

IMPORTANCE OF WITNESS PROTECTION LEGISLATION IN INDIA

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Abstract

A witness is an essential part of the criminal justice system to ensure that the actual culprit gets punished for the crime they committed, and in the words of Jeremy Bentham, we can say, "Witness are eyes and ears of justice." However, if one closes their eyes and ears, it would become tough for that person to survive. Similarly, if all the witnesses turn hostile due to external threats, harassment, or intimidation, providing justice would become very difficult. In the present time, where every person's rights are protected and catered to, the rights of witnesses should also be seen and acknowledged. Like how victims are protected and secured, there's a requirement for legislation to protect the Witness. This article would detail the reasons for a witness turning hostile and end with suggesting remedies for the same.

Keywords: Victim, Witness, Hostile, Evidence, Crime

INTRODUCTION

As defined by the Oxford Dictionary of Sociology, Crime is "an offense which goes beyond the personal and into the public sphere, breaking prohibitory rules or laws, to which legitimate punishments or sanctions are attached, and which requires the intervention of a public authority."² In other words, crime is a public wrong. A person committing an act breaches the public norms/ rules and causes injury to another, and for that act, that person needs to be punished by the appropriate authority. That person is said to have committed a crime.

Crime affects the aggrieved individual or his family and affects the public as a whole, and therefore, there comes a need for an effective criminal law code in the Country. An effective criminal code defines or states the acts that violate the public norms or are against the public

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² *What is a crime?*, SCCJR, (Oct 5th, 2021, 18:45pm)<http://www.sccjr.ac.uk/wp-content/uploads/2015/10/SCCJR-What-is-crime.pdf>

morality and prescribes punishment to ensure that society stands protected and achieves its objective of retributions, deterrence, rehabilitation, incapacitation, and reparation.³

Suppose allegations are that an individual has committed a crime. In that case, there is a need for proper investigation and trial, and the prosecution needs to prove the commission of the crime beyond any reasonable doubt⁴ and to prove it, the prosecution requires evidence, and such evidence should be unambiguous and not vague.⁵ As per the legal dictionary of Britannica, evidence means any item or facts submitted before the Hon'ble court or the tribunal to prove a theory or allegation. The prosecution can use additional evidence to prove the allegation, such as physical evidence, including fingerprints and D.N.A. samples. Demonstrative evidence- this helps to compliment the Witness's testimony. Documentary Evidence includes documents, newspaper and other written evidence that are authentic, and Witness evidence- oral, on oath, the testimony of individuals who have seen or heard about the crime.⁶

The importance of a witness in the whole trial procedure is crucial as they help narrate the whole incidence, accurately as per their knowledge, to the judge.⁷ Their information becomes a piece of evidence and can determine whether the accused is guilty or not. Since the role of the Witness is crucial, it is also vital that they are safe and deliver their information without any fear or biasness. However, are the witnesses safe? There is a constant fear in the eyes of witnesses of losing their property or life or facing a criminal charge,⁸ affecting their testimony. To provide justice, we need to ensure that no evidence is tampered with, especially the testimony of a witness. We need to make sure intimidating witnesses are not an easy task and that they are safe and protected before and after the trial, to which they are a witness, and hence, there exists a need for having witness protection legislation in India.

The scope of this paper is limited to understanding the importance and role of witnesses, as evidence, in a criminal trial and the changes brought with the enactment of Witness Protection

³ *What is the main objective of criminal law?* SLADES & PARSONS (Oct 5th, 2021, 19:03pm) <https://www.sladesparsons.com.au/what-is-main-objective-criminal-law/>

⁴ Dahyabhai v. State of Gujarat, AIR 1964 SC 1563

⁵ H.G. org, *Different Standards of proof*, HG.ORG, (Oct 5th, 2021, 20:03pm) <https://www.hg.org/legal-articles/different-standards-of-proof-6363>

⁶ *Types of Evidence and How they Impact your case*, WJ, (Oct 05th, 2021, 20:16pm) <https://www.toronto-criminal-lawyer.co/>

⁷ *The role of witnesses*, EDUCALOI, (Oct 05th, 2021, 20:59pm) <https://educaloi.qc.ca/en/capsules/the-role-of-witnesses/>

⁸ The Editorial Board, *Use of Fear: Witness protection in India*, THE TELEGRAPH ONLINE, (Oct 5th, 21:00pm) <https://www.telegraphindia.com/opinion/use-of-fear-witness-protection-in-india/cid/1794593>

Legislation in India. Further, the researcher would cite an example of a country having such legislation and its after-effects. Following this, the researcher would provide plausible suggestions that can or might make witnesses feel safe.

NEED FOR PROTECTING WITNESS

"Witnesses are the eyes and ears of justice."

- Jeremy Bentham

Before coming to the importance of Witness as evidence, let us understand more about Witness. A witness of a particular act or crime is a person who appears in court can elaborate upon the crime they have seen or heard or about any other event.⁹ In other words, they are a witness, they have seen or heard about something that has happened. An advocate can use various types of evidence to support their arguments and Witness as one such evidence.

Section 118 of the Evidence Act¹⁰ clearly states who may testify in a court of law. It says that anyone competent to testify and can apprehend the questions asked to him and give reasonable and rational answers to those questions can become a witness. It implies that seeing an event or hearing about it might make someone a witness to that event but, to come to the court and stand as the evidence, the Witness needs to be competent and able to understand the questions and answer them rationally. Nevertheless, this section does not restrict any person from being a witness, which means any person, be it a man or a woman or a child or an aged person, can become a witness, as long as they can apprehend and answer questions appropriately.¹¹ The witnesses were divided into 3 kinds by the Apex Court, in the case of *Vadivelu Thevar v. the State of Madras*,¹² which are- wholly reliable witnesses, those who are unreliable, and lastly, those who can neither wholly be relied upon and are not wholly unreliable as well.

The types of witnesses come under different heads, such as child witnesses, eyewitnesses, Hostile witnesses, Interested witnesses, Injury witnesses, and Expert witnesses. Usually, an eyewitness has a significant impact on the juror as he has been a direct witness to the incident

⁹ *Definition of Witness*, COLLINS, (Oct 6th, 2021, 21:51pm)
<https://www.collinsdictionary.com/dictionary/english/witness>

¹⁰ Indian Evidence Act, 1872 § 118

¹¹ Ankur, *Witness and types of Witness*, WRITINGLAW (Oct 6th, 2021, 22:11pm)
<https://www.writinglaw.com/witness-and-types-of-witness/>

¹² *Vadivelu Thevar v. The State of Madras* 1957 AIR 614

and can narrate the whole incident accurately.¹³ It does not mean other classes of witnesses are less critical than eyewitnesses. Every evidence and Witness is equally essential to prove a crime beyond a reasonable doubt. A witness plays an essential part in administering justice as they link the offense with what they have seen or heard and helping the court to find out the truth. It is one of the primary reasons behind a witness taking an oath before giving their testimony, to make sure they are telling the truth or, if found otherwise, can be punished.

Why do witnesses turn Hostile?

Other than Expert Witness, a witness does not have much experience in court cases, making them a little more conscious, which might affect their deposition.¹⁴ The witnesses do not have to give their opinion about the matter at hand but answer all the questions directed to them and tell what they have seen or heard.¹⁵ A witness can have a significant impact on the final judgment of a case, and therefore, they must deliver their statement accurately to their best knowledge, which is why they take an oath to say the truth and the truth only. However, similar to tampering with other evidence, one can force the Witness to say what they want. Anyone can become a witness, and everyone has some fear. If the other party is in the dominant position, they might take advantage of this fear to change the Witness's statement. When a witness retracts from his previous statements, he is unreliable in the eyes of the law.

Threats to victims do not restrict themselves to complex cases like terrorism.¹⁶ A witness is Hostile when he informs the police about a particular crime but later retracts from his words before the court. Section 154¹⁷ of the Evidence Act allows the side that calls a witness to ask any question relating to the case. Answers to such questions allow the opposite side to cross-examine the Witness under section 145¹⁸ of the act. If the Witness tries to hide the truth in front of the court, he becomes unreliable and should not be taken into consideration, as he can make the delivery of justice a problematic task.

¹³ Supra note 12.

¹⁴ *Role of witness*, CLARKE KIERNAN (Oct 07th, 2021, 00:04am) <http://clarkekiernan.com/role-witness>

¹⁵ All Answers ltd, *'Importance of a Witness'* (Oct, 07th, 2021, 12:30am) <https://www.lawteacher.net/free-law-essays/administrative-law/importance-of-a-witness-law-essays.php?vref=1>

¹⁶ Prashant R, *Witness Protection: A Comparative Analysis of Indian And Australian Legislation*, JGRS, Vol 21 Issue 3 (2020)

¹⁷ Indian Evidence Act, 1872 § 154

¹⁸ Indian Evidence Act, 1872 § 145

The primary reason for a witness turning hostile is the accused party, who is in a dominant position and violates his power to turn the court's decision in his favor. They might turn hostile because of harassment, fear, abduction, threats, perjury, political pressure, and various other reasons. In the scandalous case of *Vashisht @ Manu Sharma v State (N.C.T. of Delhi)*,¹⁹ 80 witnesses of that case turned hostile, due to which the lower court acquitted the accused as there was a lack of evidence later the higher courts reversed it. Even in the case of *Sohrabuddin's fake encounter*, somewhat 80 witnesses turned hostile.²⁰ Further, stats show that approximately 60% of the accused are acquitted because the Witness turned hostile.²¹ It clearly shows an immense need for witness protection legislation to keep witnesses from turning hostile and save them from those who misuse. It is also crucial for administering justice.

JUDICIAL STAND ON WITNESS PROTECTION LEGISLATION

This section deals with the judgments and the stand of the Judiciary on enacting laws for protecting witnesses.

The Malimath Committee stated, about the Witness, in its report on the Criminal Justice System and its reform, that, "By giving evidence relating to the commission of an offense, he performs a sacred duty of assisting the court to discover the truth." The need to protect witnesses found its first mention in the Law Commission's 14th report, which came out in 1958. The 154th and 178th report mentions the need for witness protection as well.²² However, these reports had a very brief mention of the topic. The Law Commission's 198th report on protection "*Witness Identity Protection and Witness Protection Programmes, 2006.*" Witness plays a crucial role in administering justice, and protecting these witnesses would help the Judiciary increase the rate of solving cases and make sure these witnesses are not scared to come to the court and deliver their statement.

¹⁹ *Vashisht @ Manu Sharma v State (NCT of Delhi)* 2001 Cri.L.J. 2404

²⁰ PTI, *Sohrabuddin Encounter: Number of Hostile Witnesses Reaches 80*, THE NEW INDIAN EXPRESS, (Oct 07th, 2021, 11:58am) <http://www.newindianexpress.com/nation/2018/jul/05/sohrabuddin-encounter-number-of-hostile-witnesses-reaches-80-1838857.html>

²¹ Himeesha Dhiliwal, *Witness Protection Law in India: A judicial Endeavour*, IRALR, (Oct, 7th, 2021, 22:54pm) <https://www.iralr.in/post/witness-protection-law-in-india-a-judicial-endeavour>

²² Prashant R, *Witness Protection: A Comparative Analysis of Indian And Australian Legislation*, JGRS, Vol 21 Issue 3 (2020)

Now, to understand the judicial perspective on witness protection, let us go through some case laws. In *St. of Gujrat v. Anirudh Singh*²³, the court believed that the Witness has a statutory duty to help the state by giving evidence of the crime they know. Furthermore, in *Mahendar Chawla and Ors v. Union of India and Ors*,²⁴ the court highlighted that the primary reason for the Witness to turn hostile is the state not being able to protect them adequately. Further, in the case of *Kartar Singh v. St. Of Punjab*²⁵, the legality of Section 16 of the TADA, 1987 was brought into the discussion. As there existed immense fear of life and property in the mind of the witnesses that no one was willing to testify. It was then that the Hon'ble Apex court suggested that the Witness's names and addresses should be excluded for a just and fair trial.

Also, the Hon'ble Apex court in the case of the *National Human Rights Commission v State of Gujrat*²⁶ emphasized having a witness protection legislation and how not having one is responsible for a lower conviction rate. Further, the court also showed its disappointment in the legislature that even after the report of the Malimath Committee, the legislature failed to enact a law to protect the Witness.

Further, the landmark case of *Neelam Katara v. U.O.*²⁷ laid down specific guidelines to deal with the witness protection issue known as 'witness protection guidelines.' The court also stated that the competent authority to deal with this issue is the Legal Service Authority and that any witness of a crime punishable with death or life imprisonment can ask the Competent Authority to provide him with Police Protection.

Moreover, in *Zahira Habibulla H. Sheikh and Anr. v. St of Gujrat*²⁸, the Hon'ble S.C, while defining fair trial, mentioned that threatening Witnesses and forcing them to deliver false statements would also not be considered as a fair trial. Also, one of the judges stated, "no country can afford to expose its morally correct citizens to the peril of being harassed by the anti-social elements like rapists and murderers."

Time and again, we have seen the court highlighting the importance of having legislation to protect the Witness and even set up guidelines themselves, so the Witness feels protected to come and deliver their statement. Even after so many reports and suggestions from the law

²³ State of Gujrat v. Anirudh Singh (1997) 6 SCC 514

²⁴ Mahender Chawla and Ors. v. Union of India (UOI) and Ors., 2019 (14) SCC 615

²⁵ Kartar Singh v. State of Punjab, 1994(3) S.C.C. 569.

²⁶ National Human Rights Commission v State of Gujrat 2003 (9) SCALE 329

²⁷ Neelam Katara v. Union of India, I.L.R. (2003) 2 Del. 377

²⁸ Zahira Sheikh v. State of Gujarat, (2004) 4 S.C.C. 158.

commission, it was only in 2018 that the legislature enacted the witness protection program, which will be further dealt with in the next chapter.

WITNESS PROTECTION LEGISLATION

INDIA

Before enacting the Witness Protection Scheme, 2018,²⁹ witnesses of any case would depend upon specific statutory provisions to feel protected. These provisions were –

The Criminal Procedure Code, 1973

Section 160³⁰ of the code enables the police to summon the attendance of any witness for any criminal trial. This section also assures that the witnesses are not harassed into traveling to another place and that any expense incurred while traveling would be bared by the Police Officer asking for such attendance. There might come a situation where examining a witness would seem crucial for administering justice but, procuring such a Witness might lead to delay and expense. The court can order such attendance along with issuing commission as per Section 284³¹ of the code. Section 309³² ensures that once the witness examination begins, it shall continue daily until the judge postpones or adjourn proceedings. So, that the Witness is not harassed and that they get it done fast and for good. Further, Section 312³³ ensures that the Witness does not pay unnecessary expenses, and the court, if feels, can ask the state to pay for the expenses incurred.

UAPA, 1967, TADA, 1987 and Prevention of Terrorism Act, 2002

Section 22³⁴ of the UAPA ensures that any person who threatens the case's Witness shall be liable for the punishment extending to 3 years and a fine. Further, Section 44³⁵ of the same act

29 Witness Protection Scheme, 2018

30 Code of Criminal Procedure, 1873 § 160

31 Code of Criminal Procedure, 1873 § 284

32 Code of Criminal Procedure, 1873 § 309

33 Code of Criminal Procedure, 1873 § 312

34 UAPA, 1967 § 22

35 UAPA, 1967 § 44

provides provision for the protection of the witnesses. Section 16 of the TADA³⁶ ensures the protection of the Witness and states that if the court feels the need, it can record the Witness's statements in front of a camera and hide the name and address of the Witness. Furthermore, Section 3(7)³⁷ and Section 30³⁸ of the Prevention of Terrorism Act also ensure that the witnesses are not threatened and protected their name and address.

INDIAN EVIDENCE ACT, 1872

Under section 151³⁹ has the power to restrict the advocates from asking any questions that are not relevant to the case and are indecent and scandalous. These questions might be asked to harass the victim and break their statement. Moreover, section 152⁴⁰ also ensures that any questions asked to insult or annoy the Witness are restricted. These sections together make sure that the Witness does not feel threatened in any way and is not harassed.

Witness Protection Bill, 2015

The bill to protect the witnesses was introduced before the Parliament in 2005 with the primary objective of safeguarding the Witness and ensuring free and fair trial to the citizens.⁴¹ The bill contained the following provision⁴²-

- Ensuring and preparing a witness protection program for different trial stages includes investigation, trial, and final judgment.
- Formation of "Witness protection cell" for the Trial Court's judges to order protection to the Witness.
- Formation of National and State Protection for witness council.
- Protecting the identity of the Witness.

36 TADA, 1987 § 16

37 Prevention of Terrorism Act, 2002 § 3(7)

38 Prevention of Terrorism Act, 2002 § 30

39 Indian Evidence Act, 1872 § 151

40 Indian Evidence Act, 1872 § 152

41 *Witness Protection Law in India: Issues and Current Status*, (Oct 7th, 2021, 20:41pm)

<https://www.gktoday.in/topic/witness-protection-law-in-india-issues-and-current-status/>

42 *Id.*

Witness Protection Scheme, 2018

This scheme got enacted in the year 2018. Section 2(k)⁴³ defines Witness as "any person, who possesses information or document about any offense." This scheme also elaborates upon the Fund for the witness protection, which will be operated by both state and union government and be utilized to avail protection for the Witness as per the order of the Competent Authority.⁴⁴ The witnesses are divided into different categories as per the threat level under Section 3⁴⁵ of the scheme- CATEGORY A- consists of those Witnesses who fear harm to the life of not only the Witness but of his family members as well. CATEGORY B- contains witnesses who threaten his and his family's reputation, property, and safety, and CATEGORY B- consists of people who have a minor threat or harassment of the Witness and their family members.⁴⁶ Section 6⁴⁷ of the scheme talks about applying for the protection, and Section 7⁴⁸ states the measures taken to provide safety to them. Section 9⁴⁹ and Section 10⁵⁰ deal with the Witness's identity protection and the change of the Witness's identity for the case. The scheme also allows relocating the Witness to a safer place in any part of the Country.⁵¹

The U.S

The researcher chose the U.S to compare the witness protection legislation with India because the U.S is one of the top developed countries globally, and keeping such a country as a benchmark is never wrong.

43 Witness Protection Scheme, 2018 § 2(k)

44 Prashant R, *Witness Protection: A Comparative Analysis of Indian And Australian Legislation*, JGRS, Vol 21 Issue 3 (2020)

45 Witness Protection Scheme, 2018 § 3

46 *Id.*

47 Witness Protection Scheme, 2018 § 6

48 Witness Protection Scheme, 2018 § 7

49 Witness Protection Scheme, 2018 § 9

50 Witness Protection Scheme, 2018 § 10

51 Witness Protection Scheme, 2018 § 11

The U.S has enacted the "Federal Witness Security Program" for its citizens and the protection of the Witness.⁵² This Program is the first-ever witness security program in the Country and has been a model to look up to for other countries.⁵³ Under the Organized Crime Control Act, 1984,⁵⁴ this Program was adopted in the U.S. The salient feature of the WITSEC is the permanent moving of the Witness and its secrecy, along with the change in the identity of the Witness and his family members.⁵⁵ Before a witness is introduced to such a program, the briefing of the Program is done by the US Marshal Service.⁵⁶ The Marshall Service provides 24-hour protection if the Witness is considered to be at high risk and provides funds for the rehabilitation of the Witness.⁵⁷ The attorney general of the U.S also has a crucial role in this Program.

CONCLUSION AND SUGGESTION

After the following research, the researcher can reasonably conclude that the Witness plays a highly crucial role in a case and in administering justice. All the evidence, including Witness, can help punish the accused and save or deliver justice to the victim and their family. However, in a world where the dominant person misuses their power to change the verdict of the court or to harass and scare the Witness, no one would dare to come forward and assist the court to know the truth, and no witness protection laws were one the primary reason why India had a lower conviction rate. Even though specific legislation had some provisions for safeguarding the victim's rights, India lacked a consolidated form of legislation, specifically for the protection of the Witness. Time and again, through different case laws, the Judiciary expressed the need for witness protection legislation, and reports formed by the law commission mentioned the need for such legislation. However, only in 2015, the first Witness Legislation Bill was passed in India, followed by the Witness Protection Scheme of 2018. India has come a long way but needs to go furthermore. They need to keep updating these schemes and ensure that they are being executed properly.

52 Prashant R, *Witness Protection: A Comparative Analysis of Indian And Australian Legislation*, JGRS, Vol 21 Issue 3 (2020)

53 *Witness Protection Programs in Selected Countries- Research Brief no. 43*, PUBLIC SAFETY CANADA (Oct 07th, 2021, 21:48pm) <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rgnzd-crm-brf-43/index-en.aspx>

54 Organized Crime Control Act, 1984

55 Supra note 52.

56 Supra note 51.

57 *Id.*

After conducting the following research, the researcher thought about few potential suggestions that might help Indian witnesses. They are-

1. India should have a more elaborated and detailed form of legislation for protecting witnesses and should prepare a fund for rehabilitation and change in the Identification of these witnesses.
2. Time to time, awareness programs should be conducted to make people aware of their rights and protection rights available to them as a witness.
3. A unit specialized in protecting such witnesses should be formed similar to that of the U.S.

The researcher feels that implementing the existing laws and the suggestions mentioned above would help India come forward as witnesses and deliver their statements without fear.

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