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Introduction

Welcome to the Indian Journal of Legal Affairs and Research (IJLAR), a distinguished platform dedicated to the dissemination of comprehensive legal scholarship and academic research. Our mission is to foster an environment where legal professionals, academics, and students can collaborate and contribute to the evolving discourse in the field of law. We strive to publish high-quality, peer-reviewed articles that provide insightful analysis, innovative perspectives, and practical solutions to contemporary legal challenges. The IJAR is committed to advancing legal knowledge and practice by bridging the gap between theory and practice.

Preface

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

Description

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

**THE PROBLEMS FACED BY WITNESSES DURING
THE COURSE OF TRIAL AND THEIR PROTECTION
UNDER BNSS WITH SPECIAL REFERENCE TO
WITNESS PROTECTION SCHEME, 2018.**

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Abstract: -

The administration of criminal justice is a monumental edifice built upon the cornerstone of evidence. Within this structure, the witness occupies a sacred space as the purveyor of truth, the individual who breathes life into facts and transforms abstract allegations into tangible realities for the court. However, for decades, the Indian criminal justice system has been plagued by a paradox: while the witness is indispensable for delivering justice, the system itself has largely failed to protect them, leading to rampant hostility, intimidation, and a consequent erosion of faith in judicial outcomes. This article undertakes a deep dive into the multifaceted problems faced by witnesses in India, tracing their journey from the initial registration of an FIR to the final pronouncement of a judgment. It critically analyses the historical legislative vacuum that left witnesses exposed and vulnerable. The article then shifts its focus to a watershed moment: the Supreme Court-mandated Witness Protection Scheme of 2018, examining its provisions, strengths, and limitations. Finally, in its core analytical section, the article scrutinizes the newly enacted Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, which replaces the Code of Criminal Procedure (CrPC), 1973. It investigates the extent to which the BNSS has internalized the principles of witness protection, the efficacy of its new provisions, and whether it truly represents a transformative leap towards safeguarding the "guardians of truth" in the Indian judicial process.

Keywords: Witness Protection, BNSS 2023, Witness Protection Scheme 2018, Hostile Witness, Criminal Justice Reform, Fair Trial.

1. Introduction: -

A fair trial, a fundamental right enshrined under Article 21 of the Constitution of India, is not a mere procedural formality but the very soul of a democratic justice system. This right is actualized through a rigorous process where evidence is presented, tested, and adjudicated. At the heart of this evidentiary process stands the witness. Whether an eyewitness to a crime, an expert providing scientific opinion, or a character witness, their testimony is the primary vehicle through which the court perceives the event in question. The integrity of the entire judicial process is, therefore, inextricably linked to the willingness and ability of witnesses to depose truthfully without fear or favour.

Yet, the Indian narrative has been one of profound neglect towards this crucial participant. Witnesses have often been treated as incidental bystanders, their convenience, safety, and dignity sacrificed at the altar of procedural delays and systemic apathy. The consequences are dire: witnesses turning hostile, cases collapsing, the guilty walking free, and a pervasive culture of impunity taking root. This not only denies justice to individual victims but also erodes public confidence in the rule of law, creating a vicious cycle where citizens are increasingly reluctant to come forward and assist the law.

The recognition of this crisis has been slow but steady. It culminated in a landmark intervention by the Supreme Court of India in 2018, which approved the first nationwide Witness Protection Scheme. This was a significant step, but as a scheme, its enforceability and uniformity remained challenges. The recent enactment of the *Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023*, which came into force on July 1, 2024, presented a historic opportunity to embed the principles of witness protection into the very bedrock of India's criminal procedure code. This article seeks to explore whether the BNSS has seized this opportunity.

2. Research Questions: -

- i. What are the primary categories of problems (psychological, physical, financial, procedural) faced by witnesses at various stages of the criminal justice system in India?
- ii. How did the judiciary, through its activist rulings, attempt to fill the legislative vacuum regarding witness protection prior to 2018, and what was the jurisprudential foundation laid for the WPS 2018?
- iii. How does Section 398 of the BNSS, 2023, transform the legal status of witness protection in India? Does it merely mandate a scheme or does it create an enforceable right for witnesses?
- iv. To what extent do the technology-friendly provisions of the BNSS (Sections 196 & 318) mitigate the traditional problems of witness intimidation and inconvenience? What are the limitations of video-conferencing as a protection tool?

3. Research Methodology: -

This research shall be conducted by employing the Doctrinal Method by adopting an analytical and critical approach. Hence the primary source of data shall be gathered from Statutes and Case laws. Further, secondary sources of data shall be gathered from Review of Books, historical materials, Law Commission Reports, academic writings, leading journals, newspapers, magazines etc.

4. Statement of the Problem: -

The core problem underpinning this research is the systemic and persistent failure of the Indian criminal justice system to adequately protect and support witnesses, leading to their intimidation, alienation, and hostility, which in turn fundamentally undermines the fairness of trials and the very delivery of justice.

This overarching problem can be deconstructed into several interconnected dimensions:

- i) **The Protection Gap:** For most of India's history, the Code of Criminal Procedure, 1973, lacked specific and comprehensive provisions for witness protection. This legislative vacuum created a regime where witness safety was an afterthought, left to the discretion

- of individual judges or ad-hoc police measures, making witnesses highly vulnerable to intimidation.
- ii) **The Hostility Epidemic:** The absence of protection has directly contributed to an alarming rate of witnesses turning hostile, especially in high-profile cases involving powerful accused individuals. This has resulted in the miscarriage of justice, a loss of public trust in the legal system, and the embodiment of criminal elements.
 - iii) **Procedural Apathy:** Even in the absence of overt threats, witnesses face immense hardship due to systemic inefficiencies. Multiple adjournments, a lack of witness support services (like secure waiting areas and travel compensation), and the psychological trauma of cross-examination act as strong disincentives for citizen participation in the justice process.
 - iv) **The Limitations of a Scheme:** The Witness Protection Scheme, 2018, though a landmark step, suffered from inherent limitations. As a court-mandated scheme and not an act of parliament, its permanence and uniform implementation across all states were uncertain. Its effectiveness was further hampered by a lack of dedicated funding, bureaucratic delays, and low awareness among stakeholders.
 - v) **The Need for Statutory Internalization:** The enactment of the BNSS, 2024, raises critical questions: Has it effectively internalized the principles of the WPS 2018 into a binding statutory mandate? Does it provide a sufficient financial and administrative architecture to make protection a reality? Does it address the full spectrum of witness problems, or does it remain a partial solution?

This research is dedicated to investigating these problems and rigorously evaluating whether the BNSS, 2024, provides an effective and conclusive answer to this long-standing crisis in Indian jurisprudence.

5. Hypothesis: -

While the Witness Protection Scheme, 2018, was a necessary and pioneering judicial intervention, its effectiveness was constrained by its non-statutory nature and implementation challenges. The incorporation of witness protection principles into the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, particularly through Section 398, represents a significant normative advancement.

However, due to a lack of specific detailing, an unclear financial architecture, and a continued over-reliance on video-conferencing as a primary solution, the BNSS falls short of providing a comprehensive, robust, and practically enforceable statutory framework capable of fully addressing the multifaceted problems faced by witnesses in the Indian criminal justice system.

6. Concept and Role of Witnesses in the Criminal Justice System: -

A witness is a person who provides evidence in a judicial proceeding, either orally or in writing, regarding facts in issue or relevant facts. Under the Bharatiya Sakshya Adhiniyam, (BSA) 2023 witnesses are central to the adjudicatory process, as courts largely depend upon oral testimony to reconstruct events.

The role of a witness is not merely passive. A witness performs a public duty by assisting courts in the administration of justice. The Supreme Court has repeatedly emphasized that witnesses are the “eyes and ears of justice.” Without their cooperation, even the most sophisticated investigative machinery fails.

In an adversarial legal system like India’s, witnesses serve as the bridge between investigation and adjudication. They help verify the prosecution’s version, challenge the defense narrative, and assist the court in reaching the truth. Therefore, ensuring their safety, dignity, and willingness to testify freely is fundamental to fair trial rights under Article 21 of the Constitution.

However, despite this crucial role, Indian law historically focused more on the rights of the accused and less on the position of witnesses. It is only in recent decades that the judiciary and legislature have begun to address this imbalance.

7. Analysis of Witness Vulnerability and Legal Protection: -

The problems faced by witnesses are not mono

i) Psychological and Emotional Trauma

The act of witnessing a crime, especially a violent or sexual offence, is in itself a traumatic event. Being forced to relive that experience repeatedly during police statements, pre-trial

preparations, and cross-examination in court can lead to severe secondary victimization. The aggressive and often intimidating nature of cross-examination, designed to test credibility, can feel like a brutal assault on the witness's character and truthfulness, leading to anxiety, depression, and post-traumatic stress disorder (PTSD).

ii) Intimidation and Hostility

This is the most pernicious threat to the justice delivery system. Witnesses, particularly in cases involving powerful accused persons (politicians, gangsters, wealthy individuals), face overt and covert threats. These can range from verbal threats and social boycotts to physical violence against themselves or their family members, and even murder. The infamous cases of the murder of witnesses in the Jessica Lal murder case and the Asaram Bapu case are stark reminders of the extreme risks. This atmosphere of fear is the primary catalyst for witnesses turning "hostile"—retracting their previous statements or feigning memory loss under oath, leading to the acquittal of the accused.

iii) Procedural Harassment and Systemic Apathy

The Indian judicial process is notoriously slow. For a witness, this translates into:

- a) **Multiple Adjournments:** A witness may take leave from work, travel long distances at great personal expense, only to find the hearing adjourned for a later date. This process repeats, causing significant income loss and immense frustration.
- b) **Lack of Basic Amenities:** Courts often lack dedicated witness waiting rooms. Witnesses are frequently compelled to wait in the same corridors as the accused and their associates, exacerbating their fear and discomfort. Basic facilities like drinking water, clean toilets, and seating are often inadequate.
- c) **Inconvenience and Financial Burden:** The state rarely compensates witnesses adequately for their travel, lodging, and loss of wages. For daily wage earners or those from economically weaker sections, each court appearance can push them deeper into financial hardship.
- d) **Police Apathy:** At the investigation stage, witnesses are often treated with suspicion or summoned to police stations at odd hours, disrupting their normal lives.

iv) Absence of Anonymity and Privacy

In the traditional process, a witness's identity is public from the start. Their name, address, and statement become part of the court records accessible to the accused. In cases of sexual offences or where the witness is a minor, this lack of anonymity is a severe violation of their privacy and a direct threat to their safety, deterring many from reporting crimes or testifying.

8. The Legislative Vacuum and the Judicial Awakening: -

For most of India's post-independence history, the Code of Criminal Procedure, 1973, was silent on the specific issue of witness protection. While Sections 151A, 161, 164, and others dealt with recording statements, they did not create a positive obligation on the state to protect the witness. The burden of seeking protection fell on the witness themselves, who could apply for it under broad, undefined provisions, leaving it to the discretion of individual judges.

The judiciary, particularly the Supreme Court, began to fill this void through a series of progressive judgments, acting as a judicial legislator. In *Zahira Habibulla H. Sheikh vs. State of Gujarat*¹ (Best Bakery case): The Supreme Court strongly condemned the phenomenon of witnesses turning hostile due to intimidation and emphasized that a fair trial includes the protection of witnesses. The Court stated, "Witnesses are the eyes and ears of justice."

In *State of Gujarat vs. Anirudh Singh K. Singh*²: The Court recommended the establishment of a witness protection program.

In *Neelam Katara vs. Union of India*³: The Delhi High Court issued detailed guidelines for witness protection in response to a petition highlighting threats to witnesses in a high-profile murder case. These judgments set the stage for a more comprehensive solution. The catalyst finally came in the case of *Mahender Chawla vs. Union of India*⁴. The petitioners, witnesses in a murder case, sought

¹ (2004) 4 SCC 158

² (1997) 6 SCC 514

³ ILR (2003) II Del 377

⁴ (2019) 14 SCC 615

protection after facing threats. The Supreme Court, recognizing the dire need for a uniform policy, took note of a draft Witness Protection Scheme prepared by the Union Government in consultation with the National Legal Services Authority (NALSA). In a landmark decision, the Court approved the scheme and directed its implementation by all Union Territories and States until Parliament enacted a suitable law. This made the Witness Protection Scheme, 2018, the de facto law of the land.

9. The Witness Protection Scheme, 2018: A Landmark Framework: -

The Witness Protection Scheme, 2018, was a revolutionary document. It provided a structured, three-tier framework for protecting witnesses.

i) Key Features of the Scheme:

a) Definition of Witness: It broadly defined a witness to include not only those who testified but also their family members and anyone helping the witness.

Threat Analysis: It introduced a systematic method for assessing threats. A witness applying for protection would be categorized into three classes based on the threat perception:

‘A’: Where the threat extends to the life of the witness or their family.

‘B’: Where the threat extends to the safety, reputation, or property of the witness.

‘C’: Where the threat is moderate and extends to harassment or intimidation of the witness.

b) Three-Tier Authority: It established a hierarchical administrative structure:

i) **Witness Protection Cell (WPC):** At the district level, headed by the District Superintendent of Police. It acts as the implementing body.

ii) **Standing Committee in each District:** Chaired by the District and Sessions Judge with the Head of the Prosecution and the District Police Head as members. This committee is responsible for taking decisions on applications for witness protection.

iii) **State Witness Protection Committee:** Chaired by the Secretary, Home Department, to monitor the scheme's implementation and issue guidelines.

- c) **Protection Measures:** The scheme enumerated a non-exhaustive list of protection measures tailored to the threat category, including:
- i) **Identity Protection:** Masking the witness's face, using pseudonyms, expunging identifying details from records.
 - ii) **Monitoring/Surveillance:** Periodic monitoring of the witness's communication and premises.
 - iii) **Temporary Relocation:** Shifting the witness to a safe house.
 - iv) **Financial Aid:** For relocation, change of identity, and sustenance.
 - v) **Armed Protection:** Provision of police or security guards.
 - vi) **Confidentiality:** The entire process was to be conducted with strict confidentiality to prevent leakage of information that could endanger the witness.

ii) **Limitations of the Scheme:**

Despite its groundbreaking nature, the WPS 2018 had inherent limitations:

- a) **Lack of Legislative Backing:** As a court-mandated scheme, its permanence and enforceability were subject to political and administrative will. It lacked the sanctity and permanence of an Act of Parliament.
- b) **Financial Constraints:** The scheme's success was contingent on dedicated financial allocation from state governments, which was often inconsistent or insufficient.
- c) **Implementation Inconsistency:** The effectiveness of the District Standing Committees varied widely across states, leading to an uneven application of protection measures.
- d) **Procedural Hurdles:** The application process itself could be daunting for an illiterate or terrified witness.
- e) The enactment of the BNSS, 2023, was thus seen as the perfect opportunity to address these limitations and give witness protection the statutory teeth it desperately needed.

10. The Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023: A New hope for Witnesses: -

The BNSS is not merely a cosmetic rename of the CrPC; it introduces several substantive changes. Its treatment of witness-related issues is a critical benchmark for assessing its progressive character.

i) Direct Incorporation of Witness Protection

The most significant advancement is the direct statutory recognition of witness protection. Section 398 of the BNSS states:

"398. Protection of witnesses. —The State Government shall prepare and implement a witness protection scheme for the protection of witnesses taking into account the recommendations of the Law Commission of India and the Supreme Court in its decisions, to ensure that the investigation, prosecution and trial of offences are not prejudiced because of threats or intimidation to witnesses and that the witnesses can depose without fear."

This single provision is transformative. It elevates the WPS 2018 from a judicially directed scheme to a statutory mandate. It imposes a positive obligation on State Governments to not only prepare but also implement a witness protection scheme. The reference to the Law Commission and Supreme Court decisions implicitly incorporates the principles and structure of the 2018 Scheme into the statutory framework.

ii) Audio-Video Evidence: A Game Changer (Sections 196 & 318)

The BNSS extensively promotes the use of technology, which is a boon for witness protection.

- a) **Section 196:** Allows statements and confessions to be recorded through audio-video electronic means. This can be crucial in preserving the original testimony of a witness who may later be intimidated.
- b) **Section 318:** This is a pivotal provision. It allows a witness to testify through electronic means (video conferencing). This can significantly reduce the psychological and physical pressure on a witness. They can depose from a secure location without having to be in the same physical space as the accused. This is

especially vital for vulnerable witnesses (victims of sexual assault, children, witnesses facing grave threats) as it provides a layer of physical and psychological separation.

iii) Protection for Victims of Sexual Violence (Section 194)

Section 194 of the BNSS mandates that the statement of a victim of rape (under Sections 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75 or 76 of the BNS) shall be recorded through audio-video means, preferably by a woman police officer. While this directly benefits the victim (who is also a key witness), it reinforces the use of technology to create a more sensitive and secure environment for recording crucial evidence.

i) Other Progressive Measures

- a. Expanded Use of Summons (Section 94): Allows for the service of summons via electronic means (email, messaging apps), making the process more efficient and less intrusive.
- b. Time-bound Trials: While not directly a witness protection measure, the BNSS's emphasis on time-bound investigation and trials (e.g., mandates for filing charge sheets within 90 days, which can be extended) indirectly benefits witnesses by reducing the long-drawn-out period of anxiety and risk.

11. Critical Analysis of the BNSS: -

While the BNSS marks a monumental leap forward, a critical analysis reveals areas where it could have been more robust and where implementation will be key.

i) The Positive Leap:

- a. Statutory Sanctity: The incorporation of Section 398 is the single biggest achievement. It makes witness protection a legal right and a state duty, not a discretionary benefit.
- b. Embracing Technology: The provisions for AV recording and video conferencing are pragmatic, modern, and have immense potential to shield witnesses from direct intimidation.

- c. Focus on Vulnerable Witnesses: The specific provisions for recording statements of sexual assault victims show a victim-centric approach.

ii) The Persistent Gaps and Challenges:

- a) Lack of Specificity: Section 398 is an enabling provision but is largely a direction to states. It does not itself codify the detailed mechanics of the 2018 Scheme (like the threat analysis matrix, the three-tier committee structure, specific protection measures) within the BNSS. This leaves room for interpretation and potential dilution by states. A model scheme should have been directly annexed to the Act.
- b) Financial Architecture Missing: The Act is silent on the crucial issue of funding. Without a dedicated, non-lapsable fund created by the central government and matched by states, the scheme will remain a paper tiger. Protecting witnesses, especially through relocation and armed guards, is an expensive undertaking.
- c) Limited Scope for Pre-Trial Protection: The focus of video conferencing (Section 318) is largely on testimony during trial. The most critical period for witness intimidation is often during the investigation and pre-trial phase. The BNSS could have been more explicit about providing protection measures from the moment a witness gives their first statement to the police.
- d) Inadequate Addressal of Hostile Witnesses: The BNSS does not introduce stronger legal provisions to tackle the problem of hostile witnesses. While protection can prevent hostility, once a witness turns hostile, the current laws for perjury (Section 344 of BNSS, akin to Section 340 of CrPC) are rarely invoked stringently. Stronger deterrents are needed.
- e) Training and Infrastructure: The success of AV recording and video conferencing hinges on massive investment in digital infrastructure and training for police, judges, and court staff across all tiers of the judiciary, particularly in rural and remote areas.
- f) Cultural Shift Required: A law can provide the framework, but it requires a fundamental shift in the mindset of all stakeholders—police, prosecutors, judges, and lawyers—to treat witnesses not as instruments of the state but as citizens performing a sacred duty who deserve respect, protection, and compensation.

12. Conclusion and Suggestions: -

The enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023, represents a paradigm shift in the Indian criminal justice system's approach to witnesses. By statutorily mandating witness protection schemes through Section 398 and wholeheartedly embracing technology through Sections 196 and 318, it has addressed decades of neglect. It has taken the foundational principles laid down by the Supreme Court in the Witness Protection Scheme, 2018, and given them the force of law.

However, the journey has only just begun. The BNSS provides the framework, but not the complete fortress. Its true success will be measured not by the text of the law but by its translation on the ground. The following steps are critical for realizing its potential:

- i. **Uniform Model Scheme:** The Central Government should, under Section 398, swiftly notify a detailed, uniform Model Witness Protection Scheme that all states must adopt, ensuring nationwide consistency.
- ii. **Dedicated Funding:** The Union and State budgets must create specific, adequate, and non-lapsable funds exclusively for witness protection, managed by an independent authority.
- iii. **Capacity Building:** A massive nationwide drive for training police, prosecutors, and judicial officers on the new provisions and the sensitivity required in handling witnesses is essential.
- iv. **Infrastructure Overhaul:** Courts and police stations must be equipped with reliable technology for AV recording and secure video conferencing facilities.
- v. **Strengthening Legal Provisions:** Parliament should consider amending the laws of perjury to create stronger deterrence against witnesses turning hostile under intimidation.
- vi. **Continuous Monitoring:** The National and State Legal Services Authorities (NALSA and SLSAs) must actively monitor the implementation of the scheme and address grievances.

The witness is no longer a forgotten voice in the corridors of justice. The BNSS has handed them a shield. It is now the collective responsibility of the government, the judiciary, the legal fraternity, and civil society to ensure that this shield is strong, unwavering, and accessible to all. Only then can we truly ensure that the eyes and ears of justice remain open, unblinking, and unafraid, securing not just convictions but the very ideal of justice itself.

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