposition copy is admissible.[67]Any deposition which had not followed such rules loses the benefit of presumption.[68]A witness may testify that a document is null and void as the contracting party is not competent or due execution is not made or failure of consideration.[69] A witness may testify as to the relationship between parties as to focus on undue influence by one party against the other.[70]

Competency and compellability attach to the witness and not to the evidence the witness may give. The competence and compellability on the one hand, and privilege on the other, is that the two former matters must be resolved before the witness begins to testify.[71]The competency of witness can be determined by the court by testing the maturity of the witness whose competency is in question.[72] The law has not laid down any precedent conditions to be a witness in a proceeding of the court. It also not compelled a person to be a witness as certain privileged communications are recognised for the protection of witnesses.[73] In other words, the judges and magistrates,[74]the wife and husband,[75]the advocates[76]are under privileged communications not to disclose the communication between them as a witness even though they are known with the facts which were related to fact in issue. A witness who is not a party to the proceeding can't be compelled to produce the title-deeds or any document or property virtually who holds it as a pledgee or mortgagee which might criminate him unless he voluntarily agreed in writing to produce them with the person who seeks the

[66]Sec.74 & 76
[67]Sec.91
[68]Sec.80
[69]Proviso (1) Sec.92
[70]Sec.111
[71]Cross & Tapper on Evidences (2010) p.417
[72] Sec.118-120
[73]Ss.121-132
[74]Sec.121
[75] Sec.122
[76]Secs.126-129

production of such deeds or some person through who he claims.[77] Similarly, the exemption is available to a person who is in possession of electronic records as per the amendment inserted in the Act u/s 131 substituted by Information Technology Act 2000.[78]

A witness is compelled answer the questions put forward by the concerning advocates during the process of proceedings before the court though the disclosure is likely to criminate him in further proceedings. In such circumstances, the court came to his rescue to save him from liability provided he informed before answering such question he must seek the assistance of the court to exercise a privilege that such disclosure cannot be used as evidence in further proceedings of different matter which will criminate him. [79]

There may be a crime which was committed in a secluded place where no eye witness to testify as to the scene of offence which is under the investigation of the police. In such instances law makes facility to pick one accomplice in the commission of such crime. Such accomplice as a witness testifies the actual happening which is to be admissible as evidence.[80] Such evidence shall be taken with a precaution that it should be corroborated with other evidences as the other provision[81] says that it is unworthy of credit and so not a reliable.

There is no restriction either in civil or in criminal codes as to how many number of witnesses are allowed in a proceeding before the court. The restriction is only to the matter that the witness statement must be relevant to the fact in issue for the admissibility of its evidence.[82]The court has to follow the procedure while examining the witnesses in the order of examination during the proceedings and in the absence of such practice the court can exercise its discretion in the examination of witnesses.[83] The examination in chief is to be made against his own witness and the cross-examination by the opponent advocate. After the completion of cross-examination of witness by the opponent, by seeking permission of the court, the re-examination can be taken against his own witness on the matters left-over or to

[77]Sec.130
[78]w.e.f.17/10/2000
[79]Sec.132
[80]Sec.133
[81]Sec.114(b)
[82]Sec.134
[83]Sec.135

clear the doubts created in the cross –examination by the opponent.[84] The order of examination is that the witness shall be first examined- in-chief, then cross-examination by the opponent and the party desires he may re-examine his own witness.[85] A witness called to produce a document is not regarded as witness though he produces the document he is not allowed to be cross—examined.[86]Under English law a person who is called as witness to testify the character is not allowed to be cross examined whereas the Indian law takes a deviation from English rule and permit cross-examination of such witness.[87]

Any question to test the veracity and to shake the credit of a witness can be asked in the cross-examination of a witness.[88] Then the witness shall be compelled to answer such question as even the privilege under section 132 will be applicable.[89]The witnesses are protected from indecent and scandalous questions to be asked during the proceedings of the court.[90]Any witness who is called on one side turns hostile the other side will be called hostile witness. Though he must be cross-examined by the opponent as per the practice, by seeking the permission from the court, the advocate who called him as his witness will be allowed to cross.-exam.[91] A witness credit may be impeached by placing certain evidence that he is unworthy of credit, he obtained bribe to favour and the inconsistency in previous and present statements.[92]The statement of witness can be considered as corroborative evidence at a later stage. The dying declaration by the deceased can be converted in to this kind of evidence after the survival of the deceased.[93]

Generally the witness are called to the court after a long lapse of time and they are required to say the fact which they might have knowledge but may not recollect it at the time of trial. The Act lays down certain rules to enable the witness to refresh their memory.[94]

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[84]Sec.137
[85] Sec.138
[86]Sec.140
[87]Sec.140
[88]Sex.146
[89]Sec.147
[90] Secs.149-152
[91]Sec.154
[92]Sec.155
[93]Sec.157
[94]Secs.159-161

CONCLUSION

It is clear from the above discussion that the witness is not a new concept in the Indian justice delivery system. All the religions speak about witness as representative of the Almighty to render justice to the needy and warned the witnesses not to make a false statement. There were restrictions on them earlier basing on the caste and profession which were removed in the present delivery system of justice. The credibility of the witness depends on the character earlier as the people believe the word as bond which is missing in the present day society. It is rightly said that a person may lie but a document never lie. It is the duty of the judiciary to remove the grain from chaff and they must be serious about complaining the perjury whenever they find the contradiction in the statements of witnesses. The witnesses are performing their part of the duty with great harassment and threat to not only personal but also to the family members. The plight of the witness and protection of the witness is to be a matter of concern for the law makers and they must make legislation in protecting the rights of the witnesses who are vital in the administration of justice in the society.