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# Witness Protection: Under aegis of the Law

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## ABSTRACT

*India is the land where people mostly believe in what they have seen and heard instead of a written document or fact, same happens in our courts. An eye witness is given more importance than an evidence discovered. The evidence to have some weight and substance has to be corroborated by a witness. The story or the facts of the witness shall prove the importance of the evidence. But being witness in India is not voluntary that is to say there is fear amongst people, people do not want to become a witness and this is because the witness protection in India is not up to the mark. The protection of a witness is not given much importance until recently when the witness protection scheme 2018 came into picture.*

*This paper follows doctrinal method of re-searching the paper is all about the witnesses their rights and protection. The paper mentions about who is a witness, who can be a witness, competency and compellability of a witness and the credibility of a witness. How and what are the laws that apply to a witness and the protection of a witness under the witness protection scheme 2018. The newly made witness protection scheme is also compared with different countries witness protection programs.*

*The research paper also concludes and gives suggestion as to how our witness protection system can be improved and what more we need to make the witness protection program secure so as the people voluntarily become witness in future without any fear.*

**Keywords:** *Witness, The Indian Evidence Act 1872, Witness Protection, Witness Protection Scheme 2018, Witsec, United Nation, Australia, South Africa.*

## I. INTRODUCTION

The criminal justice system has many aspects such as crime, trials, criminal, victims, laws, rules and regulations, and their implementation etc, but one of the most important aspect is the evidence. Evidence is the key to run a trial. Evidence is the discovery of the facts and proof found during an investigation to substantiate the crime its story and theory, and its facts. In India the law of evidence plays a major role as it brings out the truth of the facts mentioned in the case additionally points out the issues of the case. Evidence is basically divided into two

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types documentary and oral evidence. The oral evidence is essentially a testimony given by a witness, section 3 clause 1 of the evidence act states that “<sup>3</sup>all statements which the Court permits or necessitates to be presented before it by witnesses, in regard to matters of fact under the inquiry of the court, such accounts made are called oral evidence”. The oral evidence in India is given more value as it is said that the testimony of a witness is something that can turn table in a case. Therefore, witnesses are those elements in a criminal case that have the power to corroborate the facts and issues of a case, they are the indispensable element that add substance to a case and help to establish the guilt of an accused.

A witness to a case is a very important aspect as they have the power to substantiate the fact and issues let alone change the direction of a proceeding. This makes the witness a very important element which needs to be protected, so that when needed they can be present before the court during the trial of the case. India being a country that gives so much importance to witness testimony has a very newly established protection scheme for the protection of the witnesses. In the case of <sup>4</sup>*Mahender Chawla v Union of India* a landmark judgement was made and witness protection scheme 2018 was approved, this scheme provides guidelines with rules and regulations stating how and why a witness should be protected, in what situations this protection has to be provided, what are the step and measure that are to be taken to protect the witness, and the procedure to apply for this witness protection programme. The testimonies given by a witness is used to conduct a fair trial in the court, it is because of them that the trial is able to discover some substance which corroborate with the facts and help the court to reach to a reasonable and fair result. Because the witness's involvements may have a direct influence on an accused's guilt or acquittal, it is required that such a witness be shielded from the wrath of extraneous circumstances that have the potential to affect his mind about a case and make the witness hostile. Corruption is an example of extraneous elements along with threat to witness and violence with the witness or his or her family. On December 6, 2018, when the Supreme Court nodded for approval to draft a document for witness protection program, it took inputs from 18 different states and also Union territories to prepare the draft, the draft was opened to various sources, for their proposals and opinions such as police officers, judges and civil society etc and it was completed by the National Legal Services Authority (NALSA). The bench of justice AK Sikri and Judge S. Abdul Nazeer defined the right of witnesses to testify under article 21 of the Constitution and declared: “The right to testify in court freely and fairly without any pressure. If a person is unable to testify in court due to intimidation or other

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<sup>3</sup> The Indian evidence act, 1872, section 3 clause 1

<sup>4</sup> *Mahender Chawla v Union of India* SCC OnLINE SC 2679

pressure, this is clearly a violation of article 21 of the Constitution. In addition, the drafters considered the plan to be a "law" in article 141/142 of the Constitution and the centre and the state must follow it until an authoritative act is promulgated on the same topic.

The United States of America is one such country who have first established a witness protection programme in the 1970 to curb mafia organization type of crime called WITSEC. Then Australia is said to have the best witness protection program in the world because there the program is implemented to its full extent the program, there are other countries such as Indonesia and Nepal where there is an act to protect the witness but its purpose is not served fully. The witness protection programme is new in India but it's not a new concept that is unheard off, it's just the black words of law that are established recently. The first instance where witness protection was reported was in the <sup>5</sup>14<sup>th</sup> law commission report which was submitted in the year 1958. The next mention of witness protection was issued in the <sup>6</sup>154<sup>th</sup> law commission report in the year 1996 where a detailed report for protection was brought to light, but the legislature did not see the need and the request for protection law was put aside. Subsequently in the <sup>7</sup>172<sup>nd</sup> law commission report with the help of a case law namely <sup>8</sup>Sakshi v Union of India emphasis was given on in camera trial so that the witness does not have a fear of public opinion as well as they are separated from the accused. Then in <sup>9</sup>178<sup>th</sup> along with <sup>10</sup>198<sup>th</sup> law commission report was presented which emphasized on protection of witness from threats and violence from the accused party, so that the witness is protected and does not turn hostile. As when a witness turns hostile the chance of fair trial is lost because the witness is under threats or is intimidated or coerced into giving the statement, which makes the witness loose his or her freedom of being a witness and tell the facts accordingly. Then In the case of <sup>11</sup>Zahira Habibullah H. Sheikh and Another v State of Gujrat also known as the 'best bakery case'. This case symbolizes the brutality of the carnage during the post-Godhara riots in which more than 1200 people were killed. The witness Zahira turned hostile due to threat from the accused. So, in this case the hon'ble supreme court observed and said that if the witnesses are threatened and they are somehow forced to give a false statement that would also not result to fair trial.

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<sup>5</sup> M.C. Setalvad, Law Commission, submitted on 26.09.1958.

<sup>6</sup> 154<sup>th</sup> Report of the Law Commission of India on the "Code of Criminal Procedure, 1973", submitted on 22.08.1996.

<sup>7</sup> 172<sup>nd</sup> Report of the Law Commission of India on "Reviews on Rape Laws", submitted on 13.03.2000.

<sup>8</sup> Sakshi v Union of India, AIR 2000 SC 3479.

<sup>9</sup> 178<sup>th</sup> Report of the Law Commission of India on "Recommendation for Amending various enactments both civil and criminal 2001".

<sup>10</sup> 198<sup>th</sup> Report of the Law Commission of India Submitted on 31.08.2006.

<sup>11</sup> Zahira Habibullah H. Sheikh and Another v State of Gujrat (2006) 3 SCC 374.

## **II. WITNESSES AND THE LAW**

When a crime is committed, the innumerable elements of the crime are brought together so that it could lead to a trial. Witnesses are one of those innumerable elements in a trial that verify, substantiate and corroborate the facts and issues of the crime. They make the facts of the crime clear and sometimes indicate towards the new issue of the whole ordeal. The term witness has never been defined in code of criminal procedure, 1908 or the Indian penal code, 1860 not even in The Indian evidence act 1872. Witness can be elucidated as, “an individual who has information and knowledge about an event or crime committed. As they are the one who are the closest to the scene and have direct mode of attaining knowledge of an incident by seeing it, therefore a witness has attained the logic of an individual who is present at the scene of the crime and observed the ordeal happen.” The <sup>12</sup>witness protection scheme 2018 defines witness as “any person, who possess any information or document about any offence.” Therefore, an individual can be held as a witness if he has seen the incident happen and has some information about the victim or the culprit or has some documents related to them or he is an eye witness who has seen the crime happen. There four types of witness, firstly a lay witness, these are the most common type of witnesses. These witnesses are individuals who have watched a incident or event happen and they describe what happened. Secondly, expert witness are individuals who are high educated persons and have specific expert field that they work in for example forensics experts and doctors. They give testimony based on their finding from the evidence or the crime scene, they testify about their specialty area with the knowledge and findings and experience they have. Third, a character witness are friends, family or neighbours that stand to testify about the character of the accused of the victims. They mainly shed light on what type of people were the victim or the accused. Fourth, the fact witnesses these are the witnesses who are present to mention and corroborated the facts of the case.

Crime in India has a high rating but, in every crime, finding a witness can be difficult because witness in our country tend to be non-cooperative and have a knack of turning hostile, for example in cases like the murder of Jessica Lal, another example is Asaram Bapu Case, the spiritual guru resided in his ashram as a follower to God. He was suspect of many rape charges by the ladies who visited him for prayers but were instead forced into submission by him for sexual favours. The witnesses in the case concerned all the women who were raped by him. These witnesses received threats by his men alongside his followers. The investigation officers were conjointly vulnerable to avert the investigation or would be subjected to dire

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<sup>12</sup> Witness protection scheme, 2018

consequences. Another such case was the Vyapum scam case, which occurred in Madhya Pradesh where illegal ways were used in medical entrance exams and the whistle-blowers who were also the informants to the investigators were threatened and killed before they can be presented as witnesses in front of the court. This is why most important witnesses become hostile not only due to intimidation, coercion, financial considerations, but also due to fear of being kidnapped and killed. It hardly goes without saying that one of the main reason's witnesses become hostile is that they do not receive adequate protection from the state. A person often turns into a witness because he has no choice but to become a witness. For the most part, people do not volunteer but are forced to become witnesses due to situational reasons because if people do not become the witness the fair trial for the victim will vanish. And if those witness do not volunteer to be there in the court and give testimony, how can we achieve the key intention of the criminal justice system, which is to arrest and punish the offenders? Even with the witness protection act there are many people who still deny to be a part of a trial and be a witness because the system is not strong, the authorities most of the time fail to protect the witness. There are also other aspects to a witness that are mentioned in the Indian Evidence act 1872, such as not anyone can be a witness, to be a witness one has competent to such an extent that nothing, that is mentioned in the law can prevent that person from appearing in the court to present the evidence. The witness's competency also depends on his capacity to understand the questions put before him and provide rational answers to those questions.<sup>13</sup>Section 118 to 121 and section 133 of the evidence act talks about competency of a witness. Section 118 states that anyone is competent to testify unless the court considers them incompetent to understand the question put to them and give rational answers due to tender age, extreme old age, disease or any other condition of the same kind. Even a mentally challenged person as in a lunatic can also be a witness if he is able to understand the question and give rational answer despite of his mental condition. The court does not take into account a witness's religious belief or knowledge of falsehood in this world or next. The court only determine the competency of a witness on his intellectual capacity and understanding with the help of which a witness can give rational account of what he has seen, heard or done on the particular instance. A child can also be a witness, although children are the most dangerous type of witness because due to their tender age, they can often mistake dreams for reality, they also cram things easily and reproduce them. They repeat as to their own knowledge and can be easily influenced by the fear of violence and punishment also with hope of reward and by desire of notoriety. It is indeed true that child witness is not reliable but on the other hand the court

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<sup>13</sup> The Indian Evidence Act 1872, section 118, 119,120,121 and section133.

states that it is an accepted norm that if after careful scrutiny of the evidence the fact is found to substantiate the child's testimony then there is no problem in accepting the testimony of a child witness. There are many such cases where the child is considered as a witness such as <sup>14</sup>Dhan raj and others v state of Maharashtra, where it was held by the Supreme Court that a child witness in eighth standard can be a reliable witness because children of eight standard gain sufficient understanding to observe the fact and narrate the same. Another such case was <sup>15</sup>Satish v state of Haryana where a 12-year-old child testimony was accepted because it was convincing, reliable and no corroboration was needed. Section 119 of the act states that a person who is verbally challenged or mute can also be a witness as they can communicate by writing or by using sign language but this would have to happen in an open court and the evidence would be considered an oral evidence. Also, the court has to record the statement with the help in an interpreter or a special educator and the statement has to be videotaped. Section 120 of the act states that the husband and wife can be witness against one another in all civil cases and also in criminal cases they are competent to be witness. Section 121 mentions that a judge or a magistrate cannot be compelled to be a witness for any trial he or she had presided upon this can only happen if there is a special order from the higher court, he is subordinate to. Section 133 of the acts lays down that an accomplice can be a competent witness against the accused. The evidence provided by an accomplice is perfectly legal. Now that we have seen that who are competent to testify, we have to look at the other aspect that is compellability of a witness. There are some witnesses who are competent enough to understand the question presented before them and can give a very rational answer to this question but they cannot be compelled to the court that is they cannot be subjected to the authority of the court which means the court cannot compel such witness to attend and depose before the court for example foreign ambassadors and sovereigns cannot be compelled to by the court to appear before the court to provide evidence. Therefore, a witness who is competent may not be compellable before the court. There is something also called as restricted compellability or privilege where a witness is competent and is also compellable but the law may not force him to answer certain questions. For example, magistrates, lawyer and spouses have this privilege where they are protected from answering certain questions when examined as a witness. <sup>16</sup>Section 124 to 132 deals with privileges. section 124 of the evidence acts bars public officers to be compelled to from disclosing any communications made to them under official confidence and also when he considers that the discloser would lead to suffering of public interests. Section 125 talks about

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<sup>14</sup> Dhan raj and others v state of Maharashtra AIR 2002 SC 3302.

<sup>15</sup> Satish v State of Haryana AIR 2017 SC 3437 pp. 3439,3440.

<sup>16</sup> The Indian Evidence Act, 1872 section 124,125,126,127,128,129,130,131,132,133,134.

the protection of the identity of the informant that is no police officer or magistrate when starting a case can be compelled to say as to who gave him information regarding an offence is being committed or is going to be committed. Similarly with a revenue officer, he also cannot disclose where he got the information from. Section 126,127 and 128 mentions about lawyer client privilege, Section 126 of the Evidence Act restricts the legal advisors from disclosing any communication, documents or anything else without the express consent of the client before the court. The legal practitioner can use this privilege and not disclose any communication or documents of his client in front of the court and the court cannot compel him to do so. The obligation mentioned in this section continues even after the term of employment has come to an end. Section 127 of the Evidence Act encompasses the domain of section 126 by including all other people employed by the legal advisors such as interpreter, clerks or servants. Section 128 acts as the waiver for the client to evade from providing any evidence to the court unless it is his own will to produce such information, by calling the counsel as a witness. Section 129 of the Evidence Act states that a person cannot be compelled to reveal their communication details with their legal advisor unless the client himself decides to be a witness in the case then the court can ask the person for the communication details from the witness to explain any evidence provided by him in the court of law but other than explanation for the provided evidence no other communication can be compelled to be disclosed. Section 130 of the act lays down that a witness cannot be compelled to produce title deeds or mortgage deed in a case where he is not a party. He can seek protection under this section if he is compelled or if he is asked to produce any document which can incriminate him, also it must be taken into consideration that if the witness has given in writing to produce such documents with the person who is seeking production than the court can compel him. Section 131 states that if any person who has some documents or electronic recordings under his possession and these belong to someone else than the person is not to be compelled to produce such items before the court of law. Section 132 lays down that any statement made by the witness will not be used as a way to incriminate him unless he makes a false statement which can lead to perjury. Therefore section 124 to 132 mentions about when a person can have privilege and can not be compelled. Having done with competency and compellability another aspect for a witness is his credibility, how can we assess a witness's credibility, is the witness biased, how is the witness involved etc. the credibility of a witness can be assessed by analysing the reliability of the witness. We cannot simply determine if an individual is speaking the truth or not but there are various factors which help analyse the credibility of a witness's statement. Firstly, likelihood and reasonability of the statements provided by the witness,



secondly the way the witness carries himself, his body language and his behaviour heavily indicate his mood and feeling. Thirdly does his statements verify with the facts of the case, do they substantiate the evidence provided by the investigators. Fourth, what is the background of the witness, how is his past record. And lastly what are his or her motive to get involved in the case, is the witness an innocent bystander that unluckily got involved or does he have any connections with the accused or the victim. Why was he there at the time of the incident, his alibi etc, are to be kept into account while assessing a witness's credibility?

### **III. WITNESS AND HIS PROTECTION**

It's a pretty usual thing that the life of a witness is always in danger and it's a core duty of the state to protect the witness from any mishaps. As per the data and the exhaustive studies of the judgments it has come to the notice that usage of money, muscle power, threat, inducement by various means is the key factor that turns the witness to hostile. The main reason behind this is they don't get appropriate protection from the state. This often results in the backstepping of the witnesses even if there is a will of the witness to stand for the victim.

The Indian Judiciary has continuously valued the need for Witness Protection. In the National Human Rights Commission vs. State of Gujarat and others, the Hon'ble court admitted and accepted that how important is to implement laws that protect the witness. After reviewing laws and policies regarding witness protection it has come to the notice of the apex court that there are no such provisions that could protect the witness. The Apex Court after this was pleased to permit the Special Investigation Team to check that if there is a need for protection which must be available to such witness or not.

After this, the learned Attorney General was also requested to give his suggestions and then after reviewing everyone's suggestion and based on the recommendations of several states "Witness Protection Scheme, 2018" was finalized by the Central Government. Further, the scheme was regarded as a 'law' within article 141/142 and the center and states are bound to follow it until competent legislation is made.<sup>17</sup>The Witness Protection Scheme 2018 ensured the protection of life and safety of witnesses in every field. Additionally, one of the most important features of witness protection scheme is it identifies three different categories of threat i.e., 'Threat Analysis Report'

Category A: Those cases where threat extends to the life of witness or family members during an investigation or even after that affecting the normal life.

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<sup>17</sup> Witness Protection Scheme, 2018.

Category B: Those cases in which threat extends to safety and reputation.

Category C: Those cases where the threats are moderate and extend to harassment and intimidation of the witness or his family members.

#### **(A) Filing of Application**

The applicant who is seeking protection under this scheme should file an application before the competent authority of the concerned district where the offence is committed through its member secretary and should also submit supporting documents if any.

#### **(B) How to Process the Application**

- Once the application is filed before the competent authority, the role of the authority is to forward the application to DCP, then after he/she shall forward it to the Witness Protection Cell (In a meeting of senior officers it was decided that a witness protection cell shall be created at district level which shall work as a cell to basically implement the scheme) with the direction to collect the TAR (Threat Analysis Report). The cell shall send that to the concerned official mostly SDPO/ACP immediately for a report within 3 working days so that the report be placed before the competent authority within given time.
- Depending upon the situation and the urgency of the matter causing due to the threat, the competent authority can pass orders for protection of the witness or family members if any even if it is during the pendency of the application.
- Nothing shall stop police from providing immediate protection in case of imminent threat to life of the witness or his family.
- The Threat Analysis Report must be prepared with utmost caution while maintaining the full confidentiality and shall reach the competent court within 5 working days of the receipt of the order.
- While processing the application for witness protection, the competent authority shall also interact in person if possible and if not through electronic means so as to ascertain the level of protection the witness needs.
- All the hearings shall be held in-camera by the competent authority while maintaining full confidentiality.

- The witness protection order passed by the competent authority shall be implemented by the Witness Protection Cell of the state or trial court, as the case may be. Over all protection shall lie on the head of the police in the state.
- The witness protection order passed by the competent authority for changing of the identity or relocation shall be implemented by the department of home of the concerned state.
- Once the witness protection order is passed, the witness protection cell shall file a monthly follow up report before the authority after collecting the details from SDPO/ACP through district.
- In any case if the competent authority finds that there is a need to revise the witness protection order then he is free to do so and upon completion of the trial a Threat Analysis Report is to be made and called from ACP/ DSP.

There are certain guidelines which were issued in the case of Mahender Chawla v Union of India

- It ensured that the witness and the accused are not present together during the trial or the investigation.
- The witness must be given an unlisted telephone number so that the witness does not receive any threat calls.
- Giving adequate security to the witness in form of protection which includes regular patrol and usage of security devices such as CCTV, fencing all around, security doors, etc.
- even if the witness prefers by requesting the official, he/ she can suppress the original identity and can have some other identity.
- To avoid the threats, witness and the police officials prefer to change the residence of the witness for safety purposes.
- Witnesses are provided with a government vehicle to and from the court on the date of hearing of the case.
- Holding of in-camera trials
- Allowing one more person while recording the statement.

- Usage of specially designed courtrooms for witnesses which have one-way mirrors and separate passage for both the witness and the accused and live video links with the option to modify the audio of the witness so that he/she is not identifiable.
- Awarding time to time financial aid to the witness from witness protection fund for the reason of relocation or starting a new profession because of the change of identity.
- Any other protection is also considered if found necessary.

### **(C) Comparing witness protection with other Countries**

Today witness protection can be seen as a very important tool in reducing crime which is happening all over the globe. To combat the organized crime witness protection have been implemented across the world.

Here are some of the examples that have established the Witness Protection Scheme.

### **(D) United States of America**

Witness Protection first came into effect in the United States of America in the 1970s as a legally passed scheme to be used in connection with a program to disassemble Mafia –style criminal organizations. At that period of time the members of Mafia used to threat to anyone who cooperated with the cops. Important witnesses were unable to give witness against the accused because of the death threat hence key witnesses were lost. These continuous incidents persuaded the Department of Justice to take a step forward and to institute a scheme for Witness Protection.

The Organized Crime Control Act empowered the United States Attorney General to provide security to witnesses who are willing to stand as a witness and had agreed to testify truthfully in cases involved in serious crimes.<sup>18</sup>The Witness Security Program of the United States (WITSEC) under Attorney General ensured physical safety to the witness ranging from changing their identities and creating a new identity to changing their occupation.

After a decade of operations, a number of fault that the WITSEC program had gone through during that time was addressed by the Witness Security Reform Act.

The issues and the changes that were made during that time is still considered to lie in all the witness protection program:

- A) signature of memorandum of the witness obligation upon admission the program.
- B) Establishment of strict procedures for the disclosure of information regarding the

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<sup>18</sup> Title V of the organized crime control Act, 1970.

information of the participants and penalties to pay for unofficial revelation of such information.

C) Development of procedures to be followed if the memorandum is breached by the participant.

D) Establishment of fund to compensate the victims and the witness after their admission to the program.

#### **(E) Australia**

While going through the Australian Legislation it is found that there are various witness protection schemes.

#### **(F) Witness Protection Act, 1991(Victoria- Australia)**

The parliament of Victoria has enacted an Act which is known as <sup>19</sup>Witness Protection Act, 1991 for the purpose of providing protection to the witness. The term ‘Witness’ is defined under section 3(1) of the act. Section 3A of the act provides the <sup>20</sup>Victorian Witness Protection Program. The chief Commissioner of Police is entitled to take action for the protection of the witness and his family. In section 3B the Act gives rights to the chief commissioner of the police to decide whether the witness can be included in Victorian protection program or not and Section 5 of the Act provides memorandum of understanding. On the grounds of providing protection and assistance to the witness, the chief commissioner’s duty is to enter into a memorandum of understanding (MOU) with the witness. The MOU shall be signed by the witness in which the terms is to be mentioned whether the witness shall be included in the Victorian Witness program for protection and assistance.

#### **(G) Witness Protection Act, 1996 (Australian Capital Territory)**

National Capital Territory of Australia incorporated separate legislation for the welfare of the witnesses namely Witness Protection Act, 1996. It is almost the same as Victorian Witness Protection Act, 1996.

The Chief Police officer with commissioner shall take action for protection, safety and welfare of a witness. The action may include providing new identity, financial assistance, providing new accommodation with transport. Under section 5 the assessment of witness shall be done according to the provisions of the Common wealth Act. Under section 6 the police officer may apply for any document which is required to allow witness to establish a new identity. The

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<sup>19</sup> Witness Protection Act, 1991 section 3(1).

<sup>20</sup> Victorian Witness Protection Act, 1996 section 3A and 3B.

witness protection Act also ensures that the identity of the witness to be kept confidential, leading to disclosure of identity or any act which compromises the security of such participant shall be penalized with imprisonment up to 10 years.

#### **(H) Witness Protection Act, 2000 (Queensland)**

Part II of the <sup>21</sup>Queensland's Witness Protection, 2000 provides for the Witness Protection Program. Section 5 says that the witness protection program shall run by the commission to provide protection to the witness. If the chairman is satisfied, he shall include the person in the program as the protection agreement under section 7 and if there is an urgency then the chairman has right to order for interim protection also. This Act also provides for voluntary withdrawal of the witness through a notice under section 13.

#### **(I) Evidence (Witness Anonymity) Amendment Act, 2000 (Queensland)**

“The Queensland Evidence Act 1977 was amended in the year 2000 by Evidence (Witness Anonymity) Amendment Act, 2000”. Section 21 C and 21 D provides the scope of the division and provides for Witness anonymity certificate. The chief executive officer has been authorized to give the certificate when it is necessary to protect the witness and section 21 F provides for effect of Anonymity certificate, in regard that the protected witness may give the testimony in the court proceeding under the name of the witness used in the operation and no question shall be asked to witness which may lead to the disclosure of identity of the witness.

#### **(J) South Africa**

Back to the adoption of the 1996 National Crime Prevention Strategy, <sup>22</sup>witness protection of south Africa was governed under 185 A of Criminal Procedure Act of 1977. These were repressive in nature and were only used during the apartheid regime as a means to constrain witness to give evidence. In 1996 the strategy recognized that this is tool to get evidence from the vulnerable witness and acknowledged that the witness protection was at that time a weak link in the criminal justice system.

It regulates the power and functions of the director including the power to decide on whether the witness is fit for the admission in the program. The director's decision is based upon the recommendations of the branch office head members and official from the law enforcement agencies. The director's decision to refuse can be reviewed by the minister of justice if necessary.

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<sup>21</sup> Queensland's Witness Protection, 2000

<sup>22</sup> South Africa Witness Protection Program (Act no. 51 of 1977).

It defines offences and also the penalties for any kind of disclosure of the identity of the witness which led to the compromise of the safety of the witness. The decision whether any information is to be disclosed or not lies in the hands of the director.

It defines the crime for which the witness can request for protection, what is the procedure to be followed and who are the person eligible to apply. The list of offence is not exclusive as the director has the discretion to approve the protection for any other proceedings.

It provides that if any civil proceeding is pending against a protected witness, it may be suspended by a judge in chambers, under an ex parte application so as to prevent the disclosure of the identity of the witness.

#### **IV. AREAS WE NEED TO IMPROVE**

Witness Protection Scheme intends to provide protection to people who are directly or indirectly providing assistance to criminal law enforcement agency.

1. It provides police protection to the witness
2. It prevents face to face encounter of the accused and the Witness to maintain the security of witness
3. The identity of the of the witness shall not be revealed anywhere
4. It also suggests that there shall be in camera trials in courts.
5. The witness to be relocate to other area as per the Threat Analysis Report.

##### **(A) Lacunae in the scheme**

Many of the witness are under the threat of being ostracized from the society as there still exist casteism.

Many poor witnesses don't want to run to court again and again due to the frequent adjournment of the cases.

It is difficult for the overburdened police to prepare a detailed threat analysis report.

Provisions for in camera trails and prevent face to face interaction are not possible due to the lack of infrastructure in lower courts to implement them.

Change of identity and relocation in Indian context is not possible

The identity shall not be revealed anywhere is also mentioned in the guidelines but in real it has come to the notice that during the trail of high-profile cases the corrupted police officers under the influence of political party leaders reveal the identity of the witness which leads to the danger of the life of the witness.

There is also a witness protection fund but often we see the witnesses are not fully compensated.

Even in rarest case the witness can be seen as relocating their place of residence but once the trial of the case is completed the witness is brought back to their old residence this is really a high risk, this problem must be addressed.

More over the witness protection Scheme, 2018 provides temporary protection to the witness for three months and after the completion of 3 months the witness prone to get threatened by accused.

The scheme has some categories for the witness according to threat perception, so this type of categorization due to limitations, it does not benefit the witness.

## **V. CONCLUSION**

Witness in India is in a need of strong protection, this is because the Indian criminal Justice system have focused to protect the right of accused but have ignored the right of witnesses. This is the sole reason as to why the witness seems to be helpless when he approaches the court to lend his testimony. The code of criminal procedure is in the concurrent list hence both the state and the center can legislate on the matters. Even the Supreme Court declared the scheme as law under article 141\142 of the constitution till any enactment by state or central. Supreme Court in Mahender Chawla & ors vs. Union of India, have drafted the witness protection scheme, 2018 and ordered the central and state government and Union territories to enforce the scheme in letter and spirit. In Article 141 it is mentioned that that the law declared by the supreme court shall be binding to all the courts within the territory of India. This is a landmark step taken forward for the protection of the witness but however we find some drawbacks in the scheme. Even if the scheme is present still it has come to the notice that witnesses are not getting enough protection. There are even some serious problems which is mentioned in the area we need to improve. While drafting some policies an insight can be taken from the Australian legislation, as the legislation is beautifully drafted and even it is very much effective while providing protection to the witness.

## **VI. SUGGESTIONS AND RECOMMENDATIONS**

Discussing all the major Acts with reference to different countries. We can articulate that Witness Protection in Australia has the strongest protection program.

After looking at all the features we find some unique features in the protection scheme of Australia.



**a. Memorandum of Understanding (MOU)** This is one of the unique features that has been found in the Australian witness protection scheme. In this the witness and the commissioner are required to sign the memorandum for the protection of the witness. This has been provided under section 3B of the Act. The memorandum states all the necessary details as to why the witness is induced in the witness protection scheme and details of the protection and if there is a breach of a term of memorandum of understanding the protection and assistance may be terminated (MOU)

This provision is not mentioned in the Witness Protection Scheme of India, 2018.

**b. Witness anonymity:** This is another feature which is mentioned in the criminal justice system of Queensland, they had enacted an Act called Evidence (Witness Anonymity) Amendment ACT 2000. The Act empowers the magistrate to order the anonymity in favor of the witness whose safety maybe in danger due to the disclosure of the identity. Sometimes it may happen that the identity of the witness is known by the accused which can be a threat to the witness or the family of the witness. So, in order to protect the identity of the Witness the anonymity certificate is issued.

There is no such provision for witness anonymity under the Witness Protection Scheme, 2018.

### **Columbia witness protection scheme**

Even in the witness protection scheme of Columbia it has been seen that the witness in some cases where there is a high-level risk are open for the permanent relocation inside Columbia. Witness even receives financial aid with psychological support to start a new life.

This provision is not present in the Indian Witness Protection Scheme.

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