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WITNESS PROTECTION SCHEME, 2018 TO STATUTORY REFORM: EVALUATING THE NEED FOR A CENTRAL WITNESS PROTECTION ACT IN INDIA

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Abstract

Witnesses constitute an indispensable component of the criminal justice system, as their testimony frequently determines the establishment of guilt or innocence. However, intimidation, threats, coercion, harassment, inducement and fear of retaliation continue to discourage witnesses from providing truthful and independent testimony in India. The Witness Protection Scheme, 2018, introduced pursuant to the Supreme Court's decision in *Mahender Chawla v. Union of India*, represented a significant judicial intervention aimed at institutionalising mechanisms for the safety and security of witnesses. With the enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023, Section 398 has further provided statutory recognition to witness protection by requiring every State Government to notify a Witness Protection Scheme. Nevertheless, the existing framework continues to raise concerns regarding uniformity, institutional capacity, funding, implementation, accountability and interstate protection. This paper critically examines the transition from the Witness Protection Scheme, 2018 to statutory recognition under the BNSS, 2023, and evaluates whether the existing framework adequately addresses the practical vulnerabilities faced by witnesses. Through doctrinal and comparative analysis, the paper argues that statutory recognition alone may not be sufficient to establish an effective and uniform national system. It proposes consideration of a comprehensive Central Witness Protection Act incorporating uniform standards, independent institutional oversight, dedicated funding, effective relocation mechanisms and safeguards consistent with the accused's right to a fair trial.

Keywords: Witness Protection; Witness Intimidation; Witness Protection Scheme, 2018; Bharatiya Nagarik Suraksha Sanhita, 2023; Criminal Justice System.

1. INTRODUCTION

Witnesses play a significant role in the execution of criminal justice since their statement serves as the basis for the courts to recreate events, understand the details of an alleged crime, and formulate a decision that can legally be sustained. Therefore, the success of the adversarial criminal justice system greatly relies on witnesses' impetus and readiness to give truthful and unaffected evidence. The Witness Protection Scheme of 2018 recognizes that a witness's ability to testify before a court and to cooperate with law enforcement bodies is indispensable.¹ The necessity of protecting witnesses increases in cases of organized crime, terrorism, sexual crimes, crimes committed by powerful people, and many others, since witnesses may face threats to their lives, freedom, dignity or property. Hence, safeguarding witnesses is an essential element for the fairness and success of criminal justice.

However, witness intimidation has been a problem in India for a long time. Witnesses may experience threats, coercion, inducement, harassment, social pressure, or violence, making them either renounce their statements or change their testimonies. Many witnesses As the Supreme Court stated in the State of Gujarat case, for a trial to be fair, when making statements, people are scared. The court also stated that if people have been pressured to change their statements, it is no case where a fair trial can take place.² Therefore, witness protection is crucially connected with the right to a fair trial guaranteed by the constitution. The court also noted that the people who know about what happened for a crime are helping the state and the court in doing their job.³

The problems in the current system were identified step by step by reports produced by various expert bodies and judgments. The first mention of the necessity of protecting witnesses was made in the report of the Law Commission of India,¹ which can be seen in its 14th Report. Later on, as can be seen from the 154th and 178th Reports of the Law Commission of India, the issue was considered in details.⁴ legislative framework, courts had to intervene in this area of law, while proposals concerning the law-making process were put in place to protect witnesses in serious criminal cases.⁵ The Malimath Committee on Reforms of Criminal Justice

¹ Ministry of Home Affairs, Government of India, *Witness Protection Scheme, 2018*, Preface and "Aims & Objective" (2018).

² *Zahira Habibulla H. Sheikh v. State of Gujarat*, (2004) 4 SCC 158; AIR 2004 SC 3114.

³ *State of Gujarat v. Anirudh Singh*, (1997) 6 SCC 514.

⁴ Law Commission of India, *The Code of Criminal Procedure, 1973*, 154th Report (1996); Law Commission of India, *Witness Identity Protection and Witness Protection Programmes*, 198th Report (2006).

⁵ Law Commission of India, *Witness Identity Protection and Witness Protection Programmes*, 198th Report, chs.

System acknowledged the same importance of witnesses stating that every witness providing testimony for a court should be noted as performing an important obligation to aid the courts in investigating crimes.⁶

The Supreme Court's in *Mahender Chawla v. Union of India* marked a significant milestone in the sphere of witness protection.⁷ In this ruling, the Supreme Court reviewed the topic of witness vulnerability and assigned the enforcement of Witness Protection Scheme, 2018 nationwide until the respective legislative act will be passed. However, it is worth noting that the witnesses protection scheme has made an important step from the uncontrolled approaches towards protection of witnesses towards a systematic plan based on providing the analysis of threats, protection levels, powers of agencies involved in the scheme, confidentiality, relocation, and other protection measures.⁸ At the same time, it should be noted that although the scheme has received official approval from the court, the question of its legislative nature has arisen leading to the concerns regarding the legitimacy of the scheme, as well as the question of uniformity of its implementation and resource provision.

The adoption of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) has brought significant change in the statutory law. According to Section 398, every State Government is obliged to formulate and announce a Witness Protection Scheme for the State.⁹ The introduction of this provision to the law took place when the BNSS came into force on 1 July 2024 and is tantamount to the formal legislative acknowledgment of witness protection in the criminal procedure law of India.¹⁰ However, it should be noted that Section 398 does not envisage the establishment of a particular centralized legal witness protection system. It delegates the process of the establishment and announcement of witness protection schemes to State Governments, thereby creating doubts of a regular system of protection, institutional capability, funding, inter-state protection measures, and means of enforcing the law. Therefore, the main question shifts from whether witness protection is accepted at the legal level to whether the existing legal system has enough features to ensure a suitable protection.

I, V & XIII (2006).

⁶ Government of India, Ministry of Home Affairs, *Report of the Committee on Reforms of Criminal Justice System* (Mar. 2003).

⁷ *Mahender Chawla v. Union of India*, (2019) 14 SCC 615.

⁸ Ministry of Home Affairs, Government of India, *Witness Protection Scheme, 2018*, paras. 1–11 (2018).

⁹ The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, § 398 (India).

¹⁰ The Bharatiya Nagarik Suraksha Sanhita, 2023, § 1(2); Ministry of Home Affairs, Government of India, *The Bharatiya Nagarik Suraksha Sanhita, 2023* (enforcement date: 1 July 2024).

In this connection, the current research aims to trace the inception of the Witness Protection Scheme of 2018 till the legal recognition under Section 398 of the BNSS of 2023 and define the necessity for the establishment of the Central Witness Protection Act. The study aims to find out whether the existing framework of the witness protection in India provides adequate witness protection systems or a devoted piece of legislation is required to ensure the standards of protection, techniques used by institutions, and financing of the system safeguarding vulnerable people. The research also touches upon the issue of the constitutional aspect of witness protection.

The main questions of the study are: firstly, how has the law of witness protection evolved in India from the point of view of judicial recommendations till the adoption of the legislation? Secondly, how effectively does the Witness Protection Scheme of 2018 provide the means for help to witnesses? Thirdly, whether Section 398 BNSS is effective when speaking about the disadvantages of the existing legal protection system? And finally, whether India needs a comprehensive Central Witness Protection Act. Thus, the study will focus on the historical and legal bases of the witness protection system in India.

2. EVOLUTION OF WITNESS PROTECTION LAW IN INDIA

The witness protection legislation of India illustrates a shift away from a trend of being reactive and scattered towards a systematic and institutionalized one. For a long time in India, criminal law did not have a proper legal framework designed solely to protect witnesses from threats, intimidation, or harassment. Although some aspects of the substantive or procedural law dealt indirectly with issues related to the safety and participation of witnesses, they primarily dealt with issues of attendance in court, recording testimony, and the integrity of the judicial process rather than providing a comprehensive protection scheme. The lack of specific statutory framework started to become especially problematic in terms of serious criminal cases in which witnesses had no protection from threats and pressures from the accused and his or her network. As a result, witness testimony may not be sought, which would affect the prosecution or adjudication and disappear from the scope of the criminal justice process.

The constitutional dimension of witness protection pledged to grow together with the aforementioned legislative deficiency. The right to equality before the law and protection of the laws was covered by Article 14 and the right to life and personal liberty, provided for in Article 21 of the Constitution was applicable subject to the compliance with the established

procedure of law. The Supreme Court understood from this Article 21 implies that criminal proceedings should be fair and that the process of criminal justice itself should not undermine the integrity of the trial.¹¹ The notion of a fair trial is not restricted to the rights of the defendant but also includes the interests of victims, witnesses and society. In this regard, witness security can be seen as an important institutional mechanism that guarantees that information is given without being exposed to intimidation or intervention. Protecting a witness from being intimidated means providing two types of security: for the person and for the judicial system.¹²

The Law Commission of India has played an important role in drawing the public's attention to the necessity of a separate witness protection system. The Fourteenth Report of the Law Commission dealt with the reform of judicial administration and criminal procedure and acknowledged the significance of witnesses in the justice system.¹³ In other reports, the Law Commission kept addressing its concerns with the special nature of witnesses. The issue was addressed in particular in the 198th Report of the Law Commission of India, "Witness Identity Protection and Witness Protection Programmes," which was written in 2006.¹⁴ This Report was concerned with the problem of witness intimidation and came forward with some suggestions regarding the identity and security of witnesses. It was acknowledged that witnesses can suffer threats not only in terms of security but also in terms of their prestige, property and family. That is why the Commission suggested the establishment of a formal witness protection program and also the introduction of laws that would provide such assistance.¹⁵ The report proposed an overall strategy regarding witness protection by way of measures for witness identification security, relocation, confidentiality, etc. The report was clear about the necessity of maintaining equilibrium between witness protection and the rights of the accused person. It is critical because a mechanism protecting witnesses by depriving the possibility of confrontations would hinder the accused's right to their due process. Therefore, the question related to witness protection law was how to create mechanisms to secure witnesses but without causing damage to the crucial safeguards of criminal justice proceedings. Following this, the government circulated the 198th report to the state governments and Union territories to know their opinions while the question was also checked by the Bureau of Police Research regarding

¹¹ INDIA CONST. arts. 14, 21.

¹² *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; AIR 1978 SC 597.

¹³ Law Commission of India, *Reform of Judicial Administration*, 14th Report, Vol. 2, ch. 41 (1958).

¹⁴ Law Commission of India, *Witness Identity Protection and Witness Protection Programmes*, 198th Report (2006). The Law Commission's official catalogue identifies the 198th Report as concerning "Witness Identity Protection and Witness Protection Programmes."

¹⁵ *Id.*

how realistic the witness protection program was.¹⁶

The committee on the reform of the criminal justice system, also called the Malimath committee, also raised the question of witness significance in the criminal process. The committee's report showed that there were weaknesses in criminal justice, thus implying a necessity for reform, which could improve the quality of evidence. The committee acknowledged that witnesses have to go through a lot of difficulties and pressure in conducting any of the procedures, therefore implying that justice must create conditions for truthful testimony. Therefore, the recommendations of the committee added to the context of the reform discourse on witness protection by stating that this issue is not merely an individual safety issue, but rather is about the credibility of the whole system.

Nevertheless, even after the existence of such recommendations, there hasn't been done any progress in terms of legislation. In conclusion, Indian courts have taken an active role in developing protective measures for witnesses. The Supreme Court's decisions on fair trials, witness intimidation, and hostile witnesses have established guidelines according to which it is the responsibility of the state and the courts to create an environment where witnesses can testify. In the famous *Best Bakery* case, the Supreme Court ruled that a fair trial cannot take place unless witnesses are able to testify freely and honestly. The Court indicated that the criminal justice process cannot operate properly if witnesses are forced to change their testimony through intimidation. This landmark decision reinforced the idea that witness protection is a matter closely related to the fundamental right to a fair trial recognized by the Constitution of India.¹⁷

The Supreme Court's views on the issues of hostile witnesses and the obligation of the state to prosecute successfully can be illustrated by reference to the case of *State of U.P. v. Ramesh Prasad Misra*.¹⁸ In this case, the Court noted that the testimony of a hostile witness does not lead to the complete exclusion from the evidentiary process. This shows that there is a difference between the legal provisions that regulate the issues concerning hostile witnesses and the necessity to protect witnesses. Indeed, the problem is not only about a witness's

¹⁶ Ministry of Home Affairs, Government of India, *Security to Witnesses*, Press Information Bureau, Jan. 2, 2018. The Ministry stated that the 198th Law Commission Report had been circulated to States and Union Territories and that the matter was subsequently examined by the Bureau of Police Research and Development.

¹⁷ Ministry of Home Affairs, Government of India, *Report of the Committee on Reforms of Criminal Justice System* (2003).

¹⁸ *State of U.P. v. Ramesh Prasad Misra*, (1996) 10 SCC 360.

unwillingness to cooperate; intimidation leads to the loss. The judgment of the Supreme Court in the case of *Mahender Chawla v. Union of India* marked an important development.¹⁹ With the proceedings in this case, the issue of witnesses' vulnerability and a national framework to address the same gained great prominence among the justices.²⁰ Besides, the court considered the recommendations put forth by the Law Commission and also took into account issues of intimidation of witnesses and the lack of any comprehensive law on the same. The court noted that witnesses require protection in order to testify without fear of any threats or reprisals. As a result, it approved the Witness Protection Scheme, 2018 as well as instructed implementation of the same until the necessary legal framework was created.²¹ The importance of the judgment in question lies in the fact that the Court converted the Scheme from a mere proposition of the policy into a working mechanism across all jurisdictions of the country.

The Witness Protection Scheme, 2018 created an organized mechanism including measures taken based on the kind of threats faced by the witness. In particular, the Scheme authorizes threat assessment, categorization of witnesses, establishment of Competent Authority and provision of the set of measures, including concealment of identity, relocation of witnesses and provision of security.³

3. WITNESS PROTECTION SCHEME, 2018: LEGAL FRAMEWORK AND IMPLEMENTATION

The Witness Protection Scheme, 2018 is a significant development in witness protection law in India. Up until this point, witness protection had been addressed in the country in piecemeal manner through some existing legislative provisions, some court orders, and some administrative practices. The Scheme was formulated by the Ministry of Home Affairs and was later approved by the Supreme Court in the case of *Mahender Chawla v. Union of India*.²² The Supreme Court ordered that the Scheme ought to be implemented in its full force until Parliament passed an appropriate Act for witness protection. Hence, the Scheme became a vital bridge between judicial acknowledgment of the plight of witnesses and their eventual statutory recognition by Section 398 of the *Bharatiya Nagarik Suraksha Sanhita, 2023*. Its importance lies not only in providing physical safeguards but also in providing a system by means of which

¹⁹ *Zahira Habibulla H. Sheikh v. State of Gujarat*, (2004) 4 SCC 158; AIR 2004 SC 3114.

²⁰ *Mahender Chawla v. Union of India*, (2019) 14 SCC 615.

²¹ *Id.*

²² *Mahender Chawla v. Union of India*, (2019) 14 SCC 615.

threats can be identified and necessary measures taken. The main aim of the Scheme is to enable witnesses to help the justice system without fear of intimidation or retaliation. The Scheme also recognizes that a witness may require different types of protection due to the varying nature of his or her case. In serious organised crime cases, a witness might be in a very different situation than a witness just experiencing some social pressure or minor harassment. The Scheme takes into account these differences. Witnesses are sorted into groups based on threats.²³

There are three categories for sorting witnesses: A, B and C. A category applies when there is a threat to the life of a witness or someone related to them from the moment of an investigation and until trial proceedings are finished. The B category relates to threats to the health, wellbeing or property of the witness and their relatives.²⁴ The C category includes cases where the threat is less serious and basically consists of harassment or intimidation of the witness and their relatives. This is important from the point of view of the proportionality of protective measures. The State is not obliged to provide identical protection to all witnesses; the kind of protection and its level should correspond to the risks assessed in the situation.²⁵

The categorisation system is closely connected with the Threat Analysis Report, which is the basis for choosing the required protection measures. When an application for protection is made, the Competent Authority can request a report from the Commissioner of Police or the Head of the relevant police organization on the extent and seriousness of the threat.²⁶ The purpose of a threat assessment is to provide an objective basis for determining the need for protection, and if so, what kind of protection is suitable. This is important because witness protection must not be based on claims of fear alone. At the same time, the process must be able to deal with genuine threats, especially when witnesses may be hesitant to report threats because of the fear of reprisals. The effective implementation of a threat assessment would thus depend on trained personnel and reliable intelligence as well as a periodic assessment of the changing conditions.

²³ Ministry of Home Affairs, Government of India, *Witness Protection Scheme, 2018*, Preface and paras. 1–3 (2018).

²⁴ *Id.*

²⁵ *Id.*, para. 3. The Scheme classifies witnesses according to the nature and degree of threat, including threats to life, safety, reputation and property.

²⁶ *Id.*, para. 6.

One of the key institutional features of the Scheme is the establishment of a Competent Authority at the district level. This authority is headed by the District and Sessions Judge and includes the Head of the police in the district and the Head of the Prosecution in the district as members.²⁷ The Member Secretary is responsible for receiving applications and assisting in the processing of requests for protection. The involvement of judicial, police and prosecution representatives shows that an inter-institutional mechanism is being created. Such The Scheme establishes a structured mechanism for making an application for witness protection before the relevant authority in the district.²⁸ This application can be made along with accompanying documents which subsequently allows the authority to seek a threat analysis report and grant a protection order. The scheme has been designed to provide priority to the applicants as delay in granting protection defeats the very purpose of providing protection. Anti-social elements should not be allowed to threaten witnesses in the course of administrative process.

The most important element of the Scheme is the establishment of a fund called the Witness Protection Fund. The purpose of this fund is to meet the costs of compensation under the protection orders and other costs associated with implementation of witness protection schemes.²⁹ The fund may consist of funds allocated by the government, amounts directed by court or tribunal to be paid into the fund, donations and contributions made by donor organizations, and contributions made by corporate entities under their CSR initiative. The Fund would be operated by the relevant department or ministry of home affairs of the respective government.³⁰ The existence of a dedicated funding is important since effective protection cannot only take place because of the legal orders; it also requires funding mechanisms in place for safety, accommodation, relocation and technology-related measures. The security measures outlined within the Scheme are extensive and adaptable by nature. As per the assessment of the threat, different types of protection may be offered such as police intervention, regular monitoring of residence by authorities, installation of security measures at the residence of the witness, modifying residence temporarily, provision of escorts, and other methods of physical protection.³¹ The plan includes more advanced forms of protection to be applied in cases when regular police measures would not be enough such as hiding of identity, altering identity,

²⁷ *Id.*, para. 2.

²⁸ *Id.*, para. 5. The Scheme provides for filing an application before the Competent Authority of the concerned district through its Member Secretary.

²⁹ *Id.*, para. 4.

³⁰ *Id.* The Scheme identifies State budgetary allocations, court-ordered deposits, permitted donations and CSR contributions as sources of the Witness Protection Fund.

³¹ *Id.*, para. 7.

changing of place for the witness and his family members, and ensuring concealment of information related to the witness. This points to understanding that in cases of danger physical protection would not be capable of providing full safety from threats.

Identity protection and relocation are very important elements in the modern mechanism of witness protection. If the address, phone number, job or any information identifying the witness are made known, the witness will be forced to undergo constant pressure from criminals. Thus the scheme allows implementing various measures aimed at ensuring the concealment of the identity of the witness when justified by the situation.³² The relocation implies the movement of the witness to another locality temporarily or permanently when staying at the current place poses an extreme danger to the individual. Nevertheless, relocation raises various difficulties from the administrative and financial point of view. The relocation may lead to interruptions in employment, studying, and relationships with relatives and friends. Thus, it is necessary to ensure that relocation means the transfer of the witness from one place to another with all the consequences taken into consideration. This may involve the use of closed court sessions, screens or other means to restrict the witness from being face to face with the defendant, ensuring that the witness's identity is protected from any disclosure and employing such means as video conferencing where necessary.³³ Such measures are particularly suitable for vulnerable groups of witnesses such as minors and victims of sexual offences. The goal is to provide witnesses with the opportunity to testify and not to create unnecessary psychological pressure on them. Thus, it is of utmost importance to strike a balance between the defendant's procedural rights, in particular his or her right to cross-examine witnesses, and the protection of potential witnesses.

The Scheme also provides for periodic revision of protection measures because, as the investigation and trial go on, the degree of danger may change. A witness initially seen as facing moderate danger may later become a high-risk witness if the defendant becomes aware of his or her testimony. At the same time, if the threat is lessening, protection can be downgraded. Thus, a continuous threat assessment is much more effective than a single one-time evaluation. Successful implementation of the Scheme should be based on cooperation between law enforcement agents, prosecutors, judges and protection authorities.

³² *Id.*, paras. 7–8.

³³ *Id.*, para. 7.

4. STATUTORY REFORM UNDER THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023

The establishment of the Bharatiya Nagarik Suraksha Sanhita, 2023 represents a landmark development in the reform of India's criminal procedure. The Sanhita superseded the Code of Criminal Procedure, 1973 and brought about many changes aimed at modernizing the framework of criminal procedure, reinforcing investigative processes and responding to new challenges in the administration of criminal justice.³⁴ One of the notable changes bestowing particular significance is the statutory recognition of the protection of witnesses. India's reliance on judicial orders and the Witness Protection Scheme, 2018 for addressing vulnerability of witnesses is quite long. Section 398 of the BNSS, 2023 has now imposed mandatory requirement on every State Government to prepare and publish Witness Protection Scheme.³⁵ This is recognizable as a shift from judicially based system to one rooted in statutory framework.

The Criminal Procedure Code, 1973 did not provide for the requirement by State Governments to formulate witness protection scheme that the Section 398 BNSS imposes. The Code of Criminal Procedure has some provisions associated with protection of witnesses including those allowing summoning, cross-examining, taking evidence and protection of vulnerable participants of criminal proceedings, but the legislature did not provide for comprehensive statutory scheme related to witness protection.³⁶ Consequently, practical witness protection was reliant on the action of general criminal law, judiciary, state administration and finally, the Witness Protection Scheme of 2018. The role of the Supreme Court in *Mahender Chawla v. Union of India* decision was to provide for operation of 2018 Scheme until proper legislation is passed.³⁷

Implementation of the BNSS addresses the legislative gap. According to Section 398, “every State Government shall prepare and notify a Witness Protection Scheme for the State with a view to ensure protection of the witnesses.”³⁸ The provision is important for two reason. First, it lays the requirement to formulate a scheme instead of allowing states to act on their own in

³⁴ The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, Statement of Objects and Reasons (India).

³⁵ *Id.* § 398.

³⁶ The Code of Criminal Procedure, 1973, No. 2 of 1974 (India).

³⁷ *Mahender Chawla v. Union of India*, (2019) 14 SCC 615.

³⁸ The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, § 398 (India). The official statutory text provides that every State Government shall prepare and notify a Witness Protection Scheme. (indiacode.nic.in)

the issue. Second, it acknowledges the fact that the schemes will have to be formulated. Therefore, witness protection is taken out of the judicial endorsement realm into the realm of legislation.

There are a few significant implications of the establishment of statutory witness protection. First, the duty of the State to provide witness protection is enshrined into statutory criminal procedure for the first time. Second, the State Governments are required to establish a scheme whereas before the protection was based on ad hoc practice. Third point is that these provision gives greater legal value to mechanisms for providing witness protection. This is especially important taking into account the Supreme Court's position with respect to the 2018 Scheme.

5. EVALUATING THE NEED FOR A CENTRAL WITNESS PROTECTION ACT IN INDIA: COMPARATIVE AND REFORM PERSPECTIVES

The enactment of witness protection legislation under Section 398 BNSS, 2023 is a crucial milestone in its own right; however, it does not solve the problems in the structure of witness protection in India, which have been there historically. This provision makes it mandatory for each State Government to devise and formulate a Witness Protection Scheme; however, there is no national institutional mechanism in place that addresses the substantive rights of witnesses, standards of protection provision, relocation across States, identity change, financial provisions, monitoring and accountability. The issue, therefore, is whether the combination of Witness Protection Scheme 2018 and Section 398 BNSS is enough or whether a separate Central Witness Protection Act should be enacted by India.³⁹

The argument in favour of a Central legislation should start with the fragmentation issue. Witness Protection Scheme 2018 is meant to be a national framework; however, its implementation necessarily involves State level police and administrative institutions. Section 398 BNSS only reinforces this State-oriented approach, as it requires every State Government to devise its own scheme.⁴⁰ While such decentralisation can be conformed to the federal nature of India it also means that there would be variations in terms of institutional capacities and its functioning. States differ greatly with respect to number of police officers, financial resources,

³⁹ The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, § 398 (India).

⁴⁰ Id.

available technology, safe housing and administrative proficiency. Therefore, witness protection provided by particular States will depend on where the criminal case is brought. This is a serious problem, as witness protection is crucial for the integrity of criminal trials and for the possibility of courts to obtain truthful information.

Establishing a Central Witness Protection Act does not necessarily mean that there should be complete centralisation of witness protection processes, as the Parliament could create common minimum standards to be followed by different States. Thus, the central legislation should include the common standards like threat evaluation, eligibility, confidentiality, physical protection, relocation, identity protection, financial support and monitoring. States would then have the possibility to create additional instruments according to their local needs. This would allow for preserving the federal nature of crime administration and minimal protection being similar across the States.

With the implementation of the Central Witness Protection Act, India would have a comprehensive and legally viable framework for the safety of witnesses in the entire criminal justice process. Section 398 of the Bharatiya Nagarik Suraksha Sanhita, 2023 obliges each State to formulate its Witness Protection Scheme, but fails to provide precise national standards for risk assessment, relocation, safety of identity, funds, accountability of authorities and coordination between States. The Central Act would eliminate the existing shortcomings by establishing the National Witness Protection Authority, which would be responsible for the creation of the national standards, coordination of protection between States and monitoring of the implementation. The Act could also provide for the establishment of the corresponding authorities at the State and district levels to ensure proper operation at the local level. A Witness Protection Fund should be created to ensure financing for safety, relocation, accommodation and rehabilitation, which would be implemented through joint financial contributions from the Central and State budgets. The Act should impose confidentiality requirements and ensure protection from technological threats, psychological support and additional measures for vulnerable witnesses. Moreover, the protection measures should be implemented within the framework of the right of the accused to a fair trial. Thus, the proposed legislation should maintain the balance between the protection of witnesses and the observance of procedural fairness in the judicial process. Thus, the introduction of the Central Witness Protection Act would allow converting the current scheme-based approach to a unique and accountable

national witness protection system.⁴¹

The Central Witness Protection Act ought to outline a comprehensive institutional system capable of providing timely, permanent and precise security to witnesses. At the national level, an independent National Witness Protection Authority may be established as an autonomous agency responsible for setting up standards, coordinating state-level protection mechanism, maintaining secrecy and overseeing the implementation process.¹ At the state level, state Witness Protection Authorities can introduce national levels of protection and supervise State programs while the district authorities can do their job of working on the threats to safety and issuing protection orders. This approach can result in uniformity at the national level and accessibility at the local one.⁴²

The suggested law should also stipulate a uniform format of the threat assessment report and classify different types of threats so that protection can correspond to the type and significance of the threat. The measures of protection should be represented by police protection, safe accommodation, relocation, identity protection, confidentiality, technological security, financial support and psychological assistance.⁴³ Special attention must be drawn to children, to sexually assaulted people, and whistleblowers as well as witnesses in the cases of gang crimes and terrorism. The newly established National Witness Protection Fund is supposed to provide the necessary funding where state finances do not afford the necessary program, particularly in terms of relocation and permanent protection of witnesses.

The institutional structure should also include an independent monitoring mechanism. At the same time, special attention must be paid to the right of the accused to pursue a cross-examination under court supervision, especially where protective measures affect the rights of the accused to cross-examine or receive equitable process.

6. CONCLUSION

The concept of witness protection is core aspect within any criminal justice framework and serves as an essential aspect for successful prosecution as willing and courageous witnesses are often the cause behind getting fair justice. The particular situation of India in regard to witness

⁴¹ The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, § 398 (India).

⁴² Law Commission of India, *Witness Identity Protection and Witness Protection Programmes*, 198th Report (2006).

⁴³ Ministry of Home Affairs, Government of India, *Witness Protection Scheme, 2018*, paras. 3–11 (2018).

protection demonstrates how the legal framework has developed and acknowledged the reality of vulnerability of witnesses and the dangers of intimidation and harassment of witnesses due to their decision to testify. India has a long history of not being able to adopt any comprehensive statutory measures aimed at dealing with this issue until the recommendations made by the Law Commission of India and Malimath Committee along with considerable judicial activity where actions were taken towards the formation and institution of a well-worked out witness protection framework.⁴⁴

The Supreme Court ruling in *Mahender Chawla v. Union of India* was a game changer by giving approval and authorizing the operation of the Witness Protection Scheme, 2018 before any legislative process takes place. In this regard, the scheme covers numerous very crucial unless an operational aspect of the processes is concerned such as determination of the threat, categorization of witnesses, appointment and delegation of authority, establishing a witness protection fund and relocation and putting into force of the conceal and protection mechanism connected with the identity of witnesses. However, this fact greatly limits its effectiveness since the above mentioned process depends on an ability of the particular states to develop their administrative capabilities in order to implement this process effectively.

The implementation of the *Bharatiya Nagarik Suraksha Sanhita*, 2023 has become the significant improvement in the situation since the Act points out the necessity of creating a legal basis for witness protection under Section 398. The law requires all state governments to prepare and announce a witness protection scheme, representing a substantial change from the introduced protection, as it is regulated through the law itself and not via any judicial decision. However, the act does not define any clear mechanism that governs witness protection proceedings and is characterized by lack of a uniform legislation and interstate relocation procedure, and provides for no budget or its oversight. Therefore, although the introduced law is of great significance, it cannot be seen as the endpoint of witness protection reform.⁴⁵

Thus, it can be concluded that India should think of a new Central Witness Protection Act whose provisions would not complicate the existing system but would establish certain minimum standards at the national level, allowing the states to implement them in accordance

⁴⁴ Law Commission of India, *Witness Identity Protection and Witness Protection Programmes*, 198th Report (2006); Government of India, Ministry of Home Affairs, *Report of the Committee on Reforms of Criminal Justice System* (2003).

⁴⁵ *Mahender Chawla v. Union of India*, (2019) 14 SCC 615.

with the peculiarities of the local situation. The establishment of a National Witness Protection Authority, which would operate certain state and district level organizations, would allow timely coordinating all issues related to interstate relocation of witnesses.

The proposed legislation should perceive witness protection in a more broad sense. This may find expression in the necessity to ensure not only security, but also confidentiality, relocation, assistance, etc. However, at the same time, it is also necessary to maintain a fair balance of reasonable limitations upon the rights of the accused. The evolution from fragmented system of measures to the introduction of the Witness Protection Scheme in 2018 and Section 398 BNSS confirms this idea. Nevertheless, the problem of fragmentation still exists and indicates that there is a need for further legislative reforms in this sphere.

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