

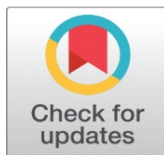
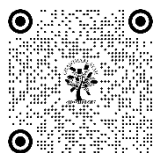
# WITNESS PROTECTION IN INDIA: LAWS AND PRACTICE

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## ABSTRACT

Judicial systems worldwide, whether dealing with criminal or civil matters, are designed to achieve justice through established laws and procedures. Witnesses play a crucial role in trial proceedings by providing evidence. In India, this holds true, with trials heavily reliant on witness testimony to establish facts. However, witness protection laws and practices are still in a developmental stage. The author undertakes an analysis of witness protection in India, examining the laws, practices, and procedures within the judicial system and legislature

## 1. INTRODUCTION

The Constitution of India enshrines a plethora of rights, primarily interpreted under Article 21, which are indispensable for safeguarding the life and liberty of individuals. One such fundamental aspect covered within Article 21 is the principle of a "Free and Fair Trial." While the adage "Justice should not only be done but should also seem to be done" may seem cliché, its significance remains undiminished.

Examining the primary objectives of India's criminal justice system, we find three essential goals: firstly, to safeguard civil society from criminal activities; secondly, to serve as a deterrent for potential lawbreakers; and thirdly, to administer punishment to those who transgress the established code of conduct by committing crimes.

In the system of criminal justice, witnesses are the major stakeholders that make the criminal justice system effective. What they depose in the Courtroom has an immense bearing on the outcome of the judicial proceeding and can sway the finding of the judiciary in one way or another. Whenever a witness comes into the court, he participates in the sacred function of the court to unearth the facts of the matter and ultimately to dispense justice.<sup>1</sup>

<sup>1</sup> Section 8 of *The Oaths Act*, 1969.

For a trial to be classified as a fair trial, it is of utmost importance that every stakeholder in the system performs his or her duty without any bias and does not cause prejudice to any other stakeholder in any manner whatsoever.<sup>2</sup> Here, I can say without any doubt that the part of the witness and the testimony given by them also needs to be strengthened. Many times witnesses have to suffer the flaws of the system of criminal judiciary in the form of inhospitable treatment when in court, repeated adjournments, the inappropriate attitude of prosecution of defense lawyers, etc.

## 2. A STEP TOWARDS PROTECTION BY JUDICIARY

Being aware of the current scenario in which India lacks sufficient measures for Witness Protection, by specifically relating to Protection of witnesses in Asharam Bapu<sup>3</sup> case jurisdiction on a PIL before it, in 2018, the Supreme Court of India approved the country's inaugural Witness Protection Scheme. Hon'ble Court, in concluding, that till such time any of the legislatures within India bring out laws on the lines of witness protection policies, 2018 scheme be deemed as a valid law by virtue Article 141 and 142 of the Indian Constitution for implying this Scheme. The Court emphasized that it should be enforced in its letter and spirit.

This plan of action was framed after consultation with 8 state and union territories, High Courts, the National Legal Services Authority, Police personnel, and the public at large.<sup>4</sup> The principal goal of the instrument, as stated in the action plan or scheme terminology is "....to protect witnesses from intimidation and avoid them being prevented from giving evidence freely due to fear of violent retaliation or other criminal reprisal during an investigation, prosecution, and trial of a criminal offense".<sup>5</sup>

- i. The scheme classifies the witness into three broad categories based on the potential risk to each of them, at any stage of a criminal proceeding and thereafter<sup>6</sup>-
- ii. Category A - It is the most danger-prone category and involves witnesses with their family members who are faced with a risk to their life,
- iii. Category B - This is the second category where witness or his family member received threat to the extent of "safety, reputation or property."<sup>7</sup>
- iv. Category C - This is the least grave category where the witness is at risk of suffering harassment or intimidation.

Section 4 of the Act also provides for setting up a consolidated fund called the "Witness Protection Fund" in which there would be money set out to finance a scheme for bestowing on security of witness. This fund will be kept at state level and annually budget shall be provided to this Fund. It can issue production orders, impose payments as part of a sentence in criminal cases and even solicit grants from other organizations or individuals.

## 3. SCHEME FOR WITNESS PROTECTION

Section 2(c), of the Scheme has established a "competent authority" that includes the District and Sessions Judge, the head of the District's Police Department, and the head of the Prosecution in the District. This authority is granted extensive administrative powers, such as accepting applications for protection and allocating funds for witness protection.<sup>8</sup>

The formulated scheme provides for diverse measures that can be taken up for the sake of protecting witnesses.<sup>9</sup>

## 4. CRITIQUE OF THE WITNESS PROTECTION SCHEME, 2018 AND PROPOSED WAY FORWARD

The Witness Protection Scheme launched in 2018 marks a significant advancement in the timeline of witness protection measures in India. Notably, it held legal weight pending the enactment of specific legislation by either the Indian

<sup>2</sup>Zahira Habibulla, H. Shiekh & Anrs. v. State of Gujrat & Ors. (2004) 4 SCC 158.

<sup>3</sup>What is Witness Protection Scheme? The Indian Express (2018), <<https://indianexpress.com/article/what-is/witness-protection-scheme-supreme-court-5480930/>> (last visited September 11, 2023).

<sup>4</sup>The Witness Protection Scheme, 2018, Drishti IAS, <[www.drishtiias.com/daily-updates/daily-news-analysis/witness-protection-scheme-2018](http://www.drishtiias.com/daily-updates/daily-news-analysis/witness-protection-scheme-2018)> (last visited September 14, 2023).

<sup>5</sup>The Witness Protection Scheme, 2018.

<sup>6</sup>S.3, The Witness Protection Scheme, 2018.

<sup>7</sup>Id.

<sup>8</sup>S.5, The Witness Protection Scheme, 2018.

<sup>9</sup>S.7, The Witness Protection Scheme, 2018.

Parliament or state legislatures. Nonetheless, the Scheme has room for improvement, particularly in addressing certain gaps and enhancing the existing provisions.

Currently, the Scheme places the responsibility of witness protection on the police department. However, given the lack of public confidence in the police, as highlighted in Law Commission reports, there is a need for reassurance. To ensure witnesses feel genuinely secure, a dedicated department, independent from the prosecution department, could be established, akin to structures in the United States.

Furthermore, doing this would prevent over-straining the police in their actions, which is already overburdened with work. The police in India are highly understaffed,<sup>10</sup> and creating a separate wing for witness protection staff would be immensely beneficial. The accountability of a separate wing would also be more as compared to a situation wherein existing police personnel are providing security for the witnesses.

It's important to highlight a significant flaw in the 2018 scheme: the absence of psychological support for witnesses. Testifying in court, enduring intense cross-examinations, and providing testimony in cases involving personal or familial harm can severely impact an individual's mental health and well-being.

Notably, witness protection schemes in countries like Germany and South Africa incorporate provisions for mental support and psychological assistance, especially when required by the witness. A progressive approach would entail future legislation including specific provisions for psychological assistance, particularly in cases of heinous offenses or crimes against children. Additionally, individuals providing psychological support could collaborate with NGOs or other institutions to ensure the effective integration of their services.

Currently, under the 2018 Scheme, the protection can be given to a witness for a maximum of 3 months in a single instance.<sup>11</sup> This needs to be suitably molded so that the competent authority gets sufficient discretion to extend the period in appropriate cases.

Moreover, to alleviate the burden on District Courts and ensure the scheme's efficiency remains intact, appointing a nodal officer for implementing the witness protection scheme or legislation would be advantageous. Additionally, a notable deficiency in the Scheme is the absence of penal provisions, which undermines its effectiveness. If the Scheme is to be legislated, it should include penalties for breaches, particularly concerning the disclosure of protected information such as the identity of witnesses. Unlike the 2015 draft Witness Protection Bill, the 2018 Scheme lacks such penalties, representing a regression. The 2018 program also falls short of giving protective measures for child witnesses. Although the chances of children being induced by monetary considerations, etc. are not palpable, they certainly need to be given special treatment when they are being examined at the stage of investigation or at the time of trial. In this respect, inspiration can be drawn from the United Nations' "Justice in Matters Involving Child Victims and Witnesses in Crime: Model Law"<sup>12</sup>. This model law published in 2009 contains special measures that can be adopted in cases of child witnesses such as sensitization, trained investigators, etc.

In its S.7, the scheme provides for monitoring of emails and telephone calls, however, an ideal witness protection scheme can go a step further and include the other ways in which the internet can be used to attack and prevent attacks on the witnesses. For this purpose, cybercrime cells can be roped in for speedy disposal of instances wherein witnesses receive threats.

A new law on the protection of witnesses can also employ soft tactics like the nudge theory<sup>13</sup> wherein awareness programs are carried out to make the public at large realize the importance of deposing fairly in a court of law. Such measures would serve to empower individuals, reducing their vulnerability to external pressures that might otherwise deter them from providing truthful testimony. Additionally, beyond legal measures offering compensation for witness efforts, individuals should be informed about their rights, such as those outlined in Section 312 of the *Criminal Procedure Code*, 1973, which mandates reasonable compensation for witnesses.

<sup>10</sup>Sriharsha Devulapalli Padmanabhan Vishnu, *India's police force among the world's weakest*, Mint (2019). <[www.livemint.com/news/india/india-s-police-force-among-the-world-s-weakest-1560925355383.html](http://www.livemint.com/news/india/india-s-police-force-among-the-world-s-weakest-1560925355383.html)> (last visited September 18, 2023)

<sup>11</sup> *Witness Protection Safeguarding: The Eyes and Ears of Justice - Litigation, Mediation & Arbitration - India*, <[www.mondaq.com/india/appeals-compensation/914274/witness-protection-safeguarding-the-eyes-and-ears-of-justice](http://www.mondaq.com/india/appeals-compensation/914274/witness-protection-safeguarding-the-eyes-and-ears-of-justice)> (last visited September 20, 2023)

<sup>12</sup>Noorul Mohamed Rashid, *Justice In Matters Involving Child Victims And Witness Of Crime: Model Law And Related Commentary*, United Nations and the Rule of Law, <[www.un.org/ruleoflaw/blog/document/justice-in-matters-involving-child-victims-and-witnesses-of-crime-model-law-and-related-commentary/](http://www.un.org/ruleoflaw/blog/document/justice-in-matters-involving-child-victims-and-witnesses-of-crime-model-law-and-related-commentary/)> (Last visited September 22, 2023)

<sup>13</sup>*Nudge Theory: What is it & how can it be applied to organizations*, lane 4, (2021), <[www.lane4performance.com/insight/blog/nudge-theory-thinking-like-a-nobel-prize-winner/](http://www.lane4performance.com/insight/blog/nudge-theory-thinking-like-a-nobel-prize-winner/)> (last visited September 02, 2023)

Moreover, courts should be granted the authority to protect witnesses proactively, even in the absence of formal applications, provided there is no objection from the witness. In the digital age, it's crucial to update the Scheme to allow for online submission of forms via email or designated portals. This adjustment would expedite the processing of applications, particularly in urgent or high-stakes cases, thereby offering valuable assistance to witnesses.

## 5. CONCLUSION

Based on the laws, practices, and circumstances outlined earlier, it's clear that India has made progress in witness protection; however, notable deficiencies remain. The Hon'ble Supreme Court and several High Courts have pointed out the shortcomings in the justice system's support for witnesses during court proceedings, particularly regarding essential elements such as allowances and police safety.

To address this issue effectively, urgent action is required. Converting the 2018 Witness Protection Scheme into a comprehensive central Act is imperative. The government can initially enforce sections it deems feasible, reserving others for future implementation through notification, citing financial constraints or other reasons.

Moreover, a statutory framework is essential to impose penalties for non-compliance with witness protection measures. The legislation should prioritize witness assistance over mere protection, fostering a supportive environment where witnesses feel confident and dignified when engaging with courts and investigation agencies.

The success of such legislation hinges on the cooperation of all stakeholders. Hence, it's crucial to not only enact change but also communicate it effectively to the public. This would encourage law-abiding citizens to participate actively while compelling wrongdoers to acknowledge the gravity of their actions.

Furthermore, it's imperative to address the limitations of the 2018 Scheme and solicit recommendations from various segments of civil society to ensure the enactment of robust and inclusive legislation.

The core of this research paper can be summed up by a statement from the Hon'ble High Court of Delhi, which highlights the vital importance of witnesses in the justice system: "The foundation of justice relies on witnesses who are willing to testify openly and honestly in a court of law, free from fear or coercion." Therefore, there is an urgent need for legislation on witness protection to fortify the moral foundation of the criminal justice system and enhance public trust.