A CRITICAL ANALYSIS OF WITNESS PROTECTION LAWS IN INDIA WITH SPECIAL REFERENCE TO WITNESS PROTECTION SCHEME, 2018

Dissertation submitted to National Law University and Judicial Academy, Assam

in partial fulfilment for award of the degree of

MASTER OF LAWS/

ONE YEAR LL.M. DEGREE PROGRAMME

Submitted by

AKASH SINGH

UID: SM0221002

LL.M. (2021-22) 2nd Semester

Supervised by

Dr. Amol Deo Chavhan

Associate Professor of Law

National Law University and Judicial Academy, Assam

(July, 2022)

CERTIFICATE

This is to certify that AKASH SINGH has completed his dissertation titled "A CRITICAL ANALYSIS OF WITNESS PROTECTION LAWS IN INDIA WITH SPECIAL REFERENCE TO WITNESS PROTECTION SCHEME, 2018" under my supervision for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam.

Date: 04/07/2022

Dr. Amol Deo Chavhan

Associate Professor of Law

National Law University and
Judicial Academy, Assam

DECLARATION

I, AKASH SINGH, do hereby declare that the dissertation titled "A CRITICAL ANALYSIS OF WITNESS PROTECTION LAWS IN INDIA WITH SPECIAL REFERENCE TO WITNESS PROTECTION SCHEME, 2018" submitted by me for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

Date: 04/07/2022

AKASH SINGH

UID: SM0221002

National Law University and Judicial Academy, Assam

CONTENT

Acknowledgment

I would like to convey my sincere and heartfelt gratitude to my Research Guide, Dr. Amol Deo Chavhan, Associate Professor of Law, who guided me throughout my research work. Without his profound mentorship, constant support and valuable suggestions, I would not have been able to complete this dissertation on time. His keen wisdom on the topic and practical recommendations made the research process more interesting and pragmatic. Under his supervision, I was able to probe into the functional aspects of Witness Protection Laws in India. He advised me to conduct an in-depth study on the topic and familiarized me with various legal intricacies. His constant motivation and right guidance helped me in overcoming the difficulties and challenges I encountered during making this dissertation.

I would also like to express my deepest gratitude to Dr. Diptimoni Boruah, Associate Professor of Law, PG Head, for her supervision and valuable guidance. I would also like to thank the Librarian and the staff members of the Library and IT Section of National Law University and Judicial Academy, Assam for their commendable co-operation in helping me find relevant materials for my research.

I would be grateful to my family and friends who stood by me in this journey and motivated me throughout. I would not have made it through without their support and faith in me.

Lastly, but most importantly, I am thankful to the Almighty for giving me this opportunity and courage to conquer all the obstacles on my way.

AKASH SINGH

LL.M. (2021-22)

UID: SM0221002

National Law University and
Judicial Academy, Assam

Table of Cases

31. *State of Himachal Pradesh* v. *Jai Lal & Ors*
32. *State of Maharashtra* v. *Chandraprakash Kewal Chand Jain*
33. *State of Maharashtra* v. *Praful B. Desai*
34. *State of Punjab v. Gurmit Singh*
35. *State of Rajasthan* v. *Smt. Kalki*
36. *State of U.P.* v. *Ramesh Prasad Misra*
37. *State* v. *Sanjeev.Nanda*
38. *Suresh* v. *State of Haryana*
39. *Swaran Singh* v. *State of Punjab*
40. *V. N. Patil* v. *K. Niranjan Kumar*
41. *Vishaka* v. *State of Rajasthan*
42. *Zahira Habibullah Sheikh* v. *State of Gujarat*

Table of Statutes

1860- The Indian Penal Code

1872- The Indian Evidence Act

1897- The General Clauses Act

1950- The Constitution of India

1967- The Unlawful Activities (Prevention) Act

1969- The Oaths Act

1973- The Code of Criminal Procedure

1987- Terrorist and Disruptive Activities (Prevention) Act

1996- Witness Protection Program Act (Canada)

1998- The Witness Protection Act (South Africa)

2002- The Prevention of Terrorism Act

2008- The National Investigation Agency Act

2015- Delhi Witness Protection Scheme

2015- The Juvenile Justice (Care and Protection of Children) Act

2017- The Maharashtra Witness Protection and Security Act

2018- Witness Protection Scheme

Table of Abbreviations

1.	AIR	All India Reporter
2.	Anr	Another
3.	CrPC	Criminal Procedure Code
4.	FIR	First Information Report
5.	IPC	Indian Penal Code
6.	NIA	National Investigation Agency
7.	Ors.	Others
8.	POTA	The Prevention of Terrorism Act
9.	SCC	Supreme Court Cases
10.	SCR	Supreme Court Reporter
11.	SIT	Special Investigation Team
12.	TADA	Terrorist and Disruptive Activities (Prevention) Act
13.	TAR	Threat Analysis Report
14.	UOI	Union of India
15.	UN	The United Nations
16.	v.	Versus
17.	WITSEC	Witness Security Program
18.	WPP	Witness Protection Programme

CHAPTER 1- INTRODUCTION

1.1. Introduction

Black's Law Dictionary defines 'witness' as "one who gives testimony under oath or affirmation in person by oral or written disposition or by affidavit."[1]The English philosopher Jeremy Bentham had rightly asserted that *"witnesses are the eyes and ears of Justice"*. This statement appropriately reflects the "significance of a witness in the justice delivery system."

The role of the witnesses has many folds for the effective delivery of justice, especially in criminal trials. Firstly, the Malimath Committee Report, 2003[2] describes the role of a witness as a '*sacred duty*,' as a witness administers an oath in the name of God to declare the truth. Secondly, it is the '*legal obligation'* by the virtue of Section 8 of the Oaths Act, 1969, which makes a witness bound to state the truth. Section 193 of the Indian Penal Code provides punishment for "intentionally giving false evidence or fabricating false evidence". Thus, a witness can be punished for perjury under this provision for intentionally giving false testimony. Thirdly, in the landmark case of *State of Gujarat v. Anirudh Singh*[3], the Supreme Court of India stressed on the importance of the witnesses in their '*salutary duty'* to assist the State in giving the evidence. Lastly, witnesses are the instruments of discovering of the 'truth', which is the ultimate aim of the Courts. This the reason why an oath has to be taken by the witnesses in a judicial proceeding. In a latest decision[4], the Supreme Court has also reiterated that that, "*the aim of every Court is to discover the truth*." The witnesses can alter the course of investigation and influence the final decision of the Courts.

In *K. Anbazhagan v. The Superintendent of Police & Ors.*[5] the apex Court of India held that "*free and fair trial is a sine qua non of Article 21 of the Constitution."* Thus, a 'fair trial' is warranted by Article 21 of the Indian Constitution.

---

[1] *Black's Law Dictionary* (9th edn, 2009) 1740.
[2] Committee on Reforms of Criminal Justice System "*Committee on Reforms of Criminal Justice System Report*" (vol I, 2003)151.
[3] [1997] 6 SCC 514.
[4] *V. N. Patil v K. Niranjan Kumar* [2021] 3 SCC 661.
[5] [2004] 3 SCC 767.

In *Zahira Habibullah Sheikh v. State of Gujarat*[6], the apex Court commented that "*in a fair trial there is no bias or prejudice of the witnesses*". Despite such a constitutional mandate, in reality we find that in India there are serious infringements of the 'right to a fair trial' due to plethora of reasons, the most important being the hostility of witnesses. The witnesses turn hostile, thereby weakening the Prosecution case and the criminals go scot free due to non-establishment of proof 'beyond reasonable doubt.' This leads to miscarriage of justice, specifically in the cases when the accused is affluent and powerful.

There are various reasons why the material witnesses turn hostile in criminal cases, leading to the denial of 'fair trial.' Justice D.P. Wadhwa in his concurring opinion in *Swaran Singh v. State of Punjab*[7] addressed the problem of harassment of witnesses, which leads to "miscarriage of justice." In criminal cases, the adjournment is a common tactics due to which people are not willing to become witnesses. The inappropriate diet money and ill-treatment in the Courts discourage the witnesses to be a part of the case. The most disturbing issue is that of the intimidation of the witnesses by the accused. The witnesses or their family members are put under threat of injury or death and dissuaded from giving testimony before the Court. Due to the fear of danger to their lives, they prefer either not to testify or turn hostile, resulting in the weakening of the Prosecution's case. This grave risk to their lives, without adequate protection provided by the State, prevents them from giving a 'true testimony.'

Article 21 of the Indian Constitution puts the State under a Constitutional duty to protect "life and liberty" of its individuals. Thus, the State has a duty to protect the witnesses, so that "the witness could safely depose truth without any fear of being haunted by those against whom he had deposed."[8] If witnesses in a criminal trial are protected, then truth will come out and a just decision will be reached by the Court. This will not only lead to a 'speedy and impartial trial', but also instil the confidence of the common people on the Courts. But this could only be attained if the witnesses are given appropriate protection, so that they can testify without any fear. For this, there should be stringent laws and policies in place, mechanism for their enforcement and awareness among the masses.

---

[6] [2004] 4 SCC 158.
[7] [2000] 5 SCC 668.
[8] *Zahira Habibullah Sheikh v. State of Gujarat* [2006] 3 SCC 374.

As far as legislative safeguards are concerned, in India we have special laws like the Unlawful Activities (Prevention), 1967, Juvenile Justice (Care and Protection of Children) Act, 2015 and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, which have specific codified provisions, which provide for the protection of witness. So, in grave offences like terrorism, sexual offences, crimes against children and the SCs and the STs, Indian law provides for a limited witness protection. But these provisions are not mandatory, but are dependent on the discretion of the Courts. There is no proper framework for the implementation of such protection measures. The Higher Judiciary has time and again through its mighty power of "judicial activism" has issued guidelines for witness protection, but there is no 'uniform law' which comprehensively guarantees protection to the witnesses and their closed ones. To fill this vacuum, the Government of India for the first time came up with a comprehensive Scheme called Witness Protection Scheme, 2018 to address the issue of threat of "life, liberty and reputation" of witnesses and their family members. This Scheme was validated by the apex Court of India in the landmark case of *Mahender Chawla v. Union of India*[9] which declared the Scheme as a *"law under Article 141 of the Constitution of India, unless a legislation is passed by the Legislature"*. Despite such a 'pro-active role' of the Government of India and the Supreme Court, in reality, due a weak implementation mechanism for witness protection, the purpose of their efforts is defeated. The framing of laws is just a beginning of reaching the goal and not the end. There are plethora of hurdles in transforming the legal mandates into actual reality.

The major focus of this dissertation is to critically analyse the status of witness protection laws in India, their lacunae and the scope for reforms in the present 'regime of witness protection' in India.

[9] [2019] 14 SCC 615.

1.2. Statement of Problem

Witnesses, who play a fundamental role in the delivery of justice, especially in criminal cases, turn hostile due to threat and intimidation by the opposite party. The vulnerable witnesses and their closed ones are subjected to daunting tactics by the criminals, due to which they could not testify before the Courts fearlessly, especially in heinous offences. The powerful and affluent perpetrators adopt various illegal means to trade and jeopardize the witnesses, putting them into perilous situations. As a result of hostility of witnesses, in most of the cases the prosecution's case is discredited and the accused enjoys the benefit of doubt. This impedes the constitutionally guaranteed 'right to fair trial.' Due to dearth of proper protection, witnesses have no option but to either refuse to give testimony or become hostile. This leads to lower conviction rates in criminal cases, especially in grave offences, thereby hampering the justice delivery system. This results in shaking the trust of the public on the Judicial System.

In India, the Court Rooms are not conductive enough to protect the interests of the witnesses. There is lack of infrastructure and adequate facilities in the Courts for their comfort. There exasperation is increased when they are subjected to rigorous examination and harassed. Irregular delays in the Court proceedings and regular adjournments put them at unease. They do not receive financial aid by the Government to compensate them for their loss at work. These factors of insecurity, harassment and insufficient financial aid compels the witness to step back and not to testify before the Courts.

Before 2018, India did not have a specific legislation or policy dealing specifically with witness protection. In India a Scheme called 'Witness Protection Scheme' was formulated by the Government in 2018 to tackle the issue of witness protection 'uniformly' in the country. This Scheme has been validated by the apex Court of India as a 'law' until a new legislation is framed. Nevertheless, in spite of it, the Scheme has not been properly implemented and there are various instances where the witnesses still face intimidation and turn hostile. Four years have passed but the Parliament of India has not passed a specific legislation for witness protection in India.

1.3. Literature Review

1. **Law Commission of India, "*198th Report on Witness Identity Protection and Witness Protection Programmes"* (2006):**

This Law Commission Report is a comprehensive report, which highlights the importance of "*Witness Identity Protection in India*", and states that it "should not be limited to the cases of terrorism and sexual offences", but encompass *"all serious offences"*. It stresses that the accused's 'right to an open trial' is not an absolute right and should be balanced with the right of the witnesses to depose without any fear. The Report also put forward a Draft Bill, titled as The Witness (Identity) Protection Bill, 2006, with a vision for it to be enacted. However, this Bill was riddled with loopholes. It only limited its focus on the identity of witnesses and did not refer to protection of 'life' of the witnesses. It also did not mention about the relocation of witnesses to a safe place and post-trial protection. Keeping these shortcomings in mind, the proposed Bill was not enacted by the Legislature.

2. **Zubair Ahmed Khan, *"Need for Witness Protection in India- A Legal Analysis"* (2015):**

This Research Work raises the issue that the Accused enjoys various human rights, whereas the witnesses do not enjoy the same. It highlights that there has been a vacuum in the Indian Law as far as hostile witnesses or witness protection are concerned. The Researcher suggests that just like Whistleblower Protection Act, 2014 has been passed to protect the Whistleblowers, in the same way, there is a necessity for passing a law for witness protection. He suggests that major reformative steps should be taken along with the increasing of the number of fast-track Courts in India.

3. **Girish Abhayankar and Asawari Abhayankar, "*Witness Protection in Criminal Trials in India"* (2018):**

This is a classical book on Witness Protection in India, specifically covering the framework in criminal trials. The work has been cited by the Supreme Court in *Mahender Chawla v. Union of India*[10] and it is one of a kind on this subject. It not only covers the framework of witness protection in India, but also presents an international perspective on the topic. The inclusion of various Reports, Legislations and Judgments on 'witness protection' of various jurisdictions makes this book an exhaustive authority on the topic. However, as it was published before the 'Witness Protection Scheme' was adopted in India, it does not give an insight into the Scheme.

4. **Prashant Rahangdale, *"Witness Protection: An Important Measure for the Effective Functioning of Criminal Justice Administration"* (2019):**

The Researcher lays emphasis on the important issue of the absence of a Central 'witness protection law' in India. He analyses various relevant judgments of the apex Court concerning witness protection in India. He underscores the fact that the latest Witness Protection Scheme, 2018 has been approved by the apex Court in the case of *Mahender Chawla v. Union of India*[11] and has to be considered as "law till the enactment of an appropriate legislation". Nevertheless, he recommends that the Scheme has to be implemented "in letter and spirit" by the co-operation of both the Central Government and the State Governments.

5. **Dr. Dwarika Prasad, *"Witness Protection in India: Some Issues and Challenges"* (2020):**

In this paper, the Researcher lists various factors that lead to hostility of witnesses in India with the support of landmark judicial decisions. He places emphasis on the plight of the witnesses due to which they turn hostile, thus impeding 'a fair trial.' After referring to the obstacles that the witnesses go through in their path of voicing the truth, the Researcher suggests for the implementation of a robust witness protection scheme in India.

[10] [2019] 14 SCC 615.
[11] ibid.

6. **Hannah Divyanka Doss, *"Critical Analysis of the Position of Witness Protection Laws in India"* (2021):**

   This Research Paper gives an in-depth analysis of the suggestions of the various Reports of the Law Commission for witness protection in India. It traces the historical trajectory for the development of a witness protection framework in the country. It highlights the issue of a restrictive witness protection plan in India, which is only limited to the physical protection of the witnesses and an absence of a specific general law in this regard.

7. **Ashi Pahariya and Saumya Katara, *"Comparative Analysis of Witness Protection in Common Law Countries: Challenges and their Potential Solutions"* (2021):** In this Article, the Researchers adopts a Comparative Research Methodology and compares and contrasts the present Witness Protection in various important common law countries. Analysing the regime in India, they discuss the drawbacks of the Witness Protection Scheme, 2018. The problematic provisions of the Scheme are that it has a limited 'temporary cap' of 3 months of protection to the witnesses; it categorizes witnesses on the possibility of danger and there is an absence of penalties in the Scheme.

1.4. Aim

The aim of this dissertation is to evaluate the legal framework for witness protection in India. The primary focus of the work is to study the issues of witnesses due to the absence of witness protection by analysing the relevant Statutes, judicial pronouncements and the existing National Scheme of Witness Protection, 2018. It attempts to succinctly cover a global study on witness protection of major countries. It also plans to provide pertinent suggestions to resolve the loopholes of the present mechanism of witness protection in India.

1.5. Objectives

- To study the concept of witnesses- the meaning and types of witnesses.
- To trace the historical genesis of witness protection in India.
- To enumerate the various legal provisions in India which relate to Witness Protection in India.
- To critically evaluate the Witness Protection Scheme, 2018.
- To highlight the Role of Judiciary in providing witness protection to ensure a 'fair trial.'
- To analyse the witness protection laws and Schemes in major countries around the globe.
- To suggest reforms in the present legal framework of Witness protection in India in order to prevent miscarriage of justice.

1.6. Scope and Limitation

The scope of this dissertation is to study the present Witness Protection Laws in Criminal cases in India, with special reference to 'Witness Protection Scheme, 2018'. It examines the National Legislations and landmark judgments of the Supreme Court and the High Courts, which relate to Witness Protection in India.

The limitation of the study is that it is restricted to the legal analysis of witness protection laws within the territory of India. Although India has a Witness Protection Scheme, 2018, in place, it is not implemented effectively, due to which even now the witnesses are vulnerable to threats and intimidation. Four years have passed but no Central Legislation has been formulated, which guarantees witness protection in real sense. Unfortunately, in India, there no official data released by the National Crime Records Bureau (NCRB), which can provide statistics about the witnesses in India. [12]

It also covers, though in brief, the global status of witness protection regime in the UK, the USA, South Africa and Canada. Although, a succinct study has been undertaken of these countries regarding their Witness protection laws and Schemes, it has not been an in-depth one as the primary focus of the study is restricted to India.

[12] G S Bajpai, 'Crime data in India is short on information on victims and witnesses' (*The Indian Express*, 28 September, 2019), <https://indianexpress.com/article/opinion/columns/crime-data-in-india-6035032/> accessed 10 May 2022.

1.7. Research Questions

1. Whether there is a proper implementation and enforcement of Witness Protection Laws in India?

2. Whether the present Witness Protection Laws are successful in preventing the hostility of witnesses?

3. Whether an introduction of a specific law for Witness Protection in India is the need of the hour?

1.8. Hypothesis

1. There is no proper implementation of the Witness Protection Scheme, 2018 in India, which leads to hostility of witnesses in criminal cases, resulting in the breach of a 'fair trial' and miscarriage of justice.

2. In India, a stringent Central Legislation for Witness Protection is the need of the hour, which can be uniformly implemented throughout India.

1.9. Research Methodology

This research adopts a purely doctrinal research methodology. It examines the various National and International Legislations, Schemes and Policies, which relate to Witness Protection. Through the Analytical research method, various landmark judgments of the Supreme Court of India and the High Courts have been analysed. It also engages in a global study of the status of Witness Protection in some selected countries.

For the purpose of research both the primary and the secondary data have been collected. The primary data includes the National and State Legislations, the Government Schemes, the Judgments and Orders of the Supreme Court and the High Courts, and the Law Commission Reports. The secondary data comprises Books, Encyclopaedias, Articles, Newspapers, Websites and Blogs.

1.10. Chapterisation

Chapter 1- INTRODUCTION: This chapter is an introduction to the dissertation, which gives a vivid scheme of the research work, alluding to the background, statement of problem, literature review, aims, objectives, scope, research questions, hypothesis and research methods of the study.

Chapter 2- CONCEPTUAL FRAMEWORK OF WITNESSES: This chapter is an extensive study on the legal meaning of the term "witness", the various types of witnesses and the legal provisions relating to the same.

Chapter 3- HISTORICAL DEVELOPMENT OF WITNESS PROTECTION IN INDIA: This chapter is a chronical, which recounts the historical genesis of witness protection in Indian history. It is divided into three parts- ancient, medieval and modern Indian historical periods and touches what the importance of witness protection was during those times.

Chapter 4- LEGISLATIONS RELATED TO WITNESS PROTECTION IN INDIA: This chapter enumerates various provisions of the Legislations- both general and special, which deal with witness protection.

Chapter 5- A CRITICAL ANALYSIS OF WITNESS PROTECTION SCHEME, 2018: This chapter is a critical analysis of the Witness Protection Scheme, 2018, which evaluates the Scheme and examines its advantages and lacunae.

Chapter 6- THE ROLE OF JUDICIARY IN PROTECTION OF WITNESSES IN INDIA: This chapter highlights the active role of the Judiciary of India in guaranteeing the protection to witnesses. It deals with various landmark judgments, which changed the course of witness protection laws in India, especially by declaring the recent Witness Protection Scheme, 2018 as "law" until a new legislation is passed.

Chapter 7- WITNESS PROTECTION: A GLOBAL PERSPECTIVE: This chapter gives an international perspective of the Witness protection in major countries and reflects how the laws and Schemes entails witness protection.

Chapter 8-CONCLUSION AND SUGGESTIONS: The last chapter concludes the study, with some valuable suggestions to the issues dealt in the paper.

CHAPTER 2- CONCEPTUAL FRAMEWORK OF WITNESSES

2.1. Legal definition of "Witness"

There is no definition "witness" in the Criminal Procedure Code, 1973 or in the Indian Evidence Act, 1872. Also, there is no definition provided in the "General Clauses Act, 1897".

Black's Law Dictionary defines 'witness' as "one who gives testimony under oath or affirmation, in person, by oral or written disposition or by affidavit."[13] *The Oxford English Dictionary* explains the meaning of "witness" as "one who gives or is legally qualified to give evidence upon oath or affirmation in a Court of justice or judicial enquiry."[14] *The Cambridge Advanced Learner's Dictionary*, gives a general 'definition' of a 'witness' as "a person who sees an event happening, especially a crime or an accident."[15]

The Supreme Court of India, while interpreting the meaning of "witness" under Article 20(3) of the India Constitution, has also explained the meaning of the word in a simplified manner. In *M. P. Sharma & Ors. v. Satish Chandra*[16], the Court stated that the word 'witness' must *"be understood in its natural sense, i.e., as referring to a person who furnishes evidence."* It was further explained that "to be a witness is not merely giving oral evidence, but also includes such evidence which can be furnished through *by production of a thing or of a document or in other modes*."

The Law Commission of India in its 198th Report on "*Witness Identity Protection and Witness Protection Programmes"*[17] put forth a Draft Witness (Identity) Protection Bill, 2006 in its Annexure-I, attached with the Report. This Draft Bill gave a vivid meaning of the term 'witness' under Section 2(g) (i) as *"any person who is acquainted with the facts and circumstances, or in possession of any information or has knowledge, necessary for the purpose of investigation, inquiry or trial of any crime involving*

[13] *Black's Law Dictionary* (9th edn, 2009) 1740.
[14] *The Oxford English Dictionary* (2nd edn, 1989) vol XX, 464.
[15] *Cambridge Advanced Learner's Dictionary* (3rd edn, 2008) 1674.
[16] AIR 1954 SC 300.
[17] Law Commission of India, *198th Report on Witness Identity Protection and Witness Protection Programmes* (Law Com No 198, 2006).

serious offence and who is or may be required to give information or make a statement or produce any document during investigation, inquiry or trial of such case."

We can also find the meaning of the word 'witness' under Delhi Witness Protection Scheme, 2015, where under Clause 2 (m), which describes witness as "any person, who possesses information or document about any crime regarded by the competent authority as being material to any Criminal proceedings and who has made a statement, or who has given or agreed to give evidence in relation to such proceedings."

The most precise and recent definition of 'witness' has been enunciated under Clause 2 (k) of the Witness Protection Scheme, 2018, which states that "witness is any person who possesses information or document about any offence."

The word "witness" can be defined and explained in a number of ways, but the context is important. After analysing the above given definitions, we can conclude that in the context of crimes, a witness is anyone who is "familiar with the facts and circumstances" of the crime or offence and is eligible under an oath to give evidence, either oral or documentary, before the Court of Law.

2.2. Types of Witnesses

Witness could be categorized in a number of ways. However, for a simplified understanding, these types of witnesses could be grouped in the following way:

I. On the Basis of the Party a witness represents:

1. *Prosecution witness:*

   A person who is called by the Prosecution in a criminal trial to give evidence against the accused is called a Prosecution witness (P.W.)[18].

2. *Defence witness:*

   A person giving evidence on behalf of the Defense is called Defense witness (D.W.).

[18] 'Prosecution Witness Meaning - Legal Definition' (*World Law Dictionary*) <https://dictionary.translegal.com/en/prosecution-witness/noun> accessed 10 May 2022.

3. *Hostile or adverse witness:*

A hostile witness is "an adverse witness who wilfully refuses to testify truthfully on behalf of the party who called him."[19] The Supreme Court in *Gura Singh v. The State of Rajasthan,*[20] defined a "hostile witness as one who is not desirous of telling the truth at the instance of the party calling him." To such hostile witnesses, leading questions may be permitted to be asked by the party who called him.

II. On the basis of the interest of the witness in the matter at issue:

1. *Interested or Partisan witness:*

An interested witness is a "witness who has a direct and private interest in the matter at issue."[21] The Supreme Court of India in the case of *State of Rajasthan v. Smt. Kalki*[22] had laid down the test for a witness to be considered as an 'interested witness.' According to it, a witness is considered as 'interested' only when "he or she derives some benefit from the result of a litigation, in the decree in a civil case, or in seeing an accused person punished."

For example, in a criminal case, the wife of the victim, who was murdered by the accused has an interest in seeing the accused punished is an interested witness.

2. *Disinterested witness:*

A disinterested witness is "a witness who has no interest in the matter at issue."[23] For instance, a bystander who saw the assault of a man on the road is a disinterested witness if he is not related to the parties.

[19] 'Hostile Witness' (*Oxford Reference*) <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095946152#:~:text=An%20adverse%20witness%20who%20wilfully,the%20party%20who%20called%20him.> accessed 10 May 2022.
[20] [2001] 2 SCC 205.
[21] *Black's Law Dictionary* (9th edn, 2009) 1741.
[22] [1981] 2 SCC 752.
[23] *Black's Law Dictionary* (9th edn, 2009) 1740.

III. On the basis of who gives the evidence:

1. *Expert witness:*

   According to *Black's Law Dictionary* an expert witness *is "a witness qualified by knowledge, skill, experience, training or education to provide a scientific, technical, or other specialized opinion about the evidence or a fact in issue."*

   In *State of Himachal Pradesh v. Jai Lal*[24], it was described that "an expert witness, is one who has made the subject upon which he speaks a matter of particular study, practice, or observation; and he must have a special knowledge of the subject." Some examples of expert witnesses are medical officers and handwriting experts.

2. *Child witness*

   According to the United Nations Convention on the Rights of the Child, "a child" means every human being below the age of 18 years.[25] In India also, the age for a child has been fixed at 18 years. A child witness is a witness, who is under the age of 18. Child witnesses are vulnerable as they can be induced with ease and can be subjected to tutoring. Nevertheless, the evidence of child witnesses cannot be ruled out by the Court. In *Panchhi v. State of U.P.*[26], the "Supreme Court of India" held that the evidence of a child can be relied upon if it is supported by adequate corroboration. However, it was cautioned that such evidence must be evaluated cautiously considering the susceptibility of a child witness.

[24] [1999] 7 SCC 28.
[25] The United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) art 1.
[26][1998] 7 SCC 177.

IV. Other witnesses:

1. *Eye witness:*

   According to *World Law Dictionary*, eyewitness is "someone who has seen something happen and who reports on it, especially a crime."[27] The conviction can be based "even on the basis of the testimony of a single eyewitness", if he is considered reliable by the Court. But if the single eye-witness is found to be unreliable, the courts may record conviction after independent corroboration of his testimony.[28]

2. *Chance witness:*

   The Supreme Court in the case of *Bahal Singh v. The State of Haryana*[29] defined a 'chance witness' in the following way:

   "If by coincidence or chance a person happens to be at the place of occurrence at the time it is taking place, he is called a chance witness." The emphasis is that the witness is at the spot of crime 'by chance' and not naturally.

   For example, if on a street a passer-by witnesses a murder, he becomes a 'chance witness'. But if an inmate of a dwelling house witnesses a murder, he becomes a 'natural witness.'[30]

   The evidentiary value of a chance witness cannot be ruled out completely. But the evidence furnished by a chance witness requires "a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence."[31]

---

[27] 'Eyewitness Meaning - Legal Definition' (*World Law Dictionary*) <https://dictionary.translegal.com/en/eyewitness/noun> accessed June 1 2022.
[28] *Anil Phukan v State of Assam* [1993] 2 SCR 389.
[29] [1976] 3 SCC 564.
[30] *Sachchey Lal Tiwari v State of U.P.* [2004] 11 SCC 41.
[31] *Satbir v Surat Singh* [1997] 4 SCC 192.

2.3. Legal framework for witnesses in Criminal Cases

2.3.1. The Indian Evidence Act, 1872

In India, the British decided to prepare and consolidate a uniform law of Evidence. The Third Law Commission of Pre- independence India, established in 1861, had assigned Sir Henry Maine, a British jurist and historian to prepare a Draft on Evidence Law. Although the draft was prepared in 1868, it was rejected as it was found to be "unsuitable for the country."[32] In 1861, the task of preparing another Draft was allotted to the law member, Sir James Fitzjames Stephen. After due considerations, this Draft was adopted in the form of a Bill and placed before the Legislature. This Bill was enacted as the Indian Evidence Act, 1872, which came into force on 1st September, 1872. It is a procedural law, which lays down the rules of evidence to be followed by the Courts. It aids them in discovering which facts are relevant and need to be proved.[33] These uniform rules act as torchbearers for the Courts to smoothly proceed with both the civil and criminal cases and come out with the decisions. They help in enforcing the rights and liabilities of the substantive laws. They simplify the proceedings and deal with a number of situations that may come before the Courts. The importance of the law of evidence is that because of it the cases could be solved efficiently and expeditiously, truth be deciphered and ultimately the justice can be attained.

The Act is arranged in such a manner that it has been divided into three Parts. The first part is about the 'Relevancy of Facts', Part II covers 'On Proof' and Part III discusses 'Production and Effect of Evidence.' Chapter IX and Chapter X under Part III specifically cover 'Witnesses' and 'Examination of Witnesses' respectively.

[32] Batuk Lal, *The Law of Evidence* (20th edn, Central Law Agency 2014) 1.
[33] ibid.

Although the Act uses the term 'witness' throughout the text, it does not provide a definition of the expression in its interpretation clause under Section 3. However, under Section 3, there is a mention of the word 'witness' in the exhaustive definition of 'Evidence', which states that oral evidence means "the statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry." Thus, we can infer from this definition that witnesses include those persons who furnish 'oral evidence' to the Court, i.e., the evidence given by the way of words spoken by mouth.

In case a witness is unable to communicate verbally, he can give evidence "in writing or by signs, and his evidence will be considered as oral evidence."[34]

The two classifications of Evidence- Oral and Documentary:

Section 3 of the Act gives an exhaustive definition of the word "evidence" and classifies it into two categories, i.e., oral and documentary evidence.

'Oral evidence' means the "statements of the witnesses, which the Court permits or requires to be made." It is the paramount principle of evidence that the evidence has to be direct and not merely a hearsay. This is known as the 'best evidence rule' for oral evidence. [35] This principle has been embodied in the Act under Section 60, which states that the "oral evidence must be direct" which means that the facts which the witness testifies must have been seen, heard or perceived by other senses by himself. The source of the evidence must be the witness himself and not any another person. As hearsay is not a reliable and credible source of information, it is not considered as oral evidence Therefore, the Act prohibits the admissibility of hearsay evidence, with certain exceptions, where the hearsay becomes relevant.

[34] The Indian Evidence Act 1872, s 119.
[35] Joji George Koduvath, 'Best Evidence Rule in Indian Law' (*Saji Koduvath Associates* 11 May 2022) <https://indianlawlive.net/2021/07/11/best-evidence-rule-in-indian-law/#:~:text=The%20'best%20evidence%20rule'%20is,primary%20or%20by%20secondary%20evidence> accessed 1 June 2022.

'Documentary evidence', on the other hand, means all the "documents "produced for the inspection of the Court". Section 3 defines a document as *"any matter expressed or described upon any substance by means of letters, figures or marks, intended to be used, or which may be used, for the purpose of recording that matter."* For example, a photograph, a will, a caricature or an inscription. After the amendment brought about in the Indian Evidence Act by the Information Technology Act, 2000, a 'document' includes an 'electronic record' produced before the Court. Section 2 (t) of the IT Act defines an "electronic record" to mean *"data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer-generated micro fiche."* Call recordings in a phone, a video stored in a pen drive or e-mails are examples of 'electronic records.' However, Section 65B (4) of the Indian Evidence Act, makes a requirement of a Certificate to be submitted before the Court for the identification of the electronic record and other particulars. This requirement of the Certificate is mandatory if the electronic record is submitted in the form of a secondary evidence, for instance, a printout of a photograph taken from a phone, but if used as primary evidence, it is not required. The then Chief Justice of India, Kurian Joseph in the landmark case of *Anvar P.V. v. P.K. Basheer & Ors.*[36] clarified this position of law in the following way:

"...if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act."

Documentary Evidence is bifurcated into two types- primary and secondary evidence. 'Primary evidence' is the original document itself, while the 'secondary evidence' includes "the copies of the original or oral accounts of the person who has seen or heard it". The '*best evidence rule'* is incorporated in Section 64, which states that the *"documents must be proved by primary evidence"* except in certain cases where secondary evidence can be allowed.

[36] [2014] 10 SCC 473.

The Test for 'Legal competency of a witness':

Section 118 of the Act deals with the 'legal competency' of a person to give a testimony before the Court. It lays down the general rule that "*all persons shall be competent to testify."* However, the Court has been endowed with the discretion to consider the competency of a witness on a case-to-case basis and can declare him to be incompetent if it reaches to the conclusion that he is "*prevented from understanding the questions put to him or from giving rational answers*." The reasons for this incompetency could be 'age', either tender years or extreme old age, 'disease' of mind or body, or any other cause of same kind. Reading both these parts together, we can deduce that the 'competency test' for a person to become a 'competent witness', is that he should have "the understanding of the questions put to him and the capacity to give rational answers" and whom the Court does not consider to be an incompetent witness.

A lunatic[37] or a person who is unable to communicate verbally[38] may be declared as a competent witness by the Court, considering that he passes the 'competency test' expounded in Section 118. In "criminal proceedings, the husband or wife of the accused is a competent witness."[39] An accomplice is a competent person against the accused.[40]

Number of witnesses: 'Quality over Quantity Principle':

As each and every case is set out in distinct facts and circumstances, it is not feasible to frame a legal rule for stipulating a specific numeric of number of witnesses to be required to prove a particular case. This has been recognized by Section 134 of the Act, which states that *"no particular number of witnesses shall in any case be required for proof of any fact."* It is a misconception by many people that more the number of witnesses, more are the chances of proving the facts and finally winning the case. Instead, the Supreme Court has laid down the rule that it is the *"quality and not the quantity of evidence"* which matters in proving a case.

[37] The Indian Evidence Act 1872, s 118.
[38] The Indian Evidence Act 1872, s 119.
[39] The Indian Evidence Act 1872, s 120.
[40] The Indian Evidence Act 1872, s 133.

In the case of *Gulam Sarbar v. State of Bihar*[41], Justice B.S. Chauhan stated that "*the test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses."* This means that even the testimony of single witness can be important, especially in the criminal cases. However, in the case of *Ramnaresh v. State of Chhattisgarh,*[42] the apex Court cautioned that "*the statement of the sole eye-witness should be reliable, should not leave any doubt in the mind of the Court and has to be corroborated by other evidence produced by the prosecution in relation to commission of the crime and involvement of the accused in committing such a crime."*

Compellable Witness:

English Law gives special privileges to the witnesses. It is settled under English Law that a witness is not compelled to answer any question, which will expose him to a criminal prosecution.[43] The main rationale behind such a privilege is to encourage witnesses to come forward with the evidence. However, in such cases when the witnesses refused to give evidence, it resulted in failure of justice. Thus, such a privilege was taken away from the witnesses. In India, under Section 132 of the Indian Evidence Act, such a privilege was abolished and "a witness can be 'compelled' to answer questions to any matter relevant to the matter in issue, even if such question will criminate or expose, such witness to a penalty or forfeiture of any kind". However, such an answer will not subject the witness to any arrest or prosecution except for the prosecution of perjury.

[41] [2014] 3 SCC 401.
[42] [2012] 4 SCC 257.
[43] Batuk Lal, *The Law of Evidence (*20th edn, Central Law Agency 2014) 572.

The Three Stages of Examination of Witnesses:

'Examination of witnesses' means "interrogation of witnesses."[44] This interrogation comprises "putting a number of questions to the witness by the parties or their lawyers with a view to obtaining matters in dispute and placing them before the Court."[45]

The interrogation of witnesses is a crucial step in testing the veracity of the witnesses by the lawyers of both the prosecution and the defence. This gives an opportunity to both the parties to turn the tables by shaking the reliability of the witnesses of the opposite party. They also try to convince the Court about the credibility of the testimonies of the witnesses, appearing on their behalf. Examination of witnesses is exclusively covered under Chapter X of the Act. Section 138 lays down the order of examination of witnesses, which is divided into the following three stages:

(i) *Examination-in-chief:*

Firstly, the party who calls a witness examines him relating to the relevant facts. This examination is called the 'examination-in-chief'. The main purpose of this examination "is to elicit facts favourable to the case of the party conducting the examination."[46]

(ii) *Cross-examination:*

After examination-in-chief is complete, if the opposite or adverse party wishes, it can also examine the witness relating to the relevant facts. This second type of examination is called the 'cross-examination.' Section 146 mentions that "such questions that may be asked in the cross-examination, which test veracity of the witness, discover his position in life and to shake his credit, by injuring his character". However, if the question is regarding 'consent' in the rape and related offences under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376B and 376E of the Indian Penal Code, is not permissible ask "questions in the cross-examination to the victim as to the general immoral character, or previous sexual experience"

---

[44] 'Examination of Witness' (*The Free Dictionary*) <https://legal-dictionary.thefreedictionary.com/examination+of+witness> accessed 13 May 2022.

[45]'Examination of Witnesses/ASR' (*Dr. MCR HRD Institute Module*) <https://www.mcrhrdi.gov.in/splfc2021/week8/2021%20SFC%20%20Witnesses%20and%20Examination%20of%20witnesses.pdf> accessed 10 May 2022.

[46]'Examination-in-Chief' (*Oxford Reference*) <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095803421> accessed 12 May 2022.

In the case of *Kartar Singh v. State of Punjab*[47], it was remarked that *"cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief."* Furthermore, the Court listed three objects of the cross-examination- "(1) to destroy or weaken the evidentiary value of the witness of his adversary; (2) to elicit facts in favour of the cross- examining lawyer's client from the mouth of the witness of the adversary party; (3) to show that the witness is unworthy of belief by impeaching the credit of the said witness." Thus, it is an opportunity given to the adverse party to shatter the authenticity the testimony of a witness before the Court. A witness may be cross-examined as to his previous relevant statement, without showing him the writing, but if the writing is used to contradict him, the parts of the writing have to be shown to him.[48]

In cross-examination, "if a witness is asked a question regarding his character, which is directly relevant to the suit or proceeding", he is 'bound' to answer it, by virtue of Section 147, notwithstanding that the answer will criminate him. Section 132 is made operative in this case. However, in case such question is not directly related to the proceeding, the Court has the power to decide whether the witness can be compelled to answer it or not. In exercising its discretion, the Court has to consider various factors.[49] The question is considered proper if the imputation conveyed seriously affects the opinion of the Court "as to the credibility of the witness on the matter to which he testifies."

(iii) *Re-examination:*

After the cross-examination of a witness is complete, if the party who called him desires, he may be examine that witness. This is called 're-examination' of a witness. The main purpose of re-examination is only to get clarification of some doubts in the cross-examination.[50] New facts can usually not be asked in the re-examination stage, however, with the permission of the Court, new facts can be introduced but, in that case, the adverse party has the right to cross-examine the witness.

[47] [1994] 3 SCC 569.
[48] The Indian Evidence Act 1872, s 145.
[49] The Indian Evidence Act 1872, s 148.
[50] *Pannayar v State of Tamil Nadu* [2009] 9 SCC 152.

'Leading questions'- Questions that suggest an answer:

Section 141 defines a leading question. Leading questions are those questions, where the examiner implicitly suggests an answer to the examinee, which is usually in 'yes' or 'no'. The answer to leading questions is a 'pre-supposed' fact, which the questioner wishes to receive. For example, 'Were you in Lucknow on 1st June, 2022?' is a leading question, where the questioner suggests that the person was in Luckow on a particular date. The general rule is that "leading questions can be asked only in cross-examination and not in examination-in-chief and cross-examination."[51] However, if the Court permits, "they can be also be asked in examination-in-chief and cross-examination." The Court shall "permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved."[52]

Prohibition of Improper Questions:

The Court has the power the forbid questions that is "indecent or scandalous[53]" or "intended to insult or annoy[54]." This gives the power to the Judge to monitor the conduct of the parties and look after the decorum of the Court during the proceedings. It is a very significant provision for the witnesses, who would not step into the witness-box in absence of this protection due to the fear of getting attacked emotionally. However, the Court has the discretion to allow such questions if they relate to facts in issue.

Hostile witnesses- 'The Paradox of Truth':

Generally, a witness produced by a person is expected to depose in his favour and against the opponent party. However, in some cases, the witnesses may turn "hostile", i.e., they might testify in favour of the opponent party. A hostile witness is defined as "an adverse witness who wilfully refuses to testify truthfully on behalf of the party who called him."[55]Unfortunately under the Indian Evidence Act, there is no express mention of the phrase 'hostile witness.'

---

[51] The Indian Evidence Act 1872, s 143.
[52] *Varkey Joseph v State of Kerala* [1993] AIR 1892.
[53] The Indian Evidence Act 1872, s 151.
[54] The Indian Evidence Act 1872, s 152.
[55] 'Hostile Witness' (*Oxford Reference*) <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095946152#:~:text=An%20adverse%20witness%20who%20wilfully,the%20party%20who%20called%20him.> accessed 10 May 2022.

In the case of *Zahira Habibullah Sheikh v. State of Gujarat*[56], the Supreme Court listed various reasons for hostility of witnesses in criminal cases. It remarked that witnesses turn hostile because of *"threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties."*

Under Section 154 of the Act, the Court has been given the power to allow a person calling the witness to ask questions to him in cross-examination that might have been put to him by the adverse party. Thus, leading questions can be asked from hostile witnesses. This grant of permission by the Court has to be exercised liberally to do justice after considering "witness's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statements or otherwise." [57]

The credit of a hostile witness can be challenged under Section 155, with the consent of the Court in three ways. The evidence of a persons who testify that "the witness is 'unworthy of credit', that the witness has been 'bribed' or received any 'corrupt inducement' and that there is a contradiction in his former statements."[58]

As far as evidentiary value of a hostile witness is concerned, the Supreme Court has clarified that "the evidence by a hostile witness cannot be rejected or discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the Defence."[59] However, in *State of U.P. v. Ramesh Prasad Misra*[60] held that "such evidence by a hostile witness has to be subjected to close scrutiny."

[56] [2004] 4 SCC 158.
[57] *Sat Pal v Delhi Administration* [1976] 1 SCC 727.
[58] ibid.
[59] *Rajesh Yadav v The State of Uttar Pradesh* [2022] SCC OnLine SC 150.
[60] [1996] 10 SCC 360.

2.3.2. The Criminal Procedure Code, 1973

The Criminal Procedure Code, 1898 was the first uniform colonial Statute which dealt with the criminal procedure for British India. There were various changes which were brought into the Code constantly through various amendments. Post-independence of India, this colonial legislation was thoroughly examined time and again by the Law Commission of India, which through its Reports suggested various recommendations to reform this Code. The most important Report was the 41st Law Commission Report, 1969[61], which give an in-depth analysis of the 1898 Code and suggested major amendments to this Code. It was the impact of this Report that the Parliament of India considered introducing a new Code to meet the changing need of the criminal justice system. A draft Bill, called the Code of Criminal Procedure Bill, 1970 was introduced in the Rajya Sabha and was referred to the Joint Select Committee of both the Houses, which returned it after giving recommendations.[62] It is the present Criminal Procedure Code 1973, which is a comprehensive criminal procedure law in India. It prescribes the procedure for the enforcement of substantive criminal law, which is majorly covered under the Indian Penal Code, 1860.

The scope of the CrPC has been expanded by the Supreme Court through plethora of important decisions, for instance by issuing guidelines regarding arrest in the cases of *D.K. Basu v. State of West Bengal*[63]and *Joginder Kumar v. State of U.P.*[64] Thus, the Supreme Court has been playing a crucial part in bringing the CrPC in line with the contemporary changes in the society.

[61] Law Commission, *Reforms of Judicial Administration* (Law Com Report No. 14, 1958).
[62] S. N. Misra, *The Code of Criminal Procedure,1973* (19th edn Central Law Publications 2015) 2.
[63] [1997] 1 SCC 416.
[64] [1994] 4 SCC 260.

Obligation of a witness to aid the Police and the Magistrates:

Section 39 makes it a mandatory obligation for 'every person', who is aware about 'certain offences' to bring it to the notice of the nearest Magistrate or Police Officer. 'Every person includes any witness who is familiar with the occurrence of the offences mentioned under this Section. These offences are 'grave offences' covered under the IPC. It covers a list of offences, like offences against the State and offences affecting life. A witness can be penalized under Section 176 of the IPC which provides punishment for the "omission to give notice or information to public servant by person legally bound to give it" and under Section 202 of the IPC for "intentional omission to give information of offence by person bound to inform." Thus, it makes is compulsory for the witnesses who have knowledge about the occurrence of crimes covered under Section 39 of the CrPC to inform the nearest Magistrate or Police Officer, otherwise they will face penal consequences for its omission. But if a witness gives a "reasonable excuse' to the Court for such omission, he can be exempted from the liability. In that case, the burden of proof is on the witness to show that there was a reason due to which he failed to inform about the commission of the crime. The obligation is complete once the information is given and after that "every eye-witness or every person who is in the know of the circumstances relating to an offence is not expected, thereafter, to go to the Police Station to give a report of what he saw."[65] The purpose of this provision is to collect information about the offence, after which the investigation can begin.

Similarly, Section 40 of the Code casts a duty on village officers and residents of a village to communicate any information about the commission of certain offences as enumerated under this Section to the nearest Magistrate or Police Officer. The nature of these offences is such that it is difficult for the police to detect such crime, without the assistance of the villagers.[66] An example of the information under this Section is the knowledge about the commission of 'non-bailable offences', and occurrence of any sudden, unnatural or suspicious death in or near such village. Omission of not furnishing such information attracts penalty under Section 176 of the IPC.

[65] *The State of Maharashtra v Dashrath Lahanu Kadu* [1972] 75 Bom LR 450.
[66] S. N. Misra, *The Code of Criminal Procedure,1973* (19th edn Central Law Publications 2015) 45.

Compelling the appearance of a Witness:

Chapter VI covers the 'processes to compel the appearance'. The ordinary process for compelling the appearance of witnesses is to issue summons. If the summons cannot be issued, the Court issues a warrant. But when a warrant cannot be executed, the Court may issue a Proclamation and attach property of a witness evading service of process.

(i) Issue of 'Summons':

A summon is a legal document, which is issued by the Court to enforce the appearance of parties, including the witnesses or for production of documents. There are various procedural requirements laid down in the Code, like the "summon has to be in writing, in duplicate, signed and sealed by the Court."[67] Section 62 (1) allows "a police officer, officer of the Court or other public servant to serve the summons". Section 62 (2) lays down the general rule that the summons shall be served personally to the person summoned. But in case the person summoned is not found after due diligence, it can be served to a male adult member of his family, residing with him. Nevertheless, if personal service of summons is not feasible, under Section 65 a 'substituted service' of summons can be made by affixing "one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides." Service of summons 'by a registered post' is not a permissible mode for serving summons and is illegal[68]. There are two exceptions carved out from this rule, i.e., when summons by post is allowed. It is permitted when they are issued as a letter to the Chief officer of a Corporation in India[69] and when they are issued to the witnesses.

Section 69 covers the scenario when a summon is issued to a witness. Section 69 (1) states that "the Court issuing the summons to a witness may also direct a copy of summons to be served by registered post addressed to the witness at the place where he ordinarily resides or carries on business or personally works for gain." Section 69 (2) provides that the summons is declared to be duly served by the Court if it receives the acknowledgment "signed by the witness or an endorsement by the postal employee that the witness refused to take the delivery of the summons."

---

[67] The Code of Criminal Procedure 1973, s 61.
[68] *Bhimappa Gangappa Sonar v Smt. Indirabai Kom Bhimappa Sonar* [1981] 1 Kant LJ 353.
[69] The Code of Criminal Procedure 1973, s 63.

(ii) Issue of 'Warrant of arrest' and attachment of property:

Under Section 87, a Court may issue a 'warrant of arrest' against a witness. The Court can exercise this discretion after recording the reason in writing on following two grounds:

i. If after summons are duly served to him, he does not appear, without any 'reasonable excuse.'
ii. If the Court has reasons that he has absconded or will disobey the summons.

This warrant of arrest could be executed by a police officer or other person who is to execute the warrant. It authorises him to arrest the witness and bring him before the Court. Form No. 9 of Schedule II, gives a *pro forma* of warrant in the first instance to bring up a witness

A situation may arise when a warrant is issued against the witness, but cannot be executed because the witness is absconding or concealing himself. In such a situation, the Court may publish a written Proclamation and direct him to appear at a specified place and time. Under Section 83, the Court may after issuing the Proclamation, after recording reasons in writing order the attachment of any movable or immovable property of the absconded person. This order of attachment can be issued to compel the attendance of witnesses. If the witness appears within the specified period mentioned in the Proclamation, the Court shall release the property from attachment. But if he fails to appear before the Court, the property shall be "at the disposal of the State Government[70]", which means that the State Government has the absolute control over the attached property. If the attached property is non-perishable, it shall remain with the State Government for 6 months, after which it can be sold. But if it is perishable, it can be sold at any appropriate time. However, within 2 years of attachment of property, the person has opportunity to defend his absence. In case the property is not sold, the attached property is returned to him, otherwise if it is sold, net proceeds of the sale are restored to him.

[70] The Code of Criminal Procedure 1973, s 85.

(iii) Power of the Court to summon witnesses "at any stage of any inquiry, trial or proceeding":

Section 311 confers wide discretion on the Court "to summon material witnesses or examine person present". The first part of the provision gives a discretionary power to the Judge or the Magistrate, to summon any person as a witness or examine any person in attendance, or recall and re-examine any person already examined. The second part makes it obligatory for the Court to do the same when it is essential to the just decision of the case. For instance, in *Zahira Habibullah Sheikh v. State of Gujarat*[71], an example of the second part was illustrated when "the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference", in such a case, it is obligatory for the Court to summon any person as a witness. In *Mohd. Hussain Umar Kochra v. K. S. Dalipsinghji*[72], it was held that "the Court has an inherent power to recall a witness if it is satisfied that he has given evidence which is materially different from what he had given at the trial."

Under Section 350, a Criminal Court may punish a witness with a fine of up to Rs. 100, if a witness summoned to appear before the Court without a just excuse neglects or refuses to attend the specified place. The Court can in the interest of justice try such witness summarily, after giving him opportunity to show cause and impose such penalty.

Examination of witnesses by the Police:

Commonly the Police goes to the person who is acquainted with the facts and circumstances of the case.[73] However, in some cases, it is required that the attendance of such persons is required. Such cases are covered under Section 160 of the Code, which deals with the police officer's power to require attendance of the witnesses. Section 160 (1) empowers the Police Officer conducting the Investigation require the attendance of 'any person' who is acquainted with the facts and circumstances of the case. Such persons include "witnesses or possible witnesses.[74]" It is mandatory for the witnesses to give such attendance as the word "shall" has been used in the provision. In contravention of this mandate, a witness can be prosecuted under Section 174 of the

[71] [2004] 4 SCC 158.
[72] [1969] 3 SCC 429.
[73] S. N. Misra, *The Code of Criminal Procedure,1973* (19th edn Central Law Publications 2015) 237.
[74] *State v N.M.T. Joy Immaculate* [2004] 5 SCC 729.

IPC for the offence of "non-attendance in obedience to an order from public servant." However, the proviso to sub-Section (1) of Section 160 provides for those people who are exempted from this rule, and they shall be attended at their place of residence only. They include a male person under 16 years of age or above 65 years, a woman and a disabled person.

Section 161 (1) gives the power to the Investigating police officer to orally examine the witnesses. A witness is bound to 'truly' answer all the questions put to him by the Police Officer, except those which "have a tendency to expose him to a criminal charge or to a penalty or forfeiture." If false answers are given, the witness can be penalized under Section 182 of the IPC. Under Section 161 (3), the Police Officer may reduce any statement made to him into writing and make a separate and true record of them. These statements have to be made voluntarily, out of free will by a witness and as read with Section 163, the police officers cannot beat or confine a person to induce a witness to make a statement.[75] If the police officer records in writing the statements of the witnesses, "he is obliged to make copies of those statements available to the accused before the commencement of proceedings."[76] This will make the accused aware of the statements made against him and then he can prepare his case accordingly.

Under Section 162(1), a general prohibition is laid down according to which a statement of a witness recorded in writing by the Police Officer cannot be used as evidence except for the specific purpose mention in the proviso. According to the proviso this statement can only be used to contradict a prosecution witness, by the accused or with the Court's permission by the prosecution.

Section 172 casts a duty on every police officer to maintain a case diary, in which he enters day-to-day information about his investigation. This enables the Court to check the mode of investigation. After the Code of Criminal Procedure (Amendment) Act, 2008 was passed, sub-Section 1A was inserted to Section 172. According to 172 (1A), the statements of witnesses recorded during the course of investigation under section 161 also have to be entered in the case diary by the Investigating Officer. The case-diary cannot be used as evidence *per se*, but can be used to aid inquiry or trial.

[75] *The State of Andhra Pradesh v N. Venugopal* [1964] 3 SCR 742.
[76] *Noor Khan v State of Rajasthan* [1964] 4 SCR 521.

Under Section 173, after the completion of investigation, a Report, called 'charge-sheet" or 'completion report' or 'Challan' is submitted by the Investigating Officer to the Magistrate, who is competent to take cognizance of the case. According to Section 173 (2) (i) (c), the charge sheet should contain the names of the persons who appear to be acquainted with the circumstances of the case. Thus, a list of witnesses has to be included in the charge sheet.

Issue of Process by the Court:

For making the accused present before the Court, the Court issues a process. Section 204 authorizes the Magistrate taking the cognizance of the case to issue summons or warrant. The Magistrate must be satisfied that there is a "sufficient ground for proceeding", which means that a *prima facie* case is made out against him.[77] Section 204 (2) states that "unless a list of prosecution witness has been filed, no summons or warrants shall be issued against an accused."

Trial before a Court of Session:

In a trial before the Court of Session, the Public Prosecutor takes up the case of the Prosecution and states the charges against the accused and gives the evidence to prove the guilt of the accused. In the landmark case of *Hukam Singh v. State of Rajasthan*[78], the scope of Section 231 of the Code was discussed. It was held that the Court of Session is obligated to take all evidence, which is produced by the Public Prosecutor for the prosecution case. The Public Prosecutor may state to the Court that certain witnesses might not support the prosecution case, and skip them to be examined as prosecution witnesses. If there are multiple witnesses on the same point, he can choose only few of them to testify, which will save the time of the Court by preventing repetition on the same facts. After considering the materials submitted to the Court and hearing both the accused and prosecution, the Judge may either discharge the accused for "no sufficient ground or frame charges against the accused". In case the charges are framed against the accused, he may either plead guilty, after which the Judge may convict him or refuse to plead guilty. In the latter case, when the accused refuses to plead guilty or does not plead, under Section 230, "the Judge fixes a date for the examination of

[77] *Smt. Nagawwa v Veeranna Shivallngappa* [1976] 3 SCC 736.
[78] [2000] 7 SCC 490.

witnesses". The prosecution may apply to the Court to issue any process for compelling the attendance of any witness or the production of any document or other thing.

On the fixed date, the Judge takes all evidences produced by the Prosecution. The Judge can exercise his discretion "to permit cross-examination of any witness to be deferred until other witnesses are examined or recall any witness for further cross-examination."[79] The judge after hearing both the sides, if finds no cogent evidence against the accused, he shall pass an order of acquittal. But if he is not acquitted, under Section 232, the Court will allow him to give defence. The Court must fix hearings for 'defence evidence', calling upon the accused to present his defense, record his written statement and issue any process to compel the attendance of any witnesses or production of any document. This is an "invaluable right provided to the accused".[80] After the examination of the defence is complete, the Prosecutor shall to sum up the case and the accused is entitled to reply. If a 'point of law' is raised by the accused, the prosecution may be permitted by the Court to make its submissions. Finally, under Section 235, the Judge shall give a judgment after hearing the argument and points of law and may either acquit or convict the accused.

Commission for the examination of witnesses:

Under Section 284 (1), the Court or Magistrate can issue a commission for the examination of witnesses if the attendance of such witness "cannot be procured without an amount of delay, expense or inconvenience." In *Dharmanand Pant v. State of Uttar Pradesh*[81], it was held that as a general rule, the important witnesses must be examined in Court and commission should be issued only in a restricted manner in cases of formal witnesses or such witnesses who could, not be produced without an amount of delay or inconvenience unreasonable in the circumstances of the case. The main objective is to examine witnesses expeditiously, without any delay of time.

For instance, in the case of *State of Maharashtra v. Praful B. Desai*[82], when the witness was in the U.S.A., the Court issued a commission to record the evidence through video conferencing.

[79] The Code of Criminal Procedure 1973, s 231.
[80] *Satbir Singh v State of Haryana* [2021] 6 SCC 1.
[81] [1957] SCR 321.
[82] [2003] 4 SCC 601.

Expenses of Witnesses:

Section 312 is an important provision, which allows any Criminal Court to order the State Government for payment of reasonable expenses of witnesses attending for the purposes of any inquiry, trial or other proceeding. This is subject to any rules framed by the State Government. In *State of Gujarat v. Vrajlal Bhimji*[83]the Gujarat High Court gave an illustration of a situation when expenses can be ordered by the Court. It stated when cases are not conducted on account of absence of the prosecutor or the defence Counsel, then the Trial Court is bound to pass order under this provision as well as under Section 254 (3).

[83] [1994] 2 GLR 1751.

CHAPTER 3- HISTORICAL DEVELOPMENT OF WITNESS PROTECTION IN INDIA

3.1. Ancient Period:

The primary literary sources of Ancient Indian history could be demarcated into Smriti and Shrutis. Together they form the 'Vedic literature.' The literary texts are religious in character and reveal the social, cultural, political and religious background of the Indian people during ancient India. Shruti literally means "that which is heard". Shruti consist of four Vedas, Brahmanas, Aranyakas, and Upanishads. They are considered to be the most authoritative and reliable texts as it is believed that the sages who wrote these texts "heard" them "directly from God." On the other hand, a Smriti means "that which is remembered." Unlike Shrutis, Smritis are written by various authors, but they acquire a secondary role and are considered less authoritative than Shrutis. Smritis are compendium of texts which interpreted Shrutis. The writers of Smritis reflected the traditions of that time and differed in their interpretations. These writings were "fluid" and changed over a period of time as the society developed. Smritis include "*Dharmasutras* and *Dharmashastras*." These texts are based on the rules of code of conduct and law. '*Dharmashastras*' are commentaries and treatises, which are on the subject of ruled of ethics and code of conduct for the society. These Dharma-shastras include Manusmriti, Shukraniti, and Arthashastra.

B.G.R. Rao in his book *"Ancient Hindu Judicature"*[84] has explained the two forms of proofs that were considered as valid in the ancient Hindu law of crimes. They are as enumerated below:

1. *Human Proof:*

   It was the proof that was furnished by humans through:

   (i) *Lekhya* or documents

   (ii) *Sakshi* or witnesses

   (iii) *Bhukti* or possession

[84] B. Guru Rajah Rao, *Ancient Hindu Judicature* (Ganesh & Co. 1920) 60.

2. *Divine Proof:*

It comprised five forms of ordeals or *Divya*. The five means were ordeal by:

(i) *Ghata* or Balance

(ii) *Agni* or Fire

(iii) *Udaka* or Water

(iv) *Visha* or Poison

(v) *Kosa* or Drinking water.

In ancient India, the witnesses were broadly divided into two groups[85]:

1. *"Krita* (chosen) witnesses:

They were further classified as-

(i) *Likhita*- one who attested a written document. If he could read and write, he was called *Likhita*, otherwise he was referred to as *Leikita* (marksman).

(ii) *Smarita*- one who has been asked to witness a transaction and is reminded about every time the transaction takes place.

(iii) *Yadhrichchagata*- one who was casually present to witness the transaction.

(iv) *Goodhasakshi*- one who was made to hide by the plaintiff to listen to the words of the adversary.

(v) *Uttarasakshi*- one who having listened to the statement of a person, who is about to die or to travel abroad about some disputed transaction is called to speak about it.

2. *Akrita* (casual) witnesses:

They were further classified as-

(i) The Villagers

(ii) Judge and members of the assembly

(iii) The King

(iv) On who has been authorized to do an act.

(v) The person deputed by the plaintiff.

(vi) Members of the family in matters affecting the family."

[85] Girish Abhayankar and Asawari Abhayankar, *Witness Protection in Criminal Trials in India* (1st edn, Thomson Reuters 2018) 14-15.

Manusmriti:

According to Manu in his book *Manusmriti,* a person becomes a witness or *Sakshi* "when he has seen or heard something."[86] He highlights the role of a witness who speaks truth in his evidence and says that he "after death, gains bliss above and fame below and such testimony is revered by the Brahman himself." [87] Thus, a truthful witness was regarded as one who received reverence and benediction. Nevertheless, gender and caste played a very significant role in the testimony of the witnesses as he says that *"women should give evidence for women, and for twice-born men twice-born men (of the) same (kind), virtuous Sudras for Sudras, and men of the lowest castes for the lowest.[88]"* Thus, it can be seen that Manu categorizes the witnesses according to their stature, castes and gender, and they did not enjoy the 'equality' to become witness in all cases.

Shukraniti:

Shukracharya in his book *Shukraniti* defined a witness as "man other than self who is aware of the facts of the case."[89] He demarcated witnesses into two classes- one who has seen the facts and the other who has heard it. The treatise lays down conditions for a person to become a competent witness. A person who was "virtuous, uniform in his statements, and whose truthfulness had been tested" was a competent witness. Further, it said that witnesses must be made according to the 'caste and race.' Wise men, young men and householders were competent witnesses. Females could be appointed as witnesses but only in "female interests." But in the cases of "violence, theft, felonies, and abuse, assault and kidnapping" the witnesses were not to be discriminated. It also referred to people who were incompetent witnesses like Ignorant child, mendacious woman, forgerer, cheat and servant.

[86] Manusmriti, 8.74.
[87] ibid, 8.81.
[88] ibid, 8.68.
[89] Shukraniti, 364-365.

Arthashastra:

Written by Kautilya, 'Arthashastra' is the most comprehensive treatise on strategies concerning politics, economy, military, ethics and law. The unwilling witnesses, who lived far away could be "summoned by royal writ" issued by the Court and the servant of the Court was travelled, was to be paid "a fee of one-eighth *pana*"[90] by the losing party. The book referred to the 'number of witnesses.' It prescribed that "there shall be at least 3 witnesses. If, however, the parties so agree, 2 shall suffice.[91]" It did not approve testimony of a single witness especially in the cases of debt. But as an exception in the case of secret transactions, "the testimony of a single witness, man or woman, may be accepted if he or she had seen or heard the transaction."[92] Taking of an oath "in the presence of a Brahmin" was made mandatory for the witnesses.[93] But if the witnesses gave false testimonies, they shall be charged with 'perjury.' A fine of "24 *panas* and 12 *panas* for refusal to testify" was imposed.[94] The motivation for the witnesses to come forward and testify before the Courts was that they were to be treated respectfully[95]. The judges who "threatened, abused, defamed or unjustly silenced witnesses" were imposed heavy penalties.[96]

[90] Arthashastra, 3.1.22-24.
[91] ibid, 3.11.25-27.
[92] ibid, 3.11.29-33.
[93] ibid, 3.11.34-38.
[94] ibid, 3.11.44-49.
[95] Pandurang Vaman Kane, *History of Dharmasastra* (vol III, 3rd edn, The Bhandarkar Institute Press, Poona, 1993).
[96] ibid.

3.2. Medieval Period:

After Muslim conquerors acquired the throne of India, a new religion of Islam was introduced in India, which influenced the judicial administration of the country. The Prophet said in the *Quran* that "to God a moment spent in the dispensation of justice is better than the devotion of the man who keeps fast every day and says prayer every night for 60 years."[97] Thus, the Muslim Kings viewed the administration of justice as a 'religious duty'.[98] This is the reason why the rules of evidence under Mohammadan Law are considered to be 'modern and advanced.'[99]

The evidence was categorized into oral and documentary evidence, oral evidence being further divided into direct and hearsay evidence. Witnesses were examined and cross-examined separately. Leading questions were generally prohibited on the ground of prejudice, but only allowed by the Judge if the witness was frightened or confused. [100] There were classes of witnesses who are regarded as incompetent like very close relatives and partners. Some people were regarded as unfit for giving testimony like infants, idiots, gambler, drunkards, professional singers and blind persons.

3.3. Modern Period:

The codification of laws in India commenced during the British Rule in India. During this time, unform codes were enforced, which were applicable throughout the territories of British India. The Criminal Law in India was developed after the enactment of three important legislations- Indian Penal Code,1860, the Indian Evidence Act, 1872 and the Code of Criminal Procedure 1882. Although these statutes were the brain-child of the British, but they are relevant even in the present time. The Chapter IX and Chapter X under Part III of the Indian Evidence Act, 1872 specifically cover 'Witnesses' and 'Examination of Witnesses' respectively.

---

[97] *Ta'rikh-i Fakhru'd-Dîn Mubarakshah*, (Royal Asiatic Society 1927) 12.

[98] Justice S. S. Dhavan, 'The Indian Judicial System: A Historical Survey' (*Allahabad High Court*) <https://www.allahabadhighcourt.in/event/TheIndianJudicialSystem_SSDhavan.html#sdfootnote74sym> accessed 15 June 2022.

[99] Girish Abhayankar and Asawari Abhayankar, Witness Protection in Criminal Trials in India (1st edn, Thomson Reuters 2018) 4.

[100] Manzar Saeed, *Commentary on Muslim Law in India* (2008) 345-346.

These evidence rules lay down the procedures that the Courts need to follow during the trials. Section 193 of the Indian Penal Code, 1860, punishes a person for giving false evidence. However, these legislations had no specific provisions for the protection of witnesses in India.

After independence, in 1950, the Constitution of India came into force and became the law of the land. The Preamble laid down the objective of Justice. Article 21 of the Constitution mandated that *"No person shall be deprived of his life or personal liberty, except according to procedure by law."* This fundamental right became the foundation for the protection of dignified lives for individuals in India. The Supreme Court interpreted that in a criminal trial, 'free and fair trial' is implicit in Article 21.[101] To ensure a fair trial, the testimony of witnesses is vital, which demands for a constitution mandate for witness protection.[102]

In 1958, for the first time, the **14th Law Commission Report**[103] titled "Reforms of Judicial Administration" suggested certain measures for the protection of witnesses. It listed the reasons for 'delays in criminal trials and inquiries.' Due to non-attendance of witnesses, the trials were delayed. As the witnesses were not paid adequate travelling allowances and inconvenience at the Courts, they were reluctant to give testimonies. It recommended for increasing the travel allowances for the witnesses and provision to be made for the inconvenience of witnesses. However, this Report was only restricted to the 'monetary protection' for the witnesses and did not consider other important measures.

In 1980, the **4th Report of National Police Commission**[104] suggested various measures for safeguarding the interests of the witnesses. It recommended that for the convenience of the witnesses, the examination of witnesses should be conducted "near the scene of offence or at the residence of the witnesses concerned or at some convenient place nearby." It suggested that witnesses should be provide with "adequate staying facilities and a fixed allowance". This Report was also limited to the convenience of the witnesses and did not consider other protection measures.

[101] *Hussainara Khatoon v Home Secretary, State of Bihar* [1979] 3 SCR 532.
[102] *Zahira Habibullah Sheikh v State of Gujarat* [2006] 3 SCC 374.
[103] Law Commission, *Reforms of Judicial Administration* (Law Com Report No. 14, 1958).
[104] Government of India, *Fourth Report of the National Police Commission* (1980).

In 1996**,** the **154th Report of the Law Commission**[105] contained a specific Chapter X on 'Protection and facilities to Witnesses'. It recommended that fixed allowances should be paid to the witnesses for all days they attend the Court through a simple procedure. Appropriate facilities should be provided to them in the Court Room for their stay and they should be given due respect. It added a new measure for expeditious disposal of cases by the Courts so that witnesses do not suffer from the wrath of delays and adjournments: "*Listing of the cases should be done in such a way that the witnesses who are summoned are examined on the day they are summoned and adjournments should be avoided meticulously."* However, the Report omitted the physical protection of the witnesses and their families.

In 2001, the **178th Report of Law Commission**[106], dealt with the issue of "Hostile witnesses and the need to ensure a fair investigation." It raised the problem of hostility of witnesses especially *"where the accused happens to be rich and/or influential persons or members of mafia gangs."* To protect public interest and to safeguard the interests of society, measures need to be devised to eliminate, as far as possible, scope for such happenings. This hampered a fair investigation. Thus, it suggested insertion of Section 164-A to the CrPC so that "all offences punishable with 10 or more years imprisonment (with or without fine) including offences for which death sentence can be awarded", the Police gets the statements of the material witnesses under Section 164 of the CrPC recorded before a Magistrate at the earliest opportunity i.e. at the very inception of the investigation. It would be the discretion of the Court to regard these statements as evidence or not. This Report was significant as it dealt with the hostility of witnesses and provided an alternative solution to prevent hostility.

[105] Law Commission of India, *Report on the Code of Criminal Procedure Code, 1973* (Law Com No 154, 1996).
[106] Law Commission of India, *Recommendations for amending various Enactments, both Civil and Criminal (*Law Com No 178, 2001).

In 2003, in the case of *Neelam Katara v. Union of India*[107], the Delhi High Court for the very first time in India, issued certain guidelines for 'witness protection' till the Legislature legislated on this topic. It cited various witness protection frameworks around the world and also referred to the Law Commission Reports.

In 2003, **Malimath Committee Report**[108] was released, which suggested various reforms in Indian criminal justice system including a topic on 'witnesses and perjury.' It reiterated the suggestions for proper arrangements for the witnesses at the Courtroom and payment of allowances. Interestingly, for the very first time there was addressal to the issue of safety of the crucial witnesses, who were threatened from testifying before the Courts. It said that, *"In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise."* Therefore, it suggested in-camera trial proceedings and protecting the identity of the witnesses. It emphasised that *"There is no such law in India. Time has come for a comprehensive law being enacted for protection of the witness and members of his family."* There were also considerations for sensitising the Judges through training and supervision to regulate cross-examination and protect the rights of the witnesses.

In 2004, in the landmark cases of *Zahira Habibullah Sheikh v. State of Gujarat*[109] and *Sakshi v. Union of India*[110] the apex Court of India emphasised on the need for a legislation for witness protection, especially in sensitive and high-profile cases.

In 2006, the **198th Law Commission Report**[111] was a comprehensive report, which entirely dealt with 'Witness identity protection and Witness Protection Programmes.' This Consultation Paper gave an in-depth analysis of witness protection programmes in the world and gave recommendations for a witness protection programme in Indian context. It recommended that a 'Witness Protection Programme' (WPP) like in various other countries should be adopted in India *"to protect the safety, welfare and interests of the witnesses."* But WPP must be provided only in the cases of 'serious offences.'

---

[107] [2003] SCC OnLine Del 952.
[108] Committee on Reforms of Criminal Justice System "*Committee on Reforms of Criminal Justice System Report*" (vol I, 2003)151.
[109] [2005] 4 SCC 294.
[110] [2004] 5 SCC 518.
[111] Law Commission of India, *198th Report on Witness Identity Protection and Witness Protection Programmes* (Law Com No 198, 2006).

Apart from changing the identities of the witnesses, other measures should also be adopted like:

- "Police protection to him and his family members.
- Transportation facilities in State vehicle.
- Granting a room put under surveillance and security located in the court or the police premises.
- Providing a new place to live in India or abroad.
- Granting of a 'survival allowance' for a specific period of time."

A Judicial officer should be made in-charge of the WPP. It was also suggested that senior police officers like Superintendent of Police or Commissioner of Police should be given the power to certify whether a person should be given protection under the WPP or not. But this certification should be examined by the Magistrate *in camera*. WPP should not only be limited to the witnesses but also cover their families and closed relatives. The funding, which is the major issue of implementation should be done by both the Central Government and the State Governments, 50% each. The Commission suggested that *"an amendment may be carried into the Legal Services Authorities Act, 1987"* by allowing the administration of funds by State Legal Aid Authority and the District Legal Aid Authority for WPP. Like most of the countries a Memorandum of Understanding (MOU) should be signed between the person in-charge of the Programme and the witness covering their rights and obligations. There should be severe criminal punishment for any person who discloses the identity of the witnesses without the authorization of the Court. For challenging the decision of protection under WPP, an eligible person may directly appeal to the High Court.

In 2015, Delhi became the "first State in India to notify a witness protection scheme".[112] In 2018, Maharashtra came up with the Maharashtra Witness Protection and Security Act, 2017.

In 2018, the Ministry of Home Affairs after consulting various stakeholders came up with a very first Central Scheme called Witness Protection Scheme, 2018. The rape case of Asaram triggered the Government of India to frame these guidelines. The Supreme Court in this case of *Mahender Chawla v. Union of India*[113] played an activist role and declared the Witness Protection Scheme, 2018 as *"a law under Article 141 of Indian Constitution until a legislation was passed in this regard."*

[112] Pragya Kaushika, 'Delhi government notifies witness protection programme' *The Indian Express* (New Delhi, 31 July 2015) <https://indianexpress.com/article/cities/delhi/delhi-government-notifies-witness-protection-programme/> accessed 2 June 2022.
[113] [2019] 14 SCC 615.

CHAPTER 4- LEGISLATIONS RELATED TO WITNESS PROTECTION IN INDIA

4.1. The Criminal Procedure Code, 1973:

The main purpose of the CrPC, 1973 is to ensure that the "accused person gets a fair trial which is accordance with the principles of natural justice".[114] However, this objective reflects how the Criminal Justice system in India is tilted more towards protecting the rights of the accused persons, sidelining the rights of the victim and the witnesses. Although the Criminal Procedure Code (Amendment) Act, 2008, attempted to introduce certain provisions, for instance a provision for the prosecution of persons threatening the witnesses to give false evidence, it is not enough to ensure protection to the witnesses. A 'fair trial' should mean that the trial should be impartial and no party is at a higher pedestal than the other. But a fair trial cannot be ensured without the active role of the witnesses. Denial of the procedure for the protection of the witnesses in a criminal trial is a serious gap in the legislation.

Although the Criminal Procedure Code, 1973 does not have any express provision dealing with 'witness protection' *per se*, it has certain provisions which intend to give protection to the witnesses. Despite the fact that these provisions indirectly provide for some protection to the witness, they are not sufficient enough for their protection in the real sense. These provisions have been listed as following:

(i) Protection during interrogation for the attendance of witnesses:

Commonly the Police goes to the person "who is acquainted with the facts and circumstances of the case."[115] However, in some cases, it is required that the attendance of such persons is required. Such cases are encompassed under Section 160 of the CrPC, which covers the police officer's power to require attendance of the witnesses. Section 160 (1) empowers the Police Officer conducting the Investigation by a written order or Notice require the attendance of 'any person' who is acquainted with the facts and circumstances of the case.

---

[114] The Criminal Procedure Bill (1970), Statement of Objects and Reasons, para 3.
[115] S. N. Misra, *The Code of Criminal Procedure,1973* (19th edn Central Law Publications 2015) 237.

Such persons include "witnesses or possible witnesses.[116]" It is mandatory for the witnesses to give such attendance as the word "shall" has been used in the provision. In contravention of this mandate, a witness can be prosecuted under Section 174 of the IPC for the offence of "non-attendance in obedience to an order from public servant." In this regard, the Legislature has intended to give momentary protection to such witnesses and this reflects in Section 160 (2), which allows the State Government to frame rules for the Police to pay 'reasonable travel expenses'[117] to a witness called in a place other than his or her residence. However, this protection is merely directory in nature.

The second protection has been assured for certain vulnerable groups, who haven excluded from the application of Section 160 (1). The proviso attached to Section 160 (1) makes certain exceptions and makes it mandatory that these people can be examined only at their place of residence. After the Criminal Law (Amendment) Act 2013, the exemptions include a male person below 15 years of age or above 65 years, a woman and a mentally or physically disabled person. In the case of *Nandini Satpathy v. Dani (P.L.)*[118]the Supreme Court laid down the law that "no woman can be summoned to a police station for interrogation or for the investigation of crime." Thus, the law is crystal clear that a woman witness cannot be interrogated by the Police except at her residence. In the case of *Niloy Dutta v. District Magistrate and Ors.*[119] the Division Bench of the Gauhati High Court ruled that the proviso to Section 160 (1) applied to the Army and Army officers under the Armed Forces (Special Powers) Act, 1958. It was formulated that no woman witness can be taken to the Army Camp for interrogation.

[116] *State v N.M.T. Joy Immaculate* [2004] 5 SCC 729.
[117] Prashant Rahangdale, 'Witness Protection: A Comparative Analysis of Indian and Australian Legislation' (2020) 21(3) Journal of the Gujarat Research Society <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516628> accessed 20 May 2022.
[118] [1978] 2 SCC 424.
[119] [1991] 2 Gau LR 217.

(ii) Recording of statement of witnesses by audio-video electronic means:

Section 161 (1) gives the power to the Investigating police officer to orally examine the witnesses. Section 161 (2) however protects a witness from "answering the questions which have a tendency to expose him to a criminal charge or to a penalty or forfeiture." The statements of the witnesses may be reduced in writing and if there is a threat or inconvenience [120] caused to the witnesses, the statement can be recorded by 'audio-video electronic means.' [121]

(iii) Right of a witness to complaint against a person threatening to give false evidence:

Section 195A of the CrPC enables a witness or any other person to file a complaint in relation to offence under Section 195A of the "Indian Penal Code. Section 195A of the IPC penalizes "threatening any person to give false evidence." This provision was inserted into the Code by Criminal Procedure Code (Amendment) Act, 2008. The CrPC categorizes this offence as "cognizable, non-bailable and non-compoundable." In the recent case of *Gurunathagouda v. State of Karnataka*[122], the Karnataka High Court has given a vivid analysis of Section 195A of the CrPC. It stressed that Section 195A of the CrPC, which came into effect in 2009 after the amendment, was inserted with the object of laying down the procedure for witnesses in case of threating to give false evidence. An application under Section 195A can be filed by the witness or any other person. As it is a cognizable offence under Schedule I of the CrPC, the Court held that a narrow interpretation cannot be applied to Section 195A and that an aggrieved person can file a complaint before the Magistrate as well as Police can investigate the matter under Section 156 of CrPC. Furthermore, it clarified that the word "whoever" would mean that the person threatening the witnesses or any other person need not necessarily be restricted to the accused, but encompasses any other person too. Thus, it becomes clear that if a witness is threatened by anyone to give false remedy, he has the remedy of either filing a complaint before the Magistrate or file an FIR before the Police.

---

[120] Zubair Ahmed Khan, 'NEED FOR WITNESS PROTECTION IN INDIA: A LEGAL ANALYSIS' (2015)
7 (1) Dehradun Law Review <http://www.dehradunlawreview.com/wp-content/uploads/2020/06/5-Need-for-witness-protection-in-India-a-legal-analysis.pdf> accessed 20 May 2022.

[121] The Code of Criminal Procedure 1973, s 161, proviso.

[122] [2019] 4 Kant LJ 203.

(iv) Diet-money:

Section 312 of the Code recognizes the concept of 'diet money'[123], i.e., the money paid to the witnesses who attend the Court. It provides the monetary protection to the witnesses and allows any Criminal Court, subject to the State rules to order payment of reasonable expenses of witnesses for any inquiry, trial or other proceeding. However, this provision is merely directory and depends upon the discretion of the Courts. Such witnesses are not paid adequate compensation[124], due to which suffer monetary losses due days off from their work.

4.2. The Indian Evidence Act, 1872

Under Section 151 of the Act, the Court has been bested with the power to forbid any questions or enquires, which are indecent or scandalous. In the similar manner by virtue of Section 152, it has been conferred the power to forbid questions, which it considers insulting, annoying or offensive. These two are the only provisions, which provide protection to the witnesses. In a way they prevent these witnesses from turning hostile and protect them from indecent and unwarranted harassment. In both these cases, the Court has the discretion to interpose for the protection of witnesses.[125]

4.3. The Indian Penal Code, 1860

Indian Penal Code is a comprehensive criminal Code of India which lays down the substantive criminal law. It was a colonial legislation drafted during British Raj in India under the chairmanship of Thomas Babington Macaulay.

There is no direct provision which deals specifically with the protection of witnesses. Section 195A was inserted in the IPC through the Criminal Law (Amendment) Act, 2005.

[123] Nitin Chhatwani, 'Witness Protection in India' (2020) 1 Law Essentials J 2.
[124] Law Commission of India, *Report on the Code of Criminal Procedure Code, 1973* (Law Com No 154, 1996).
[125] Batuk Lal, *The Law of Evidence* (20th edn, Central Law Agency 2014) 612-613.

It is bifurcated into two parts. The first part states that if a person threatens a witness to give false evidence with any injury to witness or his interested person's "person, reputation or property," the person is punishable with an imprisonment for a term of 7 years or fine or both. The second part deals with the case when due to such false evidence if an innocent person is prosecuted and sentenced with death or an imprisonment for a term more than 7 years, the person threating the witness would be punished with the same punishment the innocent person is punished. The offences under Section 195A are cognizable and non-bailable. [126] A 'cognizable offence' is an offence in which the police officer can arrest without a warrant.[127]

4.4. Terrorist and Disruptive Activities (Prevention) Act, 1987

Terrorist and Disruptive Activities (Prevention) Act, 1987 was the first anti-terror legislation in India, which was passed under the background of Insurgency of Punjab, a secessionist movement for the formation 'Khalistan,' a sovereign State for Sikhs in Punjab Region. For the very first time it defined a 'terrorist act' in India. Due to the 'sunset provision' in the Act, its lifespan was 8 years[128], due to which it was repealed on 23 May, 1995.

The most unique provision of the Act was Section 16, which rendered 'protection of witnesses' in cases falling under the Act. Under this provision, an application could be filed by a witness or a Public Prosecutor, or by the Designated Court on its own motion, for taking steps to keep the identity of the witness secret. The proceedings could be held *in camera* if the Designated Court desired. The Designated Court was given the power to take measures like keeping the identity and addresses of witness secret and directing not to reveal the identity and address of the witness. It attracted a punishment of imprisonment for a term of 1 year and fine up to ₹1,000 for its contravention.[129]

[126] The CrPC 1973, First Schedule.
[127] The CrPC 1973, sec 2 (c).
[128] The Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA 1987), s 1(4).
[129] TADA, s 16 (4).

In the landmark case of *Kartar Singh v. State of Punjab*[130] several provisions, including Section 16 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 were challenged on the ground of violating the Constitution of India.

The petitioner argued that Section 16 (1) was violative of Article 14 of the Constitution as it denied 'right to an open trial.' The respondent on the other hand relied on *A. K. Roy v. Union of India,*[131] which held that 'right to public trial' is not a constitutionally guaranteed right in India. Section 16 (2) and 16 (3) were challenged on the ground that they violated the 'right to a fair trial' as the accused was denied his right of cross-examination by not knowing the identity of the witnesses.

The five-Judge Bench of the Supreme Court upheld the Constitutional validity of the TADA, 1987. Section 16, providing for the protection of witnesses was declared to be constitutionally valid in terrorist cases. The Court held that although the right to an open trial is important for fair and proper administration of criminal trials, in exceptional circumstances, the trials can be held in camera. To substantiate its stand, the Court relied on Section 327 (2) of the Cr.P.C. in which trial of rape is mandatorily to be conducted in camera. Stressing on the importance of cross-examination of witnesses, the Court stated that, *"cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief*," to attack and weaken the veracity of the evidentiary value of the witness. It admitted that in ordinary trials, identity of witnesses plays an important role for the accused, who can prepare his defence against any false and fabricated evidence. Nevertheless, there was no legal restraint on keeping the identity of the witness in certain extraordinary circumstances. It relied on the case of *Gurbachan Singh v. State of Bombay*[132], where the apex Court had declared Section 27(1) of Bombay Police Act, 1902 as constitutionally valid. The Court in that case found that non-disclosure identity and address of the witnesses who deposed against the accused was justified as the law dealt with the mischief of exceptional cases in which out of threat of their person or property, the witnesses are not ready to depose publicly.

[130] [1994] 3 SCC 569.
[131] [1982] 2 SCR 272.
[132] [1952] SCR 737.

In such special cases, the right to confront or cross-examination cannot be granted to the accused. The witnesses are reluctant to come forward in such cases out of fear of death and harassment when the accused are "terrorists and disruptionists".

The Court, however, emphasised the importance of effective cross-examination of the witnesses by the accused, who when knows the identity of the witnesses could prepare his defence by collecting material and attacking the veracity of the statements of such witnesses. Thus, it upheld the position laid down by the Punjab and Haryana High Court in the case of *Bimal Kaur Khalsa v. Union of India*[133] that the identity of the witnesses may be disclosed "before the trial commences" but subject to the exception that after compelling reasons the Court may direct not to disclose the identity of potential witnesses whose life may be in danger.

Although TADA was a unique legislation for introducing protection of witnesses in terrorist cases, it was hit by a major setback. It was only confined to keeping the identity of the witnesses secret, but did not provide for the physical protection of the witnesses and their families. [134]

4.5. The Prevention of Terrorism Act, 2002

The Prevention of Terrorism Act (POTA), 2002 was passed in response to the 2001 terrorist attack on the Parliament of India by two Pakistan-raised terrorist organizations- Lashkar-e-Taiba (LeT) and Jaish-e-Mohammed. It had similar provisions to TADA. The sunset provision stipulated the life of the Act to be 3 years[135], which expired on 25th October, 2004.

[133] [1988] Cri LJ 869.
[134] Girish Abhayankar and Asawari Abhayankar, *Witness Protection in Criminal Trials in India* (1st edn, Thomson Reuters 2018) 83.
[135] The Prevention of Terrorist Activities Act 2002, s 1(6).

Section 30 of POTA, which envisioned the protection of witnesses in terrorist cases was *mutatis mutandis* to Section 16 of TADA. The Special Court constituted under POTA was given the power to conduct trial in camera, but had to 'record the reasons in writing.' Similarly, after recording the reasons in writing, the Court could undertake measures as it deems to keep the identity and address of witnesses, whose life was in danger to be secret. It could adopt various specific measures like by preventing the publication of such proceedings.

Contravention of such measures was penalized by a punishment of imprisonment for a term which could extend to 1 year and with fine up to ₹1000.

The unique distinction between TADA and POTA is that POTA introduced a new penal provision under Section 3(7) for the protection of witnesses. It stipulated that whoever threatened with violence, retrained, confined or did any unlawful act against the witnesses or other persons in whom such witnesses may be interested would be punished with imprisonment for a term of 3 years and fine. This could be seen as an improvement of the earlier witness protection regime of TADA as it rectified the lacuna of not providing physical protection to the witnesses and his close ones.

In *People's Union for Civil Liberties v. Union of India*[136] the Constitutional validity of POTA was challenged, including Section 30 of POTA. It was argued by the petitioners that non-disclosure of the identity of witnesses was violative of Article 21 of the Constitution as it denied the right of cross-examination to the accused, impeding the "right to fair trial." It was further contended that fair trial included the 'right for the defence' to ascertain the true identity of the witnesses. However, on the other hand, the Respondent contended that the protection of witnesses under Section 30 of POTA protected the right to life and liberty of the witnesses, mandated under Article 21 of Indian Constitution. This provision is necessary for the protection of witnesses in grave offences like terrorism in which without such protection, they would not muster courage to give evidence against the accused.

[136] [2004] 9 SCC 580.

The Court validated the constitutionally validity of the provision and reasoned that anonymity of witnesses would be justified in special cases of heinous and grave offences like terrorism. In such cases, the witnesses due to jeopardy to their lives or of their family members would step down from giving evidence against the accused. This would result in hampering the interest of the public too as there would be no effective prosecution of the terrorist offences if the witnesses do not give evidence fearlessly. Section 30 (2) required the Special Court to be satisfied that the witness was in danger and record reasons in writing. Hence, it adopted a 'due process mechanism' to ensure a fair trial and therefore valid. The Court remarked that *"in our view a fair balance between the rights and interest of witness, rights of accused and larger public interest has been maintained under Section 30."* Thus, this is a significant judgment as it highlights that a 'fair trial' cannot be just understood in the restricted sense of protecting the rights of the accused, but should be looked from a broader vision of protecting the rights and interests for an effective delivery of justice.

4.6. The Unlawful Activities (Prevention), 1967

In 1967, the Indira Gandhi government passed the Unlawful Activities (Prevention) Act, 1967 to curb the 'unlawful activities' in the country. It intended to deal "with the secessionist utterances of the Dravidian movement."[137] The movement had demanded for 'Dravida Nadu', a separate sovereign State for the speakers of the Dravidian languages in South India. The Unlawful Activities (Prevention) Bill was introduced by then Home Minister Yaswant Rao Chavan, who assured that "Government was seeking a right to take action against those who wanted to disintegrate the country."[138] He acknowledged that the power to ban organisations was necessary in the interests of protecting the "sovereignty and territorial integrity" of the country.[139] When the Act was passed, the aim was to curb the 'secessionist organizations', and terrorism was not a consideration. In fact,

[137] Sanjay Hegde, 'Sacrificing liberty for national security' *The Hindu* (22 August 2019) <https://www.thehindu.com/opinion/op-ed/sacrificing-liberty-for-national-security/article29213720.ece> accessed 23 May 2022.
[138] Parliament of India <https://parliamentofindia.nic.in/ls/lsdeb/ls10/ses5/0617129202.htm> accessed 23 May 2022.
[139] Mayur Suresh, 'The Law invoked to arrest activists has its roots in the emergency,' *The Wire* (1 December 2021) <https://thewire.in/law/uapa-activists-arrests-emergency-supreme-court> accessed 20 May 2022.

it was as late as in 2004 that principles of criminalizing 'terrorist activities' were incorporated. After the repeal of POTA, the government amended the UAPA and for the very first time inserted the provisions relating to "terrorism" in the Act, which was earlier restricted to "unlawful activities".

Section 22 of the UAPA is merely a reproduction and incorporation of Section 3 (7) of POTA, which provides punishment for threatening of witnesses or "any other person in whom such witness may be interested." It declares that any such threat, violence, unlawful act against the witnesses would attract the punishment of imprisonment of up to 3 years, and fine.

Section 44 of the UAPA is *mutatis mutandis* to Section 30 of POTA, as both of them provide for the 'protection of witnesses,' but the difference is that Section 44 (3) of the UAPA enlarged the punishment for contravention of the measures passed by the Court in protecting the witnesses. The term of imprisonment has been increased from 1 year to 3 years and fine from ₹1000 to unspecified fine.

4.7. The National Investigation Agency Act, 2008

In the wake of 2008 Mumbai attacks, popularly called 26/11 attacks, the Parliament of India enacted the National Investigation Agency Act, 2008 for the establishment of National Investigation Agency, constituted by the Central Government. It has been conferred with wide powers to investigate and prosecute offences "affecting the sovereignty, security and integrity of India, security of State, friendly relations with foreign States."[140] It includes the power of the NIA to *suo motu* take cognizance of terror cases and "enter any state without permission from the state government, and to investigate and arrest people."[141] Special Courts can be constituted under the NIA Act by the Central or the State Governments. The most relevant of provision of the NIA Act is Section 17, which ensures the protection of witnesses. Section 17 is *mutatis mutandis* to Section 44 of the UAPA, except that the fine under NIA Act has been specified up to ₹1000.

[140] The National Investigation Agency Act 2008, Preamble.
[141] Explained Desk, 'What is National Investigation Agency Act, and why is Chhattisgarh challenging it?' *The Indian Express* (New Delhi 17 January 2020) <https://indianexpress.com/article/explained/explained-what-is-the-nia-act-and-why-is-chhattisgarh-challenging-it-6219106/> accessed 21 May 2022.

4.8. The Juvenile Justice (Care and Protection of Children) Act, 2015

In India, the Juvenile Justice (Care and Protection of Children) Act, 2000 was a comprehensive special law that envisioned juvenile justice system in India. It was enacted to bring the domestic laws in India to be aligned with the UN Convention on the Rights of the Child, 1989. Although this Act provided the protection of identity of juvenile in conflict with law and child in need of care and protection under Section 21, it did not extend the same protection to the juvenile witnesses. After the horrendous Nirbhaya Gang Rape case, 2012, where one of the rapists was a minor, there was a huge outcry in the country to amend the juvenile laws by introducing stringer punishments to the minors who committed heinous offences[142]. Thereafter, Juvenile Justice (Care and Protection of Children) Act, 2015 was passed, which replaced the earlier Act. This novel legislation introduced the concept of a child between 16 to 18 years of age to be tried as an adult for committing heinous offences. According to the Act, a 'juvenile' is defined as any person below the age of 18 years.[143] Unlike Section 21 of the 2000 Act, which was limited to the protection of identity of the 'juvenile in conflict with law' and 'child in need of care and protection', 2015 Act introduced the concept of protection of the identity of a child witness under Section 74. According to Section 74, the name, address or school or any other particular, which could lead to identification of the 'child witness' is prohibited from being published. The contravention of this provision would lead to the punishment of "imprisonment for a term which may extend to 6 months or fine which may extend to 2 lakh rupees or both."[144]

[142] Aarushi Rajpurohit, 'Nirbhaya Case questioned inefficacy of Juvenile Justice Act' *Socio Legal Corp* (22 July 2021) <https://www.sociolegalcorp.com/commentary/nirbhaya-case-questioned-inefficacy-of-juvenile-justice-act/> accessed 21 May 2022.
[143] The Juvenile Justice (Care and Protection of Children) Act 2015, s 2 (35).
[144] JJ Act 2015, s 74 (3).

Rule 27 of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016, provides that an institution or organization may be recognized as a 'fit facility' by the Juvenile Justice Board or the Child Welfare Committee for the care and protection of children. Such a 'fit facility' receives a recognition for a period of 3 years by the Board or the Committee after a proper inquiry and inspection. A 'fit facility' may be given recognition for the purpose of providing "witness protection.[145]" It can provide facilities to the child witnesses like boarding, lodging, food, clothing and education. Rule 54 extends certain protection to the child witnesses:

i. If the witness does not belong to the District or State or Country, then the statement of such witness can be record through 'video-conferencing'. If the option of video-conferencing is not feasible, the travel expenses of for the child and a guardian to be provided by the State Government or the Union Territory.[146]
ii. In every Court Complex, 'separate rooms' for vulnerable child witnesses may be designated to record their evidence.

4.9. The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989

The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been enacted to "prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes."[147] The purpose of the Act can be found in the Statement of Objects and Reasons of the Bill, which explained that it aims at extending protection the vulnerable groups of SCs and STs, against whom various crimes were committed for various historical, social and economic reasons. This is evident as the '*Crime in India 2020 Report*'[148] issued by the National Crime Records Bureau (NCRB), showed an increase of 9.8% in the crimes committed against SCs and STs in 2019 as compared to 2018.

[145] Juvenile Justice (Care and Protection of Children) Model Rules 2016, r 27 (10) (vii).
[146] ibid, r 54.
[147] The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989, Preamble.
[148] The National Crime Records Bureau, 'Crime in India 2020' (NCRB 2021).

This Special law has stringent penal provisions for offences against the vulnerable groups of the SCs and the STs. It enumerates a list of punishable 'offences of atrocities' under Chapter II committed by a person not being a member of a SC or a ST. It includes wrongfully denying them of their land or enjoyment of their rights, making them do 'begar', forced labour, manual scavenging and threatening them to impose social or economic boycott.[149] For a speedy trial of cases, this legislation constitutes Exclusive Special Court and Special Courts, so that the cases can be disposed within 2 months, as far as possible.[150]

The Act has been amended by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, which has introduced new provisions which specifically provide for witness protection. It introduced a vivid definition of the term "witness." Section 2 (ed) of the Act defines "witness" as *"any person who is acquainted with the facts and circumstances, or is in possession of any information or has knowledge necessary for the purpose of investigation, inquiry or trial of any crime involving an offence under this Act, and who is or may be required to give information or make a statement or produce any document during investigation, inquiry or trial of such case and includes a victim of such offence."*

It introduces a new chapter IVA into the Act, which enumerates the rights of victims and witnesses. Section 15A (1) states that it is the obligation of the State to make arrangements for the protection of witnesses against any kind of intimidation or coercion or inducement or violence or threats of violence. Under Section 15A (6), the Special Court or the Exclusive Special Court are bound to provide to the witnesses with the following four protections-

"(a) the complete protection to secure the ends of justice

(b) Travelling and maintenance expenses during investigation, inquiry and trial

(c) Social-economic rehabilitation during investigation, inquiry and trial and

(d) Relocation."

[149] SC/ST Act 1989, sec 3.
[150] SC/ST Act 1989, sec14 (2).

Such Court shall have the power to periodically review the protection provided by the State and pass appropriate orders.[151] A witness or Special Public prosecutor may make an application before the Court, which can either on such application or on its own motion take steps like concealing the names and addresses of the witnesses, issuing direction of non-disclosure of identity of witnesses and "take immediate action in respect of a complaint relating to harassment of a witness and on the same day, if necessary, pass appropriate orders for protection."[152] Such a complaint has to be tried separately within 2 months and if it is against a public servant, it shall restraint him from interfering with the witness. Furthermore, it lays down the obligation of the Investigating Officer and the Station House Officer to record a witness's complaint against "any kind of intimidation, coercion or inducement or violence or threats of violence".[153] It also mandates the concerned State to specify appropriate schemes to provide protection to the witnesses from intimidation and harassment.

The SC and the ST (Prevention of Atrocities) Rules, 1995 also lays down certain rules regarding the protection of witnesses.

- Under Rule 6, District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate or any police officer not below the rank of Deputy Superintendent of Police" shall visit the place of occurrence of atrocities against the members of the SCs and STs and submit a report to the State Government. Such spot inspection Officer shall "take effective and necessary steps to provide protection to the witnesses."[154]
- Rule 11 provides for "the traveling allowance, daily allowance, maintenance expenses and transport facilities to the witnesses."

[151] SC/ST Act 1989, sec 15A (7).
[152] SC/ST Act 1989, sec 15A (8).
[153] SC/ST Act 1989, sec 15A (9).
[154] The SC and the ST (Prevention of Atrocities) Rules, 1995, r 6 (2) (iv).

CHAPTER 5- A CRITICAL ANALYSIS OF WITNESS PROTECTION SCHEME, 2018

5.1. Background and the need of the Scheme:

In 1958, the Law Commission of India in its 14th Report titled *"Reforms of Judicial Administration*" [155] made the first attempt to suggest witness protection. It recommended that the travel allowances should be increased and provision to be made for convenience of witnesses.

The Punjab and Haryana High Court in the case of *Bimal Kaur Khalsa v. Union of India*[156], emphasized the importance of protection to witnesses in a criminal trial so that they can "give evidence without any inducement or threat either from the prosecution or the defence." In *Kartar Singh v. State of Punjab*[157], the Supreme Court upheld the constitutional validity Section 16 and allowed the Court "not to disclose the identity and addresses of the witnesses especially of the potential witnesses whose life may be in danger."

The Malimath Committee in its 2003 Report[158] suggested various important reforms in the criminal administration in India. Addressing the plethora of issues that the witnesses face in India, it highlighted that unlike other countries in the world, India does not have a law for witness protection. Thus, it suggested that the *"Time has come for a comprehensive law being enacted for protection of the witness and members of his family."*

[155] Law Commission of India, *Report on Reforms of Judicial Administration* (Law Com No 14, 1958).
[156] [1988] 93 Punj LJ 189.
[157] [1994] 3 SCC 569.
[158] Committee on Reforms of Criminal Justice System "*Committee on Reforms of Criminal Justice System Report*" (vol I, 2003)151.

In *Zahira Habibullah Sheikh v. State of Gujarat*[159], the apex Court after discussing the issue of 'hostile witnesses' in India highlighted the importance of witness protection for the victory of truth and justice in the Courtroom in the following manner:

"There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to a mockery."

In 2006, the 198th Law Commission Report[160] suggested for the introduction of Witness Protection Programmes in India like other counties in the world, but weighed that such Programmes may be restricted to "serious offences". It also attached a Draft Witness Protection Bill as an annexure to the Report. However, this Bill was not considered for adoption. The Criminal Law (Amendment) Act, 2005 inserted Section 195A to the Indian Penal Code, which penalizes any "person who threatened witness to give false evidence".

There were several instances like the Jessica Lal murder case, Sohrabuddin Sheikh case and Asaram Rape Case, where a number of witnesses turned hostile due to threats and intimidation. In 2015, the Delhi Government formulated Delhi Witness Protection Scheme, 2015 and became the "first State in India to notify a witness protection scheme".[161]

A Witness Protection Bill was introduced in the Lok Sabha in 2015, but as no consensus was formed with the State Governments and UT administrators, the Bill could be passed. So, there were a number of attempts by the Judiciary, Legislature and Executive to provide for the witness protection in criminal cases. However, there was no comprehensive law or Scheme in India at the Central Level, which could "address the issue of witness protection in a holistic manner."

---

[159] [2006] 3 SCC 374.

[160] Law Commission of India, *198th Report on Witness Identity Protection and Witness Protection Programmes* (Law Com No 198, 2006).

[161] Pragya Kaushika, 'Delhi government notifies witness protection programme' *The Indian Express* (New Delhi, 31 July 2015) <https://indianexpress.com/article/cities/delhi/delhi-government-notifies-witness-protection-programme/> accessed 2 June 2022.

To fill the gaps of inadequacy of a uniform witness protection regime in India, Witness Protection Scheme, 2018, prepared by the Ministry of Home Affairs was adopted by the Government of India. This Scheme was validated by a Division Bench of the Supreme Court of India in the landmark case of *Mahender Chawla v. Union of India*[162]. This case was a PIL filed under Article 32 of the Indian Constitution, for the protection of witnesses in rape cases. The Court analysed the provisions of the Scheme and concluded it to be a *"beneficial and benevolent scheme."* It said that there was an immediate need for a legislation for witness protection regime. Therefore, it declared the Witness Protection Scheme, 2018, *as law under Article 141 of the Constitution till a suitable law is framed."*

In the recent years there has been a sharp rise of terrorism and organized crimes. In these grave offences, witnesses play a very vital role in conviction of the perpetrators. But the vulnerable witnesses face serious danger to their lives and face intimidation by the criminals. The Witness Protection Scheme formulates a uniform witness protection regime for the country, so that the witnesses can fearlessly come before the Courts and testify against the wrongdoers. In this way, due to proper convictions, justice is delivered and the trust and faith in the Judiciary is restored in the society.

The importance of the Witness Protection Scheme can be realized as till now no such legislation has been passed by the Parliament of India specifically dealing with witness protection. Hence, at present this Scheme is the "law" for witness protection in India.

[162] [2019] 14 SCC 615.

5.2. Important Features of the Scheme

1. **Scope of the Scheme:**

   The Scheme defines a "witness" as any person "*who possesses information or document about any offences."* But it does not intend to provide witness protection in all criminal cases. The scope of the scheme has been restricted to the "offence" defined in Clause 2 (i), which includes offences punishable with death or imprisonment up to 7 years and above and offences punishable under Section 354, 354A, 354B, 354C, 354D and 509 of the IPC. Therefor the ambit of the Scheme is to provide witness protection in heinous and grave offences, where there could be immediate threat to the lives of the witnesses and there are likely chances for them to turn hostile.

   The Competent Authority under the Scheme means a Standing Committee in each district, which would be compose of District and Sessions Judge as the Chairperson, the Head of the Police of the district as Member and Head of Prosecution of the district as its Member Secretary. It has the power to issue a Witness Protection Order, which explains the witness protection measures to be adopted in a case.

   Interestingly, the definition clause is wide enough to include a 'live-in partner' under the definition of a family member. This is a new addition, according to the changes in the society in India, as earlier, protection was not guaranteed to a 'live-in partner.'

2. **Categorization of Witnesses:**

   Clause 3 of the Scheme classifies witnesses into 3 categories- 'A', 'B' and 'C.' The basis of this classification is Threat Perception. A Threat Analysis Report (herein referred as 'TAR') is formulated by the Head of the Police of the District investigating the case, which contains the nature and extent of threats. TAR categorizes the witnesses considering the threat perception, and accordingly the witnesses are given protection measures.

The three categories have been organized in the descending order of the gravity of the threats received by the witnesses and their family members received during investigation or trial or even after that. The following three categories have been established:

(i) Category 'A'- when the threat extents to the *life of the witnesses and their family members.'*

(ii) Category 'B'- when the threat extends to their *safety, reputation and property.*

(iii) Category 'C'- when the threat is moderate and extends to their *harassment or intimidation.*

3. **Witness Protection Fund:**

The 'financial security' has been guaranteed to the witnesses as a protection measure under the Scheme. "Witness Protection Fund" has been constituted for bearing the expenses incurred for the implementation of Witness Protection order passed by the Competent Authority. Under Clause 4, it has been stated that this Fund shall be operated by the Ministry or Department of Home under State/ UT Government. The Funds would be comprised of four sources- "a Budgetary allocation in Annual budget of the State Government, amount received from the costs imposed by the Courts or Tribunals, donations and funds contributed under Corporate Social Responsibility."

4. **Witness Protection Measures:**

The Scheme provides for a number of witness protection measures that have be adopted. An important feature of these measures is that they are for a temporary period of up to 3 months. The types of these witness protection measures can be classified in the following three categories:

(i) *General Protection Measures:*

Clause 7 deals with these types of protection measures which may be ordered by the Competent Authority but *"should be proportional to the threats received by the witnesses."*

It is a very wide provision and includes various measures like:

"(1) In witness's home, security devices, like CCTV, alarms, security doors, etc. to be installed.

(2) Temporary change of residence of the witness to a nearby place or town.

(3) Provisions for escort to and from the Court and conveyance for the date of hearing.

(4) *In-camera* trials to be conducted.

(5) Usage of 'specially designed vulnerable witness Court rooms' which have special arrangements like live video-links and screens.

(6) Ensure expeditious recording of disposition during trial on a day-to-day basis without adjournments.

(7) Awarding financial aids or grants to witnesses from 'Witness Protection Fund' for relocation and starting a new profession."

(ii) *Protection of Identity:*

An application could be filed to the Competent authority through its Member Secretary for the protection of identity. The Member Secretary will then call for TAR and the Competent Authority will examine whether there is a necessity for an identity protection order. Once it is passed, "it is the duty of Witness Protection Cell to protect the identity of the witness or his family members."[163]

(iii) *Change of identity:*

Clause 10 states that a new identity can be conferred on the witnesses by the Competent Authority on the basis of the TAR. This new identity means that new name, profession, parentage and supporting documents will be issued by the Government, without hampering the existing rights of the witnesses.

[163] Witness Protection Scheme 2018, cl 9.

(iv) *Relocation of witnesses:*

The Competent authority on the request of a witness and after considering the TAR, can take a decision for the relocation of witnesses. An order can be passed to relocate the witnesses to a safer place in India keeping in view the welfare of the witnesses. The expenses would be borne from the Witness Protection Fund.[164]

5. **Procedure:**

(i) *Filing of a "Witness Protection Application"*

According to clause 2(l) of the Scheme, a Witness Protection Application can be filed before the Competent Authority through its Member Secretary. The following people are eligible to file the application:

- Witness
- Family members of the witness
- Counsel of the witness
- IO/SHO/SDPO or Jail Superintendent concerned.

  This application has to be filed in the prescribed form as appended to the Scheme along with supporting documents.

(ii) *Preparation of the "Threat Analysis Report":*

The Member secretary shall forward the application to the ACP/DSP in charge of the concerned Police Sub-Division for a Threat Analysis Report.[165] TAR shall categorize the threat and suggest protection measures. It shall be expeditiously prepared and sent to the Competent Authority within 5 days of the receipt of the Order.

[164] Witness Protection Scheme 2018, cl 11.
[165] Witness Protection Scheme 2018, cl 6 (a).

(iii) *Hearings by the Competent Authority:*

The Competent Authority shall interact in person or "by electronic means with the witness or/and his family members"[166]. It shall conduct all the hearings in camera, and maintain confidentiality.

The Witness Protection Order "shall be implemented by the Witness Protection Cell of the State/UT or the Trial Court."[167] The responsibility of implementation of the Order is on the Head of the Police of the concerned State/UT, but if the Order is for the change of identity or re-location, the duty is cast upon the Department of Home of the State/UT. The application has to be disposed in a time-bound manner.

(iv) *Monitoring of the Order:*

According to clause 8, the Competent Authority shall review the Witness Protection Order on a quarterly basis based on the monthly Follow-up Report submitted by the Witness Protection Cell.

(v) *Review Application:*

The aggrieved party, i.e., either the witnesses or the police authorities may file a review application "within 15 days of passing of the Order by the Competent Authority."[168]

5.3. Issues associated with the Scheme:

1. **Protection Measures provided only for a 'temporary period':**

Clause 7 of the Scheme mandates that *"the witness protection measures shall be ordered for a duration not more than 3 months at a time".* This 3-months cap is a very unreasonable requirement, considering the inordinate delays in the completion of criminal trials in India. Indian Judiciary is flooded with pending cases, and it takes long years for justice to be delivered.

[166] Witness Protection Scheme 2018, cl 6 (e).
[167] Witness Protection Scheme 2018, cl 6 (h).
[168] Witness Protection Scheme 2018, cl 15.

According to the '*National Judicial Data Grid'*, there are 136801(42.77%) criminal case pending in the District and Taluka Courts of India in the year 2021-2022.[169] In India, it takes years for a criminal trial to be successfully completed and reach to a verdict. Therefore, if witness protection is just provided up to 3 months, it practically means the witness is unsafe after this time limit or has to again and again apply for protection after the time-limit expires.

2. **No provision for 'penalties':**

As Witness Protection Scheme was originally formulated as a Scheme and not a Statute, there are no provisions for penalties for the violation of the witness protection measures. This is a loophole, due to which there cannot be an effective enforcement of the provisions of the Scheme. With the provisions lacking legal sanctions, they are just like hollow instructions. For instance, even if the confidentiality of the information of the witnesses is compromised, punishment would not be attracted under this Scheme.

3. **Categorization of Witnesses:**

The Categorization of Witnesses under Clause 3 into three categories 'A', 'B' and 'C' on the basis of "Threat Perception" is based on a very vague and ambiguous ground. The basis of classification is not objective, but very subjective. It opens a wide scope of interpretation like what would be a 'moderate threat' or 'harassment' for a witness to fall under Category C?

It gives a 'very wide discretion' to the Police authorities to do the categorization. This power may be misused by the police authorities, who may be corrupt or prejudiced, especially in high profile cases. There is no monitoring mechanism to evaluate the authenticity of the 'Threat Analysis Report' submitted by the Police.

[169] National Judicial Data Grid (District and Taluka Courts of India)' (*National Judicial Data Grid*) <https://njdg.ecourts.gov.in/njdgnew/?p=main%2Findex&state_code=22~18> accessed 2 June 2022.

4. **Overburdening the Police Forces in India:**

The Scheme engages the police officials for the implementation of the measures of witness protection like regular patrolling and providing security to the witnesses. This involves active participation of the police forces. However, as per the latest data issued by the *National Crime Record Bureau*, "*25% of the police posts are lying vacant in India*"[170]. Due to an already overburdened police force, it is not a feasible idea to expect the proper implementation of the witness protection scheme. It would obstruct their everyday functions.

5. **'Weak Enforcement Mechanism' due to Non-adoption by the States and Union Territories.:**

On paper, the Scheme appears to be complete compendium for establishment of a stringent witness protection regime, which guarantees protection to the witnesses in a time-bound manner. However, it has been reduced to a 'paper tiger' due to a very weak enforcement mechanism. Although in the case of *Mahender Chawla*[171], the Supreme Court had declared the Scheme to be a 'law', which has to be enforced across all the States and Union Territories of India, many States and Union Territories have not adopted the Scheme. Hence, due to this, the Scheme is implemented only in letter, but not in spirit. In 2019, the Bombay High Court reprimanded the Maharashtra Government for its omission to implement the witness protection programme despite its order.[172] Similarly, the Allahabad High Court also criticised the State Government and that states that "*in truth the Witness Protection Scheme, 2018 is not being properly implemented by the State respondents."* Recently, the Madras High Court in a case observed that: *"Though the Witness Protection Scheme, 2018 has been evolved in the year 2018, still the system is not providing confidence to the witnesses to come out with the truth as against the hard-core criminals."*

[170] Nishtha Nikhil Gupta, 'THE WITNESS PROTECTION SCHEME IN INDIA' (*IJLPP*, 20 April 2019) <https://ijlpp.com/the-witness-protection-scheme-in-india/> accessed 2 June 2022.
[171] [2019] 14 SCC 615.
[172] FPJ Bureau, 'HC pulls up State govt over witness protection scheme' *The Free Press Journal* (1 June 2019) <https://www.freepressjournal.in/mumbai/hc-pulls-up-state-govt-over-witness-protection-scheme> accessed 2 June 2022.

6. **Paucity of funds with the State Governments:**

In India, States are 'running out of funds.' According to a Study published by the Hindustan Times in 2020[173], state finances are in a precarious position. It found that *"dependency of States on the Centre for revenues has increased with the share of the revenue from own sources declining from 55% in 2014-15 to 50.5% in 2020-21."* The State Witness Protection Fund created under the Scheme is composed of the Budget allocation of the Annual Budget by the State Government. As there is already a paucity of funds with the State Government, it is very difficult to allocate funds specifically for witness protection. Also, there is no mandatory provision for the enforcement of the funds for the Witness Protection and lacks a sanction if the States do not allocate budget for the Fund.

7. **Corruption:**

According to the '*Corruption Perceptions Index*' (2021)[174] released by Transparency International, India ranked at 85th position out of 180 countries. It is evident from the statistics that India is one of the most corrupted nations in Asia. The bribery rate is as high as 39% in India. The *"use of personal connections was largely made in dealings with the police (39%)."*[175]

From the preparation of Threat Analysis Report to the implementation of the Scheme, the police administration plays a vital role in bringing the witness protection regime into reality. Wide discretion and powers have been granted to the police. But these powers can be misused by the Police officials by taking bribes and revealing the identity of the witnesses to the rich and the powerful people. This hinders the actual objective of witness protection and leads to miscarriage of justice.

[173] Avani Kapur and Udit Ranjan, 'Indian states are short of money. They need help' *The Hindustan Times* (17 May 2020) < https://www.hindustantimes.com/analysis/indian-states-are-short-of-money-they-need-help/story-PiS7gwc1dxpuJZCZqSdJiO.html> accessed 2 June 2022.

[174] Transparency International, '2021 CORRUPTION PERCEPTIONS INDEX' (*Transparency,* 2021) <https://www.transparency.org/en/cpi/2021> accessed 3 June 2022.

[175] News Desk, 'India most corrupt country in Asia' *The Express Tribune* (25 November 2020) <https://tribune.com.pk/story/2273544/india-most-corrupt-country-in-asia> accessed 3 June 2022.

8. **Poor Infrastructure of the Lower Courts:**

There is a lack of proper infrastructure in the Lower Courts in India. Recently, the Chief Justice of India N. V. Ramana has raised this issue that there are many districts in India, where there are not even Court buildings. He said that *"Courts in India still operate from dilapidated structures, without proper facilities. Such a situation is severely detrimental to the experience of litigants and lawyers."* [176]

The Scheme mandates that the Courts should have proper facilities like "Specially designed Vulnerable Witness Court Rooms with special arrangements like live-video links, one-way mirrors, screens, separate passages for witnesses and accused". In a country, where there is no infrastructure even for the Court buildings, provision for all these facilities is a utopian idea too far-fetched from actual reality.

9. **No provision for 'Online Witness Protection'[177]:**

With the advent of technology, 'digital space' has become a precarious arena for cybercrimes. The perpetrators misuse this platform as their identities are difficult to decipher. Witnesses could be face online harassment and threats, due to which they might turn hostile and reluctant to give testimony. Their identities could also be traced by the hackers. Although the Scheme gives a very wide discretion to the Competing Authority to adopt "any other form of protection measures considered necessary," there is no specific express provision for tackling the online threats to the witnesses.

10. **Lack of Awareness:**

Clause 12 of the Schemes directs the States "to give wide publicity to the Scheme" and inform the witnesses about it. However, the ground reality is not the Public in not apprised about this Scheme. There is lack of awareness among the people about the existence of this Scheme. The marginalized and vulnerable groups suffer the most and fall prey to the clutches of the perpetrators, who threaten them and dissuade them from given testimonies.

---

[176] Press Trust of India, 'CJI N V Ramana rues lack of infrastructure in lowers courts in country' *Business Standard* (New Delhi, 23 February 2022) <https://www.business-standard.com/article/current-affairs/cji-n-v-ramana-rues-lack-of-infrastructure-in-lowers-courts-in-country-122022301452_1.html> accessed 3 June 2022.

[177] Dr. Girish Abhyankar and Anindita Saha, 'Security of Witness in Criminal Justice System: Critical evaluation of the Witness Protection Scheme 2018' (2021) 4 (4) IJLMH < https://www.ijlmh.com/paper/security-of-witness-in-criminal-justice-system-critical-evaluation-of-the-witness-protection-scheme-2018/> accessed 3 June 2022.

CHAPTER 6- THE ROLE OF JUDICIARY IN PROTECTION OF WITNESSES IN INDIA

1. ***Bimal Kaur Khalsa v. Union of India***[178] **(1987):**

This judgment delivered by the Punjab and Haryana High Court dealt with the constitutional validity of Section 16 (2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987, which gave the Designated Court the discretion to "protect the identity of the witnesses." The High Court upheld the validity of this provision and discussed the issue of witness protection in criminal trials. It adopted a 'restrictive approach' towards witness protection by claiming that neither the Court nor the Government could provide total safety to the witnesses. It said that the evidence given by the witnesses was a 'public duty', which they are bound to perform, but 'at some risk' to themselves. However, the decision is very significant as it is one of the earliest cases which discussed about the measures of witness protection in India. The High Court suggested various measures which the Court can adopt for safeguarding the witnesses like:

- "Ensure that the identity of a witness is not given publicity by the media.
- In Public Record, he is mentioned AS PW1, PW2, etc. and the documents identifying his identity is kept confidential in a sealed cover and not revealed to the public.
- Allow shielding of the witness from public gaze when brought before the Court Room."

But the Court also said that the *"Court while keeping the identity of the witness secret would disclose the identity to the accused before the trial commences so that he has an effective opportunity of cross-examining the witness."*

[178] [1988] 93 Punj LJ 189.

2. ***State of Punjab v. Gurmit Singh***[179] **(1996):**

In this case, the Prosecutrix was a young minor girl who alleged gang-rape and she was also the sole witness of the incident. The Trial Court had acquitted the accused on various grounds, *inter alia*, that there was no independent corroboration of her testimony. On appeal, the apex Court overturned the holdings of the Trial Court and declared the guilt of the accused. It reprimanded the Trail Court for showing insensitivity to the rape victim.

The Supreme Court held that in the cases of sexual assault, "the sole testimony of the victim can be relied upon by the Courts if there are compelling reasons", without any need for corroboration. It relied on *State of Maharashtra v. Chandraprakash Kewal Chand Jain,*[180] which held that *"a prosecutrix of a sex offence is a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence."*

This judgment is very important as it holds that the victim of a sexual offence is a competent witness, whose sole testimony may be relied upon for convicting the perpetrators. The Court explained the importance of the exclusion to the general rule of 'open trial' in rape cases. The exception has been incorporated under Section 327 (2) of the CrPC, which makes it mandatory for the proceedings of rape trials to be conducted *in camera.* Section 327 (3) prohibits *"any person to print or publish any matter in relation to any such proceedings except with the previous permission of the Court."* It emphasized on certain measures that need to be adopted to protect the rape victim, who is also the sole witness in sexual offences. These measures are:

- "The Courts shall conduct the trials of the rape cases in camera. This would safeguard the self-respect of the victim and prevent the victim from being reluctance to testify.
- It would be unlawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the Court to prevent embarrassment caused to the victim.
- It would be preferred that Female Judges try the cases of sexual assault.
- The Courts should maintain the anonymity of the victim by not disclosing the name of the prosecutrix in their orders."

[179] [1996] 2 SCC 384.
[180] [1990] 1 SCC 550.

3. *Swaran Singh v. State of Punjab*[181] (2000):

This case was an appeal against the conviction of the appellants by the High Court for the murder of two people. During the trial, more than 50 prosecution witnesses turned hostile and were won over by the opposite party. The Supreme Court affirmed the conviction awarded to the appellants relying on the statements of 7 witnesses. The concurring judgment of Justice D.P. Wadhwa is very relevant as it reveals the predicaments which the witnesses face in criminal trials. He highlighted that the foundation of a criminal case is based upon the evidence furnished by the witnesses "whether it is direct evidence or circumstantial evidence." Despite the vital role played by the witnesses, they themselves become the victims of harassment. A witness faces various instances of harassment and intimidation, which begin before the trial and continue till its completion. They are:

- "The witnesses are intimidated, abducted, maimed and bribed.
- They are ill-treated at the Courtrooms.
- They are not even provided with basic facilities in Courts like a place to sit and a glass of water.
- After long waiting, they realize that the case has been adjourned.
- They are subjected to prolonged examination and cross-examination.
- They are provided with appropriate diet money."

In this case, the plights of the witnesses in India have been brought to light by Justice D.P. Wadhwa. It exposes the ground reality of the plights which the witnesses face, due to which they refuse to give evidence before the Court. The absence of protection measures to the witnesses ultimately leads to miscarriage of justice, especially in criminal cases.

[181] [1996] 5 SCC 501.

4. ***Neelam Katara v. Union of India***[182] "**Nitish Katara Murder Case**" (**2003**)**:**

This public interest litigation was filed under Article 226 before the Delhi High Court by the mother of the deceased. This high-profile case dealt with the murder of Nitish Katara, who was murdered by Vikas Yadav, who was the son of a Member of Parliament. The prime witness of this 'honour killing' was Bharti Yadav, the lover of the deceased. But she along with other witnesses turned hostile. This case is an example of how the witnesses turn hostile when they have to testify against powerfully strong accused due to threat to their lives.

The Delhi High Court took up the issue of 'witness protection' as a matter of public importance. It stressed on the issue of the witnesses being subjected to harassment, intimidation and allurement at the hands of the accused or his accomplices Due to this reason the witnesses do not come forward to testify without fear or favour before the Courts. This results in the collapse of the foundation of the administration of justice. There cannot be an 'escape route' by the criminals, especially in heinous cases to get away scot free by turning the witnesses hostile by illegal means.

The High Court gave a global perspective of the witness protection in various countries and cited the Statues enacted in Australia, Canada and the United States of America for witness protection. It cited the case of *Vishaka v. State of Rajasthan*[183], which observed that *"in the absence of domestic law occupying the field, any international convention not inconsistent with the fundamental rights and the harmony with its spirit may be read into the municipal law."*

It admitted the practical limitation "financial constrains" in India, due to which it was not feasible to have a Witness Protection Programs on a large scale like other countries. To make a start, the Delhi High Court issued 'Witness Protection Guidelines' until a suitable Legislation is brought on the Statute book. According to these guidelines, a witness may request the Competent Authority, i.e., the Member Secretary, Delhi Legal Services Authority to extend police protection to him.

[182] [2003] SCC OnLine Del 952.
[183] [1997] 6 SCC 241.

According to these guidelines, the Competent Authority was given the power to consider various facts like nature of the risk to the security of the witness, the importance of the witness and the costs for providing police protection. The guidelines covered offences punishable with death or life imprisonment. Significantly they were not confined to 'cases of rape, or sexual offences or terrorism or organized crime'. Duty was cast on the police to spread awareness about these 'Witness Protection Guidelines' while recording statement of the witness under Section 161 CrPC and to provide protection to the witnesses after the Competent Authority directed them to.

This high-profile case is an illustration of situations when the witness protection becomes absolutely necessary. When the witnesses, who are common people stand against politically strong accused in criminal trials, due to fear of danger to their lives do not stand with the truth. This is when the importance of witness protection is realized, especially in grave offences, where the accused occupies power in the form of position or wealth. The guidelines issued by the Delhi High Court were the first guidelines to be issued in India for witness protection. They were the beginning of a new ray of hope for the witnesses to fearlessly testify against the accused before the Courts. However, the major drawback of these guidelines was that they were just confined to providing police protection to the witnesses, which is only one aspect of witness protection framework. There was no inclusion of safeguarding the identities of the witnesses and provisions for financial support.

5. *State of Maharashtra v. Dr. Praful B. Desai*[184](2003):

This was a case of 'medical negligence' in which the issue of interpreting Section 273 of the CrPC came before the Supreme Court of India. The bone of contention was whether in a criminal trial evidence could be permitted through video conferencing or not. In this case, a witness Dr. Greenberg, who was in the Unites States was not ready to return to India to give evidence. By applying the 'principle of updating construction' the Section 273 of the CrPC, the Court interpreted that presence was not just the physical presence but can also include presence through video conferencing. Thus, it directed the Magistrate to record the evidence of Dr. Greenberg through the virtual mode. The Court suggested certain measures that must be adopted when the evidence is furnished by the witnesses through 'video conferencing'. These are:

- "It is the duty of the officer who has been deputed to so record evidence to fix time for recording the evidence, after consulting VSNL, who would suggest a convenient time for video conferencing with a person in USA.
- The Respondent and his counsel to attend the conferencing, otherwise the Magistrate will take action to compel their attendance.
- The deputed Officer will administer the oath.
- An officer would have to be deputed, either from India or from the Consulate/Embassy in the country where the evidence is being recorded, who will ensure that there is no other person in the room where the witness is sitting whilst the evidence is being recorded.
- It would be advisable, though not necessary, that the witness be asked to give evidence in a room in the Consulate/Embassy.
- As the evidence is being recorded on commission that evidence will subsequently be read into Court. If on reading the evidence the Court finds that the witness has perjured himself, just like in any other evidence on commission, the Court will ignore or disbelieve the evidence.
- The officer deputed will ensure that the Respondent, his counsel and one assistant are allowed in the studio when the evidence is being recorded. The officer will also ensure that the Respondent is not prevented from bringing into the studio the papers/documents which may be required by him or his counsel. We see no substance in this submission

[184] [2003] 4 SCC 601.

that it would be difficult to put documents or written material to the witness in cross-examination. It is now possible, to show to a party, with whom video conferencing is taking place, any amount of written material.

- The concerned officer will ensure that once video conferencing commences, as far as possible, it is proceeded with without any adjournments."

This judgment protects the interests of the witnesses, who due to reasonable causes cannot be physically present in the country to give evidence. By allowing testimony through 'video-conferencing' under Section 273, the Supreme Court has shielded the interests of the witnesses. The arrangements suggested by the Court are safeguards provided to the witnesses, who can testify against the accused, even if they are physically not present before the Courtroom. It was a remarkable decision, which introduced the advancements of technology to the archaic witness testimony framework in India.

6. ***People's Union for Civil Liberties v. Union of India***[185]**(2004):**

In this case, the Constitutional validity of the Prevention of Terrorism Act, 2002 was challenged, including Section 30 of POTA, which stipulated for the "protection of witnesses" by protecting the 'identity of witnesses'. It was argued by the petitioners that non-disclosure of the identity of witnesses was violative of Article 21 of the Constitution as it denied the right of cross-examination to the accused, impeding the right to fair trial. It was further contended that fair trial included the right for the defence' to ascertain the true identity of the witnesses. However, on the other hand, the Respondent contended that the protection of witnesses under Section 30 of POTA protected the right to life and liberty of the witnesses, guaranteed under Article 21 of the Constitution of India. This provision is necessary for the protection of witnesses in grave offences like terrorism in which without such protection, they would not muster courage to give evidence against the accused. The Court validated the constitutionally validity of the provision and reasoned that anonymity of witnesses would be justified in special cases of heinous and grave offences like terrorism. In such cases, the witnesses due to jeopardy to their lives or of their family members would step down from giving evidence against the accused. This would result in hampering the interest of the public too as there would be no effective prosecution of the terrorist offences if

[185] [2004] 9 SCC 580.

the witnesses do not give evidence fearlessly. Section 30 (2) required the Special Court to be satisfied that the witness was in danger and record reasons in writing. Hence, it adopted a due process mechanism to ensure a fair trial and therefore valid. The Court remarked that *"in our view a fair balance between the rights and interest of witness, rights of accused and larger public interest has been maintained under Section 30."* Thus, this is a significant judgment as it highlights that a 'fair trial' cannot be just understood in the restricted sense of protecting the rights of the accused, but should be looked from a broader vision of protecting the rights and interests for an effective delivery of justice.

7. ***Sakshi v. Union of India***[186] **(2004):**

A PIL was filed under "Article 32" of the Indian Constitution before the Supreme Court by Sakshi, an NGO, raising the issue of rise in sexual offences against women and children in India. It was contended that the definition of 'sexual intercourse' under Sections 375 and 377 of the Indian Penal Code, should not only be restricted to only 'penile/vaginal penetration' but also include 'non-penetrative' sexual intercourse. Unfortunately, the Court refused to give a wider interpretation of the word, and left the Parliament to bring in the changes in the legislative framework.

The Court also dealt with the importance of providing protection to a victim of sexual abuse at the time of recording the statement in court. It reiterated the ratio of *State of Maharashtra v. Dr. Praful B Desai*[187], that the recording of evidence by way of video conferencing is permissible under Section 273 of CrPC.

The apex Court approved the guidelines for protection of victims of sexual offences as laid down in *State of Punjab v. Gurmit Singh*[188] and also supplemented it with additional measures like:

"(1) *In camera* trials as mandated under Section 327 CrPC shall be conducted for the inquiry or trial of offences under sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:

[186] [2004] 5 SCC 518.
[187] [2003] 4 SCC 601.
[188] [1996] 2 SCC 384.

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

(ii) The questions put in cross-examination on behalf of the accused should be given in writing to the President Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing.

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

These three measures of *"screening, putting written questions to witnesses and victims" and sufficient breaks between recording of evidence"* are important for the protection of the vulnerable victim and witnesses as in the presence of the accused, they might be hesitant to give the testimony due to 'fear, shock or trauma.' They are remarkable as they consider the psychological impediments that the witnesses may go through, especially in the cases of sexual offences. The judgment is a very remarkable one on the topic of 'gender justice' in India. It may be criticised that the Court refused to take an activistic role like in *Vishaka and Ors. v. State of Rajasthan*[189] by not filling the legal vacuum of the legislation and not adopting a liberal interpretation. It was not until 2013, when Section 375 was amended and an expansive definition for 'rape' was provided, which included 'non-penetrative sex.' The same approach was incorporated in the Protection of Children from Sexual Offences (POCSO) Act, 2012 for "sexual offences" against children. Nevertheless, the decision is a milestone for providing comprehensive measures for protecting the susceptible victim and witnesses in sexual offences.

[189] [1997] 6 SCC 241.

8. ***Zahira Habibullah Sheikh v. State of Gujarat***[190] "**Best Bakery Case" (2004):**

This was a case of macabre communal killings by a mob that took place by burning Best Bakery in Vadodara. The prime eye-witness of the case was Zahira Sheikh, who lost family members in the incident. She approached the National Human Rights Commission and claimed that during the trial she was intimidated by the powerful politicians to depose falsely and turn hostile. There were also other eye-witnesses, but at the trial they also retracted from the testimonies which they gave during the investigation. Both the Trial Court and the High Court had acquitted the accused. The NHRC filed a Special Leave Petition before the Supreme Court, requested for a fresh trial and argued that when a large number of witnesses have turned hostile it should have raised a reasonable suspicion that the witnesses were being threatened or coerced. The Court developed a very extensive definition of fair trial, which should not be only restricted to protecting the rights of the witnesses but also protect the victim and witnesses.

"Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."

It further laid the importance of the role of the State as a protector of its citizens. For preserving the Rule of Law in the country, under the Constitutional set-up, the State has a duty to protect the life and liberty of its citizens. Therefore, the State is duty bound to shield the witnesses against *"those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty."* It has a paramount role in making sure that in trials, especially in sensitive cases, the witness could depose fearlessly, so that the truth comes out and the wrongdoers are prosecuted. It emphasised on the need of legislative measures to protect witnesses as the need of the hour to ensure a fair trial. Thus, it directed the State of Gujarat to *"ensure that the witnesses are produced before the concerned court, whenever they are required to attend them, so that they can depose freely without any apprehension of threat or coercion from any person."*

[190] [2005] 4 SCC 294.

This case is noteworthy as it demonstrates how witnesses could be intimidated and dissuaded from testifying by the use of 'threats and muscle power.' The judgment is a remarkable one as it shifts the interpretation of a fair trial from only the viewpoint of the accused to witnesses. No fair trial is possible unless the witnesses have the courage to depose against the accused, however powerful he may be. The Rule of Law can only prevail only if the vulnerable witnesses are provided with proper safeguards. It is the legal obligation of the State actors to not only to shield the witnesses but also to ensure a fair trial procedure. In cases, where there is a strong political influence on the witnesses, fear should not trigger the witnesses to step back. They need to be harboured by the State, so that the truth can be revealed and justice be administered in the society. Similarly in the case of *Javed Alam v. State of Chhattisgarh*[191] the Supreme Court had remarked that *"in cases involving influential people the common experience is that witnesses do not come forward because of fear and pressure… which depicts the tremendous need for witness protection in our country if criminal justice administration has to be a reality."*

9. *National Human Rights Commission v. State of Gujarat*[192] (2009):

In this case, the Supreme Court was dealing with the issue of Special Investigation Team (SIT) probe in communal riot cases in Gujarat, where large scale causalities were reported. It touched upon the issue of witness protection in such cases. In 2003, an Order was passed by the Court, which lamented 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 giving protection to the witnesses."* In this judgment, the Supreme Court underscored the importance of protection of vulnerable witnesses, so that there is no miscarriage of justice and their human dignity is guarded. After discussing the global perspective on witness protection programs, the Courts suggested *"setting up separate victim and witness protection units."*

[191] [2009] 6 SCC 450.
[192] [2010] 15 SCC 22.

It passed the following directions for witness protection:

- "A witness who needs protection shall make an application to the SIT, who shall pass necessary orders and after taking all relevant aspects direct the police official/officials to provide the protection to him.
- It shall be the duty of the State to abide by the direction of the SIT in this regard.
- It is essential that in riot cases and cases involving communal factors the trials should be held expeditiously.
- For ensuring that witnesses depose freely and fearlessly before the court, the following steps shall be taken:
    1. Ensuring safe passage for the witnesses to and from the court precincts.
    2. Providing security to the witnesses in their place of residence wherever considered necessary, and
    3. Relocation of witnesses to another state wherever such a step is necessary.
- As far as the first and the second is concerned, the SIT shall be the nodal agency to decide as to which witnesses require protection and the kind of witness protection that is to be made available to such witness. The Chairman of SIT could, in appropriate cases, decide which witnesses require security of the paramilitary forces and upon his request same shall be made available by providing necessary security facilities.
- In the third kind of a situation, where the Chairman, SIT is satisfied that the witness requires to be relocated outside the State of Gujarat, it would be for the Union of India to make appropriate arrangements for the relocation of such witness."

This case illustrates the importance of protection of witnesses in the investigation conducted by the Special Investigation Team of serious crimes like communal riots. The directions of the Supreme Court demonstrate the significance of 'physical protection' in heinous cases.' But the Court refused to give any general directions for witness protection, citing 'practical difficulties in implementation.'

10. *Manu Sharma v. State (NCT of Delhi)*[193] "Jessica Lal murder Case" (2010):

This was a high-profile murder case of Jessica Lal, who was shot dead by Manu Sharma, the son of an influential politician. The High Court convicted the accused after the trial continued for long 7 years. The Supreme Court affirmed his conviction. It is an infamous case which exposes the lacuna of the criminal justice system in India in protecting the witnesses. In the absence of a robust witness protection machinery, a number of key witnesses turned hostile due to threat to their lives. But the Supreme Court reiterated the law for hostile witnesses. It said that: *"where a witness for the prosecution turns hostile, the Court may rely upon so much of the testimony, which supports the case of the prosecution and is corroborated by other evidence."*

The Jessica Lal Murder Case was a landmark case as it upheld Rule of Law in India. Although, it took it took years to unravel the truth in the case, the justice was finally delivered. But one cannot deny the fact that had the witnesses not turned hostile and adequate 'witness protection' was guaranteed to them, justice would have been delivered promptly. In fact, it is an example of 'delayed justice' due to loopholes in the criminal investigation procedure, where the influential accused dominates the susceptible witnesses as 'pawns' for his own motives.

11. ***State v. Sanjeev Nanda***[194] "**BMW Hit and Run Case" (2012):**

This was a hit-and-run case that took place in 1999, when a BMW driven by Sanjeev Nada killed 6 persons and injured one. The accused who was charged under Section 302 of the Indian Penal Code was an influential man. The three prime prosecution witnesses turned hostile. The Court took the opportunity on commenting on the hostility of witnesses in high profile cases. It explained that the witnesses turn hostile *"due to monetary consideration or by other tempting offers, which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law thereby, eroding people's faith in the system."* It highlighted the role of the Courts if the witnesses turn hostile the Courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Section 193 of the IPC, which punishes a person for giving false evidence has

[193] [2010] 6 SCC 1.
[194] [2012] 8 SCC 450.

barely invoked by the Courts. The criminal justice system should not be hampered by hostile witness. Therefore, in the Court upheld the conviction of the accused.

This is another instance to show how due to the absence of an effective witness protection in India, the witnesses are compelled to become 'puppets' of the influential criminals. It also highlights the role of the Courts to prohibit the witnesses from retracting from their original testimony by invoking Section 193 of the IPC. However, the punishment of perjury against hostile is not justifies, when the witness protection measures are not implemented. Otherwise, this would lead to unreasonable punishment of the witnesses, who already are the 'victims' of intimidation by the dominant offenders.

12. ***Suresh v. State of Haryana***[195] **(2014):**

In this case, while addressing the issue of compensation to the victims of crimes, the apex Court of India held that Right of access to justice under Article 39A and the principle of fair trial incorporated in the Indian Constitution "*includes protection to witnesses."* This observation of the Court shows how the 'witness protection' is a Constitutional mandate and the State cannot deprive it from its citizens. Without adequate witness protection methods, not only the Constitutional obligation is breached but also results in failure of justice. The citizenry cannot develop conviction on the judicial system if the trials are unfair, biased or triggered by unwarranted means. For a 'fair trial' to be conducted, the conviction of the offenders is a necessity, which cannot be achieved without the protection of the gullible witnesses.

[195] [2015] 2 SCC 227.

13. *Mahender Chawla v. Union of India*[196] "Asaram Case" (2018):

In 2016, a Public Interest Litigation (PIL) was filed before the Supreme Court under Article 32 of the Indian Constitution regarding the issue of Witness Protection Programme i.e., whether there were such plans in the States or not. While the matter was pending before the Court, the Ministry of Home Affairs submitted a copy of the Witness Protection Scheme 2018 to the Court.

The petition was filed by four petitioners, including Mahender Chawla, who was a prime witness who testified against the self-claimed Godman Asaram and his son Narayan Sai. Both of them were charged with committing rape and sexual assaults in a number of cases. From 2014-2015, they were innumerable attacks on the witnesses who gathered the courage to testify against Asaram.[197] It was alleged "that as many as 10 witnesses have already been attacked and three witnesses have been killed." The witnesses were threatened that they would face dire consequences if they deposed against him. Mahender Chawla, the 'prime witness' of this case was assaulted, but he sustained injuries.[198] These suspicious attacks and deaths of the witnesses, who stood up against Asaram in the Courtroom, was the reason that the petition was filed, with a demand for protection of witnesses. The petitioners requested for a Court monitored SIT or a CBI probe. They contended that the witnesses' right to life, guaranteed by Article 21 of the Constitution was violated. They forwarded the argument that due to threats, intimidation and pressures; the witnesses could not testify in Courts and their right to life was jeopardized.

---

[196] [2019] 14 SCC 615.

[197] Manish Sahu, 'Another Asaram Bapu case witness shot at, seventh attack till now' *The Indian Express* (Lucknow, 18 July 2015) <https://indianexpress.com/article/india/india-others/one-more-witness-in-asaram-case-is-shot-at/> accessed 12 June 2022.

[198] Mumbai Mirror, 'Narayan Sai rape case: Key witness against Asaram's son shot at' *Mumbai Mirror* (14 May 2015) <https://mumbaimirror.indiatimes.com/news/india/narayan-sai-rape-case-key-witness-against-asarams-son-shot-at/articleshow/47275348.cms> accessed 12 June 2022.

This landmark judgment was delivered by a Divisional Bench comprising Justice S Abdul Nazeer and Justice A.K. Sikri. Justice A.K. Sikri beautifully penned down this historical judgment, which is a breakthrough for the Indian criminal justice system. The Court emphasized the role of the witnesses, especially in the criminal trial. It remarked that *"witnesses are important players in the judicial system, who help the judges in arriving at correct factual findings."*

Then after citing and relying on a number of case laws on the subject of hostility of witnesses, the Court listed the various factors, which compelled the witnesses to retract from their previous testimonies. They are:

(i) "Threat/Intimidation.

(ii) Inducement by various means.

(iii) Use of muscle and money power by the accused.

(iv) Use of stock witnesses.

(v) Protracted trials.

(vi) Hassles faced by the witnesses during investigation and trial.

(vii) Non-existence of any clear-cut legislation to check hostility of witness."

The Court explained the consequences of the hostility of witnesses due to the above factors and stated that it results in miscarriage of justice. The criminals go scot free and the faith of public in Judiciary is shattered. This is the reason why the State should step in and bring forth protection to the unguarded witnesses.

It highlighted the role played by the Supreme Court in earlier judgments by taking measures to guarantee 'witness protection'. In these decisions, the apex Court, by adopting the transformative tool of Judicial Activism, devised various measures for safeguarding the interests of the witnesses and ensuring a 'fair trial.' These measures were as following:

(i) "Publication of evidence of the witness only during the course of trial and not after

(ii) Re-trial allowed due to apprehension and threat to the life of witness

(iii) Necessity of anonymity for victims

(iv) Discouraging the practice of obtaining adjournments in cases when witness is present and accused is absent.

(v) Making threatening of witnesses as a ground for cancellation of bail.

(vi) Cross-examination by video conferencing — This is one of the innovative methods devised, which is specifically helpful to the victims of sexual crimes, particularly, child witnesses who are victims of crime as well."

The Central Government after consultation with various stakeholders came up with a 'Witness Protection Scheme' in 2018 and submitted the copy of the draft to the Court. The primary objective of the Scheme was *"to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance to criminal law enforcement agencies and overall administration of justice*" through a series of measures incorporated in the Scheme.

The Court took up this Scheme and gave an in-depth analysis. It applauded the essential features of the Schemes and termed it as a *"beneficial and benevolent scheme which is aimed at strengthening the criminal justice system in this country."* It cited the example of Delhi where four Vulnerable Witness Deposition Complexes were established by the Delhi Judiciary. These complexes had special facilities like *"separate witness rooms, waiting areas, pick and drop of the witnesses and equipped with all facilities of audio-visual exchange."* The Court suggested such Complexes to be established in all districts of the country.

The Bench relied on the case of *Sakshi v. Union of India*[199], which suggested for a legislation for witness protection in India. Thus, it concluded that a Statute which established a witness protection regime was the need of the hour. However, as such a legislation was not in place in India, it declared the Witness Protection Scheme, 2018 to be a 'law' under article 142 of the Indian Constitution till a suitable law is framed.

[199] [2004] 5 SCC 518.

The following four directions were passed by the Supreme Court:

(i) "This Court has given its imprimatur to the Scheme prepared by respondent No.1 which is approved hereby. It comes into effect forthwith.

(ii) The Union of India as well as States and Union Territories shall enforce the Witness Protection Scheme, 2018 in letter and spirit.

(iii) It shall be the 'law' under Article 141/142 of the Constitution, till the enactment of suitable Parliamentary and/or State Legislations on the subject.

(iv) In line with the aforesaid provisions contained in the Scheme, in all the district courts in India, vulnerable witness deposition complexes shall be set up by the States and Union Territories. This should be achieved within a period of one year, i.e., by the end of the year 2019. The Central Government should also support this endeavour of the States/Union Territories by helping them financially and otherwise."

This landmark ruling is a 'watershed' for criminal justice system in India. The Supreme Court of India, played a pro-active role in protecting the rights of the witnesses. Through the transformative mechanism of a 'strong Judicial activism' it changed the course of how witnesses should be safeguarded. It was this PIL that triggered the Government to take immediate action for framing a 'Scheme' specifically for the protection of witnesses. This was the first step in recognizing the importance of protection of witnesses in criminal cases. The vulnerable witnesses had been denied this protection since a long time, despite the judiciary's recommendations time and again in various judgments. The apex Court went a step ahead and filled the legal vacuum by declaring the Scheme as 'a law' and giving it a legal. The approval to the Scheme made it binding on all the States and Union Territories of India. There could be practical impediments in implementing the Scheme, but this judgment is a golden chapter in India's Judiciary and a victory for witnesses.

CHAPTER 7- WITNESS PROTECTION: A GLOBAL PERSPECTIVE

7.1. International Covenant on Civil and Political Rights (ICCPR)

The global community witnessed horrific atrocities during the Second World. Thus, after the end of the War, the United Nations was established in 1945, with the aim of securing international peace and security.[200]" According to the United Nations Charter, 1945, one of the prime objectives of the United Nations is to "reaffirm faith in fundamental human rights." The Universal Declaration of Human Rights (UDHR) was adopted on 10th December 1948 to complement the UN Charter. UDHR enshrines various rights and freedoms that should be guaranteed to all human beings. However, this significant Human Rights Charter was a 'non-binding legal document'. Hence, to give it a legal backing and develop an enforcement mechanism, two separate treaties were adopted in 1966- the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICCPR came into force on 23rd March 1976.

Article 14 of the ICCPR enumerates fair trial rights. Article 14 para 1 mandates that *"everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."* Para 3 deals with a number of rights that an accused should be entitled to in a criminal charge against him. Article 14 (3) (e) guarantees the right of the accused *"To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."* These provisions of the ICCPR stress that the trials should be fair with public hearing by an impartial judicial body. In furtherance of the fair trial principle, the accused enjoys the 'right to examine witnesses'. Thus, witness protection becomes an integral part of a fair trial process so that the rights of the parties are not violated.

[200] The Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) (The UN Charter) art 1.

7.2. International Criminal Tribunal for The Former Yugoslavia (ICTY)

International Criminal Tribunal for the Former Yugoslavia (ICTY) was an *ad hoc* Court established in 1993 by the United Nations to tackle the cases of war crimes in the erstwhile Yugoslavia. It was the "first international Tribunal created by the UN for prosecuting war criminals for breaching international humanitarian law."[201]

Article 15 of the Statute of the International Tribunal for Yugoslavia, 1993, gave the *"judges of the International Tribunal the power to adopt rules of procedure and evidence"*. Article 22 mandated Tribunal to provide in its rules of procedure and evidence for the protection of victims and witnesses, which should provide for the conduct of in camera proceedings and the protection of the victim's identity.

Pursuant to these provisions, ICTY Rules of Procedure and Evidence were adopted in 1994. Rule 34 of the ICTY Rules provides for setting up a "*Victims and Witnesses Section*" under the authority of the Registrar. This special unit consists of qualified and professional staff, with two-fold responsibilities, i.e., to recommend protective measures for witnesses and provide counselling and support for them, in particular in cases of rape and sexual assault.

Rule 75 suggests a number of measures that can be adopted for the privacy and protection of Victims and Witnesses. The significance of this Rule is that it states that these measures should not be inconsistent with the rights of the accused. The measures can be ordered by a Judge or Chamber "*proprio motu"* or on the request of either party, witnesses or Victims and Witnesses Section. These measures are as following:

- "In camera proceedings to be conducted by the Chamber.
- Prevent public or media from disclosing the identity or whereabouts of a witness or persons associated with him. It includes measures like conducting witness testimony through image- or voice- altering devices or closed-circuit television and assignment of a pseudonym to the witness.
- *Closed sessions* to be conducted, i.e., the press and the public be excluded from the proceedings[202] for *safety, security or non-disclosure of the identity of a witness.*
- The Chamber should control the manner of questioning to avoid any harassment or intimidation."

[201] Girish Abhayankar and Asawari Abhayankar, Witness Protection in Criminal Trials in India (1st edn, Thomson Reuters 2018) 29.
[202] ICTY Rules of Procedure and Evidence, Rule 79 IT/32/Rev.50 (1994).

Rule 77 provides for the penalties for the Contempt of the Tribunal. The Tribunal can punish any person *"who threatens, intimidates, causes any injury or offers a bribe to a witness."* The maximum penalty shall be a term of imprisonment not exceeding 7 years, or a fine not exceeding 100,000 Euros, or both.

7.3. Rome Statute of the International Criminal Court

The International Criminal Court (the "ICC") is an international Court constituted in 2002, *"to exercise its jurisdiction over persons for the most serious crimes of international concern."* The jurisdiction of the ICC extends to:

a) "The crime of genocide;
b) Crimes against humanity;
c) War crimes;
d) The crime of aggression."[203]

Article 68 of the Rome Statute of the International Criminal Court 1998 provides for the *"Protection of the victims and witnesses and their participation in the proceedings."* It states that the Court shall adopt measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. It also allows the Court to conduct in camera proceedings and allow evidence by electronic or special means. Special protection should be given victim of sexual violence or a child victim or witness. The Registrar shall set up a 'Victims and Witnesses Unit', with a special staff to take *"protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses"*

Rule 87 of the *Rules of Procedure and Evidence of the ICC*[204] deals with "Protective measures." A Chamber can take various measures to protect the witness like:

- "Holding of proceedings in camera.
- Protect identity and location of the witness from the public or media by issuing orders like expunging the information from public records.
- Testimony of the witnesses to be taken by electronic or special means, which allows use of CCTV, alteration of pictures or voice, videoconferencing and use of social media."

[203] The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9 (Rome Statute) art 5.
[204] ICC Rules of Procedure and Evidence, Rule 87 ICC-ASP/1/3 (2002).

7.4. The United States of America

The Unites States of America has one of the most robust and advanced witness protection programs in the world. "The United States Federal Witness Protection Program" also known as WITSEC was established in 1970 under Title V of the Organized Crime Control Act of 1970, which authorized Attorney General of the United States *"to provide for the security of Government witnesses, potential Government witnesses, and their families."* Now it has been included in the Comprehensive Crime Control Act 1984 under Chapter 224, titled *"Protection of Witnesses."* WITSEC is run by the United States Department of Justice and operated by the "United States Marshals Service' (USMS)". According to the latest U.S. Marshals Service Fact Sheet 2022, *"approximately 19,100 witnesses have been protected since 1971."*[205]

The U.S. Marshals control the activities of 94 federal judicial districts. More than 3,843 Deputy Marshals and Criminal Investigators form the backbone of the agency.[206] One of the responsibilities of the USMS is to operate the Witness Security Program and *"ensure the safety of witnesses, who risk their lives testifying for the government in cases involving organized crime and other significant criminal activities."*[207]

WITSEC covers offenses like organized crime, drug trafficking, any serious Federal or State felony that could result in retaliation against a witness. [208] The programme aims to provide the following witness protection measures[209]:

- "New identities given to the witnesses with authentic documentation.
- Housing, subsistence for basic living expenses and medical care.
- Job training and employment assistance.
- 24-hour protection to all witnesses, while they are in a high-threat environment.
- Organization of counselling sessions for psychological and psychiatric assistance."

---

[205] U.S. Marshals Service, 'Facts and Figures 2022' (Office of Public Affairs, 17 February 2022) <https://www.usmarshals.gov/duties/factsheets/facts.pdf> accessed 12 June 2022.
[206] The U.S. Marshals Service, 'U.S. Marshals Service' (U.S. Marshals) < https://www.usmarshals.gov/careers/duties.html> accessed 12 June 2022.
[207] ibid.
[208]Mark Theoharis, 'What Is the Witness Protection Program?' (Criminal Defense Lawyer) <https://www.criminaldefenselawyer.com/resources/criminal-defense/defendants-rights/what-witness-protection-program> accessed 13 June 2022.
[209] The U.S. Marshals Service, Witness Security Program' (U.S. Marshals) < https://www.usmarshals.gov/witsec/> accessed 13 June 2022.

7.5. The United Kingdom

In the UK there is a nationwide witness protection system which is run by the UK Protected Persons Service (UKPPS), managed by the National Crime Agency (NCA). UKPPS was constituted in 2013, replaces the earlier framework, where witness protection was managed by the local police forces.[210] UKPPS operates independently of police forces in *"providing protection arrangements, and concentrate solely on keeping people safe and helping to bring offenders to justice."*[211]

The Criminal Justice and Public Order Act 1994 provides punishment for the intimidation of any witnesses under section 51 of the Act. Under Section 51, "any person who intimidates, harms or threatens" to cause physical or financial harm to the witnesses shall be punished with "imprisonment for a term not exceeding 5 years or a fine or both" on conviction on indictment. This penal provision is important as it protects the witnesses from any 'potential harm' by punishing the perpetrators. It deters people from threatening the witnesses and makes the criminal procedure witness-friendly. The Youth Justice and Criminal Evidence Act, 1999 under Chapter I of Part II extensively enumerates *"the Special measures directions in case of vulnerable and intimidated witnesses."* A witness in criminal proceeding is eligible for assistance under the Act if at the hearing he is below 18 years of age, suffers from mental disorder or has a significant impairment of intelligence and social functioning.[212]" A witness is also eligible on the grounds of fear or distress about testifying[213] after the Court considers various factors like the nature of the offence, age and background of the witness. The Court may issue 'Special measures' on the application of the witness. These measures include "*screening of witness from the accused,*[214] *evidence by live link"*[215] *, and video recorded cross-examination or re-examination."*[216]

The Coroners and Justice Act, 2009 lays down certain witness protection provisions like issuing of '*Witness anonymity orders*' by the Court. Section 97 (1) defines a witness

---

[210] Owen Bowcott, 'UK-wide witness protection programme to be launched in 2013' *The Guardian* (28 December 2012) <https://www.theguardian.com/law/2012/dec/28/ukwide-witness-protection-programme-2013> accessed 14 June 2022.

[211]National Crime Agency, 'Protected persons' (*National Crime Agency*) <https://www.nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-specialist-capabilities-for-law-enforcement/protected-persons> accessed 15 June 2022.

[212] The Youth Justice and Criminal Evidence Act 1999 (UK) s 16.

[213] YJCEA 1999, s 17.

[214] YJCEA 1999, s 23.

[215] YJCEA 1999, s 24.

[216] YJCEA 1999, s 28.

as "any person called, or proposed to be called, to give evidence at the trial or hearing in question." The Court may pass "*Witness anonymity orders*" by specifying measures that "to ensure that the identity of the witness is not disclosed."[217] It includes measures like removal of the details of the witness from the materials of the Court proceedings, screening and voice modulation of the witness. It also brought in various amendments in the earlier The Youth Justice and Criminal Evidence Act like raising the age of the child witness from 17 to 18[218]. According to the Serious Organised Crime and Police Act 2005, a witness in a court proceeding can be given protection arrangements by a "protection provider" when the person's safety is at risk.[219]

7.6. Canada

Canada has a legislation called Witness Protection Program Act 1996, which is a comprehensive Statute that establishes a "Witness Protection Program" to be administered by the Commissioner and deals with the rights and responsibilities of the officers and witnesses. The Program is administered by the Royal Canadian Mounted Police (RCMP). According to Section 3, the purpose of the Act is to *"to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters."* The admission to the Programme is done by the Commissioner of Police on a recommendation by a law enforcement agency or an International Criminal Court or Tribunal.[220] A "Protection agreement" is signed between the 'protectee' and the Commissioner, which expressly stipulates the rights and obligations of both the parties. Protection may include relocation, accommodation and change of identity as well as counselling and financial support for those or any other purposes in order to ensure the security of a person or to facilitate the person's re-establishment or becoming self-sufficient. The agreement can be terminated by the Commissioner if the protectee requests to terminate the protection or if there is evidence of the contravention of obligations by the protectee. The Canadian Witness Protection regime is unique as it is a 'voluntary contractual agreement' between the Commissioner and the witnesses and binds both of them to certain rights and obligations.

[217] Coroners and Justice Act 2009 (UK) s 86 (1).
[218] Coroners and Justice Act 2009 s 105.
[219] Serious Organised Crime and Police Act 2005 s 82.
[220] Witness Protection Program Act, 1996 (Canada) ss 5 and 6.

7.7. South Africa

The Witness Protection Act, 1998 of South Africa is an extensive legislation that deals with various aspects of witness protection. It constitutes an office called "Office for Witness Protection (OWP)" within the Department of Justice. The Director of OWP, who is appointed by the Minister of Justice is vested with the duty for the *"protection of witnesses and related persons".*[221] The Director-General of the Department of Justice can appoint a person as witness protection officer. The Act gives a simple definition of the word 'witness' as *"any person who gives evidence in any proceedings*.[222]" 'Related person' under the Act means any *"member of the family or household of a witness, or any other person in a close relationship to, or association with, such witness".*[223] Thus, the Act extends protection to two groups- i.e., to the witnesses and related persons, who are called as "protected persons" and the authority responsible for their protection is the Director of OWP. The protection measures include *"re-location, change of identity of, or other related assistance or services"*[224] to the protected persons and *"prohibition of publication of information concerning protected person"*[225]. There are also special protection measures like under Section 8, there is a provision for a 'temporary protection' for a period up to 14 days, if Director or witness protection officer finds it necessary for the safety of such witness or related person. Also, special protection can be imparted to a 'minor' under Section 12. Any witness, who is threatened of his or related person's safety may file an application to the Investigating Officer in a proceeding or any person in-charge of a police station or the Public Prosecutor or any member of the Office.[226] An "application for protection" is prepared and referred to the Director, who may send it to Witness Protection Officer for the scrutiny of the application on merits. The Witness Protection Officer is obligated to prepare a Report within 14 days and submits it to the Director with recommendations.[227] It is the final discretion of the Director to either accept or refuse the application. He can consider various factors, before reaching to his decision, like the nature and extent of the risk to the safety of the witness or any related person and any danger that the interests of the community might be affected if the witness or any related person is not placed under

[221] The Witness Protection Act 1998 (WPA 1998) (South Africa), s (1) (a).
[222] WPA 1998, s 2 (xxiv).
[223] WPA 1998, s 2 (xx).
[224] WPA 1998 s 2 (xviii).
[225] WPA 1998 s 18.
[226] WPA 1998 s 7.
[227] WPA 1998, s 9 (1).

protection.[228] After the approval of the 'application for protection', the Director enters into an agreement with the witness or any interested person, which is called a "Protection agreement." This agreement set out the rights and obligations of the Director and the witnesses. For reasons like when the threat to the protected ceases or if he breaches his obligations, the Director may by a written order discharge protected person from protection. The most remarkable provision of the Act is Section 45, which provides sanctions for the contravention of the Act. The willful or negligent disclosure of the information of the witness or related person in contravention of the Act like his identity or location is punishable by a fine or to imprisonment for a period not exceeding 30 years. A person who makes any false statement or furnishes information that he or she knows to be untrue or misleading, could be punished with a fine or to imprisonment for a period not exceeding 5 years. The Witness Protection framework in South Africa, which is embodied in a comprehensive Legislation is a well-structured attempt to legally enforce witness protection. It vividly encompasses various general and special witness protection measures. The special measures include measures like the 'protection to minors' and 'temporary measures.' The sanctioning provisions are notable as they give life to the provisions of the Act by making them enforceable.

[228] WPA 1998, s 10 (1).

CHAPTER 8- CONCLUSION AND SUGGESTIONS

The significance of witnesses in criminal trials is that they are the pillars of truth on which the foundation of justice is based. In criminal cases, witnesses play a crucial role in unraveling the mysteries of 'truth' as their testimonies can result in the conviction or acquittal of the accused. The tunnel of a criminal trial is riddled with the darkness of truth and lies. A Criminal Court cannot punish an accused unless it has cogent evidence to prove that he is the perpetrator of the offence. The *"evidence of even a single witness"* can change the course of investigation and lead to discovery of unraveled facts. One cannot dispute the fact that witnesses are 'key players' in ensuring an impartial and unbiased trial.

According to the criminal law in India, witnesses are under a legal obligation to give evidence before the Court of Law. They could be summoned by the Court and can be charged with the offence of "perjury" if they give false evidence. It is a significant duty on their shoulders to 'utter truth and only truth.' This the reason why an oath is administered before they give testimony. Despite being a key player in the criminal justice system, the path of a witness from his dwelling to the witness box is riddled with innumerable obstacles.

In India, witnesses are hesitant to give testimonies as they go through a lot of hindrances due to which they either decide not to testify or turn hostile. In cases where the criminal is at a dominant position to manipulate the witnesses, there is an immediate danger to their lives. In such circumstances, the witnesses are coerced and dissuaded from testifying against the culprits. The security of witnesses and their families is jeopardized by these powerful perpetrators, who use "threats, coercion and menace" to intimidate them. In a number of high-profile cases like that of Jessica Lal Case, Best Bakery Case, and Asaram Rape Case, the witnesses were threatened and assaulted, due to which they turned 'hostile.' These are glaring examples where in the absence a 'witness protection' framework in the country, the powerful criminals tried to subdue the vulnerable witnesses. This is a huge loss to the criminal justice system, whose very foundation is based on the evidences through which the Courts can reach to the truth. There are various other factors due to which witnesses in India do not desire to participate in the criminal procedure. They are usually denied 'diet money' for giving testimonies. They face financial distress due to loss of work. Also, due to unnecessary delays and adjournments, they have to travel to the Courts again and again. Even at the

court rooms, they are vexed as there are no arrangements like waiting rooms for them. This distressing state of witnesses leads to lower conviction rates and ultimately the failure of justice.

There were a number of Reports like various Law Commission Reports and Malimath Committee Report, which demanded for introduction of a compact witness protection regime in India. Even the higher Judiciary assumed a 'pro-active' role by issuing various guidelines to ensure that witnesses and their families were protected. Despite these efforts and suggestions, there was no central law or policy that could guarantee witness protection in India. It was lately in 2018, when the Government of India, triggered by the intimidation of witnesses in Asaram rape Case, came up with a Witness Protection Scheme. This was the first step towards recognition of the need for a witness protection framework in India. *Mahendra Chawla v. Union of India*[229] was a landmark judgment delivered by the Supreme Court, which opened a golden chapter for the witnesses in India. The Court through it powerful wield of 'judicial activism' declared the 'Witness Protection Scheme 2018' as a *"law under Article 141 of Indian Constitution till a legislation was passed."* The commendable efforts of the Government and the Judiciary in introducing a new regime for witness protection in India is worth appreciation. These two historical initiatives were expected to change the dynamics of 'witness protection' regime in India. However due to poor implementation of the Scheme and a weak legal enforcement mechanism, the Scheme ended in a fiasco. Although the Scheme is extensive and modern in its approach towards the witness protection, it has several shortcomings. It has no legal backing to its provisions as it was formulated as a Scheme and not as a legislation. There are various practical impediments like paucity of funds, corruption, poor infrastructure of Courts, and overburdening of police forces, which hamper the implementation of this well-drafted Scheme. But this legal vacuum can be filled by introducing a specific legislation- "Witness Protection Act" by the Parliament of India, which can introduce a 'robust and complete witness protection framework' for India. The real mandate of the protection of witnesses can be achieved when the law is properly implemented and all stakeholders-the Governments, Police, Judicial fraternity, media, NGOs and public come together to make 'witness protection' in India a 'living reality.'

[229] [2019] 14 SCC 615.

SUGGESTIONS:

1. Enactment of a Specific Law on "Witness Protection:"

At present, India has a comprehensive "Witness Protection Scheme 2018" in place, but as it is a Scheme, which lacks a legal backing, for instance, there are no provisions for punishments for violating the mandates of the Scheme. This is problematic as it dilutes the requirements for the protection of witnesses, resulting in weak enforcement of the Scheme. Although the Supreme Court has declared this Scheme as a "law", many States have not adopted it "in letter and in spirit." This defeats the very purpose of framing such a commendable Scheme on witness protection.

India has a few provisions in the special laws, which allow certain measures for witness protection, but there is 'no general law' which specifically deals with this topic.[230] Countries like Canada and South Africa have specific legislations which aim at providing witness protection, namely Witness Protection Program Act, 1996 (Canada) and "Witness Protection Act, 1998 (South Africa), respectively. As suggested in various judgments like *Mahender Chawla* case, it is an absolute necessity for India to adopt a specific legislation called "Witness Protection Act" as soon as possible after proper consultation with all the concerned stakeholders like the States, Police, legal fraternity, NGOs, public and other organizations. This statute should be based on the 2018 Scheme with certain modifications and additions and spell out the measures for implementing a proper 'witness protection framework'. It is suggested that it should include the following important provisions:

- '*Psychological Assistance' as a witness protection measure:*

  The 'witness protection measures' of the 2018 Scheme are sufficient enough and should be adopted in the new Law. These measures should include protection and change of identities of witnesses; relocation of witnesses and proper security facilities for them. But it is important to also consider 'psychological distress' that the witnesses go through due to stress or trauma. Therefore, a provision like that in the WITSEC of the United States of America, "*counselling assistance*" should be provided to the witnesses by the professionals as a 'witness protection measure.'

[230] Hannah Divyanka Doss, 'Critical Analysis of the Position of Witness Protection Laws in India' (2021) 7(1) JCIL <https://jcil.lsyndicate.com/wp-content/uploads/2021/02/07.-CRITICAL-ANALYSIS-OF-THE-POSITION-OF-WITNESS-PROTECTION-LAWS-IN-INDIA.pdf> accessed 20 June 2022.

- *Protection of minors*: There should be incorporation of a special provision for Protection of minors like in South Africa.[231] A minor could be given witness protection without the consent of their parents or guardians if the safety of the minor is in danger by the Competent Authority.
- *Duration of Witness Protection:* A major drawback of the Witness Protection Scheme is that under clause 7, the witness protection measures can be availed only up to 3 months at a time. This means that after this temporary period of protection, the witness and his family members are left unsafe on their own. In India, it takes years for the Courts to reach to a verdict, especially in criminal cases. Thus, it is unjust and impractical to put such a temporary cap. The new 'Witness Protection Act' should not adopt clause 7 of the Scheme. Instead, the appropriate time period of the witness protection should be fixed by the Competent authority, which can begin even before the start of investigation. In *Paramjit Kaur v. State of Punjab*[232] the Supreme Court suggested that *"witness protection should be given only till the case is over."* In my opinion, the witness protection can become extremely necessary even after the verdict has been pronounced. In such exceptional cases, where the lives of the witnesses are at peril, the protection should be made available to them even post-trial. Thus, the duration of the 'witness protection' measures should be extended even after the judgment is delivered, considering the severity of the case.
- *Memorandum of Understanding*: A 'Memorandum of Understanding (MOU)' should be mandatorily signed between a witness and the "Witness Protection Agency" which should spell out the rights and obligations of both the parties. The Law Commission of India in its 198th Report had recommended that *"the MOU must contain the broad obligations such as those listed in Canada and South Africa.*[233]*"* In Cananda and South Africa models of witness protection, a 'protection agreement' is signed between the witness and the Director (in South Africa) or Commissioner (in Canada). The main obligation of the witness is to give the required evidence in the proceedings before the Court. The chief duty on the Investigating Agency is to "provide appropriate protection to the witness."

[231] Witness Protection Act 1998 (South Africa), s 12.
[232] [2008] INSC 2038.
[233] Law Commission of India, *198th Report on Witness Identity Protection and Witness Protection Programmes* (Law Com No 198, 2006).

After MOU is signed, the beneficiary can move to the Magistrate for availing the protection under the Act. In case of the violating of the MOU by the witnesses, the protection should be withdrawn.

- *"Online Witness Protection":* In the present era of digital age, social media has become a vital element of our lives. But the issue with the 'digital space' is that it is being misused in a number of ways. The witnesses can become a targeted group on the digital space as their identity could be easily circulated. Without a proper mechanism to regulate content regulated online, witness could be intimidated and harassed online. To address this issue, there should be express provisions in the Act which provide punishments for breach of the rights of the witnesses and there should be accountability mechanism in the form of 'online witness protection' measures like blocking of content.

- '*Stringent punishments'* should be prescribed under the Act for violating the important provisions of the Act. As suggested by the Law Commission[234], there should be a provision for punishment of *"imprisonment of 3 years with fine which may go up to Rs.10,000" for the "breach of security as to identity" of the witnesses*. It will not only lead to proper enforcement by giving 'legal sanctity' to the provisions but also make it obligatory for the States to implement them 'in letter and spirit.'

- *'Right to Appeal'*- There should be a provision, which guarantees a right to appeal of the aggrieved parties to the High Court against the Order passed by the Competent Authority.

[234] ibid.

2. Constitution of an independent 'Witness Protection Agency':

In India, according to the National Crime Record Bureau, *"25% of the police posts are lying vacant in India."*[235] Assigning the tasks of implementation of "witness protection" to police forces is overburdening them with work and can obstruct their regular functions. The conduct of investigation and providing witness protection measures is a "double burden" on the police.

According to the *Corruption Perceptions Index* (2021)[236] released by Transparency International, India ranked at 85th position out of 180 countries. The *"use of personal connections was largely made in dealings with the police (39%)."*[237] As the data suggests, the police may get involved in 'corruption' and turn 'biased' while providing protection to the witnesses. Considering both these practical issues in mind, it is not feasible for India to assign the Police with the implementation of "witness protection law." Instead, in my suggestion, there should be constitution of an independent and impartial Agency called 'Witness Protection Agency', which should be assigned the task of the enforcement and management of the witness protection measures. In Kenya, a "Witness Protection Agency" is operational, which works together with the police and other enforcement agencies to provide special protection to the witnesses. [238]

This 'Witness Protection Agency' should come under the Ministry of Law and Justice of India and should be composed of a 'specially trained task force', constituted specifically for this purpose. There should be adequate 'training and sensitization' of these Special Forces, which should include the usage of the latest modern technology. There should also be representation of women and other vulnerable groups in these Forces. The Agency should also be comprised counsellors, legal advisors and social workers. Nevertheless, this specialized Agency should work *in tandem* with the Police and Judiciary for making the witness protection law a real success.

---

[235] Nishtha Nikhil Gupta, 'THE WITNESS PROTECTION SCHEME IN INDIA' (*IJLPP*, 20 April 2019) <https://ijlpp.com/the-witness-protection-scheme-in-india/> accessed 2 June 2022.

[236] Transparency International, '2021 CORRUPTION PERCEPTIONS INDEX' (*Transparency,* 2021) <https://www.transparency.org/en/cpi/2021> accessed 3 June 2022.

[237] News Desk, 'India most corrupt country in Asia' *The Express Tribune* (25 November 2020) <https://tribune.com.pk/story/2273544/india-most-corrupt-country-in-asia> accessed 3 June 2022.

[238] UNODC Eastern Africa News and Stories, 'Witness Protection Agency celebrates its tenth anniversary at regional conference' (UNODC, 11 November 2021) <https://www.unodc.org/easternafrica/en/Stories/witness-protection-agency-celebrates-its-tenth-anniversary-at-regional-conference.html> accessed 20 June 2022.

3. Funds for implementation of "Witness Protection":

Funding is a major challenge in the implementation of 'witness protection program' in India. The witness protection measures incur heavy expenses for measures like housing, transportation, relocation, etc. A 'Witness Protection Fund' should be constituted for this purpose. Due to paucity of funds with the State Governments, the entire expenditure should not be burdened on the States alone. As suggested by the Law Commission of India in its 198th Report[239], the expenditure for witness protection *"must be borne by the Central Government and State Governments equally, 50% each."* There can be other sources for funding like individual contributions in the form of donations, corporate contribution as a part of 'Corporate Social Responsibility' and funds from international agencies like UNESCO. [240]

4. Reforms in Police administration:

The Police play a very significant role in the implementation of the criminal justice system, especially in protecting the witnesses. The main issue in India is that according to the latest data issued by the National Crime Record Bureau *"25% of the police posts are lying vacant in India."*[241] Thus, the strength of the police forces should be increased and the vacant posts must be immediately filled. Regular Training programs should also be conducted for the police to sensitize them about vulnerable witnesses like women and children.

The Police should inform the witnesses about their right to avail the protection measures. There should be 'bridging of gap' between the police and the public by frequent interactions between them, so that the public is not hesitant or afraid of approaching the police to seek assistance. Another issue is that the police may reveal the identity of the witnesses due to bribery or political pressure. There is an immediate need to keep a check on the 'corruption' that has seeped into the police system in India. Corrupt police officers should be strictly punished and honest ones should be felicitated.

---

[239] Law Commission of India, *198th Report on Witness Identity Protection and Witness Protection Programmes* (Law Com No 198, 2006).

[240] Girish Abhayankar and Asawari Abhayankar, *Witness Protection in Criminal Trials in India* (1st edn, Thomson Reuters 2018) 152.

[241] Nishtha Nikhil Gupta, 'THE WITNESS PROTECTION SCHEME IN INDIA' (*IJLPP*, 20 April 2019) <https://ijlpp.com/the-witness-protection-scheme-in-india/> accessed 2 June 2022.

5. Reforms in Judicial Administration:

In India, the people are hesitant to testify as witnesses before the Courts as there are unprecedented and long days for the completion of criminal trials. Although Section 309 of the CrPC mandates an "expeditious" holding of Court proceedings *"from day to day until all the witnesses in attendance have been examined",* the reality is that there are frequent adjournments and the trials are delayed for years. A solution to this issue is the establishment of 'Fast Track Courts' especially for serious offences, and the 'witness protection' should be guaranteed to the witnesses by these Courts.

The second issue is that of the poor infrastructure of the lower Courts in India. They do not have the basic infrastructure and facilities like CCTVs, separate rooms for witnesses and "Vulnerable Witness Deposition Complexes" as mandated by the 2018 Scheme. As suggested by the Chief Justice of India, N.V. Ramana a "*National Judicial Infrastructure Corporation (NJIC)*" should established to *"develop judicial infrastructure in trial courts.*"[242] The Central and State governments should release their share of funds to NJIC, which would be utilized by the High Courts for "infrastructure developments of the lower Courts." As a part of the 'infrastructure development' initiative, there should be major focus on providing 'proper witness protection facilities' in these Courts like *"Specially designed Vulnerable Witness Court Rooms*" with special arrangements like live- video links, one-way mirrors, screens, separate passages for witnesses and accused.

[242] Bhadra Sinha, 'What is NJIC? Agency to monitor infrastructure development in trial courts, proposed by CJI' *The Print* (23 September 2021) < https://theprint.in/judiciary/what-is-njic-agency-to-monitor-infrastructure-development-in-trial-courts-proposed-by-cji/738593/> accessed 20 June 2022.

6. Awareness:

There is a lack of awareness about 'witness protection' in India, especially among the poor and uneducated masses. Unless the witnesses and their families have the proper understanding of the witness protection framework, they will not come forward to benefit from such programs. Also, it is very important for the Government to develop 'a public trust' and assure the people that through appropriate safeguards, they will not be harmed in any way if they are willing to testify as witnesses before the Courts.

The National Legal Services Authority, State Legal Services Authority and District Legal Services Authorities should cooperate with each other to spread awareness about 'witness protection laws' even to the remotest areas of the country. Media can play an instrumental role in disseminating the information about witness protection through radio, TV programs and social media. The Non-Government Organizations (NGOs) can sensitize the people about their rights of witness protection and encourage the witnesses to give testimonies in the interest of achieving justice.[243] Along with spreading awareness, NGOs can also provide for legal and psychological counselling to the witnesses, which would prepare them to furnish evidence in the Courtrooms fearlessly.

[243] Girish Abhayankar and Asawari Abhayankar, *Witness Protection in Criminal Trials in India* (1st edn, Thomson Reuters 2018)109.

Bibliography

Books:

- Abhyankar G and Abhyankar A, *Witness Protection in Criminal Trials in India* (Thomson Reuters, Legal, 2018)
- Batuk Lal, *The Law of Evidence* (20th edn, Central Law Agency 2014) 1.
- Kelkar R.V., *Criminal Procedure* (Eastern Book Company, 2021)
- Singh A, *Principles of The Law of Evidence* (Central Law Publications, 2016)
- Pandey J.N., *Constitutional Law of India* (Central Law Agency, 2019)
- Rao B.G.R., *Ancient Hindu Judicature* (Ganesh & Co. 1920)
- Kane P V, *History of Dharmasastra* (vol III, 3rd edn, The Bhandarkar Institute Press, Poona, 1993).
- Saeed M, *Commentary on Muslim Law in India* (2008)

Dictionaries:

- *Black's Law Dictionary* (9th edn, 2009)
- *The Oxford English Dictionary* (2nd edn, 1989) vol XX, 464.
- Cambridge Advanced Learner's Dictionary (3rd edn, 2008) 1674.

Reports:

- Law Commission, *Reforms of Judicial Administration* (Law Com Report No. 14, 1958).
- Government of India, *Fourth Report of the National Police Commission* (1980).
- Law Commission of India, *Recommendations for amending various Enactments, both Civil and Criminal (*Law Com No 178, 2001).
- Committee on Reforms of Criminal Justice System "*Committee on Reforms of Criminal Justice System Report*" (vol I, 2003)151.
- Law Commission of India, *198th Report on Witness Identity Protection and Witness Protection Programmes* (Law Com No 198, 2006).

Articles:

- Khan Z A, 'Need for Witness Protection in India- A Legal Analysis' (2015)
- Rahangdale P, '"Witness Protection: An Important Measure for the Effective Functioning of Criminal Justice Administration' (2016) 22 (4) Think India.
- Prasad D, 'Witness Protection in India: Some Issues and Challenges' (2020) XVIII (II) RJPP 114.
- Doss H N, 'Critical Analysis of the Position of Witness Protection Laws in India' (2021) 7 (1) JCIL 77.
- Singh V, 'Witness Protection in India: The Judicial Endeavour' (2016) 4 (1) IJAR 367.
- Chhatwani N, 'Witness Protection in India' (2020) 1 Law Essentials J 2.
- Justice S. S. Dhavan, 'The Indian Judicial System: A Historical Survey' (*Allahabad High Court*) <https://www.allahabadhighcourt.in/event/TheIndianJudicialSystem_SSDhavan.html#sdfootnote74sym> accessed 15 June 2022.
- Dr. Girish Abhyankar and Anindita Saha, 'Security of Witness in Criminal Justice System: Critical evaluation of the Witness Protection Scheme 2018' (2021) 4 (4) IJLMH < https://www.ijlmh.com/paper/security-of-witness-in-criminal-justice-system-critical-evaluation-of-the-witness-protection-scheme-2018/> accessed 3 June 2022.
- Hannah Divyanka Doss, 'Critical Analysis of the Position of Witness Protection Laws in India' (2021) 7(1) JCIL <https://jcil.lsyndicate.com/wp-content/uploads/2021/02/07.-CRITICAL-ANALYSIS-OF-THE-POSITION-OF-WITNESS-PROTECTION-LAWS-IN-INDIA.pdf> accessed 20 June 2022.
- Nishtha Nikhil Gupta, 'THE WITNESS PROTECTION SCHEME IN INDIA' (*IJLPP*, 20 April 2019) <https://ijlpp.com/the-witness-protection-scheme-in-india/> accessed 2 June 2022.

Websites:

- 'Hostile Witness' (*Oxford Reference*) <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095946152#:~:text=An%20adverse%20witness%20who%20wilfully,the%20party%20who%20called%20him.> accessed 10 May 2022.
- Pooja Rai and Mathias Peter Haule, 'The Concept and Historical Background of the Evidence Law' (*Academike,* 20 February 2019) <https://www.lawctopus.com/academike/concept-historical-background-evidence/> accessed June 1 2022.
- Sanjay Hegde, 'Sacrificing liberty for national security' *The Hindu* (22 August 2019) <https://www.thehindu.com/opinion/op-ed/sacrificing-liberty-for-national-security/article29213720.ece> accessed 23 May 2022.
- Aarushi Rajpurohit, 'Nirbhaya Case questioned inefficacy of Juvenile Justice Act' *Socio Legal Corp* (22 July 2021) <https://www.sociolegalcorp.com/commentary/nirbhaya-case-questioned-inefficacy-of-juvenile-justice-act/> accessed 21 May 2022.
- FPJ Bureau, 'HC pulls up State govt over witness protection scheme' *The Free Press Journal* (1 June 2019) <https://www.freepressjournal.in/mumbai/hc-pulls-up-state-govt-over-witness-protection-scheme> accessed 2 June 2022.
- Avani Kapur and Udit Ranjan, 'Indian states are short of money. They need help' *The Hindustan Times* (17 May 2020) < https://www.hindustantimes.com/analysis/indian-states-are-short-of-money-they-need-help/story-PiS7gwc1dxpuJZCZqSdJiO.html> accessed 2 June 2022.
- Transparency International, '2021 CORRUPTION PERCEPTIONS INDEX' (*Transparency,* 2021) <https://www.transparency.org/en/cpi/2021> accessed 3 June 2022.
- Press Trust of India, 'CJI N V Ramana rues lack of infrastructure in lowers courts in country' *Business Standard* (New Delhi, 23 February 2022) <https://www.business-standard.com/article/current-affairs/cji-n-v-ramana-rues-lack-of-infrastructure-in-lowers-courts-in-country-122022301452_1.html> accessed 3 June 2022.

- News Desk, ‘India most corrupt country in Asia’ *The Express Tribune* (25 November 2020) <https://tribune.com.pk/story/2273544/india-most-corrupt-country-in-asia> accessed 3 June 2022.
- G S Bajpai, ‘Crime data in India is short on information on victims and witnesses’ (*The Indian Express,* 28 September, 2019), <https://indianexpress.com/article/opinion/columns/crime-data-in-india-6035032/> accessed 10 May 2022. ‘Hostile Witness’ (*Oxford Reference*) <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095946152#:~:text=An%20adverse%20witness%20who%20wilfully,the%20party%20who%20called%20him.> accessed 10 May 2022.
- ‘Eyewitness Meaning - Legal Definition’ (*World Law Dictionary*) <https://dictionary.translegal.com/en/eyewitness/noun> accessed June 1 2022.
- ‘Examination of Witness’ (*The Free Dictionary*) <https://legal-dictionary.thefreedictionary.com/examination+of+witness> accessed 13 May 2022.
- ‘Examination of Witnesses/ASR’ (*Dr. MCR HRD Institute Module*) <https://www.mcrhrdi.gov.in/splfc2021/week8/2021%20SFC%20%20Witnesses%20and%20Examination%20of%20witnesses.pdf> accessed 10 May 2022.
- ‘Examination-in-Chief’ (*Oxford Reference*) <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095803421> accessed 12 May 2022.
- Joji George Koduvath, ‘Best Evidence Rule in Indian Law’ (*Saji Koduvath Associates* 11 May 2022) <https://indianlawlive.net/2021/07/11/best-evidence-rule-in-indian-law/#:~:text=The%20'best%20evidence%20rule'%20is,primary%20or%20by%20secondary%20evidence> accessed 1 June 2022.
- Pooja Rai and Mathias Peter Haule, ‘The Concept and Historical Background of the Evidence Law’ (*Academike,* 20 February 2019) <https://www.lawctopus.com/academike/concept-historical-background-evidence/> accessed June 1 2022.
- National Crime Agency, ‘Protected persons’ (*National Crime Agency*) <https://www.nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-

specialist-capabilities-for-law-enforcement/protected-persons> accessed 15 June 2022.

- Owen Bowcott, 'UK-wide witness protection programme to be launched in 2013' *The Guardian* (28 December 2012) <https://www.theguardian.com/law/2012/dec/28/ukwide-witness-protection-programme-2013> accessed 14 June 2022.
- UNODC Eastern Africa News and Stories, 'Witness Protection Agency celebrates its tenth anniversary at regional conference' (UNODC, 11 November 2021) <https://www.unodc.org/easternafrica/en/Stories/witness-protection-agency-celebrates-its-tenth-anniversary-at-regional-conference.html> accessed 20 June 2022.