WITNESS- IN NEED OF PROTECTION - A CRITICAL STUDY OF INDIA, USA, AND UK

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Abstract: The paper discusses the conflict between the accusatorial system and the treatment of witnesses, underscoring the importance of witness protection. Despite constitutional assurances, external pressures often lead witnesses to become uncooperative, casting doubt on the efficacy of the legal system. Current laws lack a holistic approach to address witness challenges, and despite efforts such as the 2015 Witness Protection Bill and the 2020 Victim and Witness Protection Bill, comprehensive legislation is still pending. While recognizing the Supreme Court's endorsement of the Witness Protection Scheme in 2018, the paper identifies gaps in the plan. The main focus of the paper is on the evolution of Indian witness protection jurisprudence, exploring the reasons for witness hostility and its impact on criminal prosecutions. The study also assesses the effectiveness of the 2018 witness protection system in enhancing conviction rates and reducing incidents of uncooperative witnesses, highlighting the pressing need for comprehensive legislation to safeguard witnesses within the Indian legal framework.


I. INTRODUCTION
To combat severe offenses, the justice system must implement effective protection measures for informants, whistle-blowers, and witnesses. Governments must tackle the issues of intimidation faced by informants and witnesses to ensure a just and efficient response to organized crime, terrorism, and other serious offenses. This involves devising methods to shield them from threats, assaults, and reprisals. Since the inception of the judicial system, the primary objectives of courts have been recognized as the discovery, vindication, and establishment of truth. The fundamental principles of a fair trial are inherent in both civil and criminal common law, necessitating a careful judicial balance of conflicting interests during criminal trials. The considerations of the accused, the public, and, to a large extent, the victim must be weighed without losing sight of the public interest in prosecuting offenders.1

Witnesses play a pivotal role in the successful prosecution of crimes as their cooperation with law enforcement and judicial authorities is crucial. They stand as the cornerstone of effective criminal justice systems. To protect the rule of law, witnesses must be protected from the intimidation and physical threats of criminal suspects.2

The adversarial system, which was instituted in India, provided steadfast support to the accused. The prosecution often asserts its role akin to that of an impartial umpire. In such a scenario, the testimony of a third-party witness becomes crucial to ensuring a fair trial for the victim. Witnesses face potential risks from both internal and external influences. Reforms within the criminal justice system can only be viable if adequate protection is afforded to both the victim and the witnesses. The court must conduct criminal proceedings impartially and independently, finding a reasonable middle ground between wrongful conviction and wrongful acquittal.3

3 Shivaji Sahab Rao Bobade v State of Maharashtra, (1973) 2 SCC793
Given that the testimony of an honest witness is fundamental to justice, the law mandates witnesses to make sworn declarations. A witness’s testimony can significantly impact the accused's conviction or exoneration, and even expert opinions do not undermine the reliability of visual witnesses. The impartial and independent testimony of a witness throughout the trial largely influences the speed and duration of the justice served. Witnesses are not obligated to consistently support the prosecution; they must truthfully recount their experiences without fear or coercion, emphasizing free choice and consent.

In India, witnesses face a challenging situation, with reluctance to come forward and testify due to the failures of the criminal justice system. Witnesses are perceived as an intentionally underrepresented group, feeling powerless against the accused party's anger, coercion, and threats to their life and well-being. The situation worsens when witnesses realize that the state is not legally obliged to provide them with security. Despite the lack of legislative measures for witness protection, the prevalence of hostile witnesses in society has led to the formulation of regulations to penalize such behavior.

II. Witness Protection Law in the United States of America

The United States of America is composed of 50 states, each with its written constitution. Witness protection becomes crucial in the face of severe organized crime incidents. The prominence of witness protection in the U.S. grew in the 1970s, emerging as a legally mandated practice integral to the effort to eliminate Mafia-style criminal organizations. Before this period, members of the Mafia adhered to an unspoken "code of silence" referred to as "omertà," which included threats of violence against those who defied the code by cooperating with law enforcement. Important witnesses were lost as a result of the coordinated activities of criminal leaders who were the targets of prosecution, and significant witnesses could not be persuaded to testify on behalf of the state.4 The Organized Crime Control Act was created in the 1970s to provide security for witnesses testifying in instances involving organized crime. The legislation gives the US Attorney General the authority to guarantee protection. The United States offers witnesses security, relocation, and a new identity under the Witness Security (WITSEC) Program.5 For a witness to be eligible for protection under the program, their evidence must be essential to the prosecution's success and there must be no other viable means of safeguarding them.

Subsequently, the Witness Security Reform Act of 1984 was established to address the deficiencies in the witness protection program. This legislation provides relocation services and protection for witnesses during criminal investigations, extending coverage to the immediate family members or those closely associated with them. Additionally, the United States Code incorporates provisions for the safeguarding of witnesses and victims involved in criminal proceedings. Under Title 18 of the United States Code, which delineates crimes and criminal procedure, there are mechanisms in place for the protection of witnesses and victims during federal criminal trials. Part I, Chapter 73, allows for the issuance of a temporary restraining order to prevent harassment of a victim or witness. The protection of witnesses or potential witnesses for the Federal Government or a State Government in any official process in connection with organized crime or other serious offenses is covered in part II, Chapter 224.6 According to the law, the Attorney General may offer protection to a witness. In order to do so, the Attorney General and the witness sign a Memorandum of Understanding (MOU) in which the Attorney General details the witness's obligations and the protection that would be provided. If the witness delivers false testimony or violates the MOU, their protection may be terminated.7 The Attorney General may offer a witness protection package that includes a new name, lodging, moving assistance for their personal belongings, payment for incurred costs, and anonymity regarding their whereabouts and identity.8

The concept of witness protection was initially introduced in 1970 and underwent subsequent enhancements and expansions over time. Initially limited to witnesses associated with mafia gang crimes, the scope of protection was later broadened to encompass witnesses involved in various other significant offenses.

5 ibid.
6 ibid.
8 ibid.
III. Witness Protection in the United Kingdom

In the United Kingdom, the idea of “open justice” has prevailed since before the Norman Conquest. Hale and Blackstone extolled the benefits of a public trial in the eighteenth century. Transparency is openness, and abuse is concealment in a fair trial. The general public’s attendance at a trial is considered essential for fostering strong confidence in the legal system. However, it has been recognized that certain exceptions to this general rule may be necessary. As outlined in the European Convention for the Protection of Human Rights and Fundamental Freedoms, exceptions are permitted based on considerations of morality, public order, national security, protection of juvenile privacy, and other factors that could compromise the interests of justice.

Article 6(1) of the Convention explicitly states, “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interest of morals, public order, or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.” This provision underscores the balance between the principles of public access to trials and the need to address specific concerns for the sake of justice and privacy.

Any exceptions to this rule, according to the House of Lords in Scott v. Scott, must be grounded in a fundamental concept that explains the scope of the exception. The House of Lords referred to this principle as the norm. The judge will not be the one to determine what the guiding idea is. There is a clause in the Official Secrets Act of 1920 about the public’s exclusion from situations regarding national security. The act gave the court the authority to keep the public out of a trial if it believed that the release of certain information would jeopardize national security. Nonetheless, the decision ought to be made in public. In R v Socialist Worker Printers etc., he identities of the witnesses who are purportedly being blackmailed may be withheld by the court. Also, in Attorney General v Leveller Magazine, an anonymous witness is given by the prosecution. The withholding of a witness's identity during a criminal trial is viewed as an inherent court prerogative. Lord Diplock noted that exceptions to the general principle of open justice could exist based on legal or inherent court authority. Subsequently, the UK legislature codified this concept in the Contempt of Court Act of 1981. According to Section 11 of the act, a court may issue orders that forbid the publication of a name or other matter in connection with a proceeding if it appears to be necessary for the proper administration of the proceedings, regardless of any cases in which the court permits the withholding of such information from the public. In R v Taylor, the trial court's decision to grant anonymity to witnesses is lawful and justified. Witness testimony holds significance as it serves as the sole source of independent confirmation. Moreover, witness anonymity in court proceedings is safeguarded by the Coramers and Justice Act of 2009, which is applicable in England, Wales, and Northern Ireland. This legislation prohibits the disclosure of any information that could reveal the identity of the specified individual, who plays a crucial role in supporting the legal system and the investigative process. The act strictly prohibits the disclosure of such information, permitting it only under specific conditions. Any violation of this prohibition is deemed a criminal offense and may result in penalties such as imprisonment or fines.

In R v Brown, it is possible to set up a screen between the defendant and the witness. The Youth Justice and Criminal Evidence Act, 1999, Sections 16 through 33, gave the court the authority to take particular precautions to protect witnesses who were in danger or intimidated. The Youth Justice and Criminal Evidence Act of 1999 introduces several provisions aimed at aiding witnesses who may be frightened or vulnerable when testifying in criminal cases. These measures specifically apply to three categories of witnesses: individuals with mental or physical disabilities or disorders, children under the age of 18, and witnesses who are likely to be affected by anxiety or distress during their testimony in a criminal proceeding. The act allows for various protective measures, including the screening of the accused's witness, presenting evidence in private, and utilizing live links for

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10 Scott v Scot [1913] AC 417.
12 R v Socialist Worker Printers etc. [1975] QB 637.
evidence presentation, especially in cases involving sexual offenses, if the court is convinced that there have been attempts to intimidate.

Primarily focused on the protection of minor witnesses and facilitating their ability to provide testimony in criminal proceedings, the act plays a significant role in ensuring a supportive environment. Furthermore, witnesses who have testified in court and become targets of threats or dangers are covered by the Serious Organised Crime and Police Act of 2005, providing additional safeguards. A witness is defined by the act as someone who has supplied information that may be used as evidence in court. The accused is not included in the definition unless he is a witness for the prosecution.\(^\text{16}\) The statute delineates a comprehensive list of individuals eligible for protection, encompassing witnesses, juries, police officers, informants, and anyone associated with these individuals, including family members. The establishment of the Serious Organised Crime Agency (SOCA) was under this act, with the mandate to prevent, detect, and mitigate the occurrence of crime and its consequences. Subsequently, the National Crime Agency was instituted under the Crimes and Courts Act of 2013, taking over the responsibilities following the disbandment of SOCA. This agency is dedicated to combating organized and serious crime.

A recent addition is the Victim and Witness Care Unit, a unit overseen by collaboration between staff members from the Crown Prosecution Service and the Police. The witness care officer in this unit is tasked with maintaining communication with witnesses and victims, providing updates on the status of their cases.

The Ministry of Justice released the Witness Charter in 2013, outlining expectations for the treatment of witnesses within the criminal court system. This charter establishes a standard for all witnesses, whether on the prosecution or defense side. While the provided standards offer basic measures that witnesses can anticipate at various stages of the criminal justice system, it's important to note that they are not legally binding. The standards of care outlined in the charter include treating witnesses fairly, reporting crimes, documenting statements, determining their needs, and providing them with information.\(^\text{17}\)

The protection of witnesses is provided by various statutes in the United Kingdom. Though there isn't any comprehensive legislation specifically for witness protection, there are provisions for it in other laws that deal with related issues. Additionally, there is a Witness Charter that outlines the standards of care that must be followed for witnesses in court. The protection of witnesses has been greatly aided by UK courts, which have granted witnesses protection on multiple occasions. The nation has a Witness Protection Program in place that incorporates witnesses into efforts to combat serious and organized crime. Therefore, it may be said that the UK's criminal justice system has adequate provisions for witness protection.

### IV. WITNESS PROTECTION LAWS IN INDIA

India does not have the same laws protecting witnesses as industrialized nations like the US, UK, Canada, and Australia. Because of this, the witnesses are not receiving justice in the right manner, and they and their families are also not safe because they occasionally receive threats that might kill them. These days, witness vulnerability is so great that even the courts have urged for the witness protection law, breaking their silence.

In general, there are two categories of laws in India that deal with witness protection: those that deal with witness protection specifically, and those that just contain provisions pertaining to it.

1. Section 195A of the Code of Criminal Procedure (Amendment) Act, 2008, stipulates that a seven-year term is imposed on anyone who attempts to coerce or influence a witness to provide false testimony. This adjustment is the right direction to take. A witness is protected from incorrect cross-examination, which is frequently required, when sections 149 to 152 of the Indian Evidence Act, 1872 are read in conjunction with section 148.\(^\text{18}\) As per Section 16 of the Terrorist and Disruptive Activities (Prevention) Act, 1987, the identity and address of witnesses shall be kept confidential. The Act also makes mention of in-camera trials. The topic has been covered by S.17 of the National Investigation Agency Act of 2008, S.22 of the Unlawful Activities (Prevention) Amendment Act of 2004, S.30 of the Prevention of Terrorism Act of 2002, and the Criminal Law (Amendment) Act of 2005.\(^\text{19}\) Similar safeguards for witnesses are found in the Juvenile

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\(^{16}\) The Serious Organised Crime and Police Act, 2005 s 94.

\(^{17}\) ibid.


\(^{19}\) ibid

2. The Supreme Court recognized the Witness Protection Scheme 2018 in Mahender Chawla v. Union of India21 and ruled that it will be "law" under Article 141/142 of the Constitution until state or federal legislatures enact appropriate legislation on the matter. The federal government, state governments, and union territories will then enforce the scheme in letter and spirit.

Witness Protection Scheme, 2018
The Witness Protection Scheme of 2018 marks India's first initiative aimed at ensuring the safety of witnesses under the protection of the State. Developed in collaboration with the National Legal Services Authority (NALSA) and the Bureau of Police Research and Development (BPRD), this scheme is applicable nationwide, except Jammu and Kashmir. It classifies witnesses into three groups, considering perceived threats to their safety.

Categories of Witnesses
The Witness Protection Scheme of 2018 categorizes witnesses into three groups based on perceived threats:

1. Category A: This category pertains to cases where threats are severe, extending to the life of the witness or their family members during the investigation, trial, or thereafter.
2. Category B: In this category, threats extend to the safety, reputation, or property of the witness or their family during the investigation or trial, though they may not reach the level of life-threatening severity.
3. Category C: Cases falling under this category involve moderate threats, extending to harassment or intimidation of the witness or their family, reputation, or property during the investigation, trial, or thereafter. The level of threat is considered lower compared to Categories A and B.

Witness Protection Fund:
The Witness Protection Scheme of 2018 introduces several crucial elements to enhance the security and well-being of witnesses during and after legal proceedings. Here are some key features and shortcomings identified in the scheme:

Key Features:
1. Dedicated Fund: A specific fund has been established to finance the witness protection program, with states required to allocate an annual budget.
2. Management of Fund: The Department/Ministry of Home under States and Union Territories is designated to operate and manage the fund.
3. Threat Analysis Report: The scheme mandates the preparation of a 'Threat Analysis Report' by the Commissioner/SSP when a witness seeks protection.
4. Witness Protection Order: This order is issued by the Witness Protection Cell of the State/UT, with the Competent Authority, such as the Secretary District Legal Services Authority (DLSA), having the power to issue protection orders.
5. Application and Process: Witnesses can file applications seeking protection, and the Competent Authority issues a Threat Analysis Report upon receiving the application. The application process aims for a quick disposition within five working days.
6. Change of Identity: In appropriate cases, witness requests for a change of identity are considered.
7. Protection Measures: A range of protection measures is available, from providing a police escort to the courtroom to more elaborate steps like temporary residence in a safe house, granting a new identity, and relocation to an undisclosed location. Other measures include close protection, regular patrolling around the witness's residence, and necessary precautions.

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20 Law Commission of India’s Consultation Paper on Witness Protection
21 Mahender Chawla& Ors. v Union of India & Ors, 2018 SCC SC 2678
Shortcomings:

1. Dignity of Witnesses: The scheme lacks provisions aimed at safeguarding the dignity of witnesses, and recommendations from committees, such as the Mali Math committee, for appointing an official to assist witnesses are not addressed.

2. Facilities within Courtroom: There is no provision addressing the need for proper facilities within the courtroom to ensure the comfort of witnesses, including seating arrangements, relaxation areas, restrooms, and access to drinking water.

3. Financial Support: The scheme does not provide Travel Allowance (T.A.) or Daily Allowance (D.A.) for witnesses, leaving them without financial support for incurred expenses related to legal proceedings.

4. Case Adjournments: Issues related to case adjournments impacting witness safety and cooperation are not addressed in the scheme.

5. Protection from Harassment: The scheme lacks a provision specifically designed to protect witnesses from harassment.

Addressing these deficiencies is crucial for strengthening the overall effectiveness of the witness protection program. Measures such as protecting witness dignity, providing necessary facilities, offering financial assistance, addressing case adjournment concerns, and explicitly safeguarding witnesses from harassment should be considered to enhance the protective framework. Regular evaluations and updates are essential to adapt the scheme to evolving challenges and ensure the comprehensive protection of individuals crucial to the criminal justice system.

V. CONCLUSION AND SUGGESTIONS

Witnesses must be free to testify in court or take part in investigations without fear of intimidation or threats to uphold the rule of law. Legislation or other measures to safeguard witnesses whose testimony in court or cooperation with law enforcement could endanger their lives or the lives of their families are increasingly being created by nations. India's witness protection law is indeed known as the Witness Protection Scheme of 2018. However, it has been criticized for several shortcomings, including the failure to incorporate suggestions from the 198th Law Commission Report or the Mali Math Committee to preserve the dignity of the witness.

The absence of adequate provisions for witness dignity has raised concerns about the impartiality and independence of witnesses within the criminal court system. The Witness Protection Scheme of 2018 has been criticized for not offering sufficient assistance to witnesses, potentially impacting their ability to testify in a fair and unbiased manner. Addressing these deficiencies is crucial for enhancing the effectiveness of witness protection measures in India and ensuring that witnesses are adequately supported and protected within the criminal justice system. It may be advisable for policymakers to consider amendments or additional provisions to address these concerns and provide comprehensive support to witnesses involved in legal proceedings. Nonetheless, the court conviction rate was 50% in 2018 and 50.4 percent in 2019 respectively. Ultimately, 2020 saw the highest percentage of court convictions—59.2% in the previous five years. Therefore, it stands to reason that the Witness Protection Program played a role in the higher conviction rate. Witness Protection Program is a one-man show administered by the judiciary in India because of the country's weak administrative and legislative branches as well as its absence of a robust program. The prosecution must prove the accused's guilt beyond a reasonable doubt in an adversarial system.

Witnesses are important in this case because they help the judge understand the facts and provide light on them. It should be possible for witnesses to provide unbiased, independent testimony to uphold justice. So, to preserve the law's eyes and ears, the system needs to protect witnesses. A comprehensive criminal justice plan must include effective witness protection programs to safeguard those who are essential to the dismantling of organized crime groups.

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22 Witness Protection Scheme 2018
23 National Crime Records Bureau (IND)
24 Ibid.
An efficient witness protection scheme can be developed by utilizing the following strategies:

a) Institutional and legal evaluations;

b) corresponding laws;

c) spreading public awareness of criminal justice authorities, including judges, prosecutors, police, and prison guards;

d) training these officials;

e) offering specialized support and advice to facilitate the establishment of witness protection units, including direction on developing appropriate structures, staffing arrangements, and standard operating procedures;

f) promoting international cooperation for the protection of witnesses.